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Cannabis Business Blog

# USDA Releases Proposed Domestic Hemp Regulations: Six Key Takeaways for Licensees

By Emily Gant on 10.30.19 | Posted in Legalization of Hemp

Yesterday, October 29, 2019, the United States Department of Agriculture (USDA) released a draft of the much-anticipated interim rule on the Domestic Hemp Production Program under the Agriculture Improvement Act of 2018 (the 2018 Farm Bill). Since many folks don't exactly consider 161 pages of federal agency jargon and legalese "light reading," we've provided a Cliff's Notes version of this dense regulation for you all, including the top six takeaways for hemp licensees. We've also provided some insight into what's **not** in the draft interim rule.

**1. How do States and Tribes get their hemp programs approved by the USDA?**

For State or Tribal governments seeking USDA approval to have primary regulatory authority over its respective hemp program, it must submit several pieces of information to the USDA, including information on every licensed hemp producer in the jurisdiction. These jurisdictions must also submit procedures for sampling hemp product. The draft interim rule requires States and Tribes to collect samples for delta-9 tetrahydrocannabinol (THC) within 15 days of the anticipated harvest. The sampling method must also be a validated method, meaning that it produces a 95% confidence level that no more than 1% of plants would exceed the acceptable THC level.

States and Tribes may begin submitting plans for approval when the interim rule is published in the Federal Register. After receipt, the USDA will approve or deny these proposed plans within 60 calendar days. If a State or Tribal plan is revoked, producers in that jurisdiction can take shelter under the revoked plan until the remainder of that calendar year and will have a 90-day window to apply for a hemp producer's license under the USDA plan, regardless of whether that 90-day window coincides with the USDA's usual annual application period.

**2. What if my State or Tribe does not have a USDA-approved hemp program?**

For applicants who would not be covered under a State or Tribal plan, they can apply for a hemp producer's license under the USDA plan starting on the date that is 30 days after the interim rule is published in the Federal Register and ending one year later. In subsequent years, the usual annual application period will be from August 1 to October 31. To apply, an applicant must provide contact information, a legal description of the hemp producer's lot, a

criminal history report and other information as may be requested.

**3. Is there any wiggle room on the acceptable THC levels?**

As you likely know, the definition of "hemp" requires product contain less than .3% THC; the draft interim rule does not and cannot change that. However, the USDA acknowledges the huge economic loss to hemp producers who have product that tests hot and is subsequently destroyed. As such, the USDA's draft interim rule provides a little bit of wiggle room to hemp producers to help ensure, with a high degree of certainty, that the product tested is in fact compliant or noncompliant. The draft interim rule considers product compliant as long as .3% THC or below is within the product's distribution or range, which is calculated by its percentage of THC +/- its "measurement of uncertainty." For example, hemp product that contains .35% THC but has a +/-.06 measure of uncertainty based on the testing method has a distribution or range of .29% to .41%. Because .3% THC is within this range, the USDA would consider this product compliant.

**4. What if my product tests "hot" pre-harvest?**

Under State, Tribal and USDA plans, product that exceeds the acceptable THC levels must be promptly disposed of in accordance with Drug Enforcement Administration (DEA) regulations. This means the product must be collected by an authorized person and destroyed by a DEA-registered reverse distributor. The producer must then send documentation to the USDA confirming the product's disposal. Importantly, hemp producers will automatically receive a negligence violation if their product contains more than .5% THC. If a producer receives three negligence violations in a five-year period, the producer will be ineligible to produce hemp for five years.

**5. Will my hemp producer's license be transferable?**

Under the USDA's plan, a hemp producer must seek a license modification if it sells its hemp business, begins producing in a new location, or changes key people under the license. These requirements will likely vary under each approved State and Tribal plan.

**6. Can my product travel across state lines?**

There are no restrictions, and States and Tribes cannot place restrictions on the ability for compliant hemp product to cross state lines.

Now that you know the six main takeaways, here are some questions the draft interim rule does not address:

- There are no regulations regarding hemp processors or retailers. It will be interesting to see whether State and Tribal governments follow suit, as many currently license hemp processors (though not hemp retailers).
- Similarly, there are no rules discussing post-harvest or other processor testing requirements. This creates a host of open questions. Case in point: What if hemp product tests compliant pre-harvest but then tests noncompliant post-harvest after the hemp product has been concentrated? And, can that concentrated product be put into the stream of commerce or must hemp producers dispose of it?

It is unclear whether and how quickly we should expect answers to these questions.

The draft interim rule is not yet enforceable, but it will be as soon as it is published in the Federal Register. Upon publication, public comments will be accepted for 60 days. The interim rule will then be effective for two years before the final rule is published.

**Warning Regarding Federal Law:** The possession, distribution, and manufacturing of marijuana is illegal under federal law, regardless of state law which may, in some jurisdictions, decriminalize such activity under certain circumstances. Penalties for violating federal drug laws are very serious. For example, a conviction on a charge of conspiracy to sell drugs carries a mandatory minimum prison term of five years for a first offense and, depending on the quantity of marijuana involved, the fine for such a conviction could be as high as $10 million. In addition, the federal government may seize, and seek the civil forfeiture of, the real or personal property used to facilitate the sale of marijuana as well as the money or other proceeds from the sale. Although the U.S. Department of Justice (DOJ) recently rescinded its guidance regarding prioritization of criminal prosecutions of individuals and entities operating in compliance with effective state regulatory systems, DOJ left in place long standing guidance to federal prosecutors regarding how to exercise this discretion. Individuals and companies are cautioned to consult with experienced attorneys regarding their exposure to potential criminal prosecution before establishing business operations in reliance upon the passage of state laws which may decriminalize such activity. Federal authority to prosecute violations of federal law as crimes or through seizures and forfeiture actions is not diminished by state law. Indeed, due to the federal government's jurisdiction over interstate commerce, when businesses provide services to marijuana producers, processors or distributors located in multiple states, they potentially face a higher level of scrutiny from federal authorities than do their customers with local operations.

**Tags:** 2018 Farm Bill, DEA, delta-9 tetrahydrocannabinol (THC), Domestic Hemp Production Program, Federal Register, hemp, hemp processors, hemp retailers, hemp-derived products, industrial hemp, State governments, Tribal governments, USDA