

BARRIERS TO ENTRY: US CUSTOMS' EVOLVING POLICY ON IMPORTING AND EXPORTING HEMP

While 2016 presidential candidates debate whether or not to build a literal wall between the United States and Mexico, the existence of another figurative wall has been under fire for some time: the importation and exportation of industrial hemp and hemp-derived products. Industrial hemp, often incorrectly confused with its psychoactive cousin marijuana, is the non-narcotic variety of the plant *Cannabis sativa L.*, known for its expansive uses including textiles, oils and papers, among others, and being devoid of any psychoactive effect. Still, numerous cannabinoids are naturally occurring within industrial hemp, including cannabidiol (CBD) and trace amounts of tetrahydrocannabinol (THC), the psychoactive component in marijuana.

The United States Controlled Substances Act excludes certain parts of the plant *Cannabis sativa L.* from the definition of “marihuana,” primarily due to the recognition that such excluded parts of the plant are incapable of producing the psychoactive “high” commonly associated with marijuana.¹ Thus, such parts of the plant, and derivatives therefrom, have long been imported into and exported from the United States. This import/export trade only strengthened upon confirmation from the Ninth Circuit Court of Appeals in 2003-04, where the *Hemp Indus. Ass'n* court ruled such import/export activities were lawful.² Importantly, this ruling contravened and rendered void the Drug Enforcement Agency (DEA) policy illegalizing all parts of the cannabis plant and all derivatives therefrom. Yet, despite this crushing legal blow, the DEA has not relented from its opposition towards the cannabis plant, regardless of the many distinctions between industrial hemp and marijuana.

Fortunately, for several years thereafter, the United States Customs and Border Protection agency (CBP) more closely followed the *Hemp Indus. Ass'n* ruling than the DEA. Until recently, with the exception of viable seed, operators within the hemp industry generally imported and exported industrial hemp and hemp derivatives from those certain excluded parts of the plant for processing, manufacturing and distribution within the United States, and in some cases, re-exportation of products outside of the United States.³ During this time, CBP's website stated such products could be lawfully imported. Moreover, CBP harmonized tariff codes expressly provide for the importation of a variety of hemp products and derivatives including hemp seed, hemp oil, true raw hemp or hemp fibers, and hemp yarn, among others.⁴

Rather abruptly, however, in Fall 2015, the industry witnessed a significant uptick in seizures by CBP related to industrial hemp and hemp products. This change likely arose as the domestic marijuana and hemp industries continued to evolve state-by-state and face ever-increasing scrutiny by federal, state and local law enforcement officials. Even more concerning, in November 2015, CBP amended its stated website policy to reflect that any products sought to be imported which contain *any* amount of THC were treated as illegal and would be seized,

¹ 21 U.S.C. § 802(16).

² *Hemp Indus. Ass'n. v. DEA*, 357 F.3d 1012 (9th Cir. 2004); *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082 (9th Cir. 2003).

³ [https://help.cbp.gov/app/answers/detail/a_id/1751/~importing-hemp-products-into-the-u.s; c.f. https://help.cbp.gov/app/answers/detail/a_id/786/~illegal-contraband-\(marijuana\)-for-medicinal-purposes](https://help.cbp.gov/app/answers/detail/a_id/1751/~importing-hemp-products-into-the-u.s; c.f. https://help.cbp.gov/app/answers/detail/a_id/786/~illegal-contraband-(marijuana)-for-medicinal-purposes).

⁴ See generally <https://hts.usitc.gov/>.

regardless of the fact trace amounts of THC naturally occur within industrial hemp. Thus began a CBP practice where shipments were tested, in a fashion similar to a pregnancy test, to be either positive or negative for THC. If tested positive, CBP immediately seized the shipment, thus placing the importer and exporter in an exceedingly difficult position to convincingly persuade skeptical CBP agents of the legality of the product in order to attempt to release said shipment.

Upon further inquiry and questioning of such changes in its policy by our firm in early 2016, CBP quickly (and temporarily) reverted to a policy similar to that of its previous policy; allowing the import and export of certain hemp products and hemp derivatives, while working towards finalizing a more permanent policy reflective of federal law.⁵

Still, a figurative barrier remains: the trickle-down effect of such policy to each of the CBP ports and agents nationwide. Based on experience, the success or failure of any given shipment passing through CBP jurisdiction primarily is dependent upon the CBP port or agent through which such shipment travels, regardless of the policy asserted on CBP's website. Certain CBP ports and agents appear to have a better understanding of the relevant federal law and the *Hemp Indus. Ass'n* ruling than others. It also appears infrequent for CBP ports and agents to work with one another towards consistent application of CBP policies and procedure. In practice, the majority of shipments are imported or exported without issue. However, for those shipments passing through ports or agents less familiar with hemp products or hemp derivatives, shipments are seized and the standard of proof required of the importer or exporter to prove the legality of the shipment is overly burdensome, if not impossible to achieve. While modest success has been achieved in securing the release of seized shipments, certainly the preferable route for all involved is to avoid seizure completely.

The hemp industry hopes to maintain a productive working relationship with CBP and strives to clarify applicable laws surrounding the legality and import/export of industrial hemp and hemp derivatives. There is a great need to work together to affect meaningful change across all ports and CBP agents and in conjunction with the DEA too. Our clients strive to secure and illuminate the pathways through which industrial hemp and hemp products may be imported and exported well into the future. In the meantime, though not impermeable, industry best practices are recommended when importing and exporting industrial hemp and hemp products. Further, it is strongly advised you should consult with an attorney prior to importing or exporting industrial hemp or hemp derivatives to ensure compliance with all applicable laws.

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⁵ See https://help.cbp.gov/app/answers/detail/a_id/1751/~importing-hemp-products-into-the-u.s.