



FOOD FOR THOUGHT — JUNE 2019

The Potential Highs — and Lows — of CBD-Infused Foods

Ground beef infused with cannabidiol — and, coming soon, ice cream.

These are just two of the dozens of new products coming out of major food and beverage distribution centers. Consumer interest in the use of cannabidiol, a compound found in both hemp and marijuana, has surged. So has interest in claims by CBD advocates — many unsubstantiated — that it can treat chronic conditions, relieve stress and anxiety, and generally boost health and wellness.

While marijuana-derived CBD is still illegal under federal law, Congress recently created a pathway to legalize CBD created from hemp. And food and beverage companies are scrambling to jump on the bandwagon of this niche market, which is expected to see sales multiply in the coming years. But while there are clear opportunities for food and beverage manufacturers that help retailers and restaurants keep their shelves and pantries stocked, the road ahead is also lined with potential risks and liability.

A New Market Takes Flight

The Agricultural Improvement Act of 2018, better known as the 2018 federal farm bill, took CBD derived from hemp off the list of banned substances identified in the federal Controlled

Substances Act of 1971 (CSA). The new law has laid the foundation for a fast-growing new market for CBD products, which is expected to reach \$20 billion by 2024, up from \$1.9 billion in 2018, [according to a study](#) by BDS analytics and Arcview Market Research.

Among other things, the farm bill took CBD derived from hemp, which is not psychoactive, off the CSA Schedule I list of banned substances, where it sat for years alongside tetrahydrocannabinol (THC), which creates the feeling of a “high” associated with marijuana. CBD derived from marijuana is still a Schedule I controlled substance and is illegal to possess or sell.

Food and beverage companies have since announced plans to start creating hemp-derived CBD products. A leading confection company launched a line of CBD-infused jelly beans. And a well-known ice cream maker is exploring a new flavor featuring CBD.

The farm bill’s larger aim was to give producers across the country the green light to grow industrial hemp, a potentially lucrative crop from which CBD can be extracted. A plant in the cannabis family alongside marijuana, hemp is known for its tough fibers and relatively small levels of THC.

The law enables states to establish regulatory agencies to oversee hemp production, and, crucially, allows those

who grow the crop to take advantage of an array of federal programs, including crop insurance. The federal Food and Drug Administration, however, has stated that hemp-derived CBD products intended to be ingested by humans may not be sold. Further, the laws in a number of states have not caught up to the federal government's recent moves to legalize and open up production of hemp, stirring conflict and creating confusion. For example, under the 2018 federal farm bill, states are allowed to prohibit the cultivation and sale of hemp and hemp-derived products in their state.

A Patchwork of State Regulations

Due to the different regulations, food and beverage manufacturers face a number of potential legal risks and liabilities — perhaps the biggest of which revolves around their ability to transport goods across state borders. In May 2019, the Department of Agriculture (USDA) clarified that hemp produced in accordance with the 2014 federal farm bill (which partially legalized hemp) may be transported in interstate commerce and that states and tribes should not interfere with such shipments, even if these products are still illegal under state law.

But the patchwork of varying laws and regulations at the federal level and in individual states has raised the stakes when it comes to shipping hemp, especially when it involves crossing states that still ban hemp production and the sale of hemp and hemp-derived products.

Hemp growers in major production centers like Kentucky and Oregon typically ship plants to Colorado, where they are processed into CBD powder that can be added to products. But in doing so, truckers hauling hemp may have to cross through states with active bans on the plant, such as Idaho.

In the case of Idaho, the state's ban on marijuana has crashed head-on into the federal decision to lift restrictions on CBD

extracted from industrial hemp. In January, for example, Idaho State Police pulled over a truck en route from Oregon to Colorado loaded up with more than 6,700 pounds of hemp. While the driver produced an official bill of lading stating the cargo was industrial hemp, troopers tested the cargo, which came back positive for THC. The driver was charged with a felony for trafficking marijuana and released on a \$100,000 bail.

The Colorado company that ordered the load of hemp, took its case to federal court. While it failed to win a preliminary injunction, it was able to convince a federal judge to release the results of the testing conducted by police that revealed a low level of THC, which the company contends backs its argument that the truck was carrying hemp rather than marijuana, which would have had a much higher THC concentration.

No Quick Resolution

While the USDA has urged states not to interfere with the shipment of industrial hemp across their borders, challenges for companies that manufacture and transport hemp-derived CBD products won't be going away anytime soon. Legal questions remain, and may linger even after the USA issues guidelines for state regulatory plans — expected in the fall — and the FDA proposes a clear regulatory path forward.

For food and beverage companies weighing whether to get into the business of shipping hemp or hemp-derived CBD products across state lines, there is much to consider. Federal laws and regulations, and those of many states, appear to be moving towards a broad legalization of hemp as a cash crop from which CBD can be extracted and processed for use in various products. But for now, companies looking to transport hemp or finished CBD products must look closely at their risks, which can be considerable amid a Wild West of dueling state and federal authorities and contradictory laws.

This briefing was prepared by Marsh's Food and Beverage Practice, in conjunction with Dorsey & Whitney, LLP. For more information, visit marsh.com, contact your Marsh representative, or contact:

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