

The Federally Regulated Decline, Rebirth, and Decline of the United States Hemp Industry

*Henry Webb, Patrick R. Baker, Paula H. Moore,
and Karen Scanlon**

ABSTRACT

This article considers the United States hemp industry, including how it has fared in an uncertain federal regulatory environment from the Civil War to the present, several continuing barriers to its success, and two proposed federal laws, the SAFE Act and the STATES Act, which are intended to remove one of those barriers—an inability to obtain traditional financing from United States financial institutions.

INTRODUCTION

Prior to the United States Civil War, “hemp,” which is the common term for the *Cannabis sativa Linnaeus* plant and its fiber when used for industrial, non-recreational purposes, was considered to be a “cornerstone crop” of United States agriculture.¹ However, in the mid-1800’s, federal law began to regulate the visually identical psychoactive cousin of hemp, marijuana, causing the hemp industry to decline.² In 1970, hemp was lumped in with marijuana as a Schedule 1 controlled substance under the Controlled Substances Act.³

When the federal regulation of hemp finally began to ease in the 2010s with the enactment of the Agricultural Act of 2014,⁴ the Agricultural Improvement Act of 2018,⁵ and their implementing regulations, the hemp industry began a dramatic resurgence. That resurgence was short-lived, however, as by 2021, continuing regulatory uncertainty, and a number of other

*The authors are, respectively, Henry Webb a Professor of Business and Legal Studies at Palm Beach Atlantic University, Patrick Baker an Associate Professor of Law at the University of Tennessee Martin, Paula H. Moore a Professor of Accounting and Law at the University of Tennessee Martin, and Karen Scanlon a student at the University of Tennessee Martin (UTM Class of 2022).

¹ ORGANIC CONSUMERS ASS’N, *Industrial Hemp Gains Ground In Four States* (2022), <https://organicconsumers.org/industrial-hemp-gains-ground-four/> [<https://perma.cc/S8RZ-YS73>].

² *Busted—America’s War On Marijuana*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> [<https://perma.cc/2CUS-M8X7>] (last viewed Aug. 15, 2023).

³ 21 U.S.C. § 801 et. seq.

⁴ Agric. Act of 2014, Pub. L. No. 113-79.

⁵ Agric. Improvement Act of 2018, Pub. L. No. 115-334.

barriers, caused the hemp industry to once again begin to decline.⁶ The hemp industry's most significant barrier is its inability to obtain traditional financing from the United States financial services industry.⁷ This article will consider two proposed federal laws—the SAFE Act and the STATES Act—and their differing approaches toward eliminating that barrier.⁸

I. THE HEMP INDUSTRY'S CHANGING FORTUNES IN AN UNCERTAIN FEDERAL REGULATORY ENVIRONMENT

Cannabis, a genus of flowering plant, typically comprises only one species, *Cannabis sativa* Linnaeus⁹, has been a significant crop for thousands of years. When *Cannabis* fiber is used for industrial purposes, such as the manufacture of paper, fabric, rope, and biofuel,¹⁰ both the *Cannabis* plant and the fiber derived from that plant are commonly referred to as “hemp.”¹¹ The same *Cannabis* plant also produces an intoxicating resin that is commonly used as a psychoactive drug, in which case both the *Cannabis* plant and its resin are commonly referred to as “marijuana.”¹² Additionally, the *Cannabis* plant also produces highly nutritional edible seeds which are commonly referred to as “hempseeds”¹³ and which are also a source of biofuel.¹⁴

⁶ Jonathan Shepherd & Tyler Mark, *Continued Declines in Hemp Profitability Mixed with Marginal Profit Potential for 2021*, UNIV. OF KY., COL. OF AG., FOOD, AND ENV'T. (Jan. 28, 2021), <https://agecon.ca.uky.edu/continued-declines-hemp-profitability-mixed-marginal-profit-potential-2021> [<https://perma.cc/MR3L-PXSS>].

⁷ Anh Hatzopoulos, *The Challenge of Building Credit In The Cannabis Industry*, FORBES (Feb. 9, 2021, 7:40 AM), <https://www.forbes.com/sites/forbesfinancecouncil/2021/02/09/the-challenge-of-building-credit-in-the-cannabis-industry/?sh=420468e7778e> [<https://perma.cc/RD69-SJYS>].

⁸ SAFE Banking Act of 2021, H.R. 1996, 117th Cong. (2021); STATES Act, H.R. 2093, 116th Congress (2019).

⁹ See SUMAN CHANDRA ET AL., CANNABIS SATIVA L. - BOTANY AND BIOTECHNOLOGY, (2017); see also ANTONINO POLLIO, THE NAME OF CANNABIS: A SHORT GUIDE FOR NONBOTANISTS, (2016).

¹⁰ Sarttrawut Tulaphol et al., *Biofuels and Biproducts from Industrial Hemp*, 6 ADVANCES IN BIOENERGY 301, 314 (2021).

¹¹ CHANDRA ET AL., *supra* note 9, at 5.

¹² *Id.* at 3.

¹³ Barbara Farinon, *The Seed of Industrial Hemp (Cannabis sativa L.): Nutritional Quality and Potential Functionality for Human Health and Nutrition*, 12 NUTRIENTS (2020), 1, 49.

¹⁴ CHANDRA ET AL., *supra* note 9, at 7.

