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## CANNABIS BANKING: WHAT MARIJUANA CAN LEARN FROM HEMP<sup>†</sup>

JULIE ANDERSEN HILL\*

### ABSTRACT

*Marijuana-related businesses have banking problems. Many banks explain that, because marijuana is illegal under federal law, they will not serve the industry. Even when marijuana-related businesses can open bank accounts, they still have trouble accepting credit cards and getting loans. Some hope to fix marijuana's banking problems with changes to federal law. Proposals range from broad reforms removing marijuana from the list of controlled substances to narrower legislation prohibiting banking regulators from punishing banks that serve the marijuana industry. But would these proposals solve marijuana's banking problems?*

*In 2018, Congress legalized another variant of the Cannabis plant species: hemp. Prior to legalization, hemp-related businesses, like marijuana-related businesses, struggled with banking. Some hoped legalization would solve hemp's banking problems. It did not. By analyzing the hemp banking experience, this Article provides three insights. First, legalization does not necessarily lead to inexpensive, widespread banking services. Second, regulatory uncertainty hampers access to banking services. When banks were unsure what state and federal law required of hemp businesses and were unclear about bank regulators' compliance expectations for hemp-related accounts, they were less likely to serve the hemp industry. Regulatory structures that allow banks to easily identify who can operate cannabis businesses and verify whether the business is compliant with the law are more conducive to banking. Finally, even with clear law and favorable regulatory structures, the emerging cannabis industry will still present credit, market, and other risks that make some banks hesitant to lend.*

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\* Alton C. and Cecile Cunningham Craig Professor of Law, University of Alabama School of Law. I am grateful to Sam Kamin, Benjamin Leff, Lauren Newell, and David Webber for their helpful engagement with the ideas in this Article at *Boston University Law Review's* Symposium, "Marijuana Law 2020: Lessons from the Past, Ideas for the Future." I also appreciate comments provided by Michael Hill and Ron Krotoszynski.

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## INTRODUCTION

Ever since Colorado legalized recreational marijuana in 2014,<sup>1</sup> marijuana-related businesses have complained about problems accessing banking services.<sup>2</sup> Many banks explain that because marijuana is still a controlled substance under federal law, they will not serve the marijuana industry.<sup>3</sup> Some banks and credit unions have tepidly started serving the industry, but marijuana-related businesses typically pay thousands of dollars a month for a basic deposit account.<sup>4</sup> They also still have difficulty accepting credit and debit cards and getting loans.<sup>5</sup>

Advocates of marijuana banking hope to expand banking access with changes to federal law. Proposals range from broad reforms removing marijuana from the list of controlled substances to narrower legislation prohibiting banking regulators from punishing banks that serve the marijuana industry.<sup>6</sup> While these proposals, if adopted, may increase access to banking, this Article explains that they will not necessarily make banking easy or inexpensive for the marijuana industry.

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<sup>1</sup> See COLO. CONST. art. XVIII, § 16.

<sup>2</sup> See Julie Andersen Hill, *Banks, Marijuana & Federalism*, 65 CASE W. RESV. L. REV. 597, 600 (2015).

<sup>3</sup> See David Pierson, *Cash Crop: Shunned by Banks, Legitimate Pot Sellers Must Deal in Currency, Posing Safety and Logistical Problems*, L.A. TIMES, Nov. 28, 2014, at A1 (“Representatives for Wells Fargo, Bank of America and JPMorgan Chase said they adhere to federal laws when choosing customers.”).

<sup>4</sup> See *infra* Section I.B.

<sup>5</sup> See *infra* Section I.D.

<sup>6</sup> See *infra* Part II.

In 2018, Congress legalized another member of the *Cannabis*<sup>7</sup> plant family: hemp.<sup>8</sup> Prior to legalization, hemp-related businesses, like marijuana-related businesses, struggled with banking.<sup>9</sup> Some thought that, because federal law

