Farm Credit Administration

1501 Farm Credit Drive
McLean, VA 22102-5090
(703) 883-4000

INFORMATIONAL MEMORANDUM

February 7, 2020

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

From: David P. Grahn, Director
Office of Regulatory Policy

Subject: Financing Hemp

This informational memorandum provides guidance to Farm Credit System (System) banks and associations on financing hemp. 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 United States Department of Agriculture (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 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 interim final rule on the establishment of a domestic hemp production program. (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.

2. The posture of the 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) enforcement policies as they apply to hemp production or processing.

**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 registration/license issued by the state or tribe. If the state or tribe does not have a USDA-approved program, you should obtain a copy of the license issued by USDA.
2. 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.
3. Where and from whom the processor-applicant is obtaining the hemp to determine if it is from a legal source and the producer has obtained a license from the USDA or from a USDA-approved hemp program.
4. The degree of experience, if any, the applicant has had in successfully producing and/or processing and marketing hemp products.
5. A statement of intended end use for all parts of any hemp plants grown within the registered or licensed land area.
6. A copy of the criminal history reports on all key participants of the producer-applicant, dated within 60 days of the application.
7. A copy of any hemp crop acreage reported to USDA's Farm Service Agency (FSA). Producers must provide the FSA 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.

8. A copy of any testing to ensure the cannabis grown and harvested does not exceed the acceptable level of tetrahydrocannabinol (THC) (the active ingredient of cannabis). Within 15 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 from the flower material of the producer's cannabis to test the delta-9 THC concentration level.
9. A producer plan to dispose of plants that do not meet the necessary requirements.
10. A signed statement indicating the producer has no current or previous negligence violations under a state, tribal, or USDA plan. The borrower must notify the 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 or other required authorization from the state department of agriculture or tribal government, as applicable
    - 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) the cannabis does not have a delta-9 THC concentration of more than 0.5% on a dry-weight basis
11. How the producer will remain current on the loan if the hemp crop exceeds the applicable THC levels.
12. 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 total crop loss due to an unacceptably high hemp THC level.)

**Background**

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.

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 Secretary of Agriculture (Secretary) 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 (CSA), regardless whether a state allows a higher level of THC.

The 2018 Farm Bill removed hemp with 0.3% THC or less from the CSA, 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.

On October 31, 2019, USDA published an interim final rule on the establishment of a domestic hemp production program.[1] Under the interim 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 Secretary information for each producer licensed or authorized to produce hemp under the state or tribal plan.

The 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.[2] The plans also require hemp producers to report acreage and other information to FSA.

The plan must include a procedure for accurate and effective sampling of all hemp produced, for testing to determine whether the sample contains a delta-9 THC content concentration level that exceeds the acceptable hemp THC level,[3] and an effective disposal procedure for hemp plants that do not meet the requirements.

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[1] See 84 FR 58522, USDA Interim Final Rule on Domestic Hemp Program.

[2] The state or tribal plan must also have procedures for (1) submitting information on hemp producers to USDA not more than 30 days after the state or tribal agency received this information, (2) conducting annual inspections of a random sample of hemp producers, and (3) disposing of plants and products produced in violation of 7 CFR Part 990. State and tribal plans can include more information than what is required by the USDA interim final rule.

[3] In the interim final rule, USDA requires a measurement of "total THC level" to determine compliance. Total THC is the amount of THC in the hemp flower plus the amount of tetrahydrocannabinolic acid

The interim 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 compliance with the requirements of USDA hemp plans.[4] States and tribes may enact stricter standards in which case a measurement of uncertainty does not need to be incorporated in the measurement.

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 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. 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.

If a state or tribe does not have an approved plan, the interim 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.

Significant differences may exist across states and tribes in how they administer their hemp programs. Provided the minimum requirements of the interim final rule are met, each state and tribe is free to determine whether a licensee has taken reasonable steps to comply with its plan requirements. However, a producer who negligently violates a state, tribal, or USDA

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(THCA) 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.

[4] 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, is 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.

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 0.5% 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 interim final rule or (2) failed to comply with a written order from the administrator of the Agricultural Marketing Service related to a negligence violation. Reasons for suspension include credible information that plants were harvested without testing or hemp seeds were planted in locations that were not approved. If a license is suspended, the producer may not handle or remove hemp from the location where the hemp was located 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 or (703) 883-4487.