A. *Mid-1800s to 2013: Federal Law Transforms Hemp from an Important Industrial Crop to an Illegal, Schedule I Controlled Substance*

Until the mid-1800's, hemp grown for industrial purposes was considered to be a "cornerstone crop" in the United States.¹⁵ The production and use of hemp began to decline following the Civil War, however, and that decline continued for nearly 150 years.¹⁶ Much of that decline may be attributed to federal laws which failed to properly distinguish between hemp produced and used for industrial purposes and marijuana produced and used as an illegal narcotic.¹⁷

For example, the Marihuana Tax Act of 1937 (now commonly referred to as the Marijuana Tax Act of 1937 to use the more modern spelling) tightened regulations on the production of *Cannabis*.¹⁸ While that act did not make the possession or sale of marijuana illegal, it imposed registration and reporting requirements on individuals profiting from any aspect of the *Cannabis* trade, required the payment of an annual occupational tax on that trade, and imposed a transfer tax paid whenever *Cannabis* changed hands.¹⁹ As a result of the Marijuana Tax Act of 1937, yearly hemp production in the United States did not surpass 2,000 acres, aside from a brief spike in 1942 when over 100 thousand acres were produced to aid the country in WWII.²⁰ Once the war concluded, production dropped off, licenses issued during the war were revoked, and by 1957 the last commercial hemp harvest occurred.²¹

Another federal law, the Controlled Substances Act of 1970 (the "CSA"), went much further and declared *Cannabis* in every form to be a Schedule I controlled substance.²² Schedule I controlled substances are defined as substances with "no

¹⁵ ORGANIC CONSUMERS ASS'N, *supra* note 1.

¹⁶ *History of Hemp in America*, HEMP FRONTIERS (Aug. 22, 2005), <https://hempfrontiers.com/history-of-hemp-in-america/> [<https://perma.cc/RQ33-TPZ3>].

¹⁷ Matthew Wills, *The Return of Hemp*, JSTOR DAILY (July 25, 2021), <https://daily.jstor.org/the-return-of-hemp/> [<https://perma.cc/H4KV-PNAT>].

¹⁸ U.S. CUSTOMS AND BORDER PROT., DID YOU KNOW... MARIJUANA WAS ONCE A LEGAL CROSS-BORDER IMPORT?, <https://www.cbp.gov/about/history/did-you-know/marijuana> (last updated Dec. 20, 2019) [<https://perma.cc/U5PL-N264>].

¹⁹ HEMP FRONTIERS, *supra* note 16.

²⁰ *Facts About Hemp*, CANNABIS TRADES ASSOC., <https://www.cannabistrades.org/pages/126-facts-about-hemp> (last viewed Mar. 29, 2023) [<https://perma.cc/EW6U-8GP6>].

²¹ Patrick Lynch, M.A., *Why Was Hemp Banned After World War II?*, WAYOFLEAF, <https://wayofleaf.com/hemp/why-was-hemp-banned-after-world-war-ii/> [<https://perma.cc/BPN9-NSCF>] (last updated Nov. 5, 2020).

²² Michael Gabay, *The Federal Controlled Substances Act: Schedules and Pharmacy Registration*, 48:6 HOSP. PHARM. 473-474, NAT'L LIBR. OF MED. (2013).

currently accepted medical use and having a high potential for abuse.”²³ Under the CSA, farmers were required to register with the United States Drug Enforcement Administration (“DEA”) prior to growing hemp, and the DEA’s registration requirements made the production of hemp impractical.²⁴ For example, the CSA’s registration requirements included substantial documentation, United States Federal Bureau of Investigation (“FBI”) background checks, and high-security measures around plots of hemp, including security fencing and twenty-four hour monitoring.²⁵ Since the enactment of the Controlled Substances Act of 1970, the DEA has licensed only one entity to grow marijuana for research purposes, the National Center for Natural Products Research, which is based at the University of Mississippi in Oxford, Mississippi (“Ole Miss”).²⁶

B. 2014–2020: A Rapidly Changing Regulatory Environment Dramatically Increases Domestic Hemp Production

Federal regulation of hemp began to ease with the enactment of the Agricultural Act of 2014.²⁷ That act, commonly referred to as the “2014 Farm Bill,” allowed state departments of agriculture and institutions of higher learning to implement pilot programs and grow hemp where: (a) the hemp was grown solely for research purposes and (b) such use was permissible under the applicable state law.²⁸ One of the most important accomplishments of the 2014 Farm Bill was to formally define “hemp” and to clearly differentiate hemp from other forms of *Cannabis*.²⁹ The 2014 Farm Bill defined “hemp” as containing 0.3 percent or less of the primary psychoactive component of *Cannabis*, delta-9-tetrahydrocannabinol

²³ *Drug Scheduling*, U.S. DRUG ENFT ADMIN., <https://www.dea.gov/drug-information/drug-scheduling> [<https://perma.cc/C5W2-WZPU>] (last viewed Mar. 29, 2023).

²⁴ Applications to Become Registered Under the Controlled Substances Act to Manufacture Marijuana to Supply Researchers in the United States, 81 FR 53846 (Aug. 122, 2016) (to be codified at 21 CFR 1301).

²⁵ *Id.*

²⁶ *DEA Continues to Prioritize Efforts to Expand Access to Marijuana for Research in the United States*, U.S. DRUG ENFT ADMIN. (May 14, 2021), <https://www.dea.gov/stories/2021/2021-05/2021-05-14/dea-continues-prioritize-efforts-expand-access-marijuana-research> [<https://perma.cc/R7ZC-2HD6>].

²⁷ Shannon Smith, *Hemp on the Horizon: The 2018 Farm Bill and the Future of CBD**, 98(7) N. C. L. REV., 1510, Westlaw (2019) [<https://perma.cc/YUL9-7AWT>].

