INDUSTRIAL HEMP

I. BACKGROUND – 2018 FARM BILL

The 2018 Farm Bill contains several provisions relating to “hemp.” The bill amended the Controlled Substances Act (CSA) to exclude “hemp” from the definition of “marihuana,” thereby removing it from the CSA, provided certain conditions are met. The bill also establishes regulatory and licensing requirements for hemp producers, and amends the Federal Crop Insurance Act to enable insurance coverage for hemp farmers.

The Farm Bill does not specifically address banking considerations. Banks that decide to accept hemp business customers will need to keep abreast of the federal and state-specific requirements relating to the customer’s business and perform sufficient ongoing customer due diligence to ensure the customer is maintaining compliance with these requirements.

II. HEMP DEFINED – CSA AMENDMENTS

The Farm Bill defined “hemp” as “the plant 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 concentration of not more than 0.3 percent on a dry weight basis.”

Importantly, the Farm Bill also amended the definition of marihuana in the CSA to exclude hemp, and the list of controlled substances under Schedule I to reflect that “tetrahydrocannabinols” in hemp are no longer a controlled substance. For banks, that means that once the required regulations are in place, proceeds connected to a compliant hemp-related business will no longer trigger anti-money laundering statutes (See, caution below).

CAUTION: It is important to note, however, that “hemp” and “marihuana” are the same plant, separated only by the concentration of tetrahydrocannabinol (THC) in the particular strain grown. A hemp farmer who inadvertently grows a crop with too high a concentration of THC will have a field full of marihuana that will need to be disposed of in accordance with state or federal law. Banks that choose to do business with hemp companies should be aware of the unique risks that accompany this crop.
III. REGULATION AND ENFORCEMENT

The Farm Bill allows a state or Indian tribe to serve as the primary regulator over the production of hemp in its territory, if it so desires, by submitting a plan to monitor and regulate that production to the Secretary of Agriculture.

If a state does not have a plan approved by the Secretary of Agriculture, the Secretary will serve as the primary regulator for hemp in that territory. The Secretary will issue licenses to hemp producers in accordance with its own regulatory plan, the minimum requirements of which mirror those established for the states (described below). It is unlawful to produce hemp in a state for which a state plan is not approved without a license issued by the Secretary of Agriculture. Until state plans are approved and/or USDA licenses issued, hemp production may only occur under an agricultural pilot program authorized under the Agricultural Act of 2014.

For states that wish to regulate their own hemp producers, their regulatory plan should be submitted to the Secretary of Agriculture through the state Department of Agriculture, in consultation with the Governor and chief law enforcement officer of the state. The plan must include:

i. a practice to maintain relevant information regarding land on which hemp is produced in the State or territory of the Indian tribe, including a legal description of the land, for a period of not less than three calendar years;
ii. a procedure for testing, using post-decarboxylation or other similarly reliable methods, delta-9 tetrahydrocannabinol concentration levels of hemp produced in the State or territory of the Indian tribe;
iii. a procedure for the effective disposal of products that are produced in violation of this subtitle;
iv. a procedure to comply with the enforcement procedures under subsection (d);
v. a procedure for conducting annual inspections of a random sample of hemp producers—to verify that hemp is not produced in violation of this subtitle; and in a manner that ensures that a hemp producer is subject to not more than one inspection each year;
vi. a certification that the State or Indian tribe has the resources and personnel to carry out the practices and procedures described in clauses (i) through (v).

The Secretary must approve the plan within 60 days, unless it fails to comply with the standards listed above. State laws may include any other practice or procedure for regulating the production of hemp as long as they are consistent with the federal standards.

From a bank’s perspective, the regulatory structure that is outlined in the Farm Bill is designed to ensure that the hemp business is operating within the confines of the exemption from the CSA, and is therefore helpful from a compliance standpoint. Hemp producers must be operating under an approved state plan or under a license from the USDA in order to be considered a lawful business.

