



## UNDERWRITING COMMUNICATION

### Issued by

**First American Title Insurance Company**

**NC-2019-002 Standard**

**FROM:** Karl Knight, State Counsel for North Carolina

**DATE FILED:** March 13, 2019

### **Hemp Decriminalization and Marijuana Related Transactions**

#### **Purpose:**

This Standard is being sent to all agents and employees of First American Title Insurance Company doing business in the State of North Carolina. Attached please find our Home Office's new Standard NA-2019-002 regarding Hemp Decriminalization and Marijuana Related Transactions. Please forward this Standard to any approved attorneys you do business with as it may affect closings they are conducting regarding the same.

#### **Contact Information for Questions:**

If you have any questions, please feel free to contact the State Office or email [tkknight@firstam.com](mailto:tkknight@firstam.com). Thank You.

**NOTE: This Bulletin is intended for use by title issuing offices, title insurance agents and approved attorneys of First American Title Insurance Company and any reliance by any other person or entity is unauthorized. Should you have any questions regarding this Bulletin, please contact your local First American underwriter.**

**PLEASE SHARE THIS BULLETIN WITH YOUR STAFF AND RETAIN AS PART OF YOUR  
PERMANENT REFERENCE MATERIALS.**

**UNLESS OTHERWISE NOTED HEREIN, ALL OTHER UNDERWRITING  
COMMUNICATIONS APPLY.**



## **UNDERWRITING COMMUNICATION**

**ID NUMBER:** NA-2019-002-Standard  
**ISSUED BY:** Corporate Underwriting Department  
**ISSUED TO:** Direct operations, agents, and approved attorneys  
**DATE ISSUED:** February 12, 2019  
**TITLE:** Hemp Decriminalization and Marijuana Related Transactions  
**RELATED:** NA-2013-010-Advisory – Marijuana Decriminalization and Commercial Marijuana Operations (issued September 25, 2013)

*This Standard amends and supersedes NA-2013-010-Advisory – Marijuana Decriminalization and Commercial Marijuana Operations, issued September 25, 2013.*

### **I. STANDARD**

#### **A. First American does not offer title insurance or settlement/escrow services for Marijuana Related Transactions.**

First American direct operations, agents, and approved attorneys are prohibited from providing title insurance in connection with a “Marijuana Related Transaction,” which includes any transaction involving:

1. a property that is currently used or will be used for the production, sale, or distribution of marijuana, products containing marijuana, or products derived from marijuana (“Marijuana Related Property”); or
2. a buyer, borrower, or lender whose primary business is the production, sale, or distribution of marijuana, products containing marijuana, or products derived from marijuana (“Marijuana Related Business”).

Furthermore, direct operations are prohibited from providing settlement/escrow services for Marijuana Related Transactions.

Waivers of these prohibitions can only be granted by Corporate Underwriting and will only be considered in extraordinary circumstances. You should manage the customer’s expectations accordingly.

While you do not need to investigate every transaction, you must not turn a blind eye to facts and circumstances that would lead a reasonable person to believe that the transaction involves a Marijuana Related Property or a Marijuana Related Business. Contact your underwriter for guidance if you have questions about this Standard or are unsure whether your transaction qualifies as a Marijuana Related Transaction.

**B. The term “marijuana” does not include hemp, unless hemp is illegal under state law.**

Due to the recent federal decriminalization of hemp in the 2018 farm bill<sup>1</sup>, First American direct operations, agents, and approved attorneys may offer title insurance<sup>2</sup> in connection with transactions that involve the production, sale, or distribution of “hemp” (as defined below), unless hemp is illegal under the laws of the state or tribe where the property is located. In other words, unless hemp is illegal under state or tribal law, a property that is currently used or will be used for the production, sale, or distribution of hemp does not qualify as a “Marijuana Related Property” and a party whose primary business is the production, sale, or distribution of hemp does not qualify as a “Marijuana Related Business.” Contact your underwriter if you are unsure whether hemp is legal under state law.

As used in this Standard, the term “hemp” is defined as any part or product of the *Cannabis sativa L.* plant (“cannabis”) with a delta-9-tetrahydrocannabinol (“THC”) concentration of not more than 0.3 percent on a dry weight basis. This includes derivative products like CBD oil, so long as the derivative product contains 0.3% THC or less.

First American considers hemp transactions to be “unusual risks,” and you must obtain underwriting approval prior to issuing title insurance in connection with a hemp transaction. In addition, you must obtain an unmodified “Hemp Affidavit” executed by the buyer, seller, and/or lender in the transaction. First American will not negotiate the terms of the Hemp Affidavit. Contact your underwriter if you are unsure whether to obtain underwriting approval or whether to require the Company’s Hemp Affidavit. Two versions of the Hemp Affidavit are attached to this Standard – one that is designed to be signed by a natural person on their own behalf and another that is designed to be signed by a natural person on an entity’s behalf. Editable, Microsoft Word versions of both affidavits may be retrieved from the Underwriting Workbench, Underwriting Library, and AgentNet.

