

# USDA ISSUES NEW REGULATION CREATING THE DOMESTIC HEMP PRODUCTION PROGRAM



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On October 31, 2019, the U.S. Department of Agriculture published a new regulation establishing the **U.S. Domestic Hemp Production Program**.<sup>1</sup> A requirement of the 2018 Farm Bill, this new program creates a comprehensive regulatory framework through which the USDA can approve plans submitted by States and Indian Tribes for the domestic production of hemp. It also establishes a Federal plan for hemp producers in States or territories of Indian tribes that do not have their own USDA-approved plan.

A video message from USDA Secretary Sonny Perdue regarding publication of the new Domestic Hemp Production Program regulations is accessible [here](#). The interim final rule formalizing the Hemp program is published in the Federal Register, and is accessible online [here](#).

## *Uniform Protocols Under The New Interim Rule*

The new rule establishes uniform procedures for the USDA to approve hemp production plans developed by states and Indian tribes including:

- requirements for maintaining information on the land where hemp is produced;

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<sup>1</sup> While the focus of the new regulation is domestic, it is worth noting that USDA also regulates the importation of all seeds, including hemp seeds, for planting to ensure safe agricultural trade. Hemp seeds can be imported into the United States from Canada if accompanied by either: (i) a phytosanitary certification from Canada's national plant protection organization to verify the origin of the seed and confirm that no plant pests are detected; or (ii) a Federal Seed Analysis Certificate (SAC, PPQ Form 925) for hemp seeds grown in Canada. Hemp seeds imported into the United States from countries other than Canada may be accompanied by a phytosanitary certificate from the exporting country's national plant protection organization to verify the origin of the seed and confirm that no plant pests are detected. Importation of seed is covered under USDA Animal and Plant Health Inspection Service (APHIS) regulations, and APHIS has jurisdiction for any pest related issues that arise.

- testing the levels of delta-9 tetrahydrocannabinol (THC), which distinguish legal hemp from cannabis, marijuana and related products that remain Schedule 1 narcotics under the Controlled Substances Act;<sup>2</sup>
- the disposal process for plants not meeting mandatory federal requirements; and
- licensing requirements.

USDA also developed guidelines for hemp field and greenhouse sampling, as well as THC content testing, that are being issued concurrently with this new interim rule. These documents provide additional information for sampling agents and hemp testing laboratories, and are accessible at the USDA's Website via the following URL: <https://www.ams.usda.gov/rules-regulations/hemp/rulemaking-documents>.

USDA said it will make a determination about state or tribal plan applications within 60 days of their submission. Jurisdictions that submit applications to process hemp under USDA's guidelines, rather than their own local rules, will be reviewed within 30 days of their submission. Prospective state or tribal applicants<sup>2</sup> can obtain the necessary forms here.

The new interim rule will sunset in two years, after which point USDA will issue final regulations. More information about the provisions of the interim final rule is available on the U.S. Domestic Hemp Production Program web page on the Agricultural Marketing Service (AMS) website.

#### *New Federal Program Benefits Eligibility For Hemp Farmers*

The U.S. Domestic Hemp Production Program not only provides the administrative framework for hemp to be grown lawfully under federally-approved plans, but also makes hemp producers eligible for a number of federally-administered agricultural programs. Once state and tribal plans are in place, hemp producers will be eligible for several USDA programs, including insurance coverage through Whole-Farm Revenue Protection. USDA agencies that administer farm programs — including the Farm Service Agency (FSA), Natural Resources Conservation Service (NRCS), and Risk Management Agency (RMA) — have been directed to provide hemp producers with guidance on eligibility for additional farm programs. Examples include the following:

1. RMA's **Whole-Farm Revenue Protection** coverage and FSA's Noninsured Crop Disaster Assistance Program will provide coverage options for crop year 2020 to eligible hemp producers.

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<sup>2</sup> Under the USDA's new regulation, and as defined in the 2018 Farm Bill, the term "hemp" means the plant species *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. Delta-9 tetrahydrocannabinol, or THC, is the primary intoxicating component of cannabis. Cannabis with a THC level exceeding 0.3 percent is considered marijuana, which remains classified as a schedule I controlled substance regulated by the Drug Enforcement Administration (DEA) under the Controlled Substances Act (CSA)..

2. Also in crop year 2020, hemp producers may be eligible for **FSA farm loans**, such as operating, ownership, beginning farmer, and farm storage facility loans.
3. Additionally, qualifying hemp producers in 2020 will be eligible for multiple **NRCS conservation programs**, including the Environmental Quality Incentives Program, Conservation Stewardship Program, Agricultural Conservation Easement Program, and Regional Conservation Partnership Program. Hemp producers growing in accordance with Section 7606 of the 2014 Farm Bill will not need to modify their conservation program contract for their continued participation. While hemp producers cannot receive financial assistance from NRCS if they do not meet requirements, they can receive technical assistance for conservation plans on fields not under unauthorized hemp production.
4. **The Whole-Farm Revenue Protection**, or WFRP, is available beginning the 2020 crop for hemp grown for fiber, flower, or seeds. WFRP allows coverage of all revenue for commodities produced on a farm up to a total insured revenue of \$8.5 million. Hemp producers now can purchase WFRP coverage if they have a contract for the purchase of the insured industrial hemp and meet all applicable state, tribal, and federal regulations. Note that in accordance with the Farm Bill of 2018 and the federal government's distinction between legal hemp and illegal cannabis, WFRP provisions state that hemp having THC above the 0.3 compliance level will not constitute an insurable cause of loss. Additionally, hemp will not qualify for replant payments under WFRP.

#### *Pilot Programs and Public Comments*

The new Domestic Hemp Production Program also relaxes the restrictions previously imposed on hemp “pilot farms” to work exclusively through approved universities. Before the 2018 Farm Bill, producers could only grow hemp if they met the university research pilot requirements of Section 7606 of the 2014 Farm Bill. Under the new regulation, producers can grow hemp if they meet those requirements or they are growing in accordance with an approved hemp plan.

Finally, although the interim final rule became effective upon publication in the Federal Register, USDA nevertheless is inviting public comment on the interim rule and its information-collection burden. The sixty-day comment period started on October 31<sup>st</sup>, the date of the new regulation's publication in the Federal Register.,

#### *A Final Caveat*

As in the past, we caution that hemp legalization has limits. Neither the 2018 Farm Bill nor the USDA's new Domestic Hemp Production Program creates an open market for the legalization of marijuana or other cannabis products, including CBD products derived from hemp. The 2018 Farm Bill explicitly preserved the authority of the U.S. Food and Drug Administration (FDA) to regulate hemp products under the Federal Food, Drug, and Cosmetic Act (FD&C Act) and section 351 of the Public Health Service Act (PHS Act).<sup>3</sup> Accordingly, products containing

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<sup>3</sup> See § 297D(c)(1) of the 2018 Farm Bill (“Nothing in this subchapter shall affect or modify . . . the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.); § 351 of the Public Health Service Act (42 U.S.C. 262); or the

cannabis and cannabis-derived compounds remain subject to the same authorities and requirements as FDA-regulated products containing any other substance.

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authority of the Commissioner of Food and Drugs and the Secretary of Health and Human Services. . . ” under those Acts).

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