

# Intoxicating Hemp: A Threat or Opportunity for Adult-Use Cannabis?

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**A**s the legal cannabis industry (both medical and recreational) continues to await federal reforms impacting investments, banking, taxes, research and interstate commerce, the federal government's failure to act on intoxicating hemp presents the clearest danger to the regulated industry to date.

Intoxicating hemp is a manufactured form of THC derived from hemp. Its production and sale are currently permitted due to a loophole in the 1999 Farm Bill, which authorized the production of hemp. As an example, corn is an agricultural commodity but when it is changed to whiskey, it is regulated in a different manner by different regulatory bodies. Ironically, Congress has failed to recognize the existence of the legal cannabis industry, but somehow, we are to interpret that they intended to authorize unregulated, untaxed and untested intoxicating hemp products in the Farm Bill?

Many states, including those that have not approved legal medical or recreational cannabis industries, are seeing an influx of unregulated, untested and untaxed intoxicating hemp products showing up in gas stations, liquor stores and convenience stores. In many cases, these products are marketed and available to children. In addition to being a potential harm to public health, these unregulated products are rapidly becoming the largest threat to the struggling regulated, tested



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**William J. Caruso of Archer & Greiner**

and taxed cannabis industries in states around the country.

While the federal government has done next to nothing to address these issues related to the rise of intoxicating hemp, states are beginning to act to protect public health as well as their growing regulated cannabis industries. But the vagueness of federal law related to hemp provides some challenges. And, as some states are choosing to ban intoxicating hemp products, they are bumping into court challenges relying on the vagueness of the Farm Act, in some cases limiting the state's ability to eliminate the sale completely.

### **Impact on the Regulated Market**

So, what does this mean for state regulators, legal cannabis operators and intoxicating hemp dealers? It's complicated. But as the proliferation

of intoxicating hemp becomes more widespread and problematic, states are finding innovative ways to deal with the problem.

States like Minnesota have essentially legalized intoxicating hemp products, including permitting breweries to both produce, distribute and serve intoxicating hemp beverages. The state's law seeks to regulate the industry rather than an outright ban.

Closer to home, states like New Jersey initially sought an outright ban but instead chose a complicated scheme that would ban out of state hemp products while regulating in state products. This state law was challenged and overturned in part by the court. To date, New Jersey still struggles with implementing their law that would ban the sale of intoxicating hemp products to minors as well as regulate the sale and testing through the state's existing Cannabis Regulatory Commission.

Other states have sought outright bans of the substance. Texas presently is attempting to ban all intoxicating hemp products through their legislature. However, in addition to potential constitutional challenges, lawmakers are also hitting potential political headwinds as lobbying forces around hemp, liquor and other interests have been organizing to protect this odd, developing industry.

### **What's Next?**

So, where do we go from here? For starters, there is a concern for those who are engaged in this grey area of THC derived from intoxicating hemp. Their perceived authorization for this industry could end with the passage of an amendment to the Farm Bill which is due to expire later this year. If that happens, the constitutional legal protections these companies have been relying on would likely go up in smoke!

But, the highly regulated, taxed and tested patchwork of state laws that has existed for the legal cannabis industry is not only the fairest model but possibly the salvation for the intoxicating hemp industry. It would behoove serious players in this

market to work with states to develop a regulatory framework that protects public health by limiting access to adults 21 and over, ensures proper testing of products for consumer safety, mirrors regulation similar to the cannabis industry at state and local levels on where these operations are permitted and provide for reasonable taxes and fees on the industry.

The goal shouldn't be to destroy the intoxicating hemp industry, it should be to bring it into the sunlight alongside the growing regulated cannabis industry.

Indeed, many cannabis companies see a nexus between their products and intoxicating hemp products. The ability to expand product offerings on their store shelves is an attractive incentive for both industries to work together. But that must occur on an even playing field with similar laws and regulations.

To date, 39 out of 50 states have legalized medicinal cannabis programs and 24 have permitted recreational cannabis with several states continuing to consider both medical and recreational. The federal government came close to landmark cannabis reform under the Biden administration through rescheduling, but that effort appears to have stalled in the courts for now. In the first 100 days of the present administration, there has been a flurry of activity on a multitude of topics but not much on the issue of cannabis or intoxicating hemp.

For now, it appears that we're left to depend upon the work at the state level, both the statutory and regulatory change coupled with appropriate judicial review based upon present federal law. In the meantime, tax, tested and regulated seem like the safest place to be if your advising clients in the cannabis or intoxicating hemp space.

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