

## New Federal Hemp Regulations: What Businesses Should Know to Comply

Less than one year after hemp production was legalized by the 2018 Farm Bill, the U.S. Department of Agriculture (USDA) released its proposed industrial hemp regulations. These eagerly anticipated regulations establish a proposed federal domestic hemp production program, as authorized by the 2018 Farm Bill. The regulations were released on October 31, 2019 and became effective November 1, 2019 upon publication in the Federal Register. They will remain in effect for two years, until November 1, 2021. Comments on the regulations may be submitted to the USDA by December 30, 2019.

While the proposed regulations provide a much-needed framework for hemp production and sales, they leave open a number of grey areas for compliance. Whether a business grows, manufactures, distributes, or sells hemp or hemp products, here are some key factors to think about addressed by the interim final Rules:

### Document Your Land Information

Owners of land who want to grow industrial hemp must have a USDA-issued license, or a state or Tribe-issued license or authorization number to do so. As required by the 2018 Farm Bill, hemp producers must provide a legal description of the land and geospatial location to the USDA, which the USDA's Farm Service Agency can help provide. The rule allows states to require additional reporting requirements; however, the acreage report to FSA is the minimum standard.

### Comply with State Rules

Where states or Indian Tribes want to have their own regulatory authority over the production of hemp within their borders, they can submit their plans for the approval of the Secretary of the USDA. If the state or Indian Tribe's plan is approved, the state or tribe's plan will be implemented and the federal government will monitor and regulate hemp production in those areas concurrently with the state program. The federal rules are the base line rules that must be followed; a state or tribe's own rules may be more stringent than the 2018 Farm Bill, but they cannot be more lenient.

Businesses should be cognizant of each state or tribe's own rules for hemp production, as each local rule could differ. For example, according to the USDA regulations, state and tribal plans must include sampling procedures and a testing plan to ensure that the hemp does not exceed the federally mandated top .03 percent THC level; crops with more than .03 percent THC do not meet the definition of hemp in the 2018 Farm Bill. Testing must be conducted in a DEA-registered laboratory at least within 15 days before the harvest. The longer the harvest is delayed, the higher the potential THC level of the hemp could be. Thus, it is important to know each state's rule as to harvest timing and promptly and completely comply with it; if not, the harvest could become unusable as hemp and would likely have to be destroyed.

Initial comments are critical of the proposed testing plans. Some commentators believe that an overall THC level of .03 percent is unattainable and that the proposed testing plans do not appropriately account for natural variations in the THC levels of hemp.

Further, the testing method must be "reliable" under the regulations, although reliable is not an objective criteria subject to validation. It thus remains to be seen whether the same testing methods will be used, or will be required to be used, in each jurisdiction. As it stands, the USDA will consider alternative sampling and testing protocols submitted by local jurisdictions.

### Properly Dispose of Non-Compliant Plants



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### Related Practice Areas

- Product Regulatory & Compliance

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If producers grow a product exceeding the acceptable hemp THC level, the product constitutes marijuana and must be collected and disposed of by a person authorized under the Controlled Substances Act (CSA). Procedures for arranging for the disposal of non-compliant product will be listed on the USDA website; however, state or tribal regulations may create more restrictive additional rules that apply within their borders.

## Compliance

States and tribes that create their own rules must provide for annual inspections for, at a minimum, a random sample of hemp producers, as well as procedures to identify and address negligent and intentional violations. Negligent violations could include failing to provide a legal description of the land on which hemp is produced, not obtaining the required licensing requirements, or producing hemp with excessive THC levels. There could be significant differences in how different jurisdictions will administer their hemp programs, and what each jurisdiction considers to be reasonable steps to comply with local law.

## Food and Drug Administration (FDA) Jurisdiction

While the proposed rules are a significant initial step, they do not, themselves, clear up uncertainties regarding the sale of products containing the hemp-derived compound cannabidiol (CBD). The FDA will continue to regulate ingestible and topical hemp products, including CBD. The proposed regulations do not change the Federal Food, Drug, and Cosmetic Act (FDCA) and will not automatically allow hemp-derived CBD to be sold in any form. While the proposed rules contemplate testing for threshold THC levels, they do not address testing for contaminants, such as pesticides. The proposed regulations also maintain the ban on persons with felony drug convictions within the past 10 years from participating in the hemp production industry. The proposed regulations request specific public feedback on sampling, testing, and lab procedures.

## Interstate Commerce

Significant for national distribution networks, the interim final regulations make clear that interstate transportation of hemp is allowed, even if the transportation passes through a state that forbids hemp cultivation.

The proposed hemp regulations are available [here](#).

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DISCLAIMER: Cannabis is still classified as a Schedule I controlled substance by the U.S. Drug Enforcement Agency, and as such it remains a federal crime to grow, sell and/or use cannabis. Any content contained herein is not intended to provide legal advice to assist with violation of any state or federal law.