

## INFORMATIONAL MEMORANDUM



July 12, 2021

To: Chair, Board of Directors  
Chief Executive Officer  
Each Farm Credit Bank and Association

From: Kevin J. Kramp, Director  
Office of Regulatory Policy

Subject: Financing hemp

This informational memorandum incorporates guidance from the U.S. Department of Agriculture's (USDA's) final rule on this subject. It supersedes the informational memorandum on the same subject that FCA issued on February 7, 2020.

In today's economic environment, farmers continue to diversify their agricultural products. Therefore, producing and processing hemp has generated great interest. This guidance is intended to help you assess how financing hemp fits into the lending strategies at your institution.

Please note that the information provided here applies only to hemp grown under approved state or tribal plans approved by the USDA or under the USDA plan. It does not apply to recreational and medical marijuana, which do not have any exemptions and are still considered illegal at the federal level.

We ask that your institution's board and management consider this information, along with your lending policies, procedures, and practices, to ensure that the needs of all farmers and ranchers in your lending territory are being met. When developing policies and procedures for financing hemp, your institution's board of directors should consider the requirements in the [Agriculture Improvement Act of 2018](#) (2018 Farm Bill, P.L. 115-334) and [USDA's final rule on establishing a domestic hemp production program \(PDF\)](#), which took effect March 22. (See the Background section of this document for more information.)

### **Decision to finance hemp**

When deciding whether to finance hemp production, which can include processing, your board should consider many factors, such as the experience of the hemp grower or processor, how much acreage is being converted to hemp, and how much income the borrower generates from other operations to cover debt and operating costs. Your institution should also consider the following:

1. Whether the state or tribe where the hemp will be produced has a USDA-approved hemp program. Approved state and tribal plans, including their rules, regulations, and procedures, are posted on the USDA website for the [U.S. Domestic Hemp Production Program](#). These plans may include additional requirements beyond those issued by USDA. If the state or tribe does not have a USDA-approved plan, determine whether the producer has a license issued by USDA.
2. The posture of local and state law enforcement regarding hemp production and whether this posture could make hemp production more difficult.
3. Whether the hemp variety being planted is a viable crop in the area where it will be grown.
4. Whether an established market exists (or one is planned) where the producer or processor can market the hemp and whether the producer or processor has a marketing plan and a contract to sell the hemp.
5. How much your institution will lend to one hemp producer or processor (internal lending limit).
6. How much of the portfolio your institution will designate for this crop (portfolio concentration limit).
7. Whether current underwriting standards are appropriate or whether new standards that apply to financing hemp production or processing must be developed.
8. How to ensure that risks associated with financing hemp production or processing are adequately identified, analyzed, and addressed.
9. The status of the Food and Drug Administration's (FDA's) enforcement policies as they apply to hemp.

### **Decision to approve a hemp loan**

If your institution decides to proceed with financing hemp, you should consider collecting, analyzing, and documenting the following information from each applicant:

1. A copy of the USDA-approved plan issued by the state or tribe.<sup>1</sup>
2. A copy of the producer's license or authorization number issued by the state. If the state or tribe does not have a USDA-approved program, you should obtain a copy of the producer's license issued by USDA.
3. Where and from whom seed was obtained. This is important because you need to know whether the producer-applicant's seed comes from a stable and reputable source and whether the producer-applicant has a record of being effective in producing hemp in your region.
4. Where and from whom the processor-applicant is obtaining the hemp. This is important because you need to determine whether the hemp is from a legal source and whether the producer has obtained a license from the USDA or from a USDA-approved hemp program.
5. The degree of experience, if any, the applicant has had in successfully producing or processing hemp products and marketing them.

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<sup>1</sup> For plan requirements, refer to Subpart B, § 990.3 State and Tribal plans; Plan requirements of the Establishment of a Domestic Hemp Production Program, 86 FR 5596 (January 19, 2021).

