Hemp Production Regulation in Final Stages

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On October 29, 2019, the U.S. Department of Agriculture (USDA) released a draft version of the interim final rule (IFR) for the production of hemp in the United States. The draft version of the IFR is available here. The USDA is encouraging industry stakeholders to submit comments on the IFR.

In general, the IFR specifies the provisions that a State or Tribal hemp plan must contain to be approved by USDA. It also establishes the USDA federal plan that will regulate the production of hemp in States and Tribal territories that do not have a USDA-approved plan.

We are continuing to review the IFR closely, but we have already taken note of the following important provisions:

- State and Tribal plans must contain certain procedures for sampling and testing hemp for THC levels.
    - Samples must be taken within 15 days prior to harvest.
    - Samples must be taken from flower material, but the IFR does not specify which part of the flower material or contemplate a homogenized flower material sample.
    - Samples must be taken to a DEA-registered laboratory for THC testing. USDA is also considering requiring all laboratories testing hemp to have ISO 17025 accreditation.
    - Samples must be tested using post-decarboxylation or other similarly reliable methods for total THC concentration. Reliable testing methods include gas or liquid chromatography with detection. Alternative sampling and testing protocols will be considered if they are comparable and similarly reliable to the USDA plan.
    - Laboratories must report THC results based on delta-9 THC concentration on a dry weight basis and with a

measurement of uncertainty. If the measurement of uncertainty results in a range or distribution that includes 0.3%, the material meets the acceptable hemp THC level and is compliant.

  - If a sample exceeds the acceptable hemp THC level, the material is deemed marijuana and must be disposed of. There is no provision in the IFR for using non-compliant material as feedstock or for any other purpose.

- State and Tribal plans must prohibit some persons from becoming licensed as a hemp producer.
  - A person convicted of a felony related to a controlled substance is banned from becoming licensed for ten years. This does not apply to a felony for lawfully growing hemp under the 2014 Farm Bill.

- State and Tribal plans must include protocols for correcting negligent violations by hemp producers.
  - A hemp producer does not commit a negligent violation if he or she produces plants that do not have more than 0.5% THC on a dry weight basis.

- Finally, State and Tribal plans must contain procedures for reporting some information to USDA.
  - For example, producers must be required to report their hemp crop acreage to the Farm Service Agency.

The IFR also sets the framework for USDA's federal plan:

- It is anticipated that USDA will rely on the IFR for the 2020 growing season, but it is unclear whether federal plan licenses will be issued for 2020. States are expected to continuing operating pilot programs established under the 2014 Farm Bill (after reaching compliance with the IFR).
- Once the federal plan is implemented, USDA will not issue any federal plan licenses to producers in States or Tribes that have submitted a State or Tribal plan for USDA approval.
- In the first year of the federal plan, applications can be submitted at any time (i.e. on a rolling basis). In future years,

applications and renewal applications must be submitted between August 1 and October 31. Licensees issued under the federal plan will not renew automatically and must be renewed every three years. A license will be valid until December 31 of the year that is at least three years after the license is issued.

The IFR makes clear that even after the IFR takes effect, States and Tribes may prohibit the production of hemp. Hemp producers in a State or Tribal territory without a USDA-approved plan will only be able to use USDA's federal plan if not "prohibited by State or Tribal Law." Currently, three states—Idaho, Mississippi, and South Dakota—prohibit hemp production.

It is also important to note what the IFR does not do. The IFR does not:

- Alter the legality of interstate commerce involving hemp;
- Change the federal definition of hemp from the 2018 Farm Bill;
- Include a seed certification program; or
- Resolve the issue of CBD in food or dietary supplements, which remains within the jurisdiction of the U.S. Food and Drug Administration.

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