

# Where There's Smoke, There's Fire: The Raging Legislative Battle Over Smokable Hemp

Written By **Tyler J. Russell** (tjr@wardandsmith.com) and **Allen N. Trask, III** (ant@wardandsmith.com)

July 23, 2019



**Hemp and its derivatives – including hemp-derived cannabidiol ('CBD') – were previously classified as Schedule I controlled substances under the Controlled Substances Act of 1972 ('CSA').**

That changed in December 2018, when Congress passed the Agriculture Improvement Act of 2018 ("Farm Bill"). The Farm Bill, among other things, decriminalized hemp and hemp-derived CBD. It also clearly preserved the right of regulatory agencies – like the Federal Food and Drug Administration ("FDA") – to regulate certain aspects of the hemp and CBD industries. The Farm Bill also authorized individual states to opt into primary regulatory authority over the production of hemp within their borders.

The FDA and other federal agencies with authority over hemp and CBD have yet to issue their rules, regulations, and guidance for the industry – although, some updates are expected soon. This uncertainty, coupled with the Farm Bill's sweeping changes, leaves individual states to wrestle with how best to regulate and control the production and sale of hemp and hemp-derived products within their own borders. At the epicenter of this struggle to address and regulate hemp in North Carolina is "smokable hemp."

## **What is smokable hemp?**

The name "smokable hemp" is somewhat of a misnomer, since nearly any portion of the plant can conceivably be "smoked." But, this is the name our legislature has assigned to these goods in the NC Farm Act of 2019 (Senate Bill 315) ("SB 315"), so it's the name we'll use in this article for the sake of consistency. The technical definition of smokable hemp set out in SB 315, as it is currently drafted, is "a material, compound, mixture, or preparation that allows THC to be introduced into the human body by inhalation of smoke."

This generally includes the raw, cured portion of the hemp flower, commonly known as the "bud" or "flower." It is not milled, processed, and reduced to its cannabinoid-related compounds and components. Instead, it is generally sold in its whole or ground raw plant form – sometimes, in pre-rolled cigarettes. Smokable hemp contains less than 0.3% delta-9 tetrahydrocannabinol ("THC") by dry weight and a potent concentration of

CBD. It also contains a variety of other cannabinoids that may not necessarily be present or potent in THC concentrated marijuana. **It is non-psychoactive and will not get you "high" like marijuana** . Although the FDA does not allow medical claims to be made about hemp and hemp-derived products, consumers anecdotally report that smokable hemp provides a faster, more direct, and more potent delivery method for the health and wellness benefits they are seeking from CBD. And, some people just like the act of smoking.

## **Why smokable hemp?**

Hemp products range far and wide, from tinctures that consumers place under their tongues, to creams and lotions, to edible items. So why would anyone bother selling a product that is smoked? The answer is simple: smokable hemp is a high margin product that North Carolina farmers can directly sell to retailers or consumers – often for significantly more money than they would get by selling their crop to processors or other buyers. Although market factors can and do influence the price per pound for smokable hemp (and hemp in general), the market fluctuations in the price for smokable hemp – at least in North Carolina – appear to be more stable than the price fluctuations for hemp biomass. The smokable hemp market also preserves a "craft" niche for small business growers and operators who may otherwise be priced out of the biomass market once CBD extractors and processors begin to scale their operations on an industrial level. The desirable margins and commercial viability of this product are evidenced by the more than five million square feet of indoor or greenhouse grow spaces currently licensed for hemp production in North Carolina.

## **Why is it controversial?**

In North Carolina, the House of Representatives – along with local and state law enforcement agencies and county district attorneys – is fighting hard to kill the smokable hemp market in our state. The proposal set forth in SB 315 – and verbatim language that was recently included in the Amend North Carolina Controlled Substances Act (Senate Bill 352) – seeks to immediately ban and reclassify smokable hemp as a Class VI controlled substance, marijuana, and to subject its cultivation, sale, possession, and consumption to the same criminal and civil penalties. Their arguments and justifications for this ban have shifted over time, but generally include: that failing to ban smokable hemp will create "de facto" marijuana legalization in our state; that hemp and marijuana are indistinguishable in appearance and smell; that law enforcement will lose probable cause for drug-related searches and seizures; and, yes seriously, that 800 drug-sniffing canine officers may have to be retrained or retired, and their human handlers will have to be assigned to other jobs within their departments.

