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USDA Releases Hemp Regulations

In December 2018, Congress passed the Agriculture Improvement Act of 2018 (the “2018 Farm Bill”), which in part legalized hemp by removing it from the definition of “marijuana” under the Controlled Substance Act (the “CSA”). Since then, the hemp industry has waited anxiously for the U.S. Department of Agriculture (“USDA”) to release the rules and regulations for States and Indian Tribes to submit plans allowing for the domestic production of hemp under the 2018 Farm Bill. On October 31, 2019, USDA published in the Federal Register its [interim final rule](#) (the “Rules”), establishing the requirements for State and Indian Tribe hemp plans, USDA hemp plans, and hemp producers applying for licenses to grow hemp as a new Part 990 of Title 7 of the Code of Federal Regulations.

The Rules are effective immediately upon publication so the “Effective Date” for the various deadlines and time limits set in the Rules is October 31, 2019. However, as an interim rule USDA will take comments on the Rules for a 60 day period beginning on the Effective Date for possible revisions to be included in a future final rule.

The 2018 Farm Bill and the Rules require that USDA must approve or disapprove of any State or Tribal plan within 60 days of its submission and a number of states have already submitted proposed state plans. Farmers may either apply for a hemp production license from a State or Indian Tribe (upon USDA approval of a proposed plan) or from the USDA for those applicants located in States or Indian Tribe territories that do not have a USDA approved plan. In the event that the USDA revokes approval of a State or Tribal plan due to noncompliance with the 2018 Farm Bill or the Rules, producers licensed or authorized thereunder may continue to produce for the remainder of the calendar year in which the revocation became effective, and may then apply to be licensed under the USDA plan for ninety (90) days after notification of the revocation of the State or Tribal plan.

According to the Rules, the USDA will not accept applications for USDA hemp production licenses for 30 days from the Effective Date to allow the States and Tribal Governments an opportunity to submit their plans first and prevent the USDA from reviewing and issuing USDA hemp production licenses to producers when there is a likelihood that there will soon be a State or Tribal plan in place and producers will be able to obtain their licenses from the respective State or Tribe. In the meantime, States, Tribes and institutions of higher education may continue to operate under the 2014 Farm Bill in the 2020 planting season. According to the Rules, hemp production licenses may not be sold, assigned, transferred, pledged or otherwise disposed of, alienated or encumbered.

Background Information

The 2018 Farm Bill removed hemp from the definition of “marijuana” under the Controlled Substance Act. The Rules reiterate the 2018 Farm Bill’s definition of hemp as “the plant species *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 0.3 percent on a dry weight basis.”

According to the Rules, the USDA estimates that there will be 100 State and Tribal plans issued under the 2018 Farm Bill, with approximately 6,700 producers licensed under State and Tribal plans, and approximately 1,000 producers licensed under the USDA plan. The USDA estimates that each producer will have an average of two (2) lots of hemp, with most producers growing one (1) lot per year, but larger producers growing many different lots on an annual basis.

According to the USDA, from 2017 through 2018, acreage for hemp tripled, reaching more than 77,000 acres. The USDA expects hemp planted acreage to double again in 2019. Furthermore, the USDA provides that on average, prices for hemp fiber range from \$0.07 to \$0.67 per pound; prices for hemp grain and seed range from \$0.65 to \$1.70 per pound; and price for hemp flowers range from \$3.50 to \$30.00 per pound (or more) depending on CBD content. According to the Rules, hemp production interest is largely driven by the high potential for returns from sale of hemp flowers to be processed into CBD oil, with the number of licensed hemp producers more than doubling to reach 3,543 from 2017 to 2018. About two-thirds of hemp acreage is planted for floral materials according to the USDA.

