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USDA Issues Final Rules For Hemp Cultivation and Production Under the 2018 Farm Bill

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On January 15, the U.S. Department of Agriculture issued its Final Rules governing the hemp industry, replacing the Interim Final Rules (IFR) that had been in place since October 31, 2019. While much of the regulatory paradigm established by the IFR remains unchanged, the USDA appears to have thoroughly considered the public comments submitted during the rulemaking process, and as a result, there are several important differences in the Final Rules. That said, despite heavy commenting calling for changes to some of the more restrictive provisions of the IFR, the USDA did not move as much as the industry would have liked, and in some cases, it did not move at all. The following are some key takeaways from the Final Rules.

DEA-Registered Testing Labs

Despite a strong request for change from the industry, the USDA retained the requirement that labs performing testing on hemp for THC levels and purity obtain DEA certification. This part of the Final Rule will not be enforced until December 31, 2022, largely due to the fact that there are currently not enough DEA-registered labs to accommodate the market. While many labs are currently in the process of registering with the DEA, enforcement of this provision by the USDA will reduce the number of labs available for testing hemp. For that reason, and because this provision creates apprehension among farmers that a “hot” harvest — that is, a harvest that tested above the 0.3% limit for THC — will result in a raid by the DEA, the DEA registration requirement is generally viewed in the industry as an unnecessary burden on the market.

0.3% THC Limit for Hemp

Also, against the popular call for change, the USDA did not raise the 0.3% THC concentration limit for what qualifies a harvest as Farm Bill-Compliant hemp, as opposed to Schedule 1 marijuana. Of course, the USDA does not have the power to change that limit, as it is statutory, and can only be changed by an act of Congress. The limit for THC in hemp remains at a minuscule 0.3%. Notwithstanding the USDA’s inability to change this limit, the public submitted numerous comments setting forth evidence and reasoning for raising the threshold to anywhere from 0.5% to 12% or higher.

New 30-Day Testing Window

The USDA did make what was largely received as a positive change (although many in the industry hope it is a first step) to the timeframe in which farmers must harvest their hemp crops after sampling for testing. Under the IFR, farmers had to gather a testing sample no more than 15 days prior to the anticipated harvest date of the

sampled batch of hemp. Under the Final Rules, farmers must harvest within 30 days of sampling. The 30-day window is counted in calendar days, as opposed to business days, which is a point of contention that remains regarding this provision.

THC Limit Negligence Standard

The USDA also increased the standard for what is considered negligence in hemp farming. That is, under the IFR, if a testing sample came back with 0.5% or more THC, the farmer was designated as negligent. That standard has been upped to 1%. This increase should benefit farmers, as the lower threshold was too close to the acceptable 0.3% THC to allow for a reasonable margin of error. It can be a serious problem for a farmer to be considered negligent in this regard because, as discussed below, a harvest that tests above the 0.3% THC limit has to be destroyed, and if a farmer is deemed negligent in causing a crop loss, insurers may not pay on claims, and lenders may be reluctant to extend credit. The increase to a 1% threshold is seen as a positive development for the industry.

Hot Harvest Disposal

Farmers with hemp that tests above the allowable THC limits are tasked with disposing of their hot harvest. Under the IFR, there were limited options to do this compliantly, all of which required a duly authorized outside contractor to come and remove the noncompliant harvest. The Final Rules incorporate and make permanent several options for on-farm disposal that were rolled out in February 2020. Some of the new options for hot harvest disposal “include plowing under non-compliant plants, composting into ‘green manure’ for use on the same land, tilling, disking, burial, or burning. These methods are intended to allow producers to apply common on-farm practices for the disposal of non-compliant plants.”^[1]

The foregoing is a sample of the new developments contained in the USDA’s Final Rules for hemp. Troutman Pepper is committed to serving its clients operating in this sector. If you have any questions or would like to discuss how the Final Rules impact your business interest, please reach out to a member of Troutman Pepper’s Cannabis Industry Group.

[1] Establishment of a Domestic Hemp Production Program, 86 Fed. Reg. 5596, 5604 (Jan. 19, 2021).

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