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<sup>7</sup> The term “cannabis” is typically used to refer to the plant species *Cannabis sativa* L. RENÉE JOHNSON, CONG. RSCH. SERV., RL32725, HEMP AS AN AGRICULTURAL COMMODITY 1-2 (2018). “Marijuana” refers to variants of cannabis grown primarily for their high levels of tetrahydrocannabinol (“THC”)—an intoxicating drug. *Id.* And “hemp” refers to variants of cannabis primarily grown for fiber, seeds, or compounds other than THC. *Id.*; see also Caren Lissner, *As Marijuana Goes Mainstream, Reporters Wrestle with Terminology*, COLUM. JOURNALISM REV. (Sept. 26, 2018), [https://www.cjr.org/united\\_states\\_project/marijuana-terminology-pot-cannabis.php](https://www.cjr.org/united_states_project/marijuana-terminology-pot-cannabis.php) [<https://perma.cc/N24Z-QMXS>]. Federal law has now adopted this marijuana/hemp distinction. See 7 U.S.C. § 1639o(1) (defining hemp as “the plant *Cannabis sativa* L. and any part of that plant . . . with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis”); 21 U.S.C. § 812(c) Schedule I (designating “[m]arihuana” and nonhemp “[t]etrahydrocannabinol” as restricted Schedule I drugs).

Some, however, view the term “marijuana” as “an emotional, pejorative term that has played a key role in creating the negative stigma that still tragically clings to this holistic, herbal medicine.” Lissner, *supra* (quoting *Why We Don’t Say Marijuana*, HARBORSIDE (Apr. 3, 2018), <https://shopharborside.com/its-clone-season/> [<https://perma.cc/DVH6-2F92>]); see also Alex Halperin, *Marijuana: Is It Time to Stop Using a Word with Racist Roots?*, GUARDIAN (Jan. 29, 2018, 5:00 AM), <https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism> [<https://perma.cc/4Q8U-YVY2>] (“[S]ome say ‘marijuana’ is a racist word that should fall out of use.”). As a result, some states have passed legislation shifting from the term “marijuana” to “cannabis.” See, e.g., Act of June 12, 2019, ch. 595, 2019 Nev. Stat. 3767.

I do not wish to cause offense. Nevertheless, because federal law and much of the academic and popular literature still use the terms “marijuana” and “hemp,” I would lose some precision if I substituted the term “cannabis” for “marijuana.” See Angela Chen, Opinion, *Why It Can Be Okay to Call It ‘Marijuana’ Instead of ‘Cannabis,’* VERGE (Apr. 19, 2018, 2:54 PM), <https://www.theverge.com/2018/4/19/17253446/marijuana-cannabis-drugs-racist-language-history> [<https://perma.cc/D9JK-V4Z6>]. That precision is important for this Article comparing the experiences of hemp-related businesses with those of marijuana-related businesses. I take some comfort from a recent study finding that using the term “marijuana” instead of “hemp” does not negatively impact people’s perceptions of the drug today. Robert A. Mikos & Cindy D. Kam, *Has the “M” Word Been Framed? Marijuana, Cannabis, and Public Opinion*, PLOS ONE (Oct. 31, 2019), <https://doi.org/10.1371/journal.pone.0224289> [<https://perma.cc/5TGY-CV9F>]. Consistent with most legal academic work, I use the spelling “marijuana” rather than the “marihuana” spelling in federal statutes.

<sup>8</sup> Agriculture Improvement Act of 2018 (“2018 Farm Bill”), Pub. L. No. 115-334, §§ 10113, 12619, 132 Stat. 4490, 4908, 5018 (codified at 7 U.S.C. §§ 1639o-1639s and 21 U.S.C. § 802).

<sup>9</sup> See, e.g., Richard Stradling, *North Carolina’s Newest Cash Crop Is Illegal for Most Farmers to Grow*, NEWS & OBSERVER (Dec. 20, 2018, 10:37 AM), <https://www.newsobserver.com/news/local/article213445289.html> (“Because hemp is still officially classified as an illegal drug by the federal government, banks won’t loan farmers money to buy hemp seed or seedlings . . .”); *Hemp in California: Could Marijuana’s Mellow Cousin Be the Next Environmental and Economic Boon?*, CANNIFORNIAN (Sept. 27, 2017), <http://www.thecannifornian.com/special-sections/hemp-california-marijuanas-mellow-cousin-next-environmental-economic-boon/> [<https://perma.cc/NX88-YAXU>] (“The U.S.

created a path to legal cultivation and processing of hemp, it would also pave the way for access to banking services.<sup>10</sup>

