



The US Hemp Production Handbook

Understanding the US hemp production framework

Hemp production in the US has soared in the last five years and is expected to continue its high rate of production and growth in the years to come – a surge arising in large part out of consumer appetite for cannabinoid (CBD) oil and hemp’s diverse industrial and horticultural applications.

Addressing this development, the US Department of Agriculture published an Interim Final Rule with request for comment seeking to establish new rules and regulations for domestic hemp production.¹

A basic understanding of these rules and regulations is vital for businesses that are currently or are considering operating in this growing market.

¹ The Interim Final Rule may be found [here](#).





State/Tribal hemp production plans vs. the USDA hemp production plan: what's the difference?

The production of hemp is regulated at the federal and state level. Federal oversight is provided by the US Department of Agriculture (“**USDA**”). In October 2019, the USDA published an Interim Final Rule for the domestic production of hemp (the “**Interim Final Rule**”)² pursuant to Section 10113 of Public Law 115–334, the Agriculture Improvement Act of 2018 (“**2018 Farm Bill**”). On January 19, 2021, the USDA published a final rule for the domestic production of hemp, which supersedes and replaces the Interim Final Rule effective March 22, 2021 (the “**Final Rule**,” collectively with the Interim Final Rule, the “**Rule**”).³ The Rule outlines provisions for the USDA to approve State and Tribal Plans for the domestic production of hemp. It also establishes a federal plan for producers of hemp to follow in States or Tribal lands that do not have their own plans.

² 84 Fed. Reg. 58522 (Oct. 31, 2019), available at <https://www.govinfo.gov/content/t/pkg/FR-2019-10-31/pdf/2019-23749.pdf>.

³ 86 Fed. Reg. 5596 (Jan. 19, 2021), available at [2021-00967.pdf \(govinfo.gov\)](https://www.govinfo.gov/content/t/pkg/FR-2021-01-19/pdf/2021-00967.pdf).



Governing hemp production plan

A State or Native American Tribe that wants to maintain primary regulatory authority over hemp production must submit a plan for the monitoring and regulation of such production to the Secretary of Agriculture and USDA (“**State/Tribal Plan**” and collectively, “**State/Tribal Plans**”).⁴ Prior to implementation, State/Tribal Plans must meet the minimum federal requirements set forth in the Rule and be approved by the USDA.

If a State or Tribe has legalized hemp production but not adopted its own hemp production plan, then hemp production in that State or Tribe is regulated in accordance with the USDA’s federal plan established in the Rule (“**Federal Plan**”). You can find a table summarizing the status of State/Tribal Plans on the USDA’s website at: <https://www.ams.usda.gov/rules-regulations/hemp/state-and-tribal-plan-review>.⁵

The hemp production license

Prior to producing, cultivating, or storing hemp a person or entity must obtain a hemp production license. If the applicant is in a jurisdiction that has a State/Tribal Plan, the applicant must follow that plan’s production licensing rules. These requirements may vary from jurisdiction to jurisdiction and may include requirements that are more stringent than those in the Federal Plan.

If the applicant is in a jurisdiction that operates under the Federal Plan, the applicant must follow the USDA’s rules to obtain and renew a hemp production license. Pursuant to the Federal Plan there is a one-year open application window for hemp production licenses, which ends on November 2, 2020. After the close of the window, USDA hemp producer licenses may

be applied for or renewed between August 1 and October 31 in any given year. A federal license must be renewed every three years.

Description of the land used for hemp production

All hemp producers must provide two descriptions of the land to be used for production: (1) a legal description of the land to be used for each field, greenhouse, or other grow site, and its geospatial location; and (2) the amount of acreage to be dedicated to hemp production along with the producer’s license or authorization number.

Hemp producers licensed under a State/Tribal Plan make these disclosures to the applicable State or Tribe, as well as to the USDA Farm Service Agency (“**FSA**”). Hemp producers licensed under the Federal Plan are only required to make these disclosures to the FSA.

Sampling and testing for Delta-9 Tetrahydrocannabinol (“THC”)

All hemp must be sampled and tested for THC concentration. Pursuant to the Interim Final Rule, Plant samples must be taken from the flower material of the plant and delivered to a US Drug Enforcement Administration (“**DEA**”) registered laboratory within 15 days of the harvest.⁶ The Final Rule, extended the 15 day window to 30 days. All testing of hemp plants must be done at a DEA-registered lab; however, given the small number of such labs, the USDA is delaying enforcement of this requirement until December 31, 2022.

