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S.B. 57
133rd General Assembly

Bill Analysis

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Version: As Passed by the Senate

Primary Sponsors: Sens. Hill and S. Huffman

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Summary

- Decriminalizes hemp and hemp products by excluding them from the definition of marijuana that is used to enforce controlled substance laws.
- Prohibits the State Board of Pharmacy from listing hemp or hemp products as controlled substances.
- Requires the Director of Agriculture, in consultation with the Governor and Attorney General, to submit a plan to regulate hemp cultivation to the Secretary of the U.S. Department of Agriculture for approval, in accordance with federal law.
- Requires the Director of Agriculture to establish a Hemp Cultivation and Processing Program (Program) to monitor and regulate hemp cultivation and the processing of hemp to produce cannabidiol.
- Requires the Director to issue hemp cultivation licenses and hemp processing licenses.
- Requires the Director, in consultation with the Governor and the Attorney General, to adopt rules establishing standards and procedures for the Program that comply with federal law.
- Establishes prohibitions, procedures, criminal penalties, and additional enforcement mechanisms to enforce the Program and rules adopted under it.
- Establishes in the state treasury the Hemp Program Fund, which must be used to administer and enforce the Program.
- Establishes a Hemp Marketing Program.

Detailed Analysis

Introduction

Hemp is a variety of the plant *Cannabis sativa L.* (cannabis) that can be used in industrial applications, such as paper, textiles, biofuel, and animal feed. Both hemp and marijuana come

from the cannabis plant, but hemp contains a lower concentration of the psychoactive constituent of cannabis, tetrahydrocannabinol (THC). Ohio does not currently have any specific laws in place regarding hemp or hemp products, and hemp and hemp products are prohibited in Ohio because hemp comes from the same plant as marijuana – cannabis. Thus, hemp is considered a Schedule I controlled substance under Ohio law.¹

Until recently, federal law also made no distinction between hemp and marijuana. However, the federal Agriculture Improvement Act of 2018 both: (1) exempts hemp grown in accordance with the Act from the federal Controlled Substances Act (CSA), and (2) authorizes states to regulate hemp under specific conditions. The federal Act was signed into law on December 20, 2018.

Controlled substances and decriminalization of hemp

The bill prohibits the State Board of Pharmacy (Pharmacy Board) from listing hemp or hemp products as a controlled substance and decriminalizes hemp and hemp products by excluding them from the definition of marijuana that is used to enforce laws governing controlled substances.

Under the federal CSA, drugs are classified into one of five schedules (I through V) depending on the drug's acceptable medical use and its abuse or dependency potential. Generally, marijuana is a Schedule I controlled substance under the CSA, meaning it is prohibited and no prescription can be written for it. However, the federal Agriculture Improvement Act of 2018 specifies that hemp (and THC found in hemp) grown in accordance with that Act is not marijuana, and therefore, is not a controlled substance.

Ohio's controlled substance schedules are similar to those established under the federal CSA. Generally, the schedules under Ohio law are automatically updated when certain federal changes occur, subject to rule-making authority granted to the Pharmacy Board. However, in the 132nd General Assembly, S.B. 229 was enacted, which will require the Pharmacy Board to adopt rules establishing Schedules I through V. Ohio's controlled substance schedules will therefore be eliminated from statute when this provision of S.B. 229 becomes effective on March 22, 2020. The Pharmacy Board will have the authority to include in the schedules any substance that was included in the schedules immediately prior to March 22, 2020.²

In light of these changes, the bill therefore prohibits the Pharmacy Board from adopting rules including hemp or a hemp product in any schedule as a controlled substance.³ The bill further decriminalizes hemp and hemp products by excluding them from the Ohio definition of marijuana used for regulating controlled substances and the criminal enforcement of those laws.⁴ For purposes of the bill, hemp is:

¹ R.C. 3719.01(O) and 3719.41(C)(19), amended in Section 1. Note that the bill amends the current versions of R.C. 3719.01 and 3719.41 in Section 1 of the bill and the future versions of those sections in Section 3 of the bill.

² R.C. 3719.41, amended in Section 3.

³ R.C. 3719.41(C) and (D), amended in Section 3.