So far though, hemp's banking problems persist. Consider the experience of strawberry farmers Ben and Taryn Marcus in Whitefield, Maine. Hoping to supplement the income from their strawberry crop, they received a license to grow hemp on three acres of their farm.<sup>11</sup> After their farm received nationwide press as "Maine's first pick-your-own hemp operation," the Marcuses' longtime bank notified them that because they were farming hemp, the bank was closing their accounts and calling a loan.<sup>12</sup> "We tiptoed out of the dark woods of prohibition, guided by our elected officials, and wham, we got run over by everyone's other favorite institutions – banks . . .," Taryn Marcus said. "We

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government has long classified hemp the same as marijuana, meaning it faces similar restrictions on access to banking services, international trade and raising capital." (citation omitted)).

<sup>10</sup> See, e.g., Kristen Nichols, *A New Day*, MARIJUANA BUS. MAG., Mar. 2019, at 44, 48 (quoting hemp industry participants who were optimistic that the 2018 Farm Bill would improve their opportunities for banking, including hemp farmers who "did a happy dance because . . . [they] thought that now it was going to open up the banking and the credit card systems"); JAMES W. WRIGHT JR., WHITT STEINEKER & RILEY MCDANIEL, 2018 FARM BILL OPENS \$20 BILLION HEMP INDUSTRY TO BANKS 2 (2019), [https://www.bradley.com/-/media/files/insights/publications/2019/03/westlaw-journal2018-farm-bill-opens-\\$20-billion-hemp-industry.pdf](https://www.bradley.com/-/media/files/insights/publications/2019/03/westlaw-journal2018-farm-bill-opens-$20-billion-hemp-industry.pdf) [<https://perma.cc/Y7HN-QYB8>] ("While the [2018] farm bill does not directly address banking with the hemp industry, it nonetheless opens the door for financial institutions to transact with these businesses because it legalizes hemp's cultivation, manufacture, distribution and sale. The bill removes . . . barriers that previously prevented financial institutions from transacting with cannabis-related businesses."); Jeff Manning, *Oregon Hemp Industry Poised for Big Growth After Feds Sign Off*, OREGONIAN: OREGONLIVE (Dec. 18, 2018), <https://www.oregonlive.com/politics/2018/12/oregon-hemp-industry-poised-for-big-growth-after-feds-sign-off.html> [<https://perma.cc/E7JU-D6ZL>] ("Legalization will end the underground characteristics of the business. Hemp farmers will be able to . . . apply for loans . . . like any other farmer. Mainstream banks will make financing available. Credit card processors will get involved . . ."); Andrew Wagaman, *Congress Has Legalized Hemp. Here's What the Future Might Hold in U.S., Pennsylvania*, MORNING CALL (Dec. 15, 2018, 8:00 AM), <https://www.mcall.com/business/mc-biz-hemp-legalization-implications-farm-bill-20181214-story.html> [<https://perma.cc/W96E-N8DV>] ("[S]imply removing hemp from the Controlled Substances Act evaporates the chilling specter of the Drug Enforcement Administration that kept banks . . . from getting involved in the industry. Now farmers growing hemp can . . . apply for federal low-interest farm loans, and hemp-related businesses will have much more access to capital . . .").

<sup>11</sup> Penelope Overton, *New Federal Hemp Program Expected to Help Growing Maine Industry*, PORTLAND PRESS HERALD (Oct. 30, 2019), <https://www.pressherald.com/2019/10/29/usda-rolls-out-plans-for-federal-hemp-program/> [<https://perma.cc/5686-YM4F>].

<sup>12</sup> Penelope Overton, *Hopes for Hemp Farm in Whitefield Wilt as Bank and Insurer Cut Farmers Loose*, PORTLAND PRESS HERALD (Oct. 23, 2019) (citation omitted), <https://www.pressherald.com/2019/10/22/whitefield-hemp-farmers-dropped-by-insurer-bank/> [<https://perma.cc/6EKR-L5KW>].

were completely blindsided . . . what's the point of legalizing hemp if we can't actually farm it?"<sup>13</sup>

The Marcus family is not alone. News sources catalog similar anecdotal reports from other hemp-related businesses.<sup>14</sup> Moreover, a December 2019 survey of eighty-five banking executives in Wisconsin found that only 38% of the banks were accepting deposits from hemp-related businesses, and only 15% were lending to hemp-related businesses.<sup>15</sup>

This Article examines why hemp-related businesses continue to experience banking problems. Analyzing the hemp banking experience provides three insights for those who hope to expand availability of banking services to the marijuana industry. First, legalization does not necessarily lead to widespread banking. Second, regulatory uncertainty hampers access to banking services. Regulatory structures that allow banks to easily identify who can operate cannabis businesses and whether businesses are compliant with the law are more conducive to cannabis banking. Finally, even with clear law and favorable regulatory structures, the emerging cannabis industry will still present credit, market, and other risks that make banks hesitant to lend to them.

