

## **Advocacy Comments on USDA's Interim Final Rule to Establish a Domestic Hemp Production Program**

On January 29, 2020, the Office of Advocacy submitted comments to the U.S. Department of Agriculture's Agriculture Marketing Service (AMS) on its interim final rule to establish a domestic hemp production program in the U.S. The regulation includes provisions for maintaining information on where hemp is produced, as well as establishing testing methods, levels, and procedures for growers of the crop.

- The 2018 Farm Bill requires AMS to establish and administer a program to produce hemp in the U.S. On October 31, 2019, AMS published an interim final rule establishing a production program. Under AMS' rule, states and tribes that wish to maintain authority over the production of hemp in their jurisdiction must have plans approved by AMS. In those states where the production of hemp is not otherwise prohibited, and in which no plan has been or will be established, AMS will administer a federal level plan for parties who wish to grow hemp.
- The rule specifies several requirements that must be incorporated in state plans, and some requirements that each individual grower must comply with. Key requirements of the rule are outlined below:
  1. Hemp samples must be collected and tested for THC concentration within 15 days prior to harvest.
  2. Testing of samples for THC concentration must be completed at a DEA-registered laboratory.
  3. Testing concentrations must include total THC, which is the sum of THC and its acid derivative THCA, where total THC accounts for the conversion of delta-9 THCA into THC.
  4. Crops that test above 0.3 percent THC will be deemed non-compliant and must be disposed of. Producers whose crop tests above 0.5 percent total THC concentration will incur a negligence violation. Producers who receive three negligence violations in a five-year period will be ineligible to produce hemp for five years from the date of the third violation. Negligence violations are not subject to criminal charges and prosecution, provided a requisite culpable mental state is not met. This ensures that producers whose crops test above 0.3 percent are not automatically subject to criminal prosecution if proper care has been taken to grow compliant crops.
  5. The measure of uncertainty used by each individual lab will be used in testing results. For example, a result of 0.35 percent with a lab specified measure of uncertainty of +/- 0.06, would have a distribution range of 0.29-0.41 percent. Because 0.3 percent is within this range, the sample would be deemed compliant. If, however, 0.3 percent or less was not in the distribution range, the sample would be non-compliant.



6. Current approved testing methodologies include gas or liquid chromatography; however, the rule states that similarly reliable methods may be allowed.
  7. The rule requires the “flower” of the plant to be tested only. Supplemental sampling guidelines issued by AMS suggest that only the top 1/3 of the plant is to be tested.
- Advocacy appreciates AMS’ swift action to establish a domestic hemp production program in the U.S. Advocacy is concerned, however, about the effects the interim final rule will have on small domestic hemp producers. Several of the provisions of the rule impose unnecessary burdens on small entities as written. Many of the sampling and testing requirements should be revisited and alternatives should be considered and analyzed to minimize the burden to small producers.
  - Advocacy made the following comments and suggestions to the agency:
    1. AMS should work to find a consistent method for testing THC levels that aligns with the statute, does not create additional burdens, and that uses reliable testing methodology.
    2. A shortage of DEA registered labs compounds uncertainty in the industry; this requirement should be revised.
    3. AMS should lengthen the 15-day testing window as it may force farmers to spend money on non-compliant crops.
    4. AMS should establish an acceptable margin of error for testing THC concentrations rather than relying solely on a lab’s measure of uncertainty.
    5. AMS should allow for remediation prior to destruction of crops, as uncertainty surrounding negligence findings and crop disposal increase a producer’s risk exposure.
    6. AMS should test a larger portion of the plant, as testing only the top one-third of the plant is an inaccurate representation of how it will be used and raises the risk of test failure.
    7. AMS should consider other implications of the rule including shipping, law enforcement issues, and import competition.