²⁸ *Id.*

²⁹ *Id.*

(“THC”), on a dry-weight basis—with *Cannabis* containing more than 0.3 percent of THC continuing to be considered “marijuana.”³⁰ Historically, marijuana contained around 4 percent of THC, whereas today even the lowest yielding strains of marijuana contain between 8 percent and 10 percent of THC.³¹ Average yielding strains today contain between 18 percent and 20 percent of THC, and very high potency strains contain between 25 percent and 30 percent of THC.³² The most heavily concentrated THC products, such as oils, “shatter,” “dab,” and certain edible items, contain over 95 percent of THC.³³

While the 2014 Farm Bill began to ease the regulatory restrictions on the production and use of hemp, it was not until the enactment of the Agricultural Improvement Act of 2018 (i.e., the “2018 Farm Bill”) that hemp was finally removed from the list of Schedule I controlled substances under the Controlled Substances Act of 1970.³⁴ Thus, the production of hemp was legalized at the federal level.³⁵ The 2018 Farm Bill resulted in an implicit transfer of regulatory authority over hemp from the DEA to the United States Department of Agriculture (“USDA”).³⁶ On October 31, 2019, the USDA issued an Interim Final Rule with request for comments titled “Establishment of a Domestic Hemp Production Program.”³⁷ After a lengthy comment period, on March 22, 2021, the USDA issued its identically-titled Final Rule.³⁸ The Final Rule required hemp producers to be licensed by the USDA, the state, or a Native American tribe, established recordkeeping requirements for maintaining information about land where the hemp is produced, detailed the procedures through which hemp’s THC concentration levels were to be tested, established

³⁰ *Id.*

³¹ The Evolution of High-Potency Cannabis, FLUENT, <https://getfluent.com/the-evolution-of-high-potency-cannabis/> [<https://perma.cc/5KBR-33X3>] (last viewed Mar. 31, 2023).

³² *Id.*

³³ Elizabeth Stuyt, MD, *The Problem with the Current High Potency THC Marijuana from the Perspective of an Addiction Psychiatrist*, 115(6) MO Med. 482-486, NAT’L LIBR. OF MED. (Nov.–Dec. 2018) [<https://perma.cc/9X5R-PQWC>].

³⁴ USDA, THE AGRICULTURE IMPROVEMENT ACT OF 2018, <https://www.usda.gov/topics/hemp> [<https://perma.cc/6NDK-CJRW>].

³⁵ Smith, *supra* note 27, at 1512.

³⁶ Sara W. Koblitz & Karla L. Palmer, *Hemp By Any Other Name...*, FDA L. BLOG (Oct. 21, 2020), <https://www.thefdalawblog.com/2020/10/hemp-by-any-other-name/> [<https://perma.cc/T25P-MDUE>].

³⁷ Establishment of a Domestic Hemp Production Program, 86 Fed. Reg. 5596 (Jan. 19, 2021) (to be codified 7 CFR 990) [<https://perma.cc/9KLS-SUQH>].

³⁸ *USDA Update on the U.S. Domestic Hemp Production Program*, AOAC INT’L (July 20, 2021), <https://www.aoac.org/news/update-on-the-us-domestic-hemp-production-program/> [<https://perma.cc/SP3F-HQL8>].

procedures for disposing of non-compliant plants, and managing subsequent violations.³⁹ Specifically, due to the difficulty of keeping hemp's THC levels at 0.3 percent or less, the Final Rule gave hemp growers the option to either remediate the crop or sell the parts of the hemp plant that were in compliance with the THC threshold.⁴⁰ Hemp growers were also given thirty instead of fifteen days to harvest hemp plants once their growth was complete.⁴¹ However, hemp crops containing a THC level of one percent or higher were considered negligent, and were required to be discarded following the required disposal methods set out in the Final Rule.⁴²

With the federal legalization of hemp in 2018, production skyrocketed in many states including Colorado, long considered a pioneer with regard to the deregulation of *Cannabis*.⁴³ For example, in 2012 Colorado legalized the processing, sale, and cultivation of recreational marijuana and stated that industrial hemp should be regulated separately from *Cannabis* products containing higher levels of THC.⁴⁴

In 2014, Colorado introduced a hemp program which regulated the growth of the plant but not its processing, extraction, or end-products.⁴⁵ In 2014, the number of acres registered for hemp production in Colorado was 1,811.⁴⁶ By 2015, only one year after Colorado introduced its hemp program, that number had more than doubled to 3,657 registered acres, and the number of acres registered for hemp production in Colorado thereafter continued to increase dramatically to 8,988 acres in 2016, 12,348 acres in 2017, 30,080 acres in 2018, and 87,408 acres in 2019.⁴⁷

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ William Sumner, *Why Colorado Leads U.S. Hemp Production... For Now*, NEW FRONTIER DATA (Sept. 11, 2019), <https://newfrontierdata.com/cannabis-insights/why-colorado-leads-u-s-hemp-production-for-now/> [<https://perma.cc/W4U8-9PJH>].

⁴⁴ See Julie Andersen Hill, *Cannabis Banking: What Marijuana Can Learn from Hemp*, 101(3) B.U. L. Rev., Vol. 1072, Westlaw (2021) [<https://perma.cc/X6VX-X5WP>].

⁴⁵ See CDA, HEMP PILOT PROGRAM EXTENSION BENEFITS COLORADO INDUSTRIAL HEMP PRODUCERS (2020) [<https://perma.cc/3C4T-VLB7>].

⁴⁶ COLO. DEP'T OF AGRIC., REVISED COLORADO STATE HEMP MANAGEMENT PLAN (2021), <https://www.ams.usda.gov/sites/default/files/media/COHempStatePlan.pdf> [<https://perma.cc/2JLS-MSTX>].

⁴⁷ Email from Hemp Program Staff, CDA, to Karen Scanlon, Student, Univ. Tenn. Martin (Feb. 7, 2022, 9:11 AM) (on file with the author).