The Article proceeds in four parts. Part I outlines the marijuana industry's banking problems. Part II describes proposed legislation aimed at expanding marijuana banking. Part III discusses the hemp banking experience. Finally, Part IV draws on the hemp industry's experience to show why the path to robust banking for marijuana is long.

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<sup>13</sup> *Id.* (third alteration in original).

<sup>14</sup> See, e.g., Kevin Barry, 'Oh, It's Been a Nightmare' - Hemp Farmers Face Problems with Banks as Ohio's Rules Take Effect, NEWS 5 CLEVELAND (Jan. 29, 2020, 6:09 PM), <https://www.news5cleveland.com/news/state/oh-its-been-a-nightmare-hemp-farmers-face-problems-with-banks-as-ohios-rules-take-effect> (describing how a man developing hemp fertilizer had personal bank accounts closed); Stephen Hamway, *Managing CBD Mania*, ALBUQUERQUE J. (Jan. 27, 2020, 12:02 AM), <https://www.abqjournal.com/1413619/managing-cbd-mania.html> ("Despite the legalization of hemp, [the owners of two stores selling CBD products] agreed finding banks willing to work with CBD shops remains problematic. Both had stories of banks dropping their accounts without warning, and [one] said her company was without a bank or credit union for nearly a month in 2019."); Evan Stern, Opinion, *Keeping the Hemp Farm Afloat: An Asheville Agribusinessman's Survival Checklist*, CITIZEN TIMES (Jan. 26, 2020, 7:00 AM), <https://www.citizen-times.com/story/opinion/2020/01/26/keeping-hemp-farm-afloat-asheville-agribusinessmans-survival-guide/4550146002/> [<https://perma.cc/X8HE-9C8A>] (describing how banks in Asheville, North Carolina closed accounts of businesses that grew and sold hemp).

<sup>15</sup> Press Release, Eric Skrum, Wisconsin Bankers Ass'n, Wisconsin Banking Hemp Likely to Expand in 2020 (Dec. 30, 2019) [hereinafter Press Release, Wisconsin Bankers Ass'n], <https://www.wisbank.com/press-releases/2019/12/wisconsin-banking-hemp-likely-to-expand-in-2020/> [<https://perma.cc/75LJ-56W4>].

## I. MARIJUANA'S BANKING PROBLEMS

In the early days of state legalization, getting and keeping a bank account was the most pressing problem for marijuana-related businesses.<sup>16</sup> As the regulatory structures surrounding the industry and marijuana businesses themselves have matured, account access problems have receded. But marijuana-related businesses still face banking barriers. Because banks have significant due diligence and reporting requirements for marijuana-related transactions, bank accounts for marijuana-related businesses are expensive. This Part describes these banking problems in more detail.

## A. Account Access

Banks' initial avoidance of the marijuana industry was motivated by several factors. First, marijuana was (and is) illegal under federal law,<sup>17</sup> and handling money from an illegal source is money laundering.<sup>18</sup> Many of the largest banks stated that they would not service the industry for this reason alone.<sup>19</sup> Second, banks were concerned about the regulatory implications of serving the marijuana industry.<sup>20</sup> Banks are regulated and supervised by federal regulators—the Federal Deposit Insurance Corporation (“FDIC”), the Office of the Comptroller of the Currency (“OCC”), the Board of Governors of the Federal Reserve System, and the National Credit Union Administration (“NCUA”).<sup>21</sup> Banks that

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<sup>16</sup> See, e.g., Eric Gorski, *Herb Empire: A Series About the Recreational Marijuana Industry—Holding the Bags*, DENVER POST, June 15, 2014, at 1A; Serge F. Kovaleski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES, Jan. 12, 2014, at A1; Alex Altman, *Pot's Money Problem*, TIME, Jan. 27, 2014, at 32.

