

Examination Guide 1-19

Examination of Marks for Cannabis and Cannabis-Related Goods and Services after Enactment of the 2018 Farm Bill

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I. Introduction

Use of a mark in commerce must be lawful under federal law to be the basis for federal registration under the U.S. Trademark Act. *See generally* Trademark Manual of Examining Procedure (TMEP) §907. The United States Patent and Trademark Office (USPTO) refuses to register marks for goods and/or services that show a clear violation of federal law, regardless of the legality of the activities under state law. A determination of whether commerce involving cannabis and cannabis-related goods and services is lawful requires consultation of several different federal laws, including the Controlled Substances Act, 21 U.S.C. §§801 *et seq.*, the Federal Food Drug and Cosmetic Act, 21 U.S.C. §§301 *et seq.*, and the Agriculture Improvement Act of 2018, Pub. L. 115-334 (the 2018 Farm Bill), which amends the Agricultural Marketing Act of 1946 (AMA). The USPTO issues this examination guide to clarify the procedure for examining marks for cannabis and cannabis-derived goods and for services involving cannabis and cannabis production following the 2018 Farm Bill.

II. Examination of marks for cannabis and cannabis-derived goods such as cannabidiol

Under the Controlled Substances Act (CSA), the drug class “Marihuana” (commonly referred to as “marijuana”) is defined as “all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin” (subject to certain exceptions). 21 U.S.C. §802(16). Cannabidiol (CBD) is a chemical constituent of the cannabis plant that is encompassed within the CSA’s definition of marijuana. *See* Clarification of the New Drug Code (7350) for Marijuana Extract, https://www.deadiversion.usdoj.gov/schedules/marijuana/m_extract_7350.html, last accessed April 23, 2019; *see also*, 21 C.F.R. §1308.11(d)(58). The CSA prohibits, among other things, manufacturing, distributing, dispensing, or possessing certain controlled substances, including marijuana. 21 U.S.C. §§812, 841(a)(1), 844(a). Therefore, the USPTO refuses registration when an application identifies goods encompassing CBD or other extracts of marijuana because such goods are unlawful under federal law and do not support valid use of the applied-for mark in commerce.

The 2018 Farm Bill, which was signed into law on December 20, 2018, amends the AMA and changes certain federal authorities relating to the production and marketing of “hemp,” defined as “the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis.” Section 297A. These changes include removing “hemp” from the CSA’s definition of marijuana, which means that cannabis plants and derivatives such as CBD that contain no more than 0.3% THC on a dry-weight basis are no longer controlled substances under the CSA.

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.

For applications filed *before* December 20, 2018 that identify goods encompassing CBD or other cannabis products, registration will be refused due to the unlawful use or lack of bona fide intent to use in lawful commerce under the CSA. Such applications did not have a valid basis to support registration at the time of filing because the goods violated federal law. However, because of the enactment of the 2018 Farm Bill, the goods are now potentially lawful if they are derived from "hemp" (i.e., contain less than 0.3% THC). Therefore, the examining attorney will provide such applicants the option of amending the filing date and filing basis of the application to overcome the CSA as a ground of refusal.

Specifically, the examining attorney will advise the applicant that it may request to amend the filing date of the application to December 20, 2018. The applicant must specifically state for the record that such a change to the filing date is being authorized and must establish a valid filing basis under 37 C.F.R. §2.34 by satisfying the relevant requirements. See 37 C.F.R. §§2.34 *et seq.*, TMEP §§806 *et seq.* If the application was originally based on use of the mark in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. §1051(a), the applicant will be required to amend the basis to intent to use the mark in commerce under Section 1(b), 15 U.S.C. §1051(b). Because of the new legal definition of "hemp" under the 2018 Farm Bill, the applicant will also be required to amend the identification of goods to specify that the CBD or cannabis products contain less than 0.3% THC. If the applicant elects to amend the application, the examining attorney will conduct a new search of the USPTO records for conflicting marks based on the later application filing date. TMEP §§206.01, 1102.03. The examining attorney will also advise the applicant that, in lieu of amending the application, it may elect to abandon the subject application and file a new application. Alternatively, the applicant may respond to the stated refusal by submitting evidence and arguments against the refusal.

Applicants should be aware that even if the identified goods are legal under the CSA, not all goods for CBD or hemp-derived products are lawful following the 2018 Farm Bill. Such goods may also raise lawful-use issues under the Federal Food Drug and Cosmetic Act (FDCA). The use in foods or dietary supplements of a drug or substance undergoing clinical investigations without approval of the U.S. Food and Drug Administration (FDA) violates the FDCA. 21 U.S.C. §331(ii); *see also* 21 U.S.C. §321(ff) (indicating that a dietary supplement is deemed to be a food within the meaning of the FDCA). The 2018 Farm Bill explicitly preserved FDA's authority to regulate products containing cannabis or cannabis-derived compounds under the FDCA. CBD is an active ingredient in FDA-approved drugs and is a substance undergoing clinical investigations. See FDA Regulation of Cannabis and Cannabis-Derived Products: Questions and Answers, available at <https://www.fda.gov/newsevents/publichealthfocus/ucm421168.htm#whatare>, last accessed April 23, 2019. Therefore, registration of marks for foods, beverages, dietary supplements, or pet treats containing CBD will still be refused as unlawful under the FDCA, even if derived from hemp, as such goods may not be introduced lawfully into interstate commerce. 21 U.S.C. §331(ii); *see also* statement of former FDA Commissioner Scott Gottlieb, M.D., on signing of the Agriculture Improvement Act and the agency's regulation of products containing cannabis and cannabis-derived compounds. <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm628988.htm>

III. Examination of marks for services involving cannabis and cannabis production

When applications recite services involving cannabis-related activities, they will be examined for compliance with the CSA and the 2018 Farm Bill. As discussed above, the CSA prohibits, among other things, manufacturing, distributing, dispensing, or possessing cannabis that meets the definition of marijuana. Therefore, the USPTO will continue to refuse registration when the identified services in an application involve cannabis that meets the definition of marijuana and encompass activities prohibited under the CSA because such services still violate federal law, regardless of the application filing date. If the identified services involve cannabis that is “hemp” (i.e., contains less than 0.3% THC), the applications will also be examined for compliance with the requirements of the 2018 Farm Bill. Applicants refused registration under the CSA will have the same options outlined in section II above of overcoming the refusal by requesting amendment of the filing date and basis of their application, and amending the identification of services to specify that the involved cannabis contains less than 0.3% THC on a dry-weight basis. In lieu of amending the application, an applicant may elect to abandon the subject application and file a new application. Alternatively, the applicant may respond to the stated refusal by submitting evidence and arguments against the refusal.

For applications that recite services involving the cultivation or production of cannabis that is “hemp” within the meaning of the 2018 Farm Bill, the examining attorney will also issue inquiries concerning the applicant’s authorization to produce hemp. Applicants will be required to provide additional statements for the record to confirm that their activities meet the requirements of the 2018 Farm Bill with respect to the production of hemp. The 2018 Farm Bill requires hemp to be produced under license or authorization by a state, territory, or tribal government in accordance with a plan approved by the U.S. Department of Agriculture (USDA) for the commercial production of hemp. To date, the USDA has not promulgated regulations, created its own hemp-production plan, or approved any state or tribal hemp-production plans. However, the 2018 Farm Bill directs that states, tribes, and institutions of higher education may continue operating under authorities of the 2014 Farm Bill until 12 months after the USDA establishes the plan and regulations required under the 2018 Farm Bill.