6. A statement of intended end use for all parts of any hemp plants grown within the registered or licensed land area.
7. A copy of the criminal history report on the individual applicant (or, if the applicant is a business entity, a criminal history report on all key participants) dated within 60 days of the application submission date.
8. A copy of any hemp crop acreage reported to USDA's Farm Service Agency (FSA). Producers must provide the FSA, within 30 days of planting hemp, with the specific location where they are growing hemp — by the geospatial location to the extent practicable. Location information should include, but not be limited to, acreage, greenhouse, building, and site.
9. A copy of the state's or tribe's performance-based sampling requirements<sup>2</sup> and any testing. This is important because you need to ensure that the cannabis grown and harvested meets those requirements and does not exceed the acceptable level of tetrahydrocannabinol (THC), which is the active ingredient of cannabis. Within 30 days before the anticipated harvest, the producer must have an approved federal, state, or local law enforcement agency (or some other USDA-designated person) collect samples<sup>3</sup> of the producer's cannabis to test the delta-9 THC concentration level.
10. The producer's plan to dispose of plants that do not meet the necessary requirements. The final rule allows producers to dispose of noncompliant plants in ways that do not involve reverse distributors registered with the Drug Enforcement Administration and other law enforcement officers. The final rule expands the disposal and remediation measures available to producers for disposing of the plants on-site at the farm or hemp production facility. Some of these new options include, but are not limited to, plowing under noncompliant plants, composting into "green manure" for use on the same land, tilling, disking, burying, or burning.
11. A signed statement indicating the producer has no current or previous negligence violations under a state, tribal, or USDA plan.<sup>4</sup> The borrower must notify your association of any such future violations and submit a copy of the corrective action plan. Violations that qualify as negligent include the following:
  - Failure to provide a legal description of the land on which the hemp is produced
  - Failure to obtain a license before beginning production
  - Production of cannabis with a delta-9 THC concentration exceeding the acceptable hemp THC level unless the producer can prove two things: (1) he or she made reasonable efforts to grow hemp within required parameters and (2)

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<sup>2</sup> The method used for sampling must be sufficient to ensure that, at a confidence level of 95%, no more than 1% of the plants in each lot would exceed the acceptable hemp THC level and to ensure that a sample is collected that represents a homogeneous composition of the lot. Alternatively, states and tribes may adopt a performance-based method that ensures, at a confidence level of 95%, that the sample that will be subject to the alternative method will not test above the acceptable hemp THC level.

<sup>3</sup> USDA's Agricultural Marketing Service has modified the sampling requirements in its final rule to state that the sample must be five to eight inches from the "main stem" (which includes the leaves and flowers), the "terminal bud" (which is the bud at the end of a stem), or the "central cola" (cut stem that could develop into a bud) of the flowering top of the plant.

<sup>4</sup> A producer is not subject to more than one negligent violation per calendar year.

the cannabis does not have a delta-9 THC concentration of more than 1.0% on a dry-weight basis

12. How the producer will remain current on the loan if the hemp crop exceeds the applicable THC levels.
13. Repayment capacity and collateral risk, which, as with any borrower, are important. Relevant information on hemp borrowers includes the following:
  - How reliant the borrower is on hemp income
  - Whether the borrower has nonfarm income sources to support repayment
  - How hemp crops and specialized equipment will be valued
  - How institutions will repossess hemp crops, if needed

(Your institution should complete a break-even repayment analysis and a worst-case repayment analysis based on a scenario in which the total crop is lost because of an unacceptably high hemp THC level.)

## **Background**

### *Pilot program*

Section 7606 (Legitimacy of Industrial Hemp Research) of the 2014 Farm Bill (Agricultural Act of 2014, P.L. 113–79) authorized institutions of higher education and state departments of agriculture to allow cultivation of hemp for research as part of a pilot program as authorized by state law. Research allowed under pilot programs included growth, cultivation, and marketing of industrial hemp in a state where it is legal under that state's law. States were authorized to promulgate regulations to carry out these pilot programs.