⁴ R.C. 3719.01(O) and 3719.01(M), amended in Section 3.

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 concentration of not more than .3% on a dry weight basis.⁵

A hemp product is any product, containing a THC concentration of not more than .3%, made with hemp and any product containing one or more cannabinoids derived from hemp, including cannabidiol. Cannabidiol is a compound derived from hemp, also containing a THC concentration of not more than .3%.⁶

In decriminalizing hemp and hemp products, the bill removes them from the current list of Schedule I controlled substances in Ohio law. The bill also specifically removes THC found in hemp and hemp products from Schedule I in conformity with this change.⁷

Hemp Cultivation and Processing Program

Federal Agriculture Improvement Act of 2018 requirements

Under the provisions of the federal Agriculture Improvement Act of 2018, hemp and hemp products may be legally cultivated, produced, and sold⁸ under two circumstances:

1. The state submits a plan for hemp regulation to the U.S. Secretary of Agriculture that complies with the Act's requirements; or
2. If the state does not submit a plan and hemp is not prohibited by that state, the U.S. Secretary of Agriculture establishes a plan to monitor and regulate hemp in that state.

Under the first circumstance, the state's plan must include all of the following:

- A way to keep track of land where hemp is cultivated within the state;
- Methods the state will use to test how much THC is in hemp plants;
- A way to dispose of plants or products that have a higher THC concentration than is legally allowed;
- A procedure for inspecting hemp cultivators;
- Procedures for enforcing the plan;
- A procedure for annual inspections;
- A system for dissemination of a hemp cultivator's information to the U.S. Department of Agriculture (USDA); and
- Assurances that the state has the resources to carry out the plan.

⁵ R.C. 928.01(B).

⁶ R.C. 928.01(D) and (A).

⁷ R.C. 3719.41(C)(27), amended in Section 1.

⁸ As used in this analysis, the term "cultivate" refers to the act of growing hemp, and "produce" and "process" refer to the processing of hemp into a hemp product.

Under the second circumstance, a plan established by the Secretary generally must meet the same criteria as a plan submitted by a state, but must also establish a licensing procedure for hemp cultivators. The Act specifically allows a state to outlaw hemp cultivation within its boundaries or to include additional restrictions and requirements in its plan as long as the plan complies with the Act.⁹

In accordance with the Act, the bill requires the Director of Agriculture, in consultation with the Governor and Attorney General, to submit a plan for the regulation of hemp cultivation to the Secretary for approval not later than 180 days after the bill's effective date.¹⁰ The bill further requires the Director to establish a hemp cultivation and processing licensing program that incorporates the elements required for a state plan submitted under the federal Act to be approved by the Secretary, as further explained below.¹¹

Hemp cultivation license and hemp processing license

Under the bill, the Director of Agriculture must establish a Hemp Cultivation and Processing Program (Program) to monitor and regulate hemp cultivation and processing. Under the Program, the Director must issue hemp cultivation licenses and hemp processing licenses to eligible applicants. A person seeking to cultivate hemp or process hemp to produce cannabidiol must apply to the Director for a license, which is valid for three years (unless earlier suspended or revoked by the Director).¹² However, as authorized by the Director, the Department of Agriculture or a university may cultivate hemp or process hemp to produce cannabidiol without a license for research purposes.¹³

The bill specifies that no hemp cultivation license or hemp processing license is required to do any of the following:

- Possess, buy, or sell hemp or a hemp product;
- Except for processing hemp to produce cannabidiol, process hemp into a hemp product.¹⁴

In addition, the bill specifies that notwithstanding any other provision of law, the addition of hemp or cannabinoids derived from hemp, including cannabidiol, to any product does not adulterate that product.¹⁵ Under current law, adulteration of a food, device, cosmetic, or drug is criminally prohibited. Thus, the bill exempts the addition of hemp to a product from being prosecuted as "adulteration" under that law.¹⁶

⁹ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 10113.

¹⁰ Section 5 of the bill.

¹¹ R.C. Chapter 928.

¹² R.C. 928.02(B).

¹³ R.C. 928.02(A).

¹⁴ R.C. 928.02(C).

¹⁵ R.C. 928.02(D).

