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Why The Hemp-Marijuana Rift Could Widen In 2024

By **Sam Reisman**

Law360 (January 4, 2024, 8:02 AM EST) -- Policy battles over intoxicating products derived from federally legal hemp have exposed the extent to which the hemp industry's embrace of psychoactive wares has brought it into competition with the marijuana sector, and experts predict it's going to get more heated in 2024.

When the landmark 2018 Farm Bill legalized nonintoxicating cannabis, which it redefined as hemp, it set a standard that hemp must contain less than 0.3% delta-9-THC, the main compound understood to give marijuana users a high. But it did not mention other THC isomers, such as delta-8 THC, which can be derived from hemp-extracted CBD and can mirror some of delta-9's psychoactive effects.

It is these intoxicating products that have put both large and small hemp operators in the crosshairs of state policymakers and brought the sector into competition with the marijuana industry.

"You can get the same product from both industries," Rod Kight, an attorney who represents hemp companies and has written extensively on the legality of hemp-derived intoxicants, told Law360. "We've seen what has amounted to a turf war where there's a desire to control the market."

Kight readily admits that he is "on the hemp side, because I believe hemp is the way cannabis reform is actually happening."

Stakeholders on all sides of the equation are urging federal lawmakers to make some kind of change to hemp policy in the next federal farm bill, which is due to be passed in late 2024, after Congress extended the 2018 Farm Bill by one year.

The hemp industry's proposal, articulated by the industry trade group U.S. Hemp Roundtable, is for a federal regulatory scheme that includes all cannabinoids but treats intoxicating ones, like delta-8, with a greater degree of scrutiny.

According to Jonathan Miller, general counsel for the Roundtable, legalizing hemp-derived intoxicants was perhaps not the intention of the 2018 Farm Bill, but the plain text of the statute gave businesses the latitude to invest in these products and bring them to market.

"A lot of companies have gone through that and begun to sell products, and some surveys say the hemp cannabinoid industry is bigger than the marijuana market," Miller said. "We'd like to see them regulated."

The Cannabis Regulators Association, or CANNRA, a coalition of state cannabis regulators, has similarly urged Congress to amend the definition of hemp under federal statute so that it refers to the crop grown for industrial or agricultural purposes and not to intoxicating products with ingredients derived from hemp.

CANNRA also recommended that federal lawmakers make it clear that states can enact their own stricter policies governing hemp and cannabinoid products.

"States and territories need the ability to be nimble to react and adjust to issues that may pertain to their marketplace or population," the regulators wrote in testimony **submitted to Congress** in September.

Players from the marijuana industry have also urged federal lawmakers to further tighten the legal

definition of hemp by implementing a stricter "total THC" standard that limits the allowable amount of delta-8, effectively imposing a federal ban on hemp products that can get users high.

The U.S. Cannabis Council, an omnibus trade group of some of the biggest marijuana players, has urged federal lawmakers to close the delta-8 loophole while still pushing for the federal legalization of marijuana.

Similarly, the American Trade Association for Cannabis and Hemp, or ATACH — which, despite its name, is primarily composed of marijuana companies and ancillary businesses that service the marijuana industry — has urged Congress to adopt similar standards for all intoxicating products, whether they come from marijuana or hemp.

Meanwhile, consumer-focused cannabis legalization activists say they are concerned about the lack of regulatory standards for manufacturing and testing hemp-derived intoxicants — especially when compared with the rules in place for state-regulated marijuana.

Paul Armentano, deputy director of NORML, told Law360 that the organization, which lobbies for legalization and destigmatization of marijuana use, does not generally take a public position on hemp-derived intoxicating products, but when it does, "It is generally to emphasize the fact that these products are unregulated, and serious questions arise with regard to purity, potency and potential safety."

"We think any consumer ought to have a realistic sense of what they're consuming," Armentano said. "We believe there is a lot of misinformation, oftentimes purposeful misinformation, in a rapidly evolving market for these unregulated products."

However, hemp advocates say the marijuana business community's decision to take a stand against hemp-derived intoxicants is counterproductive to the overall cause of cannabis reform.

Kight, the hemp advocate, called the attacks from the marijuana sector self-defeating and ill-considered.

"We are seeing a focus on restricting access to products and a focus on protecting minors and harms that are reminiscent of 'reefer madness' and prohibitionist approaches throughout the years," he said. "And I think that that approach is really shortsighted. If they lose, they lose. And if they win, they still kind of lose, because they're talking about cannabis being dangerous."

In addition to lobbying Congress to make changes to the next farm bill, litigation in various state and federal courts has opened another front in the hemp-marijuana policy battles.