Colorado was not the only state to experience a meteoric rise in hemp production.⁴⁸ By 2019, Oregon had 63,883 acres registered for hemp production, Kentucky had 26,500 acres, and North Carolina had 17,528 acres.⁴⁹ Nationally, the number of acres registered for hemp production increased from 1,866 acres in 2014 to 146,065 acres in 2019.⁵⁰

C. 2020-2022: Changing DEA Regulations and Other Barriers Cause the Surging Hemp Industry to Once Again Decline

After domestic hemp production's rapid surge from 2014 to 2019, 2019 appears to have been the high-water mark for hemp production in the United States. In Colorado, for example, the number of acres registered for hemp production has declined by roughly 75 percent since 2019—from 87,408 acres in 2019 to only 18,592 acres in 2021.⁵¹ Similarly, Oregon's acres registered for hemp production declined from roughly 63,883 acres in 2019 to only 8,046 acres in 2021; Kentucky's hemp acreage declined from 26,500 in 2019 to only 1,800 acres in 2021; and North Carolina's hemp acreage declined from 17,528 acres in 2019 to only 5,911 acres in 2021.⁵²

i. The DEA's 2020 interim final rule once again exposes hemp processors to potential criminal liability

The dramatic decline in hemp production from 2019 to 2021 is in part the result of continuing changes in the regulatory environment.⁵³ On August 20, 2020, the DEA published an Interim Final Rule titled "Implementation of the

⁴⁸ Email from Sunny Summers, Cannabis Policy Coordinator & Special Projects, Or. Dep't of Agric., to Karen Scanlon, Student, Univ. Tenn. Martin (Feb. 7, 2022, 14:28 CST) (on file with the author); Email from Edmond Thompson, Hemp Program Specialist, Ky. Dep't. of Agric., to Karen Scanlon, Student, UTM (Feb. 4, 2022, 7:20 AM) (on file with the author); Email from Paul R. Adams III, Entomological Programs Manager, N.C. Dep't of Agric., to Karen Scanlon, Student, Univ. Tenn. Martin (Feb. 7, 2022, 6:38 AM) (on file with the author).

⁴⁹ *Id.*

⁵⁰ David W. Olson et al., *Hope for Hemp: New Opportunities and Challenges for an Old Crop*, U.S. DEPT OF AGRIC., AMBER WAVES MAG. (June 9, 2020), <https://www.ers.usda.gov/amber-waves/2020/june/hope-for-hemp-new-opportunities-and-challenges-for-an-old-crop/> [<https://perma.cc/6HNA-76EF>]; Tyler Mark et. al., *Economic Viability of Industrial Hemp in the United States: A Review of State Pilot Programs*, ECON. INFO. BULL. 22 fig. 6 (2020).

⁵¹ See Hemp Program Staff, *supra* note 47.

⁵² See Summers, *supra* note 48; see Thompson, *supra* note 48; see Adams III, *supra* note 48.

⁵³ *Id.*

Agriculture Act of 2018” for the purpose of conforming the DEA’s own regulations to the 2018 Farm Bill.⁵⁴ That Interim Final Rule stated the DEA’s position that hemp products may be converted back into illegal marijuana products—thereby bringing such products back under the DEA’s authority—if the hemp products are processed in a way that increases their THC content above the 0.3 percent threshold set by the Agricultural Act of 2014.⁵⁵ In other words, a *Cannabis* plant containing 0.3 percent or less of THC on a dry weight basis—thus not a Schedule I controlled substance under the Controlled Substances Act of 1970—that is subsequently processed in such a way that its THC content exceeds that 0.3 percent threshold may once again be regulated as a Schedule I controlled substance.⁵⁶

As a result, the DEA’s Interim Final Rule created a significant risk for hemp processors.⁵⁷ Under the Interim Final Rule, they could be deemed in possession of an illegal Schedule I controlled substance and thereby subject to criminal liability if at any point during the processing of a *Cannabis* plant the THC content of that plant exceeded the 0.3 percent threshold—however briefly and even if the finished product ultimately complied with federal law.⁵⁸ The DEA’s Interim Final Rule has been the subject of multiple lawsuits and, while those cases have to date upheld the DEA’s regulatory authority as stated in the Interim Final Rule, as of the publication of this article the agency has yet to issue its Final Rule.⁵⁹

ii. Other barriers contributing to the steep decline in hemp production

In addition to the DEA’s 2020 Interim Final Rule, several other barriers contributed to the steep decline in domestic hemp production from 2019 to 2021, including: (a)

⁵⁴ *Id.*

⁵⁵ Megan Herr et al., *The DEA’s Interim Final Rule And Its Impact On The Industrial Hemp Industry*, JD SUPRA (Sept. 18, 2020), <https://www.jdsupra.com/legalnews/the-dea-s-interim-final-rule-and-its-10314/> [<https://perma.cc/L9V6-E5TX>].

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ B.A. Dorfman, *Hemp Industry files lawsuit against DEA challenging interim rule*, POT NETWORK (Sept. 21, 2020), <https://www.potnetwork.com/news/hemp-industry-files-lawsuit-against-dea-challenging-interim-rule> [<https://perma.cc/Q9EC-JMQF>]; *Hemp Indus. Ass’n Botanicals, Inc. v. DEA*, 539 F. Supp. 3d 120 (D.C. 2021); *Hemp Indus. Ass’n Botanicals, Inc. v. DEA*, 36 F.4th 278 (D.C. Cir. 2022).

challenges involved in producing regulatorily compliant hemp crops; (b) risk of loss on the part of hemp farmers; (c) inconsistencies between federal and state law; (d) inconsistent industry demand; and (e) the difficulty of hemp processors to secure adequate credit from the financial industry.⁶⁰ According to the Agricultural Marketing Service, hemp is challenging to produce because the same hemp seed planted under different conditions can produce crops with varying levels of THC.⁶¹ Farmers thus have little control over the THC level in the hemp crops they plant, and if a crop has a THC level higher than 0.3 percent, which are commonly referred to as “hot” crops, farmers must either (a) destroy the entire crop or (b) sell the parts of the crop that are legal and either remediate or destroy the rest of the crop.⁶²