<sup>17</sup> 18 U.S.C. §§ 802(6), 812, 841(a) (prohibiting manufacturing, distributing, or dispensing marijuana).

<sup>18</sup> *Id.* §§ 1956-1957.

<sup>19</sup> Pierson, *supra* note 3, at A1.

<sup>20</sup> *Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses: Hearing Before the Subcomm. on Consumer Prot. & Fin. Insts. of the H. Comm. on Fin. Servs.*, 116th Cong. 15-16 (2019) [hereinafter *Challenges and Solutions Hearing*] (statement of Gregory S. Deckard, President, CEO, and Chairman, State Bank Northwest) (“While this issue is complex, we have determined that the legal, compliance, and regulatory risks are simply too great for my bank. We owe it to our community to ensure that our bank remains solid and stable and that we remain in good standing with our Federal regulators.”).

<sup>21</sup> The FDIC supervises banks with federal deposit insurance, the OCC supervises nationally chartered banks, the Federal Reserve supervises bank holding companies and banks that are members of the Federal Reserve, and the NCUA supervises credit unions. See generally MARC LABONTE, CONG. RSCH. SERV., R44918, WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK (2020), <https://fas.org/sgp/crs/misc/R44918.pdf> [<https://perma.cc/B9CE-VKRM>]. Only state-chartered credit unions without federal share insurance (about 2% of all credit unions) escape federal supervision. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-259, PRIVATE DEPOSIT INSURANCE: CREDIT UNIONS LARGELY COMPLIED WITH DISCLOSURE RULES, BUT RULES SHOULD BE CLARIFIED 4-5 (2017), <https://www.gao.gov/assets/gao-17-259.pdf> [<https://perma.cc/XN5G-BF53>].

served cannabis-related businesses risked regulatory enforcement actions, revocation of deposit insurance,<sup>22</sup> and restrictions on their access to payment systems operated by the Federal Reserve.<sup>23</sup> Third, banks were unsure what to make of the fledgling industry and its participants. Would these new businesses be profitable? Or would they be plagued by products liability claims, crop losses, insufficient customer demand, or other problems?<sup>24</sup> Fourth, some banks viewed marijuana banking as posing too great a reputation risk.<sup>25</sup>

Much has changed in the state-legal marijuana industry since 2014. By the end of 2020, fifteen states and the District of Columbia had legalized recreational marijuana.<sup>26</sup> Thirty-five states had legalized marijuana for medicinal use.<sup>27</sup> In 2020, there were 17,927 licensed marijuana entities or associated entities, “an increase of 367 percent in less than four years.”<sup>28</sup> The industry is worth billions of dollars.<sup>29</sup> It has thrived through both Democrat and Republican presidencies.

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<sup>22</sup> 12 U.S.C. § 1818(a)(2)(iii), (b)(1).

<sup>23</sup> The Federal Reserve provides four payment services to banks: (1) a centralized check collection system, (2) the Automate Clearinghouse (“ACH”) network for processing batched electronic small-dollar payments, (3) the Fedwire system for larger electronic payments, and (4) coin and currency services. *Policies: The Federal Reserve in the Payments System*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., [https://www.federalreserve.gov/paymentsystems/pfs\\_frpsys.htm](https://www.federalreserve.gov/paymentsystems/pfs_frpsys.htm) [<https://perma.cc/U2UW-RY9F>] (last updated Aug. 11, 2020). Access to these systems is typically given to all chartered banks. Matt Richtel, *The First Bank of Bud*, N.Y. TIMES, Feb. 8, 2015, at BU1. However, one regional Federal Reserve Bank denied these services to a proposed new credit union that intended to process marijuana payments. *See generally* Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, 861 F.3d 1052 (10th Cir. 2017) (per curiam).

<sup>24</sup> Cf. Matt Engle, *Risk Management Considerations in the Cannabis Industry*, RISK MGMT. (July 21, 2020), <http://www.rmmagazine.com/2020/07/21/risk-management-considerations-in-the-cannabis-industry/> [<https://perma.cc/REC3-AV4M>].