The Final Rule allows a State/Tribal Plan to adopt its own approach to sampling (subject to USDA approval), as opposed to requiring a producer to take a representative sample of each lot. The alternative methodology must ensure that the cannabis plant does not test above the acceptable THC limit, and the USDA may take

⁴ The Final Rule provides that Native American tribes may regulate all hemp production on their lands, not just hemp production operated and/or owned by that tribe.

⁵ You should also consult and review the laws of your jurisdiction to confirm whether that jurisdiction has adopted its own plan.

⁶ USDA maintains a list of DEA-registered laboratories, available at <https://www.ams.usda.gov/rules-regulations/hemp/dea-laboratories>.



into consideration: state seed certification programs, history of producer compliance, whether the producer is conducting research, and whether a producer is growing “immature” hemp that does not reach the flowering stage.

Total THC concentration of the sample, including the concentration of tetrahydrocannabinol acid (“**THC-A**”), must be determined using a reliable analytic method that meets USDA requirements. The USDA has specifically identified gas chromatography, high-performance liquid chromatography and ultra-performance liquid chromatography as testing methodologies that meet its requirements.⁷

The test results must include the “measurement of uncertainty” (*i.e.*, margin of error), which establishes the range in which the actual THC concentration level falls at a 95% confidence level. A plant sample with an “acceptable hemp THC level” contains less than or equal to 0.3% THC by dry weight at a 95% confidence level and will be considered hemp for purposes of compliance with State/Tribal Plans or the Federal Plan. For example, a sample with a THC concentration of 0.35% and measurement of uncertainty of +/-0.06% is considered hemp because the THC concentration range, 0.29% to 0.41%, includes a range less than or equal to the 0.3% threshold. However, if the measurement of uncertainty for that same sample is +/-0.02%, then the sample is not considered hemp since the THC concentration range, 0.33% to 0.37%, is greater than the 0.3% threshold. The Final Rule requires that labs report the measurement of uncertainty as part of the test results.

Whether and when re-testing is permitted under State/Tribal Plans varies by jurisdiction.⁸ Hemp producers licensed under the Federal Plan may request that a sample be re-tested.

⁷ USDA Hemp Testing Guidelines, available at <https://www.ams.usda.gov/sites/default/files/media/TestingGuidelinesforHemp.pdf>.

⁸ See, e.g., O.C.G.A. 40-32-2-.05(8) (“Any official sample that reveals a laboratory test result greater than 0.3% THC but less than 0.33% THC will be retested.”).

Disposal of non-compliant plants

Plant samples that exceed the level of 0.3% THC are deemed marijuana, which is a Schedule I controlled substance under the Controlled Substances Act (“**CSA**”). As a result, the samples, and the entire crop that the sample represents, must be disposed of or remediated.

Non-complaint plants can be disposed of by using a USDA approved on-farm method that renders the THC non-ingestible,⁹ such as mulching or composting.¹⁰ Such plants can also be scheduled for destruction if collected by a person authorized under the CSA to handle non-compliant hemp, such as a DEA-registered reverse distributor. The Final Rule also permits hemp producers to remediate non-complaint plants by either (1) disposing of the flower material and salvaging the remainder of the plant or (2) blending the entire plant into biomass plant material.¹¹ Post-remediated crops must be sampled again and re-tested to determine if the plant is compliant with THC concentration levels.

Hemp producers licensed under State/Tribal Plans must report and verify proper disposal to their State or Tribe, which is responsible for providing this information to the USDA. Hemp producers licensed under the Federal Plan must report and verify proper disposal of non-compliant plants directly to the USDA.

More information about the consequences of producing non-compliant hemp can be located at “[Consequences of Producing Non-Compliant Hemp](#)” on the [DLA Piper website](#).

⁹ USDA Agricultural Marketing Services, *Enforcement Discretion – Interim Final Rule*, available at <https://www.ams.usda.gov/rules-regulations/hemp/enforcement>.

¹⁰ See USDA Agricultural Marketing Services, *Hemp Disposal Activities*, available at <https://www.ams.usda.gov/rules-regulations/hemp/disposal-activities>.

¹¹ AMS published remediation techniques that can be used to remediate plants with excess THC concentration levels into a complaint form, which is available at [Hemp Remediation and Disposal Guidelines Issued January 15, 2021 \(usda.gov\)](https://www.ams.usda.gov/rules-regulations/hemp/remediation-guidelines).