Hemp Plans

As set forth in the Rules, there are certain requirements that all States and Indian Tribes must mandate for hemp producers, including: licensing requirements; maintaining information on the land on which hemp is produced; procedures for testing the THC concentration levels for hemp; procedures for disposing of non-compliant plants; compliance provisions; and procedures for handling violations. However, nothing in the 2018 Farm Bill or the Rules preempts or limits any State or Indian Tribe from enacting regulations for the production of hemp that are more stringent than the 2018 Farm Bill so long as the minimum requirements are satisfied.

License Applications

According to the Rules, any person producing or intending to produce hemp must have a valid license prior to producing, cultivating or storing hemp under the Rules. Licenses are not automatically renewable and each license holder must reapply for a hemp production license every three (3) years. A license modification is required if there is any change to the information submitted in an application including sale of the business; the production, handling or storage of hemp in a new location; or a change in the key participants producing under a license. If an applicant is producing hemp in more than one location, the applicant may have more than one license to grow hemp under the Rules.

In order to obtain a license, the Rules require that each applicant provide the State, Tribe or USDA with the full name of the business applicant, the applicant's principal business address, the full name and title of the key participants in the business, the email addresses of the key participants, and the EIN of the business entity. The Rules also require that the State or Indian tribe review the criminal history report for each key participant in the business applying for a license. The Rules define "key participants" as "a person or persons who have a direct or indirect financial interest in the entity producing hemp, such as an owner or partner in a partnership. A key participant also includes persons in a corporate entity at executive levels including chief executive officer, chief operating officer and chief financial officer." According to the Rules, "key participants" do not include other management positions like farm, field or shift managers.

Land Used for Production

Pursuant to the Rules, hemp producers are required to provide the legal description and GPS location for each field, greenhouse or other site where hemp is produced. The Rules clarify that the GPS location is required because many rural locations do not have specific addresses. Hemp producers will also be required to report this information to the USDA Farm Service Agency, along with a report of their hemp crop acreage and their

State or Indian Tribe-issued license or authorization number. Hemp producers are required to retain records of this information for at least three (3) years according to the Rules.

Sampling and THC Testing

State and Tribal plans are required, under the 2018 Farm Bill and the Rules, to have procedures for sampling and testing hemp to ensure that the hemp grown and harvested does not exceed the acceptable THC level (which according to the Rules is derived from the sum of the THC and THCA content). An authorized representative of the producer must be present at the growing site when testing samples are collected and the samples must be physically collected by a Federal, State or Tribal representative and delivered to a DEA-registered laboratory for testing within fifteen (15) days prior to the anticipated harvest of the subject cannabis plants and the hemp plant material samples from one lot cannot be commingled with hemp plant material from other lots. A producer cannot harvest the cannabis crop prior to the samples being taken. The rationale for the 15-day sampling period is because if producers delay harvest beyond 15 days, the plants will likely have a higher THC level at harvest and as such, this requirement will yield the truest measurement of the THC level at the point of harvest. Testing must be completed by a DEA-registered laboratory to ensure the use of a reliable methodology for testing the THC level of the plants.

The Rules also discuss the inclusion of a “measurement of uncertainty” in the THC testing process, which the Rules define as “the parameter, associated with the result of a measurement, that characterizes the dispersion of the values that could reasonably be attributed to the particular quantity subject to measurement.” For example, if a laboratory reports a THC test result of 0.35%, with a measurement of uncertainty of +/- 0.06%, then the THC range is 0.29% to 0.41%, which is considered hemp for the purpose of compliance with State, Tribal or USDA hemp plans because .3% is within that range. If, however, the measurement of uncertainty for that same sample was 0.02%, then the range is 0.33% to 0.37%, and the sample would be considered marijuana (not hemp) under State, Tribal or Federal law. In the event that a producer believes that original THC concentration level test results are in error, it may request additional testing under the Rules.

