

# Insights

## Federal Agency Raises Lending Concerns Within Hemp Industry

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On July 12, 2021 the U.S. Farm Credit Administration (“FCA”), the federal agency that regulates farm lending, issued an informational memorandum (“Memo”) to its network of farm credit institutions. The Memo recommends considerations when deciding whether to provide financing to farmers seeking to engage in hemp production. Hemp advocates are concerned that the guidance, which includes recommendations to consider whether an established market exists where the producer (or processor) can market the hemp, and whether the posture of local and state law enforcement regarding hemp production will deter lenders from providing financing for hemp operations.

### Background

#### The FCA

The FCA is a regulatory agency of the executive branch of the federal government that oversees the various lending institutions and banks of the Farm Credit System (“FCS”). The FCS is a network of borrower-owned financial institutions that provide credit to farmers, ranchers, and agricultural and rural utility cooperatives.<sup>1</sup> The FCA was created in 1933 by an executive order of President Franklin D. Roosevelt to regulate the FCS. From 1939 to 1953, the FCA was part of U.S. Department of Agriculture, but the Farm Credit Act of 1953 restored the FCA’s independent status, and it remains independent today.

#### Hemp in the United States

Hemp is a variety of the plant *Cannabis sativa* L and has been harvested for a wide variety of purposes for over ten thousand years. Hemp was a legal crop in the United States until the 20th century. In fact, farmers were often required to grow hemp because of its importance in producing rope, sail canvas, and other goods.<sup>2</sup> However, hemp production was heavily discouraged throughout the United States beginning in 1937, with the passing of the Marihuana Tax Act and effectively banned with the passage of the Controlled Substances Act of 1970 (“CSA”). Unlike its cousin “marijuana,” which is another variety of the cannabis plant, hemp does not contain a significant amount of the “high” producing substance “delta-9 tetrahydrocannabinol” (“THC”) but does contain varying amounts of cannabidiol (“CBD”), which is popularly used as an alternative treatment for various health issues. Nevertheless, the Drug Enforcement Agency’s position has been that, because hemp was from the same plant species as “marijuana,” both were prohibited under the CSA.

The passage of the Agricultural Act of 2014 (“2014 Farm Bill”) saw a return of U.S. hemp, albeit as part of a pilot program by states for educational and research purposes. Then, under the Agricultural Act of 2018 (“2018 Farm Bill”), commodity hemp production was federally legalized and industrial hemp, defined as cannabis and derivatives of cannabis with concentrations of THC of not more than 0.3 percent, was removed from the definition of “marijuana” in the CSA. The 2018 Farm Bill, however, explicitly preserved the authority of the Food and Drug Administration (“FDA”) to regulate products containing cannabis or cannabis-derived compounds (like CBD).<sup>3</sup> Even after the 2018 Farm Bill, the production of hemp requires a license or authorization under a state hemp program, a tribal hemp program, or the U.S. Department of Agriculture (“USDA”) hemp program.<sup>4</sup>

## FCA Memo

In its July 12, 2021 **Memo**, the FCA noted the growing appeal of hemp production for U.S. farmers seeking to diversify their agricultural products. In the face of this increased interest, the Memo was issued to provide guidance to FCS institutions looking to integrate the need for hemp financing into their existing lending strategies. In addition to encouraging the lending institutions to consider general factors such as the experience of the hemp grower and the availability of income from other operations to cover debt and operating costs, the Memo recommends additional considerations, and information that should be gathered, in connection with hemp-related lending decisions, including:

- Determining whether the state or tribe where the hemp will be produced has a USDA-approved hemp program or, if the state or tribe does not have a USDA-approved plan, whether the producer has a license issued by the USDA.
- Considering the position of local and state law enforcement regarding hemp production and whether such views could make hemp production more difficult.
- Researching whether an established market exists (or one is planned) where the producer or processor can market the hemp.
- Noting the status of the FDA's enforcement policies as they apply to hemp.
- Requesting a copy of the USDA-approved plan issued by the state or tribe.

The release of the Memo was met with criticism from hemp advocates concerned that it would make it more difficult for growers to obtain loans to expand their operations. The National Industrial Hemp Council has interpreted the suggestion to obtain a copy of the USDA-approved plan as an indication that growers operating under older rules (i.e., the 2014 Farm Bill's pilot program) or waiting on USDA approval could be turned down based on this guidance (e.g. growers in California, Colorado and Oregon). The FCA has responded that it did not intend to discourage hemp lending but was simply making recommendations on factors to be considered in making such a decision.

Regardless of the FCA's intention, the Memo certainly illustrates that access to banking services is not just a concern for state-legal cannabis (i.e., "marijuana" businesses) See our alert **here**. On the contrary, fully legal industrial hemp producers and processors can also find themselves under scrutiny when applying for loans. While the Memo provides guidance to the FCA's institutions, its contents provide insight into the likely factors to be considered by any lending institution contemplating a hemp-related loan. As such, it illustrates the various headwinds faced by the hemp industry as it works for a market foothold, including the stigma from its cousin "marijuana" (which has often resulted in disfavor from law enforcement worried about distinguishing between legal hemp and illegal "marijuana") and the lack of regulatory guidance from the FDA on hemp derivatives like CBD, which has slowed market growth. Check back for future alerts as we monitor developments at the state and federal level impacting the cannabis industry.

If you have any questions regarding the information in this article or with any of the federal or state legal requirements related to cannabis, hemp, or CBD, contact **Kendall A. Schnurpel** or **Kyle P. Chambers**.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have. In addition, marijuana remains a federally illegal Class I drug. All activities related to marijuana are currently illegal under the federal laws of the United States and nothing contained on this alert is intended to assist in any way with violation of applicable law.*

[1] The FCS's share of the agricultural debt market accounts for roughly forty percent of farm business debt. See **History of FCA | Farm Credit Administration**.

[2] George Washington grew hemp at Mount Vernon and it is again grown there today as part of its historical

mission. See <https://www.mountvernon.org/george-washington/farming/washingtons-crops/george-washington-grew-hemp/>.

[3] To date, the FDA has approved only one use for CBD. The drug Epidiolex, which contains a purified form of CBD, is approved for use in treating rare and severe forms of epilepsy.

[4] The production, processing, and transportation of Industrial Hemp is now legal in every state, with Idaho becoming the last state to legalize the crop on April 16, 2021.