

ALERT

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USPTO'S GUIDANCE ON CANNABIS RELATED TRADEMARKS EXPANDS TRADEMARK RIGHTS FOR CERTAIN HEMP RELATED GOODS & SERVICES



Michael J. Schwab

On May 2, 2019 the United State Patent and Trademark Office (“USPTO”), in response to the 2018 Farm Bill’s removal of “hemp” from the definition of marijuana in the Controlled Substances Act (“CSA”), issued an Examination Guide for trademark applications for cannabis and cannabis derived products and services. It is now possible to register trademarks for **some** hemp related goods and services.

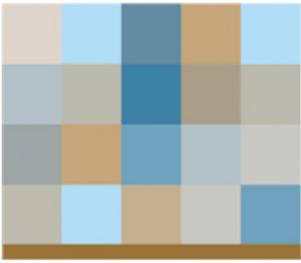
In the United States trademark rights are derived from the use of the trademark in commerce. The USPTO has held that to qualify for a federal trademark registration the use of the mark in commerce must be “lawful.” Therefore, the sale or shipment of a good or the provision of a service in violation of a federal statute is not recognized as a basis for establishing trademark rights.

The CSA prohibits interstate commerce of marijuana and marijuana related goods, which it defines as all parts of Cannabis sativa L plant. Therefore, the USPTO refuses to register any trademark that is used or intended to be used on or in connection with any marijuana or marijuana related good or service on the basis that the use of such a mark is unlawful.

Hemp refers to non-psychoactive varieties of the Cannabis sativa L plant and is used for a variety of industrial uses such as paper, textiles and cordage. The 2018 Farm Bill, which was signed into law on December 20, 2018, removed hemp, defined as any part of the Cannabis sativa L plant and any derivatives thereof that do not contain more than 0.3% THC on a dry weight basis, from the CSA’s definition of marijuana.

In response to this change in the law the USPTO will now approve **some**, but not all, trademark applications for hemp related goods and services.

1. **Applications filed on or after December 20, 2018.**
These applications will be allowed **provided the identification of goods explicitly states that the goods contain less than 0.3% of THC.**
2. **Applications filed before December 20, 2018.**
These applications will be refused, but the applicant will be given the option to modify the filing date of the application to December 20, 2018 and amend the identification of goods so that it **states that the goods contain less than 0.3% of THC.**
3. **Applications for foods, beverages, pet treats and dietary supplements will not be allowed.**
The 2018 Farm Bill explicitly preserved the Food and Drug Administration’s (FDA) authority to regulate products containing cannabis and cannabis-derived compounds under the Federal Food Drug and Cosmetic Act (FDCA). CBD, short for cannabidiol, is a chemical constituent



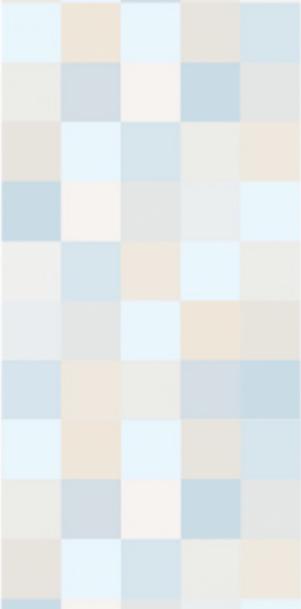
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This Alert was written by Michael J. Schwab.

Mr. Schwab, counsel to the firm, concentrates his practice in all facets of complex intellectual property and licensing matters.

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of the Cannabis sativa L plant and is an active ingredient in FDA-approved drugs and a substance undergoing clinical evaluations. The use of an approved drug or a substance undergoing a clinical evaluation in a food, beverage, pet food or dietary supplement is prohibited under the FDCA. Therefore, the USPTO will continue to refuse applications to register trademarks for foods, beverages, pet treats and dietary supplements that contain CBD on the basis that the use of such marks is unlawful.

Applicants seeking to register trademarks for hemp related goods and services should review the specific nature of their business and goods with a trademark attorney who can evaluate whether their trademark qualifies for registration under the guidelines.

Any issues raised in this Alert may be addressed to Mr. Schwab who can be reached at (212) 239-2000 or by email at mschwab@moritthock.com.



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