To be clear, a Marijuana Related Transaction that involves both hemp and marijuana remains prohibited under Section I above.

**C. First American offers informational reports for Marijuana Related Transactions.**

Direct operations may provide informational reports in connection with Marijuana Related Transactions, so long as the customer is notified that First American will not provide title insurance or settlement/escrow services on Marijuana Related Transactions.

As used in this Standard, an “informational report” includes any report of property information derived from a search of the public records that is not itself a filed title

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<sup>1</sup> The Agriculture Improvement Act of 2018 (P.L. 115-334), often called the “2018 farm bill,” was enacted on December 20, 2018.

<sup>2</sup> First American direct operations may provide settlement/escrow services in these transactions as well.

insurance policy (e.g., recorded document certificate/guarantee<sup>3</sup>) or a statement of the terms on which First American will issue a title insurance product (e.g., title commitment, preliminary report, or local equivalent). Common informational reports include chains of title, radius reports, and ownership & encumbrance reports for a subject property. As a reminder, direct operations must adhere to NA-2013-006-Standard when issuing an informational report in connection with a commercial property transaction.

As a further reminder, providing informational reports is not within the scope of authority granted to limited title agents, and agents may not offer informational products as agent for or on behalf of First American.

**D. First American offers certain guarantee products to certain parties for Marijuana Related Properties.**

Direct operations, agents, and approved attorneys may provide a Trustee Sale Guarantee, Condition of Title Guarantee, or Litigation Guarantee in connection with Marijuana Related Properties, but only if the following two conditions are met:

1. the product is provided to:
  - a. a governmental entity;
  - b. a federal/state-chartered financial institution; or
  - c. an attorney or trustee in connection with the foreclosure of a mortgage or deed of trust held by a federal/state-chartered financial institution.
2. the product is allowed by law or applicable regulations of that jurisdiction.

**II. ADDITIONAL INFORMATION**

**A. Cannabis with 0.3% THC or less a/k/a “hemp” is legal, unless state law says otherwise.**

The cannabis plant, a/k/a “marijuana,” a/k/a “marihuana” was effectively made illegal in 1937 under the Marihuana Tax Act and formally made illegal in 1970 under the Controlled Substances Act (“CSA”).<sup>4</sup> For decades, federal law did not differentiate hemp – a variety of the cannabis plant containing lower amounts of THC<sup>5</sup> that is sometimes referred to as “industrial hemp” – from other varieties of the cannabis plant. That first changed in 2014, when Congress legalized a small number of pilot programs to study hemp. But the real change occurred in 2018, when Congress legalized hemp by removing it from the CSA’s definition of “marihuana” through the 2018 farm bill.

Under federal law, legal hemp is defined as any cannabis plant, or part thereof, with 0.3 percent THC or less. This includes derivatives like cannabidiol (“CBD”), a non-

<sup>3</sup> In some states, guarantee products are filed as insurance products, but they are not considered policies.

<sup>4</sup> See 21 U.S.C. § 801, et seq. The CSA classifies controlled drugs into five schedules. Schedule I, the highest level of control, is reserved for substances that the government considers to have no safe medical use and a high risk of abuse or misuse. It is illegal to produce, sell, distribute, or possess Schedule I substances.

<sup>5</sup> THC is the main psychoactive compound in cannabis.

psychoactive compound found in cannabis.<sup>6</sup> **Any cannabis plant or part thereof containing more than 0.3 percent THC remains illegal.**

Although the 2018 farm bill legalizes the production and sale of hemp at the federal level, it does not preempt state or tribal law, meaning that states and Indian tribes retain the authority to regulate the production, sale, or distribution of hemp and hemp products within their borders. However, to do so, the state or Indian tribe must first submit a regulatory plan to the U.S. Secretary of Agriculture. Furthermore, although states and tribes may limit the production, sale, or distribution of hemp and hemp products within their borders, they may not limit the transportation or shipment of hemp or hemp products through the state or Indian territory.

