

Some CBD Trademarks Are Now Federally Registrable Based on New Guidance from the USPTO

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by Sarah Robertson and Evan Everist



The United States Patent and Trademark Office will now allow federal trademark registration for marks used on some hemp-based products, including those containing hemp-derived CBD, except for foods, beverages, dietary supplements, or pet treats.

On May 2, 2019, the USPTO issued Examination Guide 1-19 for the examination of federal trademark applications covering cannabis and cannabis-derived goods and services. The guide comes in the wake of the December 20, 2018 Farm Bill, which among other

things, explicitly removed hemp (a type of cannabis) and its byproducts from the definition of “Marihuana” in the Controlled Substances Act and broadened the pilot program to allow for more widespread non-academic cultivation of hemp. The Farm Bill created tension with the USPTO’s longstanding practice of outright denying or, in the case of CBD products, sometimes postponing the examination of, any application with a whiff of cannabis on the ground the goods or services cannot be used lawfully in commerce (which is a requirement for federal registration). The brand new Examination Guide acknowledges that marks used on hemp products (including CBD) produced lawfully under a state pilot program, which controls the means by which hemp may be grown and processed within a given state, are not illegal under the Controlled Substances Act and so should also be registrable.

But the Guide identifies another potential ground for refusing hemp-based CBD products as unlawful based on guidance from the FDA. The Farm Bill explicitly preserved the FDA’s authority to regulate certain types of products containing cannabis and cannabis-related compounds. The FDA has indicated that it believes the sale of foods, beverages, dietary supplements, or pet treats containing CBD (regardless of how derived) to be illegal under the Federal Food, Drug and Cosmetic Act ([click here](#)). Thus, based on the FDA’s statements, the USPTO has indicated that it will not allow registration of foods,

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beverages, dietary supplements, or pet treats containing hemp-derived CBD on the ground they cannot be lawfully used in commerce, unless or until the FDA's position changes.

Importantly, the USPTO has indicated that its guide applies only to applications filed after the passage of the Farm Bill on December 20, 2018. For applications filed on or before December 20, applicants can amend their filing date to December 20, 2018, based on the USPTO's view that applicants could not have legally sold or had a good faith intent to legally sell any CBD or cannabis-derived product prior to the passage of the Farm Bill.

This change in USPTO policy opens up new potential registration opportunities for cannabis brands. For example, smokable products are conspicuously absent from the USPTO's list of prohibited CBD goods. Thus, companies selling smokable hemp-derived CBD products may have a good case for federal registration. Additionally, for cannabis brands selling products derived from both hemp and marijuana, it potentially presents an opportunity to obtain federal registration for the federally-legal components of their businesses.

Although the FDA currently maintains it is illegal to sell foods, beverages, dietary supplements, or pet treats containing CBD, it is taking steps that could indicate a change to its approach. The FDA is holding a public hearing on May 31 for stakeholders in the cannabis industry and is forming a high-level working group to explore pathways for legally selling and marketing food and dietary supplements containing cannabis, including hemp-derived CBD. If and when the FDA changes its approach for these products, this could open the door for widespread federal registration of hemp-based CBD products.