The remediation or destruction of “hot” crops costs hemp farmers a considerable amount of money and resources.⁶³ For example, Kentucky reported that over 43 percent of its hemp production was “hot” in 2019, and Tennessee reported that around 42 percent of its hemp crops were “hot” in 2021.⁶⁴ In 2021, for example, approximately half of the hemp grown by Nashland Farms in middle Tennessee tested above the allowable THC limit, causing Nashland Farms to lose thousands of dollars.⁶⁵ According to the Chief Executive Officer of the Tennessee Growers Coalition, Ms. Kelley Hess, many hemp farmers chose not to grow hemp crops in 2022 as a result of the current regulations regarding “hot” crops.⁶⁶

⁶⁰ Establishment of a Domestic Hemp Production Program, 84 Fed. Reg. 58522, 58523 (Oct. 31, 2019) (to be codified at 7 C.F.R. pt. 990); *State Industrial Hemp Statutes*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 16, 2020), <https://www.ncsl.org/agriculture-and-rural-development/regulating-hemp-and-cannabis-based-products> [<https://perma.cc/59WX-6EHZ>]; Seth Boone, VP of Bus. Dev., PanXchange, Univ. of Tenn. Extension's 2021 Tennessee Hemp Market Outlook Webinar (May 6, 2021); Hill, *supra* note 44, at 1099.

⁶¹ Establishment of a Domestic Hemp Production Program, 86 Fed. Reg. 5596 (Jan. 19, 2021) (to be codified 7 CFR 990) [<https://perma.cc/9KLS-SUQH>].

⁶² See AOAC INT'L, *supra* note 38.

⁶³ Andy Rideout, *Hemp producers encounter growing pains, uncertainty*, THE GLEANER, <https://www.thegleaner.com/story/life/columnists/2020/05/09/rideout-growing-hemp-2020/3084649001/> [<https://perma.cc/BMW8-NYX2>] (last updated May 9, 2020, 12:34 PM).

⁶⁴ Kyle Horan, *Hemp farmers forced to destroy crops over USDA rules*, NEWSCHANNEL 5 NASHVILLE, <https://www.newschannel5.com/news/hemp-farmers-forced-to-destroy-crops-over-usda-rules> [<https://perma.cc/8LQA-86RF>] (last updated Feb. 25, 2022, 7:49 PM).

⁶⁵ *Id.*

⁶⁶ Kyle Horan, *Tennessee hemp farmers worry they'll have to destroy crops due to new rules*, NEWSCHANNEL 5 NASHVILLE, <https://www.newschannel5.com/news/tennessee-hemp-farmers-worry-theyll-have-to-destroy-crops-due-to-new-rules> [<https://perma.cc/CR4M-BWRM>] (last updated Feb. 17, 2022, 1:39 PM).

The difficulties involved in producing hemp crops compliant with the DEA's Interim Final Rule increase the risk of loss for hemp farmers, and neither the tax code nor the insurance industry adequately assist hemp farmers in ameliorating that risk of loss.⁶⁷ Despite state governments pushing for more hemp production for the purpose of increasing those states' tax revenues, the United States Internal Revenue Code ("IRC") does not allow hemp farmers to recognize a tax loss on unintentionally illegal crops.⁶⁸ Similarly, while insurance for profit loss is available for hemp farmers, it does not cover "hot" crops which test above the allowed THC level.⁶⁹

Inconsistencies between federal and state law have also contributed to the decline in hemp production.⁷⁰ While state hemp programs must at a minimum conform to the applicable federal regulations, states are also allowed to enforce more strict rules regarding the production of hemp if they so choose.⁷¹ This option results in an inconsistent regulatory environment where hemp farmers wishing to grow crops in different states must comply with different rules and regulations instead of merely complying with one, consistent regulatory scheme.⁷²

In the 2018 case *United States v. Mallory*, for example, the United States District Court for the Southern District of West Virginia considered the government's request for a permanent injunction barring Matthew Mallory and his company, CAMO Hemp WV, LLC, from harvesting and transporting certain *Cannabis* plants across state lines.⁷³ The government argued that Mallory, who had bought hemp seeds from a farm in Kentucky and planted them in West Virginia, violated the CSA by transporting the seeds across state lines without a DEA registration number.⁷⁴ The court ruled in favor of Mallory, holding that hemp producers can purchase seeds from out-of-state suppliers without violating the CSA.⁷⁵ In reaching that decision, the court found it important that, as of

⁶⁷ Rideout, *supra* note 63.

⁶⁸ 26 U.S.C. § 280E (1982).

⁶⁹ *USDA Hemp Programs for Risk Management FAQ*, U.S. DEPT OF AGRIC., <https://www.farmers.gov/your-business/row-crops/hemp/faq> [<https://perma.cc/WS6N-7P8X>] (last viewed Mar. 29, 2023).

⁷⁰ See Michael Nepveux, *USDA Releases Long-Awaited Industrial Hemp Regulations*, FARM BUREAU: MKT. INTEL (Oct. 31, 2019) <https://www.fb.org/market-intel/usda-releases-long-awaited-industrial-hemp-regulations> [<https://perma.cc/PRQ7-E3SP>].

⁷¹ Smith, *supra* note 27, at 1513.

⁷² Nepveux, *supra* note 70.

⁷³ *United States v. Mallory*, 372 F. Supp. 3d 377, 379 (S.D. W. Va. 2019).

⁷⁴ *Id.* at 384.

⁷⁵ *Id.* at 384–85.

