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USDA Releases Interim Rules for Domestic Hemp Production

On October 29, 2019, the US Department of Agriculture (the "USDA") issued interim rules for the domestic production of hemp and requested comments on the rules over the next 60 days. The rules provide minimum requirements for plans adopted by states or Indian tribes as well as requirements for hemp production in states and Indian tribes that do not choose to adopt their own plan.

The key highlights of the proposed rules are that licensed producers will need their crop tested by a DEA-registered lab and that non-compliant crops must be destroyed by persons authorized to handle marijuana under the Controlled Substances Act (the "CSA"). There is a little wiggle room on the amount of THC based on the degree of uncertainty, but this only provides producers with limited flexibility. The USDA did not certify any specific seeds as THC compliant.

Testing Procedures

The USDA proposed rules focus on the testing of hemp to ensure compliance with the amount of THC. The rules require that the testing samples be taken 15 days prior to anticipated harvest as longer periods will lead to higher THC levels. As folks may be aware, hemp and marijuana come from the same plant. Hemp has .3% THC or less on a dry weight basis and is not covered by the CSA. Marijuana has more than .3% THC and is covered by the CSA. The key to producing hemp is keeping below the .3% THC level. The USDA is requiring that the testing must occur at a DEA-registered lab. In addition to determining the amount of THC, the testing lab is also required to provide a measurement of uncertainty. The proposed rules define the "acceptable hemp THC level" as the range of the amount of THC on a dry weight basis plus or minus the measurement of uncertainty, if that range covers .3% THC.

Although producing hemp with over .3% THC technically results in marijuana production, it does not result in a criminal violation if the result was unintentional or negligent. However, if it happens in three out of five years, a producer would lose its hemp

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production license and could face criminal liability if the continued marijuana production is not a result of negligence.

Destruction of Noncompliant Hemp

The proposed rules require testing at a DEA-registered lab because hemp which is found to have THC levels in excess of .3% is deemed marijuana under the CSA. Therefore, only DEA-registered labs should possess these marijuana samples and only persons authorized under the CSA to handle marijuana are authorized to collect and properly dispose of the marijuana.

Hemp that is over .3% THC on a dry weight basis will need to be destroyed. The requirement to dispose of these plants now deemed marijuana is a significant risk for hemp producers as entire harvests could need to be destroyed.

Seed Certification

The proposed rules do not include a seed certification program as the USDA is concerned that crops grown from the same seeds have different THC production results based on geographic location. As a result, hemp producers are taking the full financial and compliance risk that their hemp production will result in true hemp, and not marijuana.

Potential Areas for Comment

Potentially the hemp industry might comment on the lack of certified seeds which could produce USDA compliant hemp. Further, industry may want additional flexibility on the amount of THC since the result of slightly too much THC results in the destruction of the crop yet is still too little to result in truly commercial marijuana. The requirement to destroy non-compliant crops rather than a different solution is another area of concern.