

LAW WEEK COLORADO

Attorneys Scrutinize USDA Hemp Rules

Public comments expected to pour in over testing, licensing and other new requirements

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The U.S. Department of Agriculture issued its first guidance on how hemp can be lawfully produced under the 2018 Farm Bill.

But with more than a week since the USDA's interim rule has been revealed in its 161 pages, attorneys and their clients in the hemp industry still have plenty of questions on how the federal government will regulate the crop.

The USDA interim rule on hemp, published Oct. 31 in the Federal Register, provides a framework for states and Native American tribes to set their own regulations for commercial hemp. The rule reinforces that states cannot ban interstate commerce in legal industrial hemp, and it sets federal baselines for licensing, reporting, testing samples and other requirements.

Hemp is defined as cannabis sativa plant containing no more than 0.3% THC, which is the psychoactive component of

marijuana. Hemp is regulated separately from marijuana. In Colorado, it is the purview of the Department of Agriculture whereas marijuana regulation falls within the Department of Revenue.

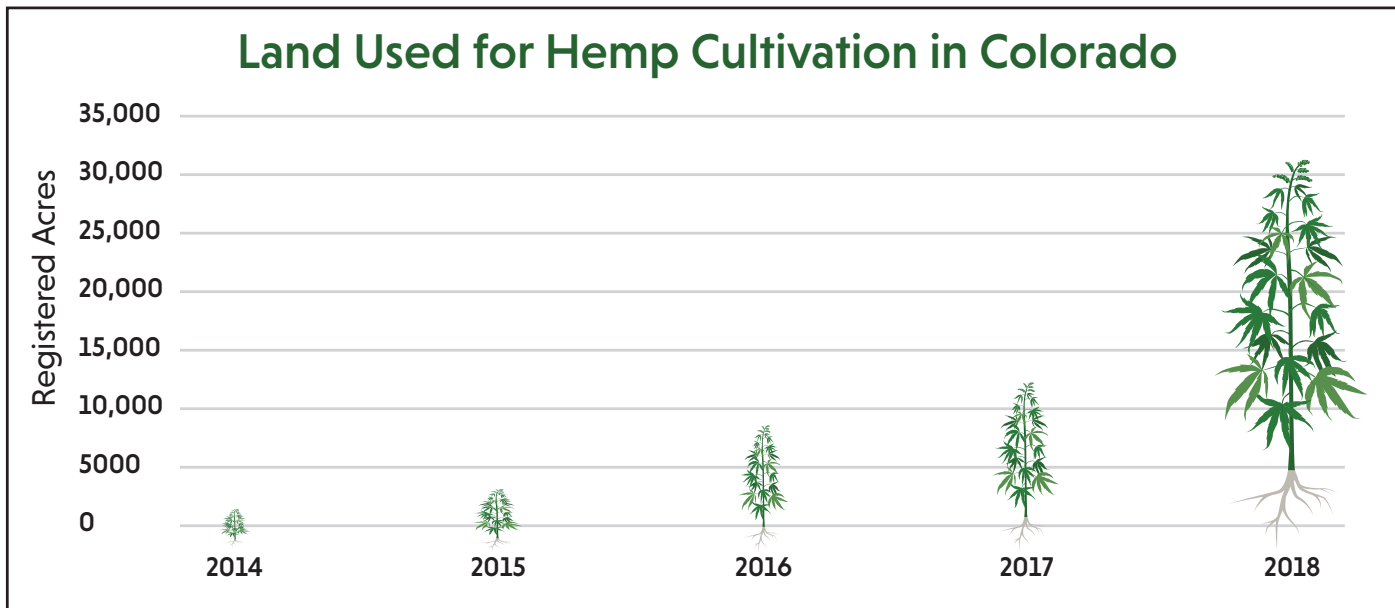
The USDA hemp rule doesn't implicate cannabidiol, or CBD products, the market for which has ballooned in the year since the 2018 Farm Bill was enacted. The cannabis industry still awaits guidance on CBD from the U.S. Food and Drug Administration.

The hemp rule, which is effective immediately,

is now in its 60-day public comment period.

