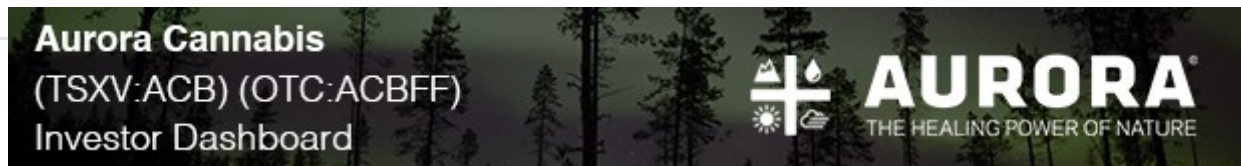


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USDA Discriminates Against Domestic Hemp Producers Seeking Organic Certification for CBD Products

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CBD – It's Organic Unless it's Domestic

Guest post by Robert Hoban, Managing Partner at Hoban & Feola, LLC

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Longmont, Colorado hemp company CBDRx develops, cultivates, processes and distributes wholesale hemp-based CBD products. The large-scale operation markets its products as the best high-CBD, broad spectrum cannabinoids. In an effort to further distinguish their hemp products within the industry, CBDRx applied for organic hemp certification and on September 29, 2015, CBDRx's application was approved by accredited third-party certifier OneCert, Inc. This certification means the hemp company can legally market and sell its hemp products bearing the USDA Organic Seal.

However, the U.S. Department of Agriculture (USDA) released an instruction on February 16, 2016 that undermines recent developments in organic hemp certification. The instruction, titled, "Organic Certification of Industrial Hemp Production," instructs accredited certifiers regarding the certification of industrial hemp production. Notably, the instruction states that NOP- accredited certifying agents, "may not certify the domestic production of industrial hemp." Purporting to clarify USDA policy, the memo justifies this instruction by pointing to confusion surrounding the legality of various uses of hemp under the 2014 Farm Bill. Specifically, the memo says that the confusion relates to federal jurisdiction over hemp research pilot projects, using industrial hemp in food and pharmaceutical products and organic certification of industrial hemp. Thus, organic certification of industrial hemp product must cease until the USDA releases further guidance.

The USDA Effectively Instructs NOP-Accredited Certifiers to Violate the NOP Organic Regulations

As an accredited certifier, OneCert must comply with organic regulations that the USDA's National Organic Program (NOP) administers. These regulations direct the USDA to accredit third-party certifying agents. Once a third-party certifier is accredited, it has the authority to approve or deny applications for organic certification. The third-party certifiers review applications and product compositions, evaluate onsite inspections, make certification recommendations and ultimately issue organic certificates. Beyond the certification process, third-party certifiers have a regulatory obligation to follow and enforce the NOP organic regulations.

A few of the NOP regulations are problematic in light of the USDA's recent instruction. Specifically, the certifiers are bound by the NOP accreditation rules regarding nondiscrimination. Accredited certifying agents are required to accept applications from all qualified applicants without regard to

the applicant's size or membership in any association or group. 7 C.F.R. § 205.501(a)(19). Similarly, accredited certifying agents are prohibited under the regulations from denying NOP benefits to any person based on discrimination because of race, color, *national origin*, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status. 7 C.F.R. §205.501(d).

And yet, another NOP regulation states that accredited certifying agents must comply with all terms and conditions the Secretary deems necessary. 7 C.F.R. § 205.501(a)(21). The recent instruction announces a new term the Secretary deemed necessary: NOP-accredited certifying agents may not certify the domestic production of industrial hemp. So, certifiers are obligated to comply with the instruction and deny organic certification to industrial hemp production.

However, denying certification of only domestic production constitutes denying certification because of national origin. Consequently, by telling certifiers to not certify domestically produced hemp, the USDA instruction is telling certifiers to violate the NOP's nondiscrimination regulations that prohibit discrimination based on national origin.

Taken together, the instruction and the NOP regulations leave NOP-accredited certifiers and hemp cultivation companies in a frustrated position. Indeed, the USDA's instruction effectively binds certifying agents to irreconcilable duties. OneCert and other accredited certifiers grant organic certification to hemp operations in numerous foreign countries as well as in the United States. The instruction directs these certifiers to stop certifying only domestic organic hemp operations, and therefore mandates that certifiers violate federal organic regulations.

Alternatively, if certifiers comply with the NOP nondiscrimination provisions and certify domestic organic hemp, then the certifiers would violate the NOP regulation requiring compliance with the instruction. Which obligation in the NOP regulations is more binding on NOP-accredited certifying agents? The answer to that question may be found in the Introduction of the NOP Handbook that contains the instruction on hemp certification. It states that guidance documents "are not applied as binding requirements." If the documents in the NOP are not binding requirements, then the obligation for certifying agents to accept applications for all applicants would appear to be more binding.

When asked which section of the USDA organic regulations would prevent certification of organic hemp, the NOP refers questioners to the instruction. That confirms there is nothing in the regulations that prevents certification of organic hemp. That is also clear from the many operations that continue to be certified for the production and handling of organic hemp.

The 2014 Farm Bill Authorizes and Encourages Domestically Grown Hemp and Many States Have Legal Hemp Pilot Programs Pursuant to the Farm Bill

The 2014 Farm Bill allows and encourages domestically grown organic hemp. Section 7606, titled, “Legitimacy of Industrial Hemp Research,” permits higher education institutions or state agricultural departments to grow or cultivate industrial hemp for research under a pilot program or other agricultural or academic research, in states that have legalized industrial hemp as an approved crop. The Farm Bill defines “industrial hemp” as the *Cannabis sativa L* plant and any part of the plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

Importantly, Section 7606 authorizes industrial hemp cultivation for research notwithstanding any federal laws, including the Controlled Substances Act. In this respect, the language in Section 7606 clearly legalizes hemp research pilot programs. Nonetheless, the USDA asserts that their legality is undetermined.