In an effort to rein in hemp-derived goods that can achieve the same effect as marijuana, states have adopted their own policies — which do not always correspond with how they treat intoxicating marijuana products — and these policies are being challenged in court.

"There's an increasingly complex web of state laws. I think it's surprising how many companies go to market saying, 'We're willing to take the federal risk on this,'" Eric Berlin, a co-lead of the cannabis practice group at Dentons, told Law360. "States are having an increasing say in the use, production and sale of these products."

Some states with legal recreational marijuana attempted either to ban delta-8 altogether, such as Oregon and Colorado, or to integrate it into their regulatory scheme for adult-use cannabis, such as Michigan and Maryland.

States where marijuana is still illegal have also taken divergent paths on delta-8. Texas sought to ban delta-8 products, but a state appeals court **in September** affirmed a judge's decision to temporarily block the policy while a lawsuit plays out. However, in Kentucky and Tennessee, neither of which has legal recreational marijuana, delta-8 products can be legally sold to adults 21 and over.

When states have attempted to crack down on products that the hemp industry maintains are federally legal, hemp businesses have brought lawsuits challenging state hemp laws on the grounds that they are preempted by the federal Farm Bill.

Pending lawsuits in multiple states — including Virginia, Arkansas, Alaska, Texas and Maryland — brought by a broad swath of hemp product purveyors allege state policies cracking down on hemp products that mirror marijuana's psychoactive effects run afoul of the 2018 Farm Bill, which legalized hemp and its derivatives nationwide.

Regarding the challenged hemp laws, the U.S. Hemp Roundtable's Miller said, "It's not that they're trying to regulate [intoxicating hemp products], it's that they're trying to ban them. And that's where the lawsuits have been successful."

For the most part, hemp plaintiffs have been notching wins, with courts in Maryland and Arkansas in recent months granting injunctions blocking the state's hemp laws on preemption grounds.

"I think the courts are reading the plain language of the statute, [as opposed to] trying to divine the congressional intent behind it," said Kight, the hemp industry attorney. "Secondly, I think the courts are viewing this as ultimately a federal issue. We're talking about a federal law that legalized a form of cannabis, and to the extent that states are trying to redefine it, the courts are prohibiting them from doing that."

In one particular case, litigation over hemp-derived intoxicants has made strange bedfellows between the cannabis industry and anti-marijuana groups.

An Arkansas law implemented in 2023, Act 629, imposed a total statewide ban on intoxicating hemp products. The legislation was backed by Smart Approaches to Marijuana, or SAM, a group that opposes the legalization and normalization of marijuana.

After hemp companies filed suit, the hemp ban was **blocked** by a federal judge in September, and the injunction is currently being **challenged** in the Eighth Circuit.

Luke Niforatos, executive vice president of SAM, told Law360 that legalizing psychoactive products was clearly not the intent of the 2018 Farm Bill.

"There's this gray area in the 2018 Farm Bill that needs to be fixed," he said. While Congress is unlikely to enact changes to federal hemp policy anytime soon, Niforatos added, "At the state level, we want to see more of what Arkansas did."

Even though it was supported by anti-marijuana activists, when the bill was challenged in a federal lawsuit, the marijuana industry trade group American Trade Association for Cannabis and Hemp filed an **amicus brief** in December arguing that Congress never meant to legalize psychoactive hemp products for recreational consumption and asserting states' rights to regulate those wares.

"Those who argue against the ability for states to have regulatory authority over intoxicating products anywhere, do so at the expense of cannabis and hemp industry regulation everywhere," Michael Bronstein, president of ATACH, said in a statement at the time of the filing. "The ability for states to establish state-level regulatory frameworks for cannabis and hemp is a foundational principle of legalization and must be protected as a matter of law, irrespective of how a state ultimately decides to exercise this power."

Asked about the unusual alliance of pro- and anti-marijuana groups, SAM's Niforatos said the marijuana industry was acting "anti-competitive, because some in the industry think the delta-8 products are competing with their business."

"We're not working with the industry," he added. "They have profit incentives."

Miller, the U.S. Hemp Roundtable attorney, has called the forces pushing for the delta-8 loophole to be closed "an ironic alliance between policymakers who hate anything that's intoxicating and 'Big Marijuana,' which thinks hemp-derived intoxicants are competition."

On the question of which approach to regulating hemp Congress will ultimately take, Miller said, "My best bet is that Congress will do neither and leave it up to the states. And we'll continue to see these legal actions crop up every time you see a state crack down on it."

--Additional reporting by Mike Curley. Editing by Alanna Weissman.

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