

Updates

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USDA Issues Interim Rules Regarding Hemp Production (Finally)

Since late February 2019, the U.S. Department of Agriculture (USDA) has been promising to publish guidelines regarding hemp production. Aside from the obvious importance of these guidelines to hemp farmers, the guidelines are critical to effectuating the interstate movement of hemp and hemp products. Although the 2018 Farm Bill guarantees interstate shipment of hemp, federal courts and the USDA's own general counsel have flagged that this guarantee cannot take effect until the USDA approves state or tribal hemp regulations, or issues its own hemp regulations. In the meantime, companies that do business in hemp or hemp derivatives (including CBD) have anxiously waited for the USDA to publish its rules.

On October 31, 2019 the USDA [finally published its interim final rule](#) specifying rules and regulations for domestic hemp production. Agencies issue interim final rules when it is in the public interest to promulgate an effective rule while keeping the rulemaking open for further refinement, generally because there is compelling justification or little controversy regarding the rule. This particular interim rule will be operative for two years (until November 1, 2021). Until December 30, 2019, the USDA will be accepting comments to help guide formulation of the final rule.

Interstate Hemp Transportation Addressed

Much of the interim rule addresses agricultural issues relevant to hemp growers and producers. But the rule also confirms that hemp and hemp products may be transported interstate, providing important clarity to businesses that have refrained from entering the hemp market while the legality of interstate shipment was unclear. Specifically, the bulk of the rule concerns guidelines for producing hemp, which are unlikely to affect companies seeking to market hemp-infused products but not cultivate hemp. Section VII of the interim rule, however, specifies, "Nothing in this rule prohibits interstate commerce of hemp. No State or Indian Tribe may prohibit the transportation or shipment of hemp produced in accordance with [federal law]...through the State or the territory of the Indian Tribe."

We interpret this language as creating the necessary predicate to effectuate the 2018 Farm Bill's guarantee that hemp and hemp derivatives may be transported in interstate commerce. Based on this interpretation, we believe that businesses that have postponed entering the hemp industry due to uncertainty regarding interstate shipment may now consider hemp market opportunities with sufficient assurance that interstate shipment is guaranteed by federal law.

Critically, the interim rule does not guarantee interstate shipment of CBD. Although this is somewhat inconsistent, as hemp-derived CBD is simply a hemp byproduct, many states regulate hemp-derived CBD differently than hemp itself. Moreover, as many already know, the Food and Drug Administration (FDA) takes an aggressive posture regarding the legality of CBD as an additive or in products that can be characterized as drugs (although the FDA has done virtually nothing regarding enforcement in this area). Thus, until the federal government confirms that CBD may be transported interstate, companies should be mindful that interstate shipment of certain CBD products still poses some risks.

Authors

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