2018, hemp was no longer considered a controlled substance, regulatory authority belonged to the state agencies instead of to the DEA, and West Virginia had no statute against transporting seeds across state lines.⁷⁶ While Mr. Mallory ultimately prevailed in that case, the ongoing inconsistencies between federal and state law continue to cause uncertainty for hemp farmers nationwide.⁷⁷

Law enforcement agencies struggle to distinguish between hemp and illegal *Cannabis*.⁷⁸ To address these inconsistencies, the Oregon legislature recently passed a bill targeting “illegal marijuana grows being passed off as hemp.”⁷⁹ Senate Bill 1564 authorizes the Oregon Department of Agriculture to suspend the issuance of hemp grower licenses in any county that has declared a state of emergency to address the production and sale of illegal marijuana as hemp.⁸⁰ Oregon Senator Jeff Golden, who carried the bill, stated:

Overproduction of hemp can cause critical difficulties for law enforcement in rural areas. At face value, hemp is nearly indistinguishable from THC cannabis (sic) crops. Law enforcement asked us to temporarily pause the spread of hemp acreage to improve their ability to deal with bad actors. Because conditions vary across the state, this bill gives local government the key role of making the call.⁸¹

While law enforcement's desire to limit illegal hemp production is understandable, doing so by refusing to issue additional hemp grower licenses further increases the instability and uncertainty for the struggling hemp industry.⁸² Perhaps Oregon would be better served if its law enforcement agencies would simply enforce existing laws by prosecuting individuals who are illegally growing marijuana rather than by

⁷⁶ *Id.* at 384–86.

⁷⁷ Hemp Industry Daily Staff, *As hemp harvest nears, US farmers face uncertainty about regulations*, HEMP INDUS. DAILY (Aug. 20, 2020), <https://hempindustrydaily.com/as-hemp-harvest-nears-us-farmers-face-uncertainty-about-regulations/?cn-reloaded=1> [<https://perma.cc/H3HL-EV7R>].

⁷⁸ Jamie Parfitt, *Oregon Senate passes bill designated to get a handle on 'hemp'*, NEWSWATCH 12, https://www.kdrv.com/news/local/oregon-senate-passes-bill-designed-to-get-a-handle-on-hemp/article_61af00e0-905d-11ec-93ac-8f0f0529af1a.html [<https://perma.cc/5HE5-GSDR>] (last updated Feb. 17, 2022).

⁷⁹ *Id.*; S.B. 1564, 81st Or. Legislative Assemb., Reg. Sess. (Or. 2022).

⁸⁰ Parfitt, *supra* note 78; S.B. 1564, 81st Or. Legislative Assemb., Reg. Sess. (Or. 2022).

⁸¹ Parfitt, *supra* note 78.

⁸² Parfitt, *supra* note 78.

penalizing the entire hemp industry by refusing to issue additional hemp grower licenses.

Another issue faced by the hemp industry is the unpredictable and inconsistent demand for hemp and hemp products.⁸³ Globally, the largest product segment in the hemp industry is Cannabidiol oil, or “CBD oil,” which represents over seventy-five percent of the market for hemp products.⁸⁴ In May 2021, PanXchange, a major hemp company, estimated that supplying the United States’ entire demand for CBD oil would require less than 5,000 acres of hemp.⁸⁵ Considering that more than 3 hundred thousand acres of hemp were planted in the United States in 2020, the supply of hemp far exceeded the demand for hemp at that time, and that oversupply likely contributed to the enormous reduction in hemp acreage from 2020 to 2021.⁸⁶

A final major barrier to the success of the hemp industry is the difficulty hemp producers have encountered in securing credit from the financial industry.⁸⁷ That barrier, and two potential solutions proposed by the United States Congress—the SAFE Act and the STATES Act—are discussed in detail in the following section.⁸⁸

III. THE SAFE BANKING ACT AND THE STATES ACT WOULD ALLOW UNITED STATES FINANCIAL INSTITUTIONS TO SERVE THE HEMP INDUSTRY WITHOUT FEAR OF CRIMINAL LIABILITY

The hemp industry’s attempts to secure financing from the United States financial industry is long and convoluted. Following the enactment of the 2014 Farm Bill, the United

⁸³ Seth Boone, VP of Bus. Dev., PanXchange, Univ. of Tenn. Extension’s 2021 Tennessee Hemp Market Outlook Webinar (May 6, 2021).

⁸⁴ *Industrial Hemp Market to Hit Highest Takings of US\$ 3259.5 Million by 2028, says proficient market insights*, GLOBE NEWSWIRE (July 27, 2022, 7:19 PM), <https://www.globenewswire.com/en/news-release/2022/07/27/2486734/0/en/Industrial-Hemp-Market-to-Hit-Highest-Takings-of-US-3259-5-Million-by-2028-says-proficient-market-insights.html> [<https://perma.cc/CSV3-EZPV>].

⁸⁵ See Boone, *supra* note 83.

⁸⁶ *U.S. Hemp Crop Report*, VOTE HEMP, <https://www.votehemp.com/u-s-hemp-crop-report> [<https://perma.cc/Y3TK-H58F>] (last viewed Mar. 29, 2023); *2021 U.S. Hemp Production Update*, HEMP BENCHMARKS (July 7, 2021), <https://www.hempbenchmarks.com/hemp-market-insider/2021-us-hemp-production-update/> [<https://perma.cc/4XGL-F9UN>].

⁸⁷ Laura Drotleff, *Banking, financing remain serious struggle for hemp, CBD businesses*, HEMP INDUS. DAILY (Jun. 28, 2019), <https://hempindustrydaily.com/banking-financing-remain-serious-struggle-for-hemp-cbd-businesses/> [<https://perma.cc/DXY2-9WLM>].