<sup>25</sup> *Challenges and Solutions Hearing*, *supra* note 20, at 15, 26 (statement of Gregory S. Deckard, President, CEO, and Chairman, State Bank Northwest); Karen A. Parker, Attilio Di Mattia, Fatima Shaik, Juan Carlos Cerón Ortega & Robert Whittle, *Risk Management Within the Cannabis Industry: Building a Framework for the Cannabis Industry*, 28 FIN. MKTS. INSTS. & INSTRUMENTS 3, 32 (2019); *see also* Julie Andersen Hill, *Regulating Bank Reputation Risk*, 54 GA. L. REV. 523, 535 (2020) (explaining that reputation risk is the risk that bank stakeholders will negatively adjust their perceptions of a bank in response to the bank’s actions or inactions).

<sup>26</sup> *See* Robin Abcarian, Opinion, *Pot, the Perfect Issue to Unite a Divided Nation*, L.A. TIMES, Dec. 9, 2020, at A13 (reporting that in 2020 ballot measures in “Arizona, Montana, New Jersey and South Dakota approved marijuana for recreational use”).

<sup>27</sup> *Id.* (reporting that, in 2020, ballot measures in Mississippi and South Dakota approved marijuana for medical use, bringing the total number of medical-use states to thirty-five).

<sup>28</sup> The Dow Jones Risk & Compliance Rsch. Team, Tom Firestone & The FIBA Legal & Regul. Aff. Comm., *Assessing Legal Risk When Financing the Cannabis Industry*, DOW JONES RISK & COMPLIANCE (2020), <https://visit.dowjones.com/risk/content/banking-with-mrbs/> [<https://perma.cc/SVS2-HWYA>] (emphasis omitted).

<sup>29</sup> *See* Adrian Snead & Logan Hill, *Accounts That Go Up in Smoke: To Bank or Not to Bank, the Marijuana Industry*, ABA (Jan. 30, 2020), <https://www.americanbar.org/groups>



Bank regulators have allowed banks with robust compliance policies and practices to serve the marijuana industry. In 2014, the Financial Crimes Enforcement Network (“FinCEN”)—the federal agency tasked with combatting money laundering—issued guidance explaining how banks should prepare and file suspicious activity reports<sup>30</sup> for transactions with marijuana-related businesses.<sup>31</sup> Under the guidance, banks must prepare suspicious activity reports for most marijuana-related transactions. Run-of-the-mill marijuana-related transactions warrant only “Marijuana Limited” suspicious activity reports.<sup>32</sup> These reports identify the parties involved, state that “the filing institution is filing the [report] solely because the subject is engaged in a marijuana-related business,” and represent that “no additional suspicious activity has been identified.”<sup>33</sup> For a customer whose marijuana activity continues, a financial institution must regularly refile and update “Marijuana Limited” suspicious activity reports.<sup>34</sup> However, FinCEN expects banks to conduct due diligence to determine whether the marijuana-related transactions implicate any federal enforcement priorities<sup>35</sup> or state law. If a bank discovers transactions that might

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/business\_law/publications/committee\_newsletters/banking/2020/202001/fa\_3/ [https://perma.cc/LB24-KHBY] (“At the end of 2019, the U.S. cannabis industry was worth an estimated \$12 billion and is projected to nearly triple by 2025, reaching \$30 billion.”).

<sup>30</sup> Banks must file suspicious activity report for transactions involving “at least \$5,000 in funds or other assets, [if] the bank knows, suspects, or has reason to suspect that . . . [t]he transaction involves funds derived from illegal activities.” 31 C.F.R. § 1020.320(a)(2) (2020).

<sup>31</sup> FINCEN, DEP’T OF THE TREAS., FIN-2014-G001, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES 1 (Feb. 14, 2014) [hereinafter FINCEN MARIJUANA GUIDANCE], <https://www.fincen.gov/sites/default/files/guidance/FIN-2014-G001.pdf> [https://perma.cc/F9JX-EDSY].