### *Changes introduced by the 2018 Farm Bill*

The 2018 Farm Bill, enacted into law on December 20, 2018, amended the Agricultural Marketing Act of 1946 by adding subtitle G, which gives the U.S. secretary of agriculture the authority to administer a national hemp production program. Section 297D of subtitle G authorizes and directs USDA to promulgate regulations to implement this program.

Hemp is defined by the 2018 Farm Bill as "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 [THC] concentration of not more than 0.3 percent on a dry weight basis." Cannabis plants that do not meet this definition constitute marijuana, a schedule I controlled substance under the Controlled Substances Act, regardless whether a state allows a higher level of THC.

The 2018 Farm Bill removed hemp with 0.3% THC or less from the Controlled Substances Act, decontrolling hemp production in all states and in territories of Indian tribes, unless prohibited by state or tribal law. This action eliminated the uncertain legal status of hemp production at the federal level and allows USDA to provide hemp producers with crop insurance programs. The statute also prohibits interference in the interstate transport of hemp through a state, including a state that prohibits hemp production and sales.

The 2018 Farm Bill explicitly preserved the authority of the FDA to regulate hemp products under the Federal Food, Drug, and Cosmetic Act and section 351 of the Public Health Service Act. Therefore, products containing hemp and hemp-derived compounds are subject

to the same authorities and requirements as FDA-regulated products containing any other substance.

*USDA rules on the establishment of state and tribal plans*

On October 31, 2019, USDA's Agricultural Marketing Service published an interim final rule on the establishment of a domestic hemp production program.<sup>5</sup> On January 19, 2021, the Agricultural Marketing Service published a final rule, effective March 22, 2021.<sup>6</sup> Under the final rule, states and tribes may submit plans to USDA for approval to monitor and regulate hemp production. These plans must include a practice to collect, maintain, and report to the agriculture secretary information for each producer licensed or authorized to produce hemp under the state or tribal plan.

The agriculture secretary must approve or disapprove the plan within 60 days. If the plan is disapproved, the state or tribe can submit an amended plan. At a minimum, the information on state and tribal plans must include contact information; a legal description of the land where each producer will produce hemp in the state or tribal territory, including, to the extent practicable, its geospatial location; and the status and number of each producer's license or authorization.<sup>7</sup> The plans also require hemp producers to report acreage and other information to FSA.

The plan must include a procedure for accurate and effective testing of the hemp produced, within 30 days before the anticipated harvest, to determine whether the sample contains a delta-9 THC content concentration level that exceeds the acceptable hemp THC level.<sup>8</sup> The plan must also include an effective disposal procedure for hemp plants that do not meet the requirements. After December 31, 2022, states and Indian tribes must require that testing be conducted only by laboratories registered with the Drug Enforcement Administration.

The final rule requires laboratories to calculate and include the measurement of uncertainty, which is like a margin of error, when they report THC test results. The application of the measurement of uncertainty to the reported delta-9 THC content concentration level on a dry-weight basis produces a distribution or range. If 0.3% or less is within the distribution or range, then the sample is considered hemp for the purpose of complying with the requirements of USDA hemp plans.<sup>9</sup>

State and tribal plans also must prohibit any person convicted of a felony related to a controlled substance under state or federal law before, on, or after the enactment of the

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<sup>5</sup> See 84 FR 58522, [USDA Interim Final Rule on Domestic Hemp Production](#).

<sup>6</sup> See 86 FR 5596, [USDA Final Rule on Domestic Hemp Production](#).

<sup>7</sup> The state or tribal plan must also have procedures for (1) submitting the report described in 7 CFR § 990.70 to the U.S. agriculture secretary by the first of each month, (2) disposing or remediating cannabis plants if the sample representing that plant tests above the acceptable hemp THC level, and (3) conducting annual inspections of random samples of hemp producers. State and tribal plans can include more information than what is required by the USDA final rule.

