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2018 Farm Bill and Federal Trademark Protection for Hemp

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This article continues our earlier discussion about brand protection for hemp-derived cannabidiol ("CBD").

The U.S. Patent and Trademark Office ('USPTO') generally refuses to register marks that violate federal law.

Hemp and hemp-derived CBD were previously classified as Schedule I controlled substances under the Controlled Substances Act of 1972. But, that changed with the December 20, 2018 enactment of the Agriculture Improvement Act of 2018 ("2018 Farm Bill") which, among other things, decriminalized hemp and hemp-derived CBD and opened the doors for brand protection at the USPTO. At the time of our prior article on this subject, the USPTO had not released official guidelines on the examination of marks in this industry, and the industry was left to speculate about its intentions moving forward. Now, the USPTO has directly addressed the topic and provided guidance for the industry with, Examination Guide 1-19: The Examination of Marks for Cannabis and Cannabis-Related Goods and Services after Enactment of the 2018 Farm Bill.

Hemp breeders, growers, processors, manufacturers, distributors, and retailers can now seek federal registration for trademarks or service marks (collectively, "marks") by submitting an application with the USPTO. Success and registration of those applications, though, is a matter of whether use of the mark in commerce is a lawful use under federal law. Applications for products or services related to or derived from marijuana (including marijuana-derived CBD) will continue to be denied as they are still considered controlled substances under the CSA. Applications for products or services related to or derived from hemp (including hemp-derived CBD) will be scrutinized for their lawful use, including compliance with the Federal Food, Drug and Cosmetic Act, the 2018 Farm Bill, and other laws and regulations that govern the industry.

In its May 2, 2019 Examination Guide, the USPTO explains:

> *For applications filed on or after December 20, 2018 that identify goods encompassing cannabis or CBD, the 2018 Farm Bill potentially removes the CSA as a ground for refusal of registration, but only if the goods are derived from "hemp." Cannabis and CBD derived from marijuana (i.e., Cannabis sativa L. with more than 0.3% THC on a dry-weight basis) still violate federal law, and applications encompassing such goods will be refused registration regardless of the filing date. If an applicant's goods are derived from "hemp" as defined in the 2018 Farm Bill, the identification of goods must specify that they contain less than 0.3% THC. Thus, the scope of the resulting registration will be limited to goods compliant with federal law.*

The Guide provides options to amend trademark applications to comply with federal law.

- For applications filed before December 20, 2018, applicants may amend the filing date to December 20, 2018;
- Applicants may amend the filing basis from actual use of the mark to intent to use of the mark;
- Applicants may amend the dates of first use of the mark to after December 20, 2018; and/or
- Applicants may amend the identification of products and/or services to expressly state that the products contain less than 0.3% THC on a dry-weight basis.

Hemp growers, processors, manufacturers, distributors and retailers that own or submit federal trademark applications should be aware that the USPTO may still issue a refusal or inquiry (called an "Office Action") that questions whether use of the mark in commerce complies with federal law. If an Office Action issues, the applicant must amend the application, submit information and documentation about how its use complies with federal law, submit arguments to overcome the Office Action or submit a new application. Each trademark application is reviewed on a case-by-case basis, and examination depends on the examiner assigned.

The ability to register marks relating to hemp and hemp-derived CBD industry is another huge step forward for the industry. But, as indicated above, not all marks will receive federal registration and the protections that follow. The USPTO's guidance is clear: marks for products that violate federal law (or the USPTO's interpretation of federal law) will not register. For now, it appears that the USPTO will follow the U.S. Food and Drug Administration's lead and refuse registration of marks for food, beverages, dietary supplements, or pet treats containing CBD as unlawful under the Federal Food, Drug and Cosmetic Act, even if derived from hemp. Companies desiring federal registration should ensure that their goods, activities, or services related to the industry comply with federal laws and regulations.

The complete Examination Guide is provided on the USPTO website.

We encourage anyone considering brand protection for hemp and hemp-derived CBD marks to seek legal counsel before adopting use of a mark and before submitting an application to register the mark. Ward and Smith's Hemp Law team is available to assist, providing full-service legal representation to hemp breeders, growers, processors, manufacturers, distributors, retailers and other market participants on these and other complex legal issues.

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