<sup>32</sup> *Id.* at 3-4.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> FED. FIN. INST. EXAMINATION COUNCIL, BANK SECRECY ACT/ANTI-MONEY LAUNDERING EXAMINATION MANUAL 69 (2015) [hereinafter BSA EXAMINATION MANUAL], [https://bsaaml.ffiec.gov/docs/manual/06\\_AssessingComplianceWithBSARegulatoryRequirements/04.pdf](https://bsaaml.ffiec.gov/docs/manual/06_AssessingComplianceWithBSARegulatoryRequirements/04.pdf) [https://perma.cc/M382-T8YK] (“FinCEN’s guidelines have suggested that banks should report continuing suspicious activity by filing a report at least every 90 calendar days. Subsequent guidance permits banks with SAR requirements to file SARs for continuing activity after a 90 day review with the filing deadline being 120 calendar days after the date of the previously related SAR filing.”).

<sup>35</sup> When FinCEN issued its marijuana guidance, the Department of Justice (“DOJ”) had a published set of marijuana enforcement priorities that included, among other things “[p]reventing the distribution of marijuana to minors” and “[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states.” Memorandum from James M. Cole, Deputy Att’y Gen., DOJ, to All U.S. Att’ys, Guidance Regarding Marijuana Enforcement 1 (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [https://perma.cc/849R-PJXH]. In 2018, under a new Attorney General, the DOJ rescinded its earlier marijuana priorities. Memorandum from Jefferson B. Sessions, III, Att’y Gen., DOJ, to All U.S. Att’ys, Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [https://perma.cc/U49V-LXU6]. Nevertheless, FinCEN left its guidance in place and said banks should continue to focus on the earlier federal enforcement priorities when filing suspicious activity

violate those priorities or state law, the institution must file a “Marijuana Priority” suspicious activity report.<sup>36</sup> Finally, a financial institution must provide a “Marijuana Termination” suspicious activity report when the institution determines that it is “necessary to terminate a relationship with a marijuana-related business in order to maintain an effective anti-money laundering compliance program.”<sup>37</sup>

While federal bank supervisors have not publicly embraced marijuana banking, they seem content with banks that strictly follow the FinCEN guidance. FDIC Chairman Jelena McWilliams told Arizona bankers that because marijuana is illegal “on the federal level,” she could not “give . . . blanket immunity” from enforcement efforts for serving the industry.<sup>38</sup> However, she told bankers that if they do “appropriate due diligence based on state requirements, . . . file a suspicious activity report and follow [federal] guidance,” they would “be OK.”<sup>39</sup> There do not appear to be any instances where a bank has had its federal deposit insurance or its Federal Reserve account privileges revoked because of marijuana banking.

A recent enforcement action illustrates the NCUA’s tacit approval of banking marijuana-related customers. The enforcement action was issued to Live Life Federal Credit Union, a Michigan institution with about 150 marijuana-related accounts.<sup>40</sup> The credit union handled suspicious activity reporting manually and did not file some required reports.<sup>41</sup> Although the enforcement action prohibited the credit union from opening new marijuana-related accounts, it did not require the credit union to close existing marijuana-related accounts.<sup>42</sup> Rather, it required Live Life to adopt an automated compliance system that would reconcile point of sale data with customer deposits.<sup>43</sup> This enforcement action

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reports. See Letter from Drew Maloney, Assistant Sec’y for Legis. Affs., Dep’t of the Treasury, to Denny Heck, Rep., U.S. House of Reps. (Jan. 31, 2018), [https://web.archive.org/web/20200728133535/https://dennyheck.house.gov/sites/dennyheck.house.gov/files/documents/Treasury%20Response%201.31.18\\_Heck.pdf](https://web.archive.org/web/20200728133535/https://dennyheck.house.gov/sites/dennyheck.house.gov/files/documents/Treasury%20Response%201.31.18_Heck.pdf).

<sup>36</sup> FINCEN MARIJUANA GUIDANCE, *supra* note 31, at 4.

<sup>37</sup> *Id.*

<sup>38</sup> Angela Gonzales, *Q&A: FDIC Chairwoman Jelena McWilliams on the Future of Arizona’s Banking Industry*, PHOENIX BUS. J. (June 14, 2020, 10:00 AM), <https://www.bizjournals.com/phoenix/news/2020/06/14/jelena-mcwilliams-disusses-arizona-banking.html>.

<sup>39</sup> *Id.*

<sup>40</sup> Live Life Federal Credit Union, NCUA No. 21-0105-ER (Feb. 22, 2021), <https://www.ncua.gov/regulation-supervision/enforcement-actions/administrative-orders/2021/administrative-order-matter-live-life-federal-credit-union> [https://perma.cc/JV9K-92MD]; Kevin Wack & Aaron Passman, *First Penalty for Pot Banking Violations Lands on Credit Union*, AM. BANKER (Mar. 16, 2021, 4:20 PM), <https://www.americanbanker.com/news/first-penalty-for-pot-banking-violations-lands-on-credit-union>.

