

USDA RELEASES LONG-AWAITED REGULATION ON THE ESTABLISHMENT OF HEMP PRODUCTION PROGRAMS

On October 29, 2019, the U.S. Department of Agriculture (“USDA”) released its interim final regulation regarding the establishment of hemp production programs by States and Indian Tribes. The regulation was required by the Agricultural Improvement Act of 2018 (the “2018 Farm Bill”), which was signed into law on December 20, 2018. The regulation becomes effective upon its publication in the Federal Register, which is expected to occur shortly.

The 2018 Farm Bill vested the USDA with the authority to establish and administer a program for nationwide hemp production. Under this authority, a State or Indian Tribe that wants primary regulatory authority over hemp production in that State or territory is required to submit a plan for the monitoring and regulation of hemp production to the Secretary of the USDA for approval. The information required for a person or entity to be a licensed hemp producer (e.g., background checks, personal/corporate information, property location and crop acreage) is useful to financial institutions (banks, thrifts and credit unions) to comply with the Customer Identification Program requirements in connection with the onboarding of these persons/businesses as customers/members.

Under the USDA’s regulation, each State/Tribal plan must, at a minimum, contain the following provisions:

- Perform a criminal history review of each applicant for a hemp producer license. If the applicant is a business, then the criminal history of its key participants must be reviewed.
- Adopt procedures to share information with the USDA, including the name, address, telephone and email address (if available) of each licensed hemp producer. If a producer is a business, then its employer identification number must also be reported to USDA.
- Require licensed hemp producers to provide the legal description of the land and GPS coordinates for each field, greenhouse or site where hemp is produced and to report their hemp crop acreage to the USDA Farm Service Agency.
- Require that within 15 days prior to the anticipated harvest of the hemp plant, a federal, state, local or Tribal law enforcement agency or designated person collect a sample from the flower material of such plants for delta-9 tetrahydrocannabinol (“THC”) concentration testing.
 - The acceptable hemp THC level must produce a distribution or range that is not greater than 0.3% on a dry weight basis. Testing must be performed by a Drug Enforcement Agency (“DEA”) registered laboratory. If the acceptable hemp THC level is greater than 0.3% on a dry weight basis, then the plant material must be disposed of in accordance with Controlled Substances Act and DEA regulations.
- Adopt compliance procedures to ensure that hemp is being produced in accordance with USDA regulation, including annual inspections and random plant sampling.
- Adopt procedures to identify and address negligent and intentional (knowing or reckless) violations of USDA and/or State/Tribal law or regulation.

- Negligent violation is defined as a failure to exercise the level of care that a reasonable prudent person would exercise in complying with USDA regulations and applicable State/Tribal law and regulation.
 - No negligent violation occurs if hemp producer used reasonable efforts to grow hemp plants with acceptable hemp THC levels and the THC levels test greater than 0.3% but not more than 0.5% on a dry weight basis.
 - If a negligent violation occurred, then a corrective action plan must be established for the hemp producer with reasonable time frames to correct violation and periodic reporting to the State/Indian Tribe. The corrective plan must be in place for at least two calendar years. Three negligent violations of the corrective plan within a five-year period will make the producer ineligible to be a licensed hemp producer for five years.
- Intentional violation is defined as a violation made with culpable mental state greater than negligence (i.e., intentional, knowing or reckless acts). State/Indian Tribe must immediately report the producer to the U.S. Attorney General, USDA and chief State/Tribal law enforcement officer for prosecution. Conviction of a felony results in 10-year ban from producing hemp.
- Certify to the USDA that the State/Indian Tribe has the personnel and resources necessary to carry out the practices and procedures described in their plan.

Once the USDA has approved a State/Indian Tribe plan, it will remain approved unless revoked by the USDA. Current State/Tribal hemp pilot programs operating under the authority of the Agricultural Act of 2014 will expire 12 months from the effective date of the USDA's regulation.

Neither the 2018 Farm Bill nor the USDA regulations preempt or limit the ability of a State or Indian Tribe to adopt more stringent laws or regulations relating to the production of hemp in that State or territory. Thus, for example, a State or Indian Tribe can provide for the licensing of hemp producers as well as hemp sellers. However, no State or Indian Tribe may interfere with the interstate transportation or shipment of hemp because the 2018 Farm Bill expressly allows for it.

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