



Hemp, CBD, and Marijuana: What Processors Should Know

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In 2018, Congress passed the Agriculture Improvement Act (also known as the 2018 Farm Bill), and with it removed cannabis plants and derivatives that contain no more than 0.3 percent THC on a dry weight basis from the federal Controlled Substances Act (CSA). As a result, retailers selling hemp and products derived from hemp, including cannabidiol (CBD), have sought services from payments companies willing to process such products. Putting steps in place to help ensure merchants understand the regulatory framework governing payment processing of hemp-related products and tailoring risk management procedures specifically for these merchants are key components of servicing the industry. Moreover, with evolving legislative and regulatory developments in this area, MAC members will need to stay apprised of changes that might impact their business in this sector.



Hemp and Hemp-Derived Products

The 2018 Farm Bill legalized hemp, defined to include the cannabis plant and any part of that plant (including seeds, extracts, cannabinoids, isomers, acids, salts, and other derivatives) containing less than 0.3 percent THC concentration on a dry weight basis. If, at any point in the process of producing a hemp or hemp-derived product, the product exceeds that THC limit, then the product becomes marijuana, which is still a controlled substance under federal law. Thus, a retail CBD product with no detectible THC could be either legal hemp or illegal marijuana depending on the THC content of the source plant and the processing of the product. It is imperative that a payments company that provides services in the industry understands the risks of inadvertently providing financial services to a marijuana-related business (which is considered illegal under federal laws) as opposed to a legal hemp-related business.



There are other considerations in the production of hemp-related products that merchants and processors should understand. For example, hemp production in a state or tribal territory requires a U.S. Department of Agriculture (USDA)-approved hemp plan. States or tribal territories that want regulatory authority over hemp production in their jurisdiction must have their own plan approved by the USDA. States without their own plan are subject to the federal hemp plan established by the USDA. On October 31, 2019, the USDA set forth a process for approving state and tribal plans and USDA licensing of hemp producers in states that do not have their own hemp plans. The USDA has approved hemp plans in a small number of jurisdictions but has not yet issued any federal hemp licenses. Payments companies should monitor developments in state hemp plans and USDA approvals for such plans.

While hemp is no longer a controlled substance under the CSA, other laws apply to the sale and marketing of hemp and CBD products. For example:

- The Food and Drug Administration (FDA) retains the authority to regulate hemp under the Federal Food, Drug, and Cosmetics Act (FDCA). Products subject to the FDA's jurisdiction (including containing CBD (either hemp or marijuana) must still comply with the FDCA and FDA regulations.

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The FDA has stated that a cosmetic containing CBD may not violate the FDCA as long as the CBD does not cause the product to harm users. However, a dietary supplement, food, or drug containing CBD violates the FDCA unless the FDA has specifically approved an application or regulation authorizing the marketing of such product.

- Numerous federal and state laws prohibit unfair and deceptive advertising and marketing practices (encompassing both the producers of the products as well as the marketers), which would include making false or unsupported claims about the benefits of CBD. The FDA and the Federal Trade Commission have sent numerous warning letters about CBD claims, including that CBD products can prevent, treat, or cure disease. Some states and localities have laws or regulations prohibiting the manufacture, sale, or use of hemp or CBD products.

Providing Financial Services to Hemp-Related Businesses

In December 2019, guidelines published by the Federal Reserve Board, the Federal Deposit Insurance Corporation, FinCEN, and the Office of the Comptroller of the Currency, in conjunction with the Conference of State Bank Supervisors, issued guidance for banks to provide banking services to the hemp industry. In particular, the guidance confirmed and stated:

- Banks are responsible for complying with the requirements set forth in the 2018 Farm Bill and applicable regulations.
- Banks are not required to file Suspicious Activity Reports (SARs) on customers solely because they are engaged in the growth or cultivation of hemp in accordance with applicable laws and regulations. As usual, banks are required to file a SAR if suspicious activity justifies it.
- Banks must have a Bank Secrecy Act / Anti-Money Laundering (BSA/AML) compliance program accounting for the risks and complexities associated with serving hemp related business.
- With respect to serving hemp-related businesses, banks must also comply with customer identification, currency transaction reporting, the collection of beneficial ownership information, and other appropriate risk-based due diligence.

The regulatory requirements imposed on banks in the payments industry flow down to processors and other third parties working under them.

Banks and financial institutions have also been tracking the Secure and Fair Enforcement (SAFE) Act, also referred to as the SAFE Banking Act (H.R. 1595), which is federal legislation initially proposed to allow financial institutions to offer banking services to marijuana businesses in states where marijuana is legal. The SAFE Act gained momentum quickly after it was introduced and overwhelmingly passed in the House of Representative in September 2019. More recently, however, the bill has faced strong opposition from key lawmakers, including current Senate Banking Committee Chairman Mike Crapo, who raised concerns about potential harmful effects of marijuana, marketing to children, and potential mis-use of the proposed law by bad actors to launder money.

The foregoing information sets forth basic guidelines in conjunction with the labyrinth of federal laws concerning hemp and CBD. Payment companies should also be aware that several states have adopted or are pursuing testing, labeling, and registration requirements for hemp and CBD products, and payment companies are also advised to ensure any industry merchant's compliance with those laws/regulations as well.

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