

## IN THE WEEDS: HEMP INDUSTRY VOICING CONCERNS REGARDING USDA INTERIM HEMP RULES

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### U.S. Product Liability Alert

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Since publishing the Interim Final Rule for the U.S. Domestic Hemp Program (the "IFR") [1], the U.S. Department of Agriculture ("USDA") has been inundated with comments and criticism from stakeholders in the hemp industry. We discuss below the main concerns that have been voiced by hemp farmers and industry advocates.

### "TOTAL THC" TESTING (THC + THC-A)

Under the 2018 Farm Bill, a cannabis plant must contain a THC concentration of less than 0.3 percent to be considered legal hemp. [2] Under the IFR, that figure must include both Delta-9 THC (the psychoactive chemical in marijuana) and another form called THC-A, which is not psychoactive but can be converted into Delta-9 THC through a chemical reaction.

Many hemp farmers aim to get the highest cannabinoid level as possible as that will render the most value for their flowers. However, lowering the allowable THC limit lowers the overall potency of the cannabinoids being grown, affecting the ability to produce hemp products efficiently. One hemp farmer [3] wrote a comment to the USDA stating:

We have genetics that can grow over 25% cannabinoid content while staying under 0.3% Delta-9 THC; however genetics that must grow under the proposed 0.3% total THC rule will be under 15% and perhaps even under 10% ... A farmer will have to grow approximately twice as much acreage under the proposed 0.3% total THC threshold to get the same amount of end product as he would under the 0.3% delta-9 THC threshold.

In addition, states and tribal jurisdictions have taken different approaches regarding whether both THC and THC-A concentrations must be tested for. As the IFR was made effective immediately, it placed farmers who were preparing for an imminent harvest with little time to comply, putting their crop at risk of testing "hot." It also limits the types of strains and seeds farmers can use for the next growing season due to the lack of genetic availability.

### DEA-CERTIFIED LABS

Farmers are concerned about the requirement that only laboratories registered with the Drug Enforcement Administration (DEA) can be qualified to conduct THC testing. The limitation, in addition to the possibility that all

labs must be LAP or ISO 17025 certified [4], places a strain on the availability of certified labs and could significantly delay THC testing.

In addition, since only DEA-registered labs may conduct testing, this raises the possibility that if hemp is sent out of a state or jurisdiction for testing and fails to meet the THC level, the sender could potentially be subjected to criminal prosecution for sending marijuana across state lines.

## SAMPLING TIMELINE AND PROCEDURES

Many have voiced that the sampling time frame of 15 days is too soon before harvest, suggesting that testing 30 to 45 days before harvest is more appropriate. Also, as there are not enough DEA-certified labs, the 15 day window between THC testing and crop harvest may not occur seamlessly in certain parts of the country.

In addition, farmers are requesting clarity regarding the process of sampling the flowers. The IFR does not clarify which part of the flower must be sampled, and more guidance from the USDA will prevent samples from falsely testing "hot."

## DESTRUCTION OF NON-COMPLIANT PLANTS

The IFR requires all non-compliant plant material to be destroyed. However, as Congress has not specified destruction of such plants, only disposal, [5] in the Farm Bill, farmers are requesting that non-compliant parts of the plant be permitted for use on farms with feedstock or fuel. The U.S. Hemp Roundtable, a business advocacy organization for hemp, stresses the value of hemp biochar as a soil amendment and for research and development purposes. It also specifically suggests pyrolysis as an acceptable means of effective disposal to allow the resulting char to enter into commerce. [6]

## FINAL NOTES

Comments received by December 30, 2019 will be considered by the USDA prior to the issuance of a final rule. The IFR is set to expire in November 2021, by which time the USDA hopes to have final rules in place.

K&L Gates will continue to monitor and provide updates on further developments in this area. Given our experience in and knowledge of USDA-regulated industries, K&L Gates is well positioned to facilitate engagement and help stakeholders assess regulatory and litigation risks in this area, including assistance with submitting comments to the IFR.

*The authors would like to thank Ashley Song for her contribution to this Client Alert.*

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## NOTES

[1] See our previous client alert here summarizing the IFR.

[2] 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 DEA under the Controlled Substances Act.

[3] Josh Briggs of Back40 Organics; see his comment to the USDA here.

[4] LAP or ISO 17025 - general requirements for lab competence to carry out tests and calibrations, including sampling; it covers testing and calibration quality systems using standard methods and laboratory-developed or modified methods.

[5] The Farm Bill directs disposal, not destruction, in Section 297B (2)(A)(iii) - "a procedure for the effective *disposal* of products that are produced in violation of this subtitle" (emphasis added).

[6] See the U.S. Hemp Roundtable's comment to the USDA here.

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