⁸⁸ *Id.*

States Treasury's Financial Crimes Enforcement Network ("FinCEN") required banks to report any marijuana-related transactions as "suspicious activity."⁸⁹ Because of this requirement, banks were not eager to do business with *Cannabis* producers of any type.⁹⁰

The 2018 Farm Bill allowed banks to differentiate between marijuana-related and hemp-related businesses.⁹¹ Many banks considered the process for vetting hemp businesses as set out in the 2018 Farm Bill to be unreasonably burdensome and simply chose not to lend to any *Cannabis*-related businesses – whether those businesses involved hemp or marijuana.⁹²

In addition, federal money laundering statutes defined "any transaction involving the proceeds of the manufacture, distribution or sale of cannabis [sic] to be illegal, even if the transaction would be permitted under state law," with violations of those statutes penalized by fines, imprisonment, or both.⁹³ Federal law also allowed federal officials to seize *Cannabis*-related assets, such that financial institutions lending to the hemp industry faced not only the risk of financial loss, but also the "reputational risk" associated with such seizures and forfeitures.⁹⁴

Finally, because *Cannabis* remained illegal under the CSA, the United States Bank Secrecy Act ("BSA") required United States financial institutions to file Suspicious Activity Reports ("SARs") for all *Cannabis*-related transactions—regardless of whether those transactions related to hemp or marijuana.⁹⁵ Financial institutions who failed to file the appropriate SARs could be criminally liable under the BSA.⁹⁶

The reluctance of United States financial services companies to lend to the hemp industry is thus well-founded. For a financial services company to be certain it is lending to a legitimate hemp-related business rather than an illegal marijuana-related business, it would first have to be aware of all of the current laws and regulations relating to *Cannabis* on both the federal and state levels.⁹⁷ As discussed above, those

⁸⁹ Hill, *supra* note 44, at 1094.

⁹⁰ *Id.* at 1094.

⁹¹ Smith, *supra* note 27, at 1512; Agricultural Improvement Act of 2018, Pub. L. No. 115-334, §12619, 132 Stat. 5018 (codified as amended at 21 U.S.C. §802(16)).

⁹² Hill, *supra* note 44, at 1099.

⁹³ Katherine P. Franck, *Cannabis Reform: High on the Banking Agenda*, 24 N.C. BANKING INST. 163, p. 167 (2020).

⁹⁴ *Id.* (citing 18 U.S.C. §§ 981–982, 1956-1957).

⁹⁵ *Id.* at 68.

⁹⁶ *Id.*

⁹⁷ Hill, *supra* note 44, at 1089–90.

laws change frequently, and it is difficult to keep up with the ever-shifting regulatory environment. Additionally, financial service companies would have to periodically assess their borrowers operating in the hemp industry to make sure they were consistently adhering to the applicable laws.⁹⁸ Further, many *Cannabis*-related businesses are cash-intensive and are therefore subject to higher risks of theft and violent crimes.⁹⁹ Without help from banks, hemp farmers have limited options with regard to their cash on hand, so those farms become targets for burglary and violent crimes as well.¹⁰⁰ For example, four men attempted to rob a Colorado hemp farm because they thought it was farming marijuana and thus that the farmer most likely had large amounts of cash.¹⁰¹

Finally, due to the relatively recent legitimization of the hemp industry, little research has been conducted regarding the industry and its prospects for success going forward.¹⁰² *Cannabis* was illegal for years, so there is—for example—scarce agronomic data about best practices for new growers.¹⁰³ As a result, hemp farmers attempt many different approaches which often fail.¹⁰⁴ In sum, because the economics and profitability of the hemp industry are not very well known, financial institutions are reluctant to lend it money.¹⁰⁵

For all of the above reasons, even after the enactment of the 2018 Farm Bill, only around 2 percent of United States financial institutions provided financial services to hemp producers.¹⁰⁶ Due to the limited availability of traditional financing to the hemp industry, it was forced to utilize alternative financing methods such as operating on an all-cash basis, borrowing from private credit firms, using equity

⁹⁸ *Id.* at 1091.

⁹⁹ James Black & Marc-Alain Galeazzi, *Cannabis Banking: Proceed with Caution*, AM. BAR ASS'N, BUS. LAW TODAY (Feb. 6, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/02/cannabis-banking [<https://perma.cc/587C-HX2R>].

¹⁰⁰ *Id.*

¹⁰¹ Liz Henderson, *El Paso County hemp grower reports gunbattle with invaders who might have mistaken plants for marijuana*, THE GAZETTE, https://gazette.com/news/el-paso-county-hemp-grower-reports-gunbattle-with-invaders-who-might-have-mistaken-plants-for/article_f2f4083e-8bff-11ea-8f8d-83c959f9e23d.html [<https://perma.cc/YYX3-82RA>] (last updated July 1, 2020).

¹⁰² See David W. Olson et al., *Hope for Hemp: New Opportunities and Challenges for an Old Crop*, U.S. DEP'T OF AGRIC., AMBER WAVES MAG. (June 9, 2020), <https://www.ers.usda.gov/amber-waves/2020/june/hope-for-hemp-new-opportunities-and-challenges-for-an-old-crop/> [<https://perma.cc/6HNA-76EF>].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Olson, *supra* note 102.

¹⁰⁶ Hill, *supra* note 44, at 1087.

financing, and crowdfunding, all of which are less desirable than traditional financing for various reasons.¹⁰⁷

Fortunately, certain members of the United States Congress are aware of the problems that the lack of traditional financing poses for the hemp industry and have introduced two acts—the SAFE Act and the STATES Act—to attempt to address this concern.¹⁰⁸

A. *The SAFE Act: Expressly Absolving Financial Service Companies from Liability Related to Cannabis-Related Legitimate Businesses*

To address the dearth of traditional financing available to the hemp industry, in 2019, Representative Ed Perlmutter (D-CO) introduced the Secure and Fair Enforcement Act (the “SAFE Act”).¹⁰⁹ The goal of the SAFE Act was to provide *Cannabis*-related legitimate businesses with access to traditional financial services so that they could move away from all-cash operations and other alternative financing arrangements.¹¹⁰ Under the SAFE Act, federal regulators would be prohibited from interfering with the deposit insurance of a financial institution serving a legitimate *Cannabis*-related business, hemp-related business, or service provider.¹¹¹ The act would also prohibit federal regulators from punishing banks for or discouraging banks from serving *Cannabis*-related businesses, and would forbid regulators from taking corrective actions on loans to those businesses or their service providers.¹¹² Finally, Section 3 of the SAFE Banking Act would amend federal money laundering statutes such that “proceeds derived from transactions involving a cannabis-related (sic) legitimate business will not constitute proceeds from an unlawful activity just because a cannabis-related (sic) business or service provider conducted the transaction.”¹¹³

The United States House of Representatives passed the SAFE Banking Act, H.R. 1595, on September 25, 2019, on a 321-103 vote.¹¹⁴ Senate Bill 1200, introduced by Oregon

¹⁰⁷ Franck, *supra* note 93, at 174.