These arguments ignore reality and cover those advocates' true motivations for proposing the ban: a "reefer madness" mentality that continues to exist in the minds of some officials; and the diminution of law enforcement's ability to profit from federal asset forfeiture procedures in connection with cannabis. They also ignore the reality that smokable hemp has existed, legally, in our state for years without any prior outcry from law enforcement – and with no tangible evidence presented to date that smokable hemp has led to a loss of probable cause or dismissal of criminal charges. Instead, House Republicans and the law enforcement groups that they support have entirely ignored the good faith, workable proposals and compromises offered by hemp industry stakeholders to remedy probable cause and other concerns – like, an open container law that would preserve law enforcement's probable cause for lawful searches, adoption of one of the many available field test kits that distinguish between hemp and marijuana, or the use of an excise tax on smokable hemp that would generate additional revenue for the state that could be used to offset the costs of "retraining" the canine drug-sniffing officers and their handlers.

## **How have other states handled it?**

The treatment of smokable hemp by other states is across the board. Kentucky, a leader in the hemp space, currently has a conditional ban on smokable hemp (it may be grown in the state's border, but must be shipped out of state); however, that ban is under review, and Kentucky's Commissioner of Agriculture has called for it to be removed. Tennessee allows for the sale, possession, and consumption of smokable hemp, but has imposed an excise tax of 6.6% on the product. Florida allows smokable hemp and has adopted an "odor plus" standard for addressing probable cause. Industry advocates believe that our sister states, Virginia and South Carolina, will allow for possession and use of smokable hemp as their state-level programs continue to develop. On the flip side, Indiana recently implemented a smokable hemp ban similar to the proposals being pushed in North Carolina – and a Federal lawsuit was immediately filed to challenge the legality of that ban on the basis that it impermissibly violates the 2018 Farm Bill (the Federal law of the land) and unlawfully restricts lawful interstate commerce for hemp and hemp products. That lawsuit is ongoing – and, to be certain, a similar lawsuit will be filed quickly in North Carolina if our smokable hemp ban takes effect.

## **What do we stand to lose without it?**

North Carolina is an agricultural state. At the heart of our agricultural economy are farmers. But farming is hard and full of risk, and our farmers are in dire need of new, economically viable crops. Especially, crops with a price that is driven by a domestic market – not by tariffs and foreign policy. Hemp, and particularly smokable hemp, is just that: a new crop with a strong, domestic market relatively free of the concerns of international commodities like tobacco, corn, and soybeans.

Smokable hemp is also the economic driver of the industry in North Carolina today. Eventually, the market will grow and diversify – including hemp grown for fiber and true industrial usage. But, for now, hemp grown for CBD content (especially in the form of smokable hemp) is the crop that allows farmers to earn a profit and a return on their investment in the industry. In turn, that crop can be sold to processors, product manufacturers, and retailers who drive additional business and investments, and further grow the positive economic impact of hemp on our state. If we eradicate the market for smokable hemp, as proposed, we will lose opportunities for the growth and development of our industry – and cause real, immediate, and significant harm to our farmers and retailers who have already made significant monetary investments in their business operations.

The North Carolina Department of Agriculture & Consumer Services, the North Carolina Senate (especially Senator Brent Jackson), other officials have worked collaboratively to support the hemp and CBD industries and to find common ground legislative and regulatory solutions that will allow the market to flourish in our state. Now, it's time for the House of Representatives to do the same. It's hard to understand how we can hold ourselves out as a state that puts its farmers first, while simultaneously ruining the sunk investments of so many growers and limiting their ability (under threat of criminal prosecution) to grow and sell a Federally legal crop.

Consumer demand for smokable hemp and other CBD products is extremely high. We should be seeking to capitalize on that demand in a responsible manner, and position North Carolina as a true national leader in hemp. Instead, we are spending significant time and resources on a short-sighted ban that will cause irreversible harm and a multitude of unintended consequences in our state. We will see, in time, how this

issue finally shakes out - and we hope that common sense and fact-based decision making will ultimately win the day.

Ward and Smith's Hemp Law attorneys are actively helping individuals and businesses navigate the complex and rapidly changing state and federal regulations governing the hemp industry. If you are serious about growing your hemp-related business, we are serious about helping you.

--

© 2020 Ward and Smith, P.A. For further information regarding the issues described above, please contact Tyler J. Russell or Allen N. Trask, III.

*This article is not intended to give, and should not be relied upon for, legal advice in any particular circumstance or fact situation. No action should be taken in reliance upon the information contained in this article without obtaining the advice of an attorney.*

*We are your established legal network with offices in Asheville, Greenville, New Bern, Raleigh, and Wilmington, NC.*