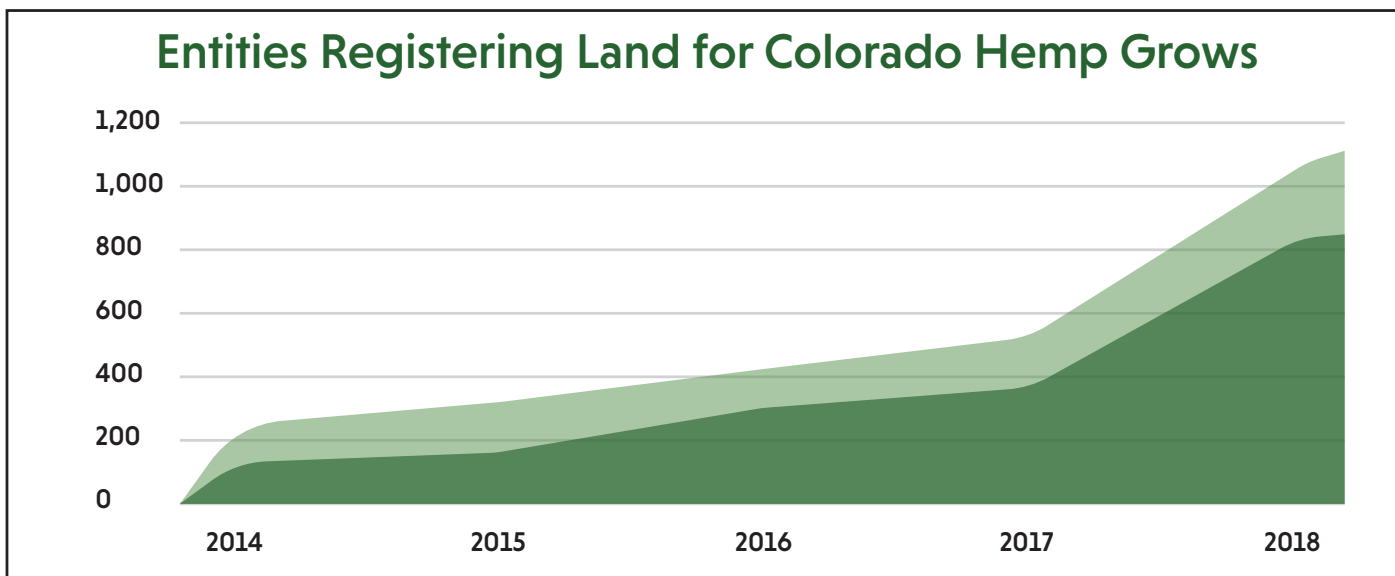
With Colorado voters approving legal hemp and recreational marijuana in 2012, Colorado has been cultivating hemp commerce and regulations for years. The state has issued more than 2,600 registrations to date for entities to process or sell hemp. The Colorado Department of Agriculture Plant Industry Division is preparing to submit a new state hemp plan to the USDA.

Ten other states have submitted plans



The Growth of the Grows

Legal hemp cultivation in Colorado was already increasing at a rapid pace before the 2018 Farm Bill. Acreage and registrants are expected to jump again in 2019 data.



■ = Registrants
■ = Registrations

IN THE NEWS

so far that are awaiting USDA approval. The USDA rule essentially sets a floor for states to meet in their regulatory frameworks, but they can make theirs more restrictive than the federal government's, if they choose.

The USDA's interim rule is "massively significant," said Marshall Custer, a partner at Husch Blackwell and member of the firm's cannabis team. "It's what a number of businesses have been waiting for to help legitimize the industry."

The industrial hemp space has had many "early entrants," some of whom take compliance more seriously than others, Custer said. Large companies that are more risk-averse yet interested in hemp, like traditional agricultural corporations, will be entering the market in greater numbers now that the USDA has issued guidance, Custer said. "This was the green light for them ... to start their machinery up."

But the rules pose a unique challenge to those larger corporations. For an entity to become a USDA-licensed hemp producer, all of its "key participants" must undergo a criminal background check. The rule defines a key participants as people "who have a direct or indirect financial interest in the entity producing hemp, such as an owner or partner in a partnership."