¹⁰⁸ SAFE Banking Act of 2021, H.R. 1996, 117th Cong. (2021); STATES Act, H.R. 2093, 116th Congress (2019).

¹⁰⁹ Franck, *supra* note 93 at 178.

¹¹⁰ Franck, *supra* note 93 at 179.

¹¹¹ *See id.* § 2(a)(1).

¹¹² *See id.* §§ 2(a)(2), (4).

¹¹³ Franck, *supra* note 94, at 179.

¹¹⁴ *Id.*

Senator Jeff Merkley on April 19, 2019, died in committee.¹¹⁵ In March 2021, Representative Perlmutter reintroduced the SAFE Banking Act as H.R. 1996, and on April 19, 2021, the bill again passed in the House on a 321-101 vote.¹¹⁶ On March 23, 2021, Senator Merkley reintroduced the Senate version of the SAFE Act as S. 910.¹¹⁷

B. The STATES Act: Subjugating Federal Cannabis Law to State Law

On June 7, 2018, Senator Elizabeth Warren introduced S. 3032, the Strengthening the Tenth Amendment Through Entrusting States Act (the “STATES Act”), with a companion House bill, H.R. 6043, introduced that same day by representative David Joyce.¹¹⁸ Despite bipartisan support, neither bill passed, and the STATES Act was reintroduced on April 4, 2019 in both the Senate, as S. 1028, and the House, as H.R. 2093.¹¹⁹

Broader than the SAFE Act, the STATES Act would amend the CSA so that federal laws regarding marijuana would not apply to anyone acting “in compliance with State law relating to the manufacture, production, possession, distribution, dispensation, administration, or delivery of marihuana.”¹²⁰ Conduct complying with state marijuana laws would be legal and could no longer be the basis for criminal or civil forfeiture of property.¹²¹ In addition, the proceeds of marijuana-related transactions that are legal under state law would not be unlawful under federal money laundering statutes.¹²² The bottom line is that, under the STATES Act, “marijuana would remain illegal under federal law in states that have not legalized it . . . , but it would become legal under federal law in states that have legalized it.”¹²³

¹¹⁵ Lynne Terry, *Merkley, Blumenauer Optimistic About Prospects of Cannabis Banking Act*, JEFF MERKLEY UNITED STATES SENATOR FOR OR. (May 10, 2023), <https://www.merkley.senate.gov/news/in-the-news/merkley-blumenauer-optimistic-about-prospects-of-cannabis-banking-act> [<https://perma.cc/PS6Z-2V32>].

¹¹⁶ H.R. 1996, 117th Cong (2021).

¹¹⁷ S. 910, 117th Cong (2021).

¹¹⁸ Strengthening the Tenth Amendment Through Entrusting States Act, S. 3032, 115th Cong., 2d Sess. (2018); H.R. 6043, 115th Cong., 2d Sess. (2018).

¹¹⁹ S. 1028, 116th Cong. (2019), H.R. 2093, 116th Cong. (2019), S. 3032, H.R. 6043.

¹²⁰ S. 1028, *supra* note 119, at § 2.

¹²¹ Hill, *supra* note 44, at 1063.

¹²² *Id.*

¹²³ *Id.*

While the STATES Act does not expressly reference financial services, its sponsors have stated that the bill “[a]ddresses financial issues caused by federal prohibition by clearly stating that compliant transactions are not trafficking and do not result in proceeds of an unlawful transaction.”¹²⁴

IV. CONCLUSION

Whether it be accomplished via the SAFE Act and its specific modifications of federal law related to the provision of financial services to the hemp industry, or via the STATES Act and its broader subjugation of federal marijuana law to the various state laws, allowing United States financial institutions to provide financing to legitimate businesses within the hemp industry without the fear of criminal liability would be an important step in allowing the hemp industry to grow and thrive.¹²⁵

As between the two acts, the authors prefer the approach of the STATES Act to that of the SAFE Act because the STATES Act would allow individual states, rather than the federal government, to decide how those states wished to regulate *Cannabis*.¹²⁶ The enactment of the STATES Act would also reduce the uncertainty to the hemp industry caused by the inconsistencies between federal and state law, as hemp farmers complying with the applicable state law would automatically be in compliance with federal law.¹²⁷ Finally, the approach taken by the STATES Act would continue the trend toward state determination of hemp-related issues that began with the 2014 and 2018 Farm Bills.¹²⁸

As long as marijuana remains illegal at the federal level, the hemp industry will continue to suffer due to hemp's innate similarity to marijuana. Absent the legalization of marijuana at the federal level, however, either the SAFE Act or the STATES Act would remove one of the largest barriers to the success of the hemp industry, and it seems increasingly likely that one of both of those acts will be passed in the relatively near future.¹²⁹ Hopefully, the passage of either act will help foster a regulatory environment stable enough for the hemp

¹²⁴ *Id.* at 1063-64.

¹²⁵ SAFE Banking Act of 2021, H.R. 1996, 117th Cong. (2021); STATES Act, H.R. 2093, 116th Congress (2019).

¹²⁶ *Id.*

¹²⁷ STATES Act, H.R. 2093, 116th Congress (2019).

¹²⁸ *Id.*

¹²⁹ SAFE Banking Act of 2021, H.R. 1996, 117th Cong. (2021); STATES Act, H.R. 2093, 116th Congress (2019).

industry to resume the growth it experienced between 2014 and 2020.¹³⁰

¹³⁰ Agric. Improvement Act of 2018, Pub. L. No. 115-334.