<sup>8</sup> Total THC is the amount of THC in the hemp flower plus the amount of tetrahydrocannabinolic acid that would be converted into THC if the flower were burnt. Therefore, in addition to determining the THC level in the hemp flower, the producer must also determine the amount of THCA.

<sup>9</sup> For example, if a laboratory reports a result of 0.35% with a measurement of uncertainty of 0.06%, the range is 0.29% to 0.41%. Because 0.3% is within that range, the sample, and the lot it represents, are considered hemp for the purpose of compliance with the requirements of state, tribal, or USDA hemp plans. However, if the measurement of uncertainty for that sample were 0.02%, the range would be 0.33% to 0.37%, which is greater than 0.3%. Therefore, the sample would not be considered hemp for the purpose of plan compliance, and the lot it represents would be subject to disposal.

2018 Farm Bill from participating in the state or tribal plan and from producing hemp for 10 years following the date of conviction. The only exception applies to a person who lawfully grew hemp under the 2014 Farm Bill before December 20, 2018, and whose conviction also occurred before that date.

To meet this requirement, the state or Indian tribe will need to review criminal history reports for each applicant, dated within 60 days of the application for a license. When an applicant is a business entity, the state or Indian tribe must review the criminal history report for each key participant in the business. Key participants include anyone who has a direct or indirect financial interest in the entity producing hemp, such as an owner or partner in a partnership. Key participants also include persons in a corporate entity at executive levels, such as the chief executive officer, chief operating officer, and chief financial officer. If a key participant in a corporation has a disqualifying felony conviction, the corporation must remove that person from a key participant position or risk having its license revoked.

#### *USDA rules on the establishment of USDA-approved plans*

If a state or tribe does not have an approved plan, the final rule requires an individual producer to apply to USDA for a license, provided that the state or tribe in which the producer's operation is located does not prohibit hemp production. The requirements of the USDA plan are similar to those under state and tribal plans. To produce hemp under the USDA plan, producers must apply for, and be issued, a license from USDA. Licenses do not renew automatically and must be renewed every three years. Licenses will be valid until December 31 of the year that is no more than three years after the license is issued. (For example, if a producer receives a license on January 22, 2020, that license would be valid until December 31, 2023.) All applications must be accompanied by a completed criminal history report for each key participant.

#### *Plan violations*

Significant differences may exist across states and tribes in how they administer their hemp programs. Provided the minimum requirements of the final rule are met, each state or tribe is free to determine whether a licensee has taken reasonable steps to comply with its plan requirements. Hemp producers are not subject to more than one negligent violation per calendar year. However, a producer who negligently violates a state, tribal, or USDA plan three times in a five-year period will be ineligible to produce hemp for a period of five years from the date of the third violation.

Violations that are considered negligent are not subject to criminal enforcement action by local, tribal, state, or federal government authorities. These violations include, but are not limited to, (1) failure to provide a legal description of land on which the producer grows hemp; (2) failure to obtain a license or other required authorization from the state department of agriculture or tribal government or a license from USDA, as applicable; and (3) hemp production with a delta-9 THC concentration exceeding the acceptable hemp THC level. However, producers are not considered negligent if they make reasonable efforts to grow hemp with a delta-9 THC concentration of no more than 1.0% on a dry-weight basis.

A USDA license may also be suspended if USDA receives credible information that a licensee has either (1) violated the final rule or (2) failed to comply with a written order from the administrator of the Agricultural Marketing Service related to a negligence violation. If a license is suspended, the producer may not handle or remove hemp from the location it was

grown when the suspension was issued and may not produce hemp during the suspension. A suspended license may be restored after one year.

**For more information**

If you have questions on this guidance, please contact Lori Markowitz, Senior Policy Analyst, Office of Regulatory Policy at [markowitzl@fca.gov](mailto:markowitzl@fca.gov) or (703) 883-4487.