With the release of an interim rule, the USDA now has a framework for approving hemp regulations set by states and Native American tribes. / K STATE RESEARCH AND EXTENSION

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— Marshall Custer, business attorney

That may include not only CEOs but also board members and other figures who need to submit to background checks and be felony-free. The requirement could be "overly onerous" for large businesses, "and if you're a global conglomerate, that's even tougher," Custer said.

But the registration requirement makes sense from the USDA's perspective to limit bad actors using legal hemp's legitimacy, Custer said. Case in point, authorities in California recently seized \$1 billion worth of marijuana plants that were cultivated under the cover of a purported legal hemp grow.

David DiGiacomo, an associate with Michael Best & Friedrich who co-leads the firm's cannabis practice group out of its Broomfield and Boulder offices, said the USDA rule provides much-needed clarity but still carries uncertainties.

"On the interstate commerce front, there's still a lot of interesting stuff there for everybody [to figure out]," DiGiacomo said. One example is in interstate shipping. The rule doesn't provide for labels or certificates that hemp transporters can use to easily certify, if they're stopped and questioned by authorities, that their hemp prod-

uct is legal, DiGiacomo said.

In the USDA rule, one of the provisions causing the most consternation in the hemp industry is the testing requirement. Under the rule, every hemp grow must have a sample tested for THC level each year, but the testing must be done at a facility approved by the Drug Enforcement Administration to handle controlled substances. The USDA said it added this requirement because, in theory, these facilities might receive samples that test above the legal hemp limit — i.e., federally outlawed marijuana.

Attorneys are skeptical that the current, limited number of DEA-approved testing facilities could handle the influx of hemp they will receive from producers around the country. Complicating matters is that every hemp grow must provide a sample within 15 days of its harvest, and a sample already takes a week or more to test.

Garrett Graff, managing partner of Hoban Law's Denver office, said the DEA-approval limitation has caused people to question whether the USDA's testing requirements are practicable. That provision might receive a lot of public comments, in particular, he added.

The USDA rule also lacks a safety net for

hemp growers who "fail" a THC sample test. While the Colorado hemp rules give producers a chance to remediate their hemp grow if their sample tests above 0.3% THC (but under 1%), the USDA rules give no such leeway.

A "hot" sample — in which the test returns an above-0.3% result past the lab's margin of error — means the hemp producer must have their crop destroyed by authorities, according to the rule.

"Your plant's done," Custer said. "Are you going to get insurance for that? Almost certainly not — it's marijuana now."

Also notable, Graff said, is the USDA declined to set any rules on seed certification. Certified seeds help growers identify which seeds have been proven to reliably grow hemp below the 0.3% THC threshold in a given geographic area.

Using certified seeds can also reduce the testing burden for growers under different state rules. Colorado was the first state to launch its own hemp seed certification program in 2016.

But the USDA has no plans to institute a federal program for certified seeds, citing the fact that a seed can yield different THC results in varying geographic locations across the U.S. The federal inaction on seed certifi-

cation didn't come as a surprise to experts, however, Graff said.

Graff said the USDA rules will leave every state with requirements to tweak in their hemp plans, but "everyone's anticipated that."

The USDA has a two-year window in which to finalize the hemp rules, so they are subject to change in the short-term.

Where cannabis industry attorneys and their clients are also looking, in the meantime, is at what the FDA will do to regulate CBD products. Graff noted that while the FDA has been sending out letters to companies warning them not to make unlawful claims with their CBD products, it has issued no substantive guidance on CBD, and he doesn't expect robust regulations on it anytime soon.

Considering how much regulatory uncertainty exists in the hemp industry, even with the USDA rule, the CBD industry is in even thicker fog. When CBD rules do eventually come, they will be a boon to businesses, DiGiacomo said.

"There's a lot of uncertainty for producers of CBD around what the FDA is going to do, and we certainly would love to get some guidance on that front." •

— Doug Chartier, DChartier@circuitmedia.com

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