

# USDA Issues Long-Awaited Hemp Production Regulations

October 31, 2019

On October 29, 2019, the U.S. Department of Agriculture (“USDA”) released draft language of an interim final rule implementing the Agriculture Improvement Act of 2018’s (the “2018 Farm Bill”) hemp production provisions, which will be effective for two years after publication in the Federal Register prior to being replaced by a final rule. USDA seeks public comment on the interim final rule and will issue a final rule that incorporates public comments received.<sup>1</sup> Promulgation of an interim final rule is unusual, but in light of congressional intent, regulatory confusion, and litigation evidencing the pressing need for immediately effective regulations, USDA argued that a more traditional notice-and-comment rulemaking was “impracticable, unnecessary, or contrary to the public interest.”<sup>2</sup>

Accordingly, USDA implemented the “good cause” exception to notice-and-comment rulemaking and concluded that immediate implementation of the interim final rule—accompanied by a 60-day comment period—would best balance Congress’s interest in the expeditious implementation of a regulatory program for domestic hemp production with the agency’s interest in reaching informed and responsive decisions. After reviewing public comments, USDA will publish a final rule that would go into effect in two years.

This long-awaited guidance clarifies the regulatory expectations placed on hemp producers and is intended to engender confidence among business partners, such as financial institutions and merchants, regarding the lawfulness of hemp production.

The interim final rule sets standards for hemp production under federal law, and USDA will now begin reviewing state and tribal government applications to obtain “primary regulatory authority” over the production of hemp. State and federal officials intend for state frameworks to go into effect before the start of the spring 2020 growing season.<sup>3</sup>

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<sup>1</sup> USDA, Establishment of a Domestic Hemp Production Program (Oct. 28, 2019), available [here](#). The regulation will be codified at 7 C.F.R. Part 990.

<sup>2</sup> *Id.* at 112.

<sup>3</sup> 7 U.S.C. § 1639p(a)(1).

This Debevoise Update summarizes the new USDA regulations, emphasizing areas of particular significance for entities working with hemp producers.

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## Background

The 2018 Farm Bill took certain steps to legalize hemp, defined as the plant *Cannabis sativa L.* with a tetrahydrocannabinol (“THC”) concentration of “not more than 0.3 percent on a dry weight basis,” in the United States. Specifically, the 2018 Farm Bill removed hemp and its derivatives, including hemp-derived cannabidiol (“CBD”), from the definition of marijuana under the federal Controlled Substances Act.<sup>4</sup>

Although the 2018 Farm Bill lifted the federal bar on certain hemp-related activities, such as the possession, processing, distribution, purchase, and sale of hemp and hemp-derived CBD, hemp production generally remained unlawful in the absence of a regulatory framework approved by USDA.<sup>5</sup> The statute addressed certain aspects of how this framework should be structured, such as minimum requirements for state and tribal hemp production plans and civil and criminal penalties for noncompliance, but left substantial discretion to USDA.<sup>6</sup>

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## Summary of Interim Final Rule

USDA’s interim final rule principally addresses two subjects, which appear at Subparts B and C. Subpart B sets out minimum standards for state and tribal hemp production plans and clarifies the procedures for USDA approval of such plans. Meanwhile, for state and tribal governments that have legalized hemp but choose not to submit their own plan, Subpart C establishes a backstop system of federal regulation.

Although many commentators believed USDA’s hemp regulations would have a wider scope than the 2018 Farm Bill and cover issues contemplated in certain draft state hemp production plans—such as rules for hemp processors and standards for criminal liability—the interim final rule instead appears to be confined to practical implementation issues solely with respect to hemp production.

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<sup>4</sup> Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 12619.

<sup>5</sup> Limited hemp production conducted pursuant to the Agricultural Act of 2014 has been permitted “for purposes of research.” 7 U.S.C. § 5940(b).

<sup>6</sup> For additional information regarding the 2018 Farm Bill’s hemp production provisions, please see our related analysis, available [here](#).

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## Subpart B—State and Tribal Hemp Production Plans

- The interim final rule requires that states or Indian tribes that wish to have primary regulatory authority over the production of hemp within their respective jurisdictions submit a plan to the U.S. Secretary of Agriculture for approval.<sup>7</sup>
- State and tribal plan requirements include:
  - A practice to collect, maintain, and report to USDA a legal description of cropland, geospatial location, contact information, and license information for each producer.<sup>8</sup>
  - A procedure for accurate and effective sampling of all hemp produced.<sup>9</sup> Specifically, producers must test each crop within 15 days of harvest at a laboratory certified by the Drug Enforcement Administration for an “acceptable THC level.” A hemp plant meets this standard if 0.3% THC concentration falls within the confidence interval determined by the laboratory (at least 95%).<sup>10</sup>
  - Disposal of plants that exceed the permissible THC concentration by a person, such as a law enforcement officer, authorized under the Controlled Substances Act to handle marijuana as well as a procedure to notify USDA when this occurs.<sup>11</sup>
  - Provisions relating to enforcement of producer violations, which are separated into negligent violations and violations committed with a culpable mental state greater than negligence.<sup>12</sup> Notably, USDA is explicit that the production of hemp with a THC concentration of more than 0.5% on a dry weight basis constitutes a violation committed with a culpable mental state greater than negligence that must be reported to the U.S. Attorney General and the chief law enforcement officer of the state or Indian tribe.<sup>13</sup>

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<sup>7</sup> USDA, Establishment of a Domestic Hemp Production Program at 127 (to be codified at 7 C.F.R. § 990.2(a)).

<sup>8</sup> *Id.* at 127 (to be codified at 7 C.F.R. § 990.3(a)(1)).

<sup>9</sup> *Id.* (to be codified at 7 C.F.R. § 990.3(a)(2), (3)).