Disposal of Non-Compliant Plants

According to the Rules, if a hemp producer produces cannabis that exceeds the acceptable THC level, then the material must be disposed of in accordance with CSA and DEA regulations because such material constitutes marijuana. Because marijuana is a Schedule I controlled substance under the CSA, all material that constitutes marijuana must be collected for destruction by a person authorized by the CSA to handle marijuana, such as a DEA-registered reverse distributor, or an authorized Federal, State or local law enforcement officer. Specific DEA procedures for arranging for the disposal of non-compliant product will be listed on the USDA Domestic Hemp Production Program website. Producers are also required to document the disposal of all marijuana, which for USDA hemp production licensees can be accomplished by either providing the USDA with a copy of the documentation of disposal provided by the reverse distributor, or by using the reporting requirements established by the USDA.

Compliance with Enforcement Procedures

The Rules reiterate the requirement that State and Tribal plans include procedures to ensure that hemp is produced in compliance with the 2018 Farm Bill and the Rules, including annual inspections and establishing procedures for handling violations. As such, hemp producers must have policies and procedures in place to correct certain actions that are deemed negligent violations, which the Rules define as “a failure to exercise the level of care that a reasonably prudent person would exercise in complying with the regulations,” which is the same definition as found in Black’s Law Dictionary. The Rules specifically provide that the following will be deemed “negligent violations” under the 2018 Farm Bill: failing to provide a legal description of the land on which the hemp is produced; not obtaining a license or other required authorizations from the State or Tribal government; or producing plants exceeding acceptable hemp THC levels. According to the Rules, a hemp

producer does not commit a negligent violation if it produces plants that exceed the acceptable THC level (0.3%), so long as it uses reasonable efforts to grow the hemp and the plant does not have a THC concentration of more than 0.5% on a dry weight basis. The Rules further provide that “reasonable efforts” may include using certified seed or other seed that has reliably grown compliant plants in other parts of the country, or engaging in other best practices despite producing plants that exceed 0.3% THC. Under this situation, even though the producer would not be deemed “negligent,” it would still need to dispose of the plants that have THC concentrations between 0.3% and 0.5%. The Rules provide that the USDA will consider the entire harvest from a distinct lot in determining whether a violation occurred.

In the event of a negligent violation, the hemp producer must engage the procedures set forth in its corrective action plan including establishing a reasonable date by which the producer will correct the negligent violation. Producers operating under a corrective action plan must also periodically report to the State or Tribal government regarding their compliance with their corrective action plan, for a minimum of two (2) calendar years following the negligent violation. Producers are also required to maintain copies of all records and reports necessary to demonstrate their compliance with a State, Tribal or USDA hemp plan, which should include, at a minimum, the producer’s (or the key participants’) criminal history report; records of hemp plants acquired, planted, harvested and, if applicable, disposed (which shall also be reported to the State or Tribal government with regulatory authority of its licensees); records regarding the storage of hemp plants; notifications of THC test results; and the producer’s license. The Rules reiterate that a hemp producer that negligently violates a State, Tribal or USDA plan three (3) times in a 5-year period shall be ineligible to produce hemp for 5 years from the date that the 3rd violation occurred.

Interstate Transportation

The Rules provide very little further guidance regarding the interstate transportation of hemp. The Rules simply reiterate the provisions in the 2018 Farm Bill and provide that “[n]othing in this rule prohibits the interstate commerce of hemp. No State or Indian Tribe may prohibit the transportation or shipment of hemp produced in accordance with this part.” However, the Rules do clarify that States and Indian Tribes likewise cannot prohibit the transportation or shipment of hemp produced in accordance with section 7606 of the 2014 Farm Bill, and refer to the USDA General Counsel’s Legal Opinion on the Authorities for Hemp Production, dated May 28, 2019, which reached the same conclusion. As such, the Rules make clear that States and Indian Tribes cannot prevent the movement of hemp through their respective States or territories even if they prohibit its production.

Additional Information

If you have any questions regarding this Client Alert, please contact your Kutak Rock attorney or one of the authors listed below. For more information regarding our practices, please visit us at www.KutakRock.com.

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