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Client Alert: New Ohio Law Permits Possession and Sale of Hemp Products – But Legal Risks Remain

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On July 30, 2019, Ohio Governor Mike DeWine signed a new law legalizing and regulating “hemp,” defined as cannabis and derivatives thereof with no more than 0.3% tetrahydrocannabinol (THC) concentration on a dry weight basis.

Although hemp was removed from the *federal* schedules of controlled substances with the passage of the Agriculture Improvement Act of 2018 (popularly known as the “2018 Farm Bill”), Congress expressly reserved to the states authority to regulate its production more stringently. (For more information, our alert on the 2018 Farm Bill is available [here](#).) On this basis, the Ohio Board of Pharmacy took the position that Ohio law did not distinguish between “hemp” and “marijuana,” and therefore that all hemp products were subject to the Ohio Medical Marijuana Control Program (MMCP). Under this interpretation, the majority of hemp products – including any products containing hemp-derived cannabidiol (CBD) – were generally illegal to possess or sell in Ohio as Schedule I controlled substances.

The new law, originally introduced as Senate Bill 57 (SB 57), adopts the federal distinction between “hemp” and “marijuana.” Primary authority for the regulation of hemp now lies with the Ohio Department of Agriculture, which is charged with developing by administrative rule standards and procedures for the issuance of licenses to cultivate^[1] or process^[2] hemp. In the meantime, SB 57 provides that “any person may, without a...license..., possess, buy, or sell hemp or a *hemp product*,” defined to include “cosmetics, personal care products, dietary supplements or food intended for animal or human consumption, ...and any other product containing one or more cannabinoids derived from hemp, including cannabidiol.”

However, a new informational website created by the Department of Agriculture (available [here](#)) indicates that the department “will be testing all CBD products for safety and accurate labeling to protect Ohio consumers.” While SB 57 does **not** appear to contemplate that such testing may be required as a *precondition* to the legal sale of CBD and other hemp products unless they are cultivated and/or processed

in Ohio, retailers must nonetheless be prepared to demonstrate that their products (1) qualify as “hemp” or “hemp products” (i.e., have a THC concentration of no more than 0.3%), and (2) are not adulterated or misbranded according to generally-applicable standards under Ohio law. For example, a product that is inaccurately labeled with respect to its CBD content would be considered to be “misbranded,” and could be subject to seizure under Ohio’s Pure Food and Drug Law.^[3]

Further, the Ohio regulatory scheme applicable to hemp and hemp-derived CBD is now substantially more permissive than federal law. Because CBD is the active ingredient in an approved Schedule V drug product (namely, GW Pharmaceuticals’ Epidiolex®), the federal Food and Drug Administration (FDA) has taken the position that *all* products containing CBD are considered to be drugs (**not** dietary supplements or food additives). As such, the introduction or delivery for introduction of a CBD product into interstate commerce without FDA approval is illegal under the Food, Drug, & Cosmetic Act (FD&C Act), and compliance with Ohio law will **not** provide protection from liability under the FD&C Act.

That said, the FDA has indicated that it plans to “expedite [its] work related to CBD products” and to report its progress by “early this fall.” If the FDA decides to adopt a scheme allowing for greater flexibility in the regulation of CBD products, Ohio law now will not – as it did following the enactment of the 2018 Farm Bill – inhibit Ohio businesses from participating fully in the markets that it opens.

The full text of SB 57 is available [here](#).

If you have questions about the impact of the new law or about the regulation of cannabis generally, please contact Elizabeth T. Smith, Jolie N. Havens, Timothy J. Bechtold, or Mairi K. Mull.

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[1] As defined in SB 57, “cultivate” means “to plant, water, grow, fertilize, till, or harvest a plant or crop.”

[2] As defined in SB 57, “process” means “to convert hemp into a hemp product.”

[3] See Chapter 3715 of the Ohio Revised Code.