While the instruction suggests that the Farm Bill’s authorization of hemp cultivation is something less than an explicit authorization, many states have invoked the provision to develop hemp pilot programs. Section 7606 authorizes state agricultural departments to enact regulations to implement state hemp cultivation pilot programs. Pursuant to this section, at least 27 states have enacted laws that address the cultivation of industrial hemp. Fourteen states permit industrial hemp cultivation, and eight of those allow industrial hemp cultivation for commercial purposes.

In Colorado, Amendment 64 approved industrial hemp cultivation in 2012. In 2013, the state adopted legislation empowering the Colorado Department of Agriculture to pass regulations for industrial hemp cultivation, and in 2014 the Department promulgated registration and inspection regulations. Hemp companies in Colorado register with the Department to grow hemp, thereby complying with state and federal legislation. Further, no language exists in either source of hemp legislation that forbids hemp farms in Colorado from growing national organic hemp.

NOP Organic Certification of Hemp Occurred Years Before the 2014 Farm Bill

Hemp has been legally used for many years in products that display the USDA Organic Seal. Hemp companies domestic and abroad have gained USDA organic certification for their hemp or for products with hemp as an ingredient. The foreign hemp growers have also received organic certification under the NOP for years.

Further, over 200 operations are currently certified to grow or handle organic hemp or products containing organic hemp as an ingredient. These products include seed, fiber, oil and the various products made from those ingredients. This certification began years before Section 7606 of the 2014 Farm Bill went into effect. Thus, the instruction seems to ignore these aspects of industry history when it tags the organic certification of industrial hemp production as “premature.”

Conclusion

Various forms of industrial hemp have legally displayed the USDA Organic Seal for years, and many hemp companies in the United States gained certification to market their hemp products with the Organic Seal. Yet, the USDA deems organic hemp certification premature. It is evident that confusion exists among the regulatory agencies regarding the distinction between marijuana and hemp and the legality of the two. However, the Farm Bill expressly permits the growing of hemp regardless of other federal laws.

In addition, the NOP regulations prohibit accredited certifiers from denying the benefits of the NOP based on national origin. Conversely, the recent USDA’s instruction instructs accredited certifiers to deny domestic hemp productions, effectively instructing certifiers to violate the NOP regulations. The conflict in the rules governing certifiers and growers is justifiably paralyzing for OneCert, CBDRx, and other hemp companies and certifiers.

Consequently, the recent USDA instruction seems to be yet another regulatory impediment to the industrial hemp industry’s efforts to maximize product safety and quality, minimize consumer deception and satisfy the growing national demand for this versatile crop. If it is legal to grow hemp under federal law, why are we discriminating against nationally grown hemp?

What should a domestic operation do if they want to get certified to grow organic hemp?

Submit an application to a certification agency. That agency is required to accept applications by 7 C.F.R. § 205.501(a)(19). Organic certification requires crop rotation, so the applicant should be requesting other crops for certification in addition to hemp. That will ensure that their application will be accepted. It may not be possible to obtain organic hemp seed or planting stock, so the applicant may use untreated non-organic hemp seed

or planting stock. Hemp production does not violate any provision of the USDA organic regulations. It is being certified in other countries and hemp products are being imported and sold in the USA with labels displaying the USDA organic seal.

Choosing a certification agency that has already certified hemp will provide greater assurance that the agency will limit its review to compliance with USDA organic regulations. Other laws and regulations may also be applicable to the growing of hemp and processing of hemp products. A USDA accredited organic certification agency's authority is limited to assessing compliance with USDA organic regulations. Organic certification does not affect the enforcement of any other law or regulation that may also be applicable to your operation.



About the author:

Bob Hoban is an AV® Preeminent™ rated attorney and seasoned full-service commercial practitioner. Drawing upon more than twenty years of diverse legal and practical entrepreneurial business experience, he regularly counsels clients regarding corporate organizational and governance issues, general commercial transactions, real estate development/transactions, government/regulatory licensing, strategic acquisitions, and commercial litigation.

Today, Bob concentrates his practice in the areas of commercial litigation, business law, cannabis law, real estate, land use/eminant domain, public policy/governmental relations, and appellate matters. He represents business owners, governmental entities, retail/commercial centers, landowners, developers, landlords/tenants and other entities in all aspects of these practice areas.

Bob is recognized as one of the leading commercial cannabis practitioners nationwide; representing private and publicly-held clients in numerous states and abroad. He has litigated nearly every aspect of Colorado's Marijuana Code and has closed well-over 200 marijuana-related business transactions. Commercial marijuana and industrial hemp-based business operations, related litigation and regulatory representation are a specialty.

Furthermore, Bob is devoted to impacting law at its source; he has drafted more than 30 bills for the Colorado General Assembly in policy areas relating to eminent domain, land use, hemp/marijuana and transportation policy.

Bob is a professor at the University of Denver, in the Law and Society Program, and regularly instructs regarding government regulations, public policy advocacy, and various research-based policy courses. He has completed a number of hours toward his PhD at the University of Colorado Graduate School of Public Affairs. Bob is a regular presenter/lecturer at legal, policy and academic conferences around the country.

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