### **B. Cannabis with greater than 0.3% THC a/k/a “marijuana” is illegal.**

Several U.S. states have decriminalized medical and/or recreational marijuana over the last several years under state law, but the drug remains on Schedule I of the Controlled Substances Act. Therefore, every single one of those programs is illegal under federal law, with no exceptions, and the 2018 farm bill does nothing to change that. Regardless of what state law says, it is illegal to produce, sell, distribute, or possess marijuana in the United States. Even purely local intrastate marijuana activity is subject to federal regulation and criminal prosecution because of its potential “aggregate” effect on the interstate market.<sup>7</sup>

In addition to violating the CSA, marijuana related business also triggers concerns under anti-money laundering laws, banking regulations, and federal conspiracy law, such as 18 U.S.C. § 371.

Because the foregoing concerns are not pure title risks, they cannot be eliminated through exceptions or exclusions in the title insurance policy. The only sure way to protect the Company and its employees is to limit participation in marijuana related business and Marijuana Related Transactions.

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NOTE: This Underwriting Communication is intended for use by title issuing offices, title insurance agents, and approved attorneys of First American Title Insurance Company and any reliance by any other person or entity is unauthorized. While the scope of agency of First American Title Insurance Company agents is limited to the functions of underwriting and the issuance of title insurance policies on First American's behalf and does not include closing or escrow services, First American sometimes provides information and recommendations with regard to its agent's ancillary closing or escrow business as a courtesy to them. Moreover, some communications, depending on whether noncompliance could impact on liability under First American's title insurance policies or closing protection letters, should be considered directives. This Communication is being provided to First American agents with those considerations in mind. This Underwriting Communication should become a permanent part of your records to assure compliance with its requirements.

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If you have questions, please contact your local underwriter or the Corporate Underwriting Department at (800) 854-3643.

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<sup>6</sup> CBD's popularity has recently surged, and it can now be found in a wide variety of products, including drinks, cosmetics, and food.

<sup>7</sup> See *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding rooted in the Commerce Clause of the U.S. Constitution).



## HEMP AFFIDAVIT NATURAL PERSON

State of [insert State] )  
                        ) ss.  
County of [insert County] )

I, [insert name of owner/purchaser/lender], being first duly sworn, depose and say on oath as follows:

1. I am of legal age and have personal knowledge of the facts herein stated.
2. Select one:
  - a. \_\_\_\_ (owner/borrower): I am familiar with the condition, maintenance, operation, and use of those certain tracts or parcels of real property and improvements thereon, if any, located in [insert County, State] and more particularly described in Schedule A of the title commitment or preliminary report bearing file number [insert file number].
  - b. \_\_\_\_ (purchaser): I am under contract to purchase those certain tracts or parcels of real property and improvements thereon, if any, located in [insert County, State] and more particularly described in Schedule A of the title commitment or preliminary report bearing file number [insert file number].
  - c. \_\_\_\_ (lender): I am the proposed lender in connection with those certain tracts or parcels of real property and improvements thereon, if any, located in [insert County, State] and more particularly described in Schedule A of the title commitment or preliminary report bearing file number [insert file number].
3. I am and will remain in compliance with 21 U.S.C. § 801 et seq. (the "Controlled Substances Act").

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[Name]

**[Note: you may need to modify this notary block to comply with state law]**

Sworn to and subscribed before  
me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

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Notary Public

My Commission Expires:

[NOTARIAL SEAL]



## HEMP AFFIDAVIT ENTITY

State of [insert State] )  
                        ) ss.  
County of [insert County] )

I, [insert name of authorized signer], being first duly sworn, depose and say on oath as follows:

1. I am of legal age and have personal knowledge of the facts herein stated.
2. I am the [insert title] of [insert name of owner/purchaser/lender] ("Entity"), and I am authorized to execute this Affidavit on behalf of the Entity.
3. Select one:
  - a. \_\_\_\_ (owner/borrower): I am familiar with the condition, maintenance, operation, and use of those certain tracts or parcels of real property and improvements thereon, if any, located in [insert County, State] and more particularly described in Schedule A of the title commitment or preliminary report bearing file number [insert file number].
  - b. \_\_\_\_ (purchaser): The Entity is under contract to purchase those certain tracts or parcels of real property and improvements thereon, if any, located in [insert County, State] and more particularly described in Schedule A of the title commitment or preliminary report bearing file number [insert file number].
  - c. \_\_\_\_ (lender): The Entity is the proposed lender in connection with those certain tracts or parcels of real property and improvements thereon, if any, located in [insert County, State] and more particularly described in Schedule A of the title commitment or preliminary report bearing file number [insert file number].
4. The Entity is and will remain in compliance with 21 U.S.C. § 801 et seq. (the "Controlled Substances Act").
5. I execute this Affidavit solely in my representative capacity, and shall have no personal monetary liability hereunder.

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[Name]

**[Note: you may need to modify this notary block to comply with state law]**

Sworn to and subscribed before  
me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

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Notary Public

My Commission Expires:

[NOTARIAL SEAL]