Therefore, in order to safely bank one of these hemp producers, a bank must ensure that the customer is operating within these confines and has the necessary licenses in place. Similar conditions apply to whether a bank can safely offer products and services to any company that produces any hemp derivatives.
IV. FDA REGULATION AND CBD PRODUCTS

Although the hemp plant is now a legal crop, there are still restrictions on how it can be processed and sold to the public. The Farm Bill retained the Food and Drug Administration’s authority over how CBD and hemp-derived THC can be used in food, drugs and cosmetics. The FDA has banned the use of CBD in food and dietary supplements because CBD is an active ingredient in an FDA approved epilepsy drug, and selling ingestible products that contain a medical ingredient is illegal. It is unclear how the FDA plans to treat non-ingestible CBD products, but the agency has indicated that it plans to review its CBD policy.

Banks will want to consider whether CBD-related customers can demonstrate that their products are sourced from legal hemp producers, with THC concentrations of less than 0.3 percent, and that they are in compliance with FDA guidelines.


V. LB 657 – STATE HEMP LAW

Nebraska’s statutory provisions to monitor and regulate hemp are contained within LB 657, which was adopted by the legislature this session. The bill went into effect on May 31, 2019.

LB 657 requires the State Department of Agriculture to establish, operate and administer a program to license and regulate those who cultivate, process, handle or broker hemp, defined as cannabis with no more than 0.3 percent Delta-9-tetrahydrocannabinol (THC).

Among other requirements, license holders must be at least 18; not have had a cultivator, processor-handler or broker license revoked in the five years preceding the application; and not have been convicted of a felony related to a controlled substance within the preceding 10 years.

License holders must consent to background checks; entry onto and inspection of all sites where hemp will be cultivated or processed; testing of hemp samples; destruction of hemp found to have THC concentration greater than that allowed by the act; and annual inspections by the department to verify that hemp is being grown in accordance with the law.

LB 657 requires any person other than a hemp cultivator or processor-handler who is transporting hemp to carry a bill of lading indicating the hemp’s owner, its point of origin and its destination, as well as documentation affirming that it was produced in compliance with federal law.

The bill requires the Department’s director to submit a state regulatory plan to the U.S. Secretary of Agriculture no later than December 31, 2019.

The plan will describe practices to maintain information regarding land where hemp is cultivated, handled or processed; procedures governing the sampling and testing of hemp; procedures for destroying hemp plants or products that violate the act; procedures for
implementing the Act’s enforcement provisions; and a procedure for conducting annual inspections of a random sample of hemp cultivators.

NOTE: Prior to the state plan’s approval, a person with a valid licensing agreement with the state Department of Agriculture may only cultivate, handle or process hemp as part of the department’s agricultural pilot program, which federal law authorized in 2014.

VI. SUGGESTED GUIDELINES

Issues for financial institutions to consider in determining whether to do business with a hemp–related business, include the following:

1. Except for approved testing facilities, (a) in order to cultivate hemp (planting, watering, growing and harvesting), a farmer must obtain a license from the state; and (b) no person may process, handle, or broker hemp unless licensed by the state as a processor-handler or broker.

2. It is expected that licensed farm operations will be listed publicly on the Department of Agriculture’s website.

3. Financial institutions should obtain a copy of the license and/or check the state website, and then periodically ensure that the license remains in effect.

4. Sellers of retail products, such as hemp–derived CBD, do not have the same state licensing requirements. However, they should be asked to supply the licensing information from the farmers and/or processors who supply them with hemp products.

VII. USDA – FAQs

The USDA has posted a set of FAQs on its website at and then put a link: https://nifa.usda.gov/industrial-hemp

The foregoing Compliance Update is for informational purposes only and does not constitute legal advice. As a reminder, the NBA general counsel is the attorney for the Nebraska Bankers Association, not its member banks. The general counsel is available to assist members with finding resources to help answer their questions. However, for specific legal advice about specific situations, members must consult and retain their own attorney.