USDA ISSUES LONG-AWAITED HEMP PRODUCTION RULE

Interim guidance adds some certainty to an evolving industry, including relief from strict criminal limits
Hemp & Medical Cannabis Alert
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On October 31, 2019, the United States Department of Agriculture (USDA) published its interim rule (7 CFR Part 990) in the Federal Register regarding the domestic production of hemp. The interim rule is a long-anticipated one, coming nearly a full year after hemp was legalized under federal law, and is much welcome by all involved in the industry who have, up until now, been operating in a state of uncertainty. While some questions remain, the rule provisions are comprehensive and thorough, and address a host of complicated issues, offering much-needed guidance. This latest rule is another important development in the cannabis and hemp industry and follows on the heels of other industry developments, including the SAFE Banking Act, NCUA guidelines, and Department of Agriculture formal opinions.

The Agriculture Improvement Act of 2018 (the 2018 Farm Bill) requires USDA to create regulations and guidelines to establish and administer a program for the domestic production of hemp. Any state or tribal authority who wants to have primary regulatory authority over hemp production in its state or tribal territory is required to submit a plan to USDA which describes how it will monitor and regulate the domestic production of the hemp.

The new interim rule specifies rules and regulations for hemp production, outlines provisions for USDA to approve plans submitted by states and tribes for domestic hemp production, and establishes a federal plan for producers in states or tribes who do not have their own USDA-approved plan. The effective date of the new rule runs from October 31, 2019 to November 1, 2021. Comments regarding the interim rule are required to be filed on or before December 31, 2019.

Plans for hemp production submitted by states and tribes for approval by USDA have to meet certain requirements and must contain procedures to address the following:

Land used for production: A legal description of the land for each field, site or greenhouse, including geospatial location must be provided; land records must be retained for 3 years; hemp crop acreage must be reported to the FSA using the state or tribal issued license or authorization number.

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Sampling and testing for Delta-9 THC: Within 15 days prior to harvest, certain designated law enforcement officers are required to collect samples from the flower material to test for acceptable THC levels. Testing procedures must ensure that the test is completed by a DEA-registered facility using a reliable THC testing methodology. Hemp testing labs have to be registered with the DEA to conduct chemical analysis of controlled substances. The term "acceptable hemp THC level" is addressed in detail by the interim rule. Of note, the interim rule does not alter the definition of hemp or marijuana as it exists under federal law – that is, cannabis which contains THC levels of higher than 0.3 per cent dry weight is considered to be marijuana, a schedule I controlled substance regulated under the Controlled Substances Act (CSA).

Disposal of non-compliant plants: Cannabis plants which exceed the acceptable THC levels violate the rule and are deemed controlled substances whose disposal must be effected according to CSA and DEA guidelines. Specific types of individuals or law enforcement officers authorized to collect the plants for destruction are identified in the interim rule.

Compliance with enforcement procedures including annual inspection of hemp producers: Compliance procedures must be included in state and tribal plans to show production in accordance with this rule. Annual inspections of random samples of hemp producers must occur in order to ensure that the hemp is being produced per the rule requirements. Procedures for handling violations must be established and plans must contain procedures "to identify and attempt to correct certain negligent acts." Negligence is discussed under the rule and where negligence occurs, the plan needs to specify corrective action. While penalties exist for the negligent violation of the rule, none are criminal in nature.

Information sharing: Specific information must be reported to USDA and plans must have procedures for reporting that information. The specific information required, the correct format for submission, applicable due dates and record retention requirements are addressed in the rule.

Certification of resources: The state or tribe must certify that it has the requisite resources and staff necessary to perform the practices and procedures in its plan.

Plan Approval, technical assistance and USDA oversight: USDA may provide technical assistance in the development of hemp production plans. USDA has 60 days to review hemp production plans; those that do not meet all applicable requirements will be rejected. Potential producers may either submit an amended plan which addresses USDA noted deficiencies or they may pursue an appeals process. Approved plans are valid until revoked by USDA in accordance with the rule's revocation procedures or if there are substantive changes to the plan that change the way it complies with the rule. States and tribes may be audited by USDA in order to verify compliance with their plans.

Provisions regarding hemp producers are included in the rule, as follows:

USDA hemp producer license: Producers may not grow hemp without a license issued by USDA. Filing dates for both license applications and renewals are found in the rule. License applicants are required to submit a criminal history report not more than 60 days old at the time of application. A state or federal felony conviction regarding a controlled substance for the 10 years prior to the completion of the criminal history record will result in the denial of the license application. Hemp producers have to certify that they will adhere to the plan provisions. License denials and appeals, approvals and renewals, hemp crop acreage reporting requirements and length of license validity periods are addressed by the interim rule.

Sampling and testing for THC: Provisions outline the sampling and testing requirements for acceptable levels of THC.

Disposal of non-compliant hemp: Must be disposed of according to CSA and DEA guidelines and disposal of the non-compliant hemp must be documented.

Compliance: Licensees must comply with USDA requirements, therefore USDA may engage in a "desk-audit," conduct physical, on-site inspections of the licensee's premises, request records from the licensee and/or propose corrective action plans where negligence is found to exist.

Suspension of a USDA license: The rule describes the conditions under which a license will be suspended or revoked and the penalties that attach. Provisions exist for appeals from such suspensions.

Reporting and record-keeping: The rule specifies what type of information is required to be reported and to whom that information is submitted. A three-year record retention period is established.

Information sharing: A detailed list of all domestic hemp producers and the status of all licensees will be established by USDA.

Definitions: Of note, the definition of cannabis/marijuana/hemp remains unchanged from the definition under federal law.

Appeals: Procedures are established for the appeal of a license denial, renewal, suspension or revocation.

Hemp farmers receive a small cushion in THC limits under the proposed rule. Crops testing higher than 0.3% THC due to genetic variations in sampling and testing procedures will receive a range of "measurement of uncertainty" that they must fall within for test results to be deemed acceptable.

USDA appears to recognize that hemp farmers may take all necessary precautions and adhere to all best practices, yet still produce plants that exceed the acceptable hemp THC threshold. As a result, farmers will not be considered in negligent violation unless their crops test above 0.5% THC. However, crops that test between 0.3% and 0.5% will still require disposal. The THC variance provides some comfort to farmers that they will not face drug crimes for excessive THC levels, but whether the proposal goes far enough for farmers whose profit margins largely depend on a miniscule amount of THC content remains in question. The 60-day public comment period will be important in shaping the 2020 growing season as an experimental test drive of the rule to guide any necessary adjustments.

This interim final rule gives producers a regulatory "floor" to start building compliance programs as they prepare their hemp crop for next year. But given that the public comment period is underway, the rules are still subject to change before USDA issues final rulemaking. Further, states and tribes will soon be submitting their own plans for approval, which must meet the minimum guidelines of USDA's regulations in order to be approved. Those plans will likely have additional and different requirements of which producers must be aware.

This alert describes certain key attributes of the interim rule in a general way and is not intended as a substitute for a review of the rule in its entirety. Assorted documents relating to the interim rule can be accessed here: https://www.ams.usda.gov/rules-regulations/hemp/rulemaking-documents.

To learn more about these regulations or other aspects of this evolving industry, please contact a member of Hodgson Russ's Hemp & Medical Cannabis Practice. You can find us at https://www.hodgsonruss.com/practices-2049.html

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