<sup>10</sup> For example, if a laboratory reports a result as 0.35% with a measurement of uncertainty of +/- 0.06, the actual value may be 0.29% to 0.41%. Because 0.3% is within that distribution, the sample, and the crop it represents, is considered hemp. *Id.* at 14.

<sup>11</sup> *Id.* at 129 (to be codified at 7 C.F.R. § 990.3(a)(4)).

<sup>12</sup> *Id.* at 130 (to be codified at 7 C.F.R. § 990.3(a)(5)); *id.* at 135 (to be codified at 7 C.F.R. § 990.6) (describing requirements of plans regarding violations).

<sup>13</sup> *Id.* at 135 (to be codified at 7 C.F.R. § 990.6(b)(3)).

- Barriers to eligibility including previous felony convictions and false statements in a license application.<sup>14</sup>
- A procedure for conducting annual inspections of a random sample of producers to verify that hemp is not produced in violation of USDA’s minimum standards.<sup>15</sup>
- A procedure for submitting required information to USDA and law enforcement.<sup>16</sup>

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## Subpart C—USDA Hemp Production Plan

- USDA’s hemp production plan—which applies in jurisdictions where a state or Indian tribe does not have a USDA-approved plan—contains many of the same requirements as state and tribal plans imposed directly on applicants and licensees, including: information collection requirements;<sup>17</sup> sampling requirements;<sup>18</sup> disposal of noncompliant plants;<sup>19</sup> enforcement provisions;<sup>20</sup> barriers to eligibility;<sup>21</sup> and compliance audits.<sup>22</sup>
- USDA’s plan also includes a few differences from the minimum standards established for state and tribal plans to account for the maintenance of a federal licensing system rather than the oversight of a regulatory framework implemented at the state or tribal level. Specifically, the regulations set out approval standards,<sup>23</sup> license suspension and revocation procedures,<sup>24</sup> and recordkeeping requirements.<sup>25</sup>

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<sup>14</sup> *Id.* at 137 (to be codified at 7 C.F.R. §§ 990.6(e), (f)).

<sup>15</sup> *Id.* at 130 (to be codified at 7 C.F.R. § 990.3(a)(6)).

<sup>16</sup> *Id.* at 130 (to be codified at 7 C.F.R. §§ 990.3(a)(7), (9)). *Cf. id.* at 155 (to be codified at 7 C.F.R. § 990.70) (information regarding producers, disposal of noncompliant plants, THC concentration testing results, and an annual production report); 7 U.S.C. § 1639q(d) (law enforcement information sharing).

<sup>17</sup> USDA, Establishment of a Domestic Hemp Production Program at 140 (to be codified at 7 C.F.R. § 990.21) (contact information and criminal history report); *id.* at 142 (to be codified at 7 C.F.R. § 990.23) (address of crop, geospatial location, and hemp crop acreage).

<sup>18</sup> *Id.* at 143 (to be codified at 7 C.F.R. § 990.24).

<sup>19</sup> *Id.* at 144 (to be codified at 7 C.F.R. § 990.27).

<sup>20</sup> *Id.* at 146 (to be codified at 7 C.F.R. § 990.29).

<sup>21</sup> *Id.* at 139 (to be codified at 7 C.F.R. §§ 990.20(b), (c)).

<sup>22</sup> *Id.* at 145 (to be codified at 7 C.F.R. § 990.28).

<sup>23</sup> *Id.* at 141 (to be codified at 7 C.F.R. § 990.22).

<sup>24</sup> *Id.* at 148 (to be codified at 7 C.F.R. § 990.30) (license suspension); *id.* at 149 (to be codified at 7 C.F.R. § 990.31) (license revocation).

<sup>25</sup> *Id.* at 149 (to be codified at 7 C.F.R. § 990.32).

As noted above, the regulations apply only to hemp producers. Therefore, hemp processors appear not to be covered by this set of federal regulations, though processing activities are addressed in certain draft state plans.<sup>26</sup> Another area where state and tribal plans may provide additional specificity is with regard to reporting of violations committed with a culpable mental state greater than negligence to the U.S. Attorney General and the applicable chief law enforcement officer.<sup>27</sup> USDA's regulations, as currently drafted, do not specify any basis for, or the scope of, criminal liability.

Further, although certain states have submitted hemp production plans for evaluation by USDA since the passage of the 2018 Farm Bill, such states will need to amend these plans to account for the specific requirements set out in USDA's regulations and resubmit for approval.<sup>28</sup> USDA has clarified that for the first 30 days following the interim final rule's publication in the Federal Register, it will focus entirely on reviewing state and tribal government plans;<sup>29</sup> after 30 days, the agency will then begin to review and approve license applications pursuant to its own hemp production plan.<sup>30</sup> The rule requires USDA to approve or disapprove a state or tribal plan within 60 calendar days of receipt of such plan.<sup>31</sup> Accordingly, state and tribal plans may be effective as early as January 2020, if not earlier.

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<sup>26</sup> See, e.g., Kentucky Department of Agriculture, Kentucky Hemp Production Plan at 302 KAR 50:030 (Dec. 20, 2018), available [here](#).

<sup>27</sup> USDA, Establishment of a Domestic Hemp Production Program at 136 (to be codified at 7 C.F.R. § 990.6(d)); *id.* at 147 (to be codified at 7 C.F.R. § 990.29(f)).

<sup>28</sup> *Id.* at 131 (to be codified at 7 C.F.R. § 990.4(a)) ("No plans will be accepted by USDA prior to [the date the regulations are published in the Federal Register]").

<sup>29</sup> *Id.* at 24.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 131 (to be codified at 7 C.F.R. § 990.4(a)).

Please do not hesitate to contact us with any questions.

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