Compliance with enforcement procedures including annual inspections

State/Tribal Plans must include procedures to ensure that hemp is being produced in accordance with federal regulations, including 7 C.F.R. §§ 990.6 (violations of State/Tribal Plans), 990.7 (establishing records with USDA FSA), and 990.70 (State/Tribal hemp reporting requirements). The record keeping requirements imposed by State/Tribal Plans vary from jurisdiction to jurisdiction, but typically relevant records must be collected and maintained for at least three years. In addition, the Rule requires that States and Tribes conduct annual inspections of, at a minimum, a random sample of hemp producers within their jurisdiction.

The Federal Plan's compliance procedures require that hemp producers maintain copies of all records and reports necessary to demonstrate compliance with USDA rules for a minimum of three years, including records identifying all hemp plants acquired, produced, handled, or disposed of. Hemp producers licensed under the Federal Plan must also submit annual reports to the USDA by December 15 containing the producer's license number, name, address, location information, and total acreage disposed of and/or harvested. Hemp producers licensed under the Federal Plan are subject to no more than one inspection every three years, however, the USDA may conduct random audits of hemp producers.

Negligent violations

A negligent violation of a hemp production plan is defined as a failure to exercise the level of care that a reasonably prudent person would exercise in complying with a plan. Examples of negligent violations include, (1) failing to provide a legal description of the land on which the hemp is produced; (2) not obtaining a license or other required authorization; and (3) producing plants exceeding the acceptable hemp THC level. Importantly, the Rule provides a safe harbor for hemp producers whose hemp exceeds the acceptable .3% THC threshold if (i) the producer used reasonable efforts to grow compliant hemp; and (ii) the THC concentration of the hemp does not exceed 0.5% on a dry weight basis. The Final Rule amends this safe harbor provision by raising the THC negligence threshold from .5% to 1%.

All hemp production plans include procedures for handling negligent violations, including procedures to identify and to correct the offending act. When a negligent violation occurs, the hemp producer must take the corrective action(s) specified by the relevant plan, which, at a minimum, must satisfy the requirements identified in the Interim Final Rule. Corrective action plans must remain in effect for at least two years from the date of the negligent violation.

All hemp production plans specify that a hemp producer who commits three negligent violations of the governing production plan in a five-year period

becomes ineligible to produce hemp for five years from the date of the third violation. The Final Rule provides that a producer shall not be subject to more than one negligent violation per calendar year.

Pursuant to the Interim Final Rule, negligent violations are not subject to criminal enforcement action by local, Tribal, State, or Federal government authorities. However, under the Federal Plan, a hemp producer who operates without a license is automatically reported to the US Attorney General. Additionally, under the Federal Plan, a production license may be suspended for failing to comply with a written order from the USDA's Agricultural Marketing Service Administrator (which creates domestic and international marketing opportunities for US farmers) related to a finding that a negligent violation of a production plan has occurred.

Intentional and reckless violations

A hemp producer who intentionally or recklessly violates a hemp production plan will, at a minimum, be reported to the US Attorney General, the USDA, and the chief law enforcement officer of the State or Tribe with jurisdiction over the site of the hemp production. Under the Federal Plan, the intentional violation of a hemp production plan will result in automatic revocation of a production license, subject to appeal.

Felony convictions

No person convicted of a felony involving a controlled substance may produce hemp for 10 years following the date of the conviction, except if that person legally grew hemp pursuant to the Agricultural Act of 2014 (the "2014 Farm Bill") before December 20, 2018. This felony conviction limitation also applies to key managers (i.e., persons with executive managerial control, such as the CEO, COO, and CFO) of corporate hemp producers.

Conclusion

Hemp production rules, regulations and requirements vary from jurisdiction to jurisdiction. Individuals interested in producing hemp should consult legal counsel and review the laws of their jurisdiction when making the decision to enter the industry.

This handbook is current as of February 1, 2021.



About us

DLA Piper is a global law firm with lawyers located in more than 40 countries through the Americas, Europe, the Middle East, Africa, and Asia Pacific. To meet the diverse needs of our clients, DLA Piper's [Hemp and Hemp Regulated Products/CBD](#) team helps clients navigate the nuances and complexities of the hemp and CBD industry.

Learn more

For more information or to discuss the issues raised in this handbook, please contact:

Matt Miehl

T +1 404 736 7797
matt.miehl@dlapiper.com

Jae Yeon Kim

T + 1 215 656 3352
jae.kim@dlapiper.com

Christopher Gismondi

T +1 212 335 4876
christopher.gismondi@dlapiper.com