¹⁶ See *e.g.*, R.C. 3715.52, 3715.99, and R.C. Chapter 3715 generally, not in the bill.

Rules

The bill requires the Director, in consultation with the Governor and the Attorney General, to adopt administrative rules establishing standards and procedures to regulate hemp cultivation and processing. These rules incorporate all of the elements required to be included in a state plan by the federal Agriculture Improvement Act of 2018. The rules must include all of the following:

- The form of an application for a hemp cultivation license and hemp processing license and information required to be included in each application;
- The amount of the application fee that must be submitted with each application;
- Requirements and procedures for applicant background investigations;
- Procedures and requirements for the issuance, renewal, denial, suspension, and revocation of a license, including providing for an administrative hearing with regard to a denial, suspension, or revocation of a license;
- Grounds for the denial, suspension, and revocation of a license;
- A requirement that the Director cannot issue a license to any person who has pleaded guilty to or been convicted of a felony relating to a controlled substance in the ten years immediately prior to submission of an application;
- A requirement that any person that materially falsifies information in an application is ineligible to receive either license;
- A practice for maintaining relevant information regarding land on which hemp cultivation licensees cultivate hemp, including a legal description of the land;
- Requirements prohibiting a hemp cultivation licensee and a hemp processing licensee from cultivating or processing marijuana;
- A procedure for testing, using post-decarboxylation or other similarly reliable methods, delta-9 THC concentration levels of hemp and hemp products;
- Requirements and procedures for corrective action plans (see “**Negligence: corrective action plan**”);
- A procedure for conducting, at a minimum, random annual inspections of hemp cultivation license holders to verify that hemp is being cultivated in accordance with the Program;
- A procedure for conducting, at a minimum, random annual inspections of hemp processing license holders to verify that hemp is being processed to produce cannabidiol in accordance with the Program;
- A procedure for complying with enforcement procedures required under federal law;
- A procedure for the effective disposal of both:
 - Plants that violate Program requirements;
 - Products derived from plants that violate Program requirements;

- Procedures for sharing information regarding hemp cultivation license holders with the USDA;
- A setback distance requirement that specifies the distance a hemp cultivation license holder must locate hemp plants from a location where medical marijuana is being cultivated (this requirement does not apply if a medical marijuana cultivator locates medical marijuana within the setback distance after the hemp cultivation license holder has already begun operating);
- Annual reporting requirements and procedures for hemp cultivation license holders and hemp processing license holders;
- Recordkeeping and documentation maintenance requirements and procedures for hemp cultivation license holders and hemp processing license holders;
- Fees for the laboratory testing of hemp and hemp products;
- Standards for the testing and labeling of hemp and hemp products;
- Any other requirements or procedures necessary to administer and enforce the Program.¹⁷

Enforcement

The bill establishes enforcement procedures that mirror those required for a state plan to be approved by the Secretary of Agriculture under the federal Agricultural Act of 2018. Generally, a state plan must require violations of a hemp program involving criminal negligence to be addressed through the use of a corrective action plan, and for violations involving a culpable mental state of recklessness (or greater) to be referred for criminal prosecution.

Under current Ohio law, a culpable mental state is the degree of culpability necessary to commit a criminal offense. In descending order, the various degrees of culpability are:

- Purposely (specific intent to cause a certain result);
- Knowingly (with knowledge that a certain result probably will occur);
- Recklessly (heedless indifference to consequences that a known risk may cause a certain result); and
- Negligently (a substantial lapse in due care that an act may cause a certain result).

Each mental state includes the levels of mental states listed after it. For example, if a criminal offense requires a person to have acted recklessly, then a person acting knowingly or purposely would be guilty of that offense.¹⁸

The bill creates general prohibitions, a scheme for issuing corrective action plans, criminal penalties and procedures for prosecuting violations committed with a culpable mental

¹⁷ R.C. 928.03.

¹⁸ R.C. 2901.22, not in the bill.

state greater than negligence, in accordance with federal law, and additional enforcement mechanisms for ensuring compliance with the Program.

Prohibitions

The bill prohibits all of the following:

- Cultivating hemp without a hemp cultivation license;
- Processing hemp to produce cannabidiol without a hemp processing license;
- Violating any provision of the Program or rules;
- Failing to comply with a corrective action plan issued by the Director.¹⁹

The applicable criminal penalty for a violation of the prohibitions depends on the culpable mental state of the offender. However, negligent violations must be addressed by the Director with a corrective action plan, as described below. There is no criminal penalty associated with a negligent violation of any of these prohibitions.

Negligence: corrective action plan

The bill requires the Director to issue a corrective action plan to any person that the Director determines has negligently violated the bill's prohibitions. The Director must include in the corrective action plan both of the following:

- A reasonable date by which the person must correct the violation;
- A requirement that the person report to the Director regarding the person's compliance with the Program, rules, and the corrective action plan for two calendar years immediately following the date of the violation.²⁰

If the Director determines that a person negligently violated any of the bill's prohibitions three or more times in any five-year period, the Director must revoke the person's hemp cultivation license or hemp processing license (if any) and may not issue a hemp cultivation license or hemp processing license to that person for a period of five years beginning on the date that the Director determines that the person committed the most recent violation.²¹

Recklessness: criminal penalties and prosecution

The bill requires the Director to report a person whom the Director determines has violated the bill's prohibitions with a culpable mental state of recklessness (or greater) to the Attorney General, the U.S. Attorney General, and the applicable county prosecutor.²² The bill authorizes a county prosecutor or the Attorney General to prosecute such violations.²³

¹⁹ R.C. 928.04.

²⁰ R.C. 928.05(A).

²¹ R.C. 928.05(B).

²² R.C. 928.05(C).

²³ R.C. 928.99(B).

In addition, the bill establishes the following criminal penalties that apply to such violations:

- For a first offense, a minor misdemeanor;
- For each subsequent offense, a fourth degree misdemeanor.

The bill specifies that the sentencing court must issue an order prohibiting a repeat offender (a person convicted of or who has pleaded guilty to a third or subsequent offense) from obtaining a hemp cultivation license or hemp processing license. The court must provide notice of that order to the Director. The Director must then revoke any license the person holds and refuse to issue the person a license beginning on the date of the court order.²⁴

Additional enforcement mechanisms for compliance

The bill authorizes the Director to enter at reasonable times upon any public or private property at which hemp is being cultivated or processed to produce cannabidiol for the purpose of determining compliance with the Program and rules adopted under it. The Director may apply for, and any judge can issue, a search warrant needed to achieve the Program's purpose. In addition to any other available remedies, the bill authorizes the Director, the Attorney General, and a county prosecutor to apply to the court of common pleas in the county where a violation of the Program is happening for an injunction to restrain the person from continuing that violation.

Hemp Program Fund

The bill establishes in the state treasury the Hemp Program Fund, which must consist of all hemp cultivation license application fees, hemp processing license application fees, fees for laboratory testing of hemp and hemp products, money appropriated to the Fund, and any other money received from gifts or federal grants. The Fund's investment earnings must be credited to the Fund. The Director must use the Fund to administer and enforce the Program and rules.²⁵

Hemp Marketing Program

The bill establishes a Hemp Marketing Program to promote the sale and use of hemp products, and expand present markets for hemp and hemp products. It generally applies the same procedures, requirements, and other provisions that exist for the Grain and Soybean Marketing Programs in current law.²⁶ The Hemp Marketing Program Operating Committee must consist of 18 members, 14 of whom must be elected by eligible hemp producers in accordance with the election procedures that apply to the Grain Marketing Program's Operating Committee. The Director must appoint the remaining four members. With regard to levying assessments to fund the Hemp Marketing Program, the bill requires the Director to levy an assessment on hemp producers at the rate of 0.5% of the value of the hemp seed, fiber, or flower at the first point of sale. This assessment is similar to the assessments currently levied on

²⁴ R.C. 928.99(A).

²⁵ R.C. 928.06.

²⁶ See R.C. 924.21 and 924.211.

grains and soybeans under the Grain and Soybean Marketing Programs, which are levied at the rate of 0.5% per bushel.²⁷

History

Action	Date
Introduced	02-20-19
Reported, S. Agriculture & Natural Resources	03-28-19
Passed Senate (30-0)	03-28-19

²⁷ R.C. 924.01(A) and 924.212.