<sup>41</sup> Wack & Passman, *supra* note 40.

<sup>42</sup> Live Life Federal Credit Union, NCUA No. 21-0105-ER.

<sup>43</sup> *Id.*

shows that the NCUA allows institutions with appropriate compliance and reporting practices to serve marijuana-related customers.

The change in public attitude toward marijuana, the success of the industry, and the marijuana-specific regulatory guidance have softened some banks' attitudes toward marijuana banking. These days, marijuana-related businesses with robust internal controls can open bank accounts.<sup>44</sup> FinCEN reports that, according to suspicious activity report filings, 502 banks and 175 credit unions actively bank marijuana-related businesses.<sup>45</sup>

#### B. *Account Cost*

Nevertheless, marijuana-related businesses continue to experience banking struggles. First, although bank accounts are available, they are expensive. It is not uncommon for a marijuana-related business to pay thousands of dollars a month for the privilege of having a bank account.<sup>46</sup> Some businesses say these fees are prohibitively expensive.<sup>47</sup>

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<sup>44</sup> See *Landing a Bank Account*, MARIJUANA BUS. DAILY (July 1, 2019), <https://mjbizmagazine.com/landing-a-bank-account-for-your-marijuana-business/> [<https://perma.cc/2JN5-RZ9F>] (explaining that in order to secure a bank account, marijuana businesses “need to optimize their internal controls, financial recordkeeping and external reporting”); Tyler Beuerlein, *Dispelling Banking Myths in the Cannabis Industry*, FORBES (Jan. 7, 2020, 8:00 AM), <https://www.forbes.com/sites/forbesbusinessdevelopmentcouncil/2020/01/07/dispelling-banking-myths-in-the-cannabis-industry/?sh=1b62991225e2> [<https://perma.cc/UE8U-8MDF>] (“The overwhelming majority of [marijuana] licensees across the country . . . are banked.”).

<sup>45</sup> FINCEN, DEP'T OF THE TREASURY, MARIJUANA BANKING UPDATE 1 (Sept. 30, 2020), [https://www.fincen.gov/sites/default/files/shared/508\\_297562\\_MJ%20Banking%20Update%204th%20QTR%20FY2020\\_Public.pdf](https://www.fincen.gov/sites/default/files/shared/508_297562_MJ%20Banking%20Update%204th%20QTR%20FY2020_Public.pdf) [<https://perma.cc/6E5C-6YDM>].

<sup>46</sup> See Aaron Gregg, *Bank Eases Pot World's Cash-Only Handicap*, WASH. POST, Jan. 3, 2018, at B1 (reporting that one marijuana-related business “paid \$3,000 to open an account . . . and pays monthly fees of \$1,750”); James Rufus Koren, *Hard to Stash*, L.A. TIMES, July 9, 2017, at C1 (reporting that an unnamed California credit union charges marijuana growers \$5,000 per month and dispensaries \$7,500 per month for a bank account); Robb Mandelbaum, *High Finance*, N.Y. TIMES MAG., Jan. 7, 2018, at 46, 51 (reporting that Partner Colorado, a credit union in Colorado, charges its new marijuana customers \$450 in fees for each \$100,000 deposited—an amount less than most other marijuana account providers); An-Li Herring, *High Banking Costs Hold Back Marijuana Industry*, WITF (Dec. 17, 2019, 10:47 AM), <https://www.witf.org/2019/12/17/high-banking-costs-hold-back-marijuana-industry/> [<https://perma.cc/3XZU-NUQT>] (“[M]edical marijuana businesses in western Pennsylvania said they . . . pay about \$3,000 a month for each of their [bank] accounts.”).

<sup>47</sup> See Mia Getlin, *Navigating Today's Wild West: Cannabis Clients Lack Banking Options Amid Onerous Federal Requirements*, OR. ST. BAR BULL., Apr. 2019, at 32, 34 (stating that high cost of banking services “leads many [cannabis-related] businesses to continue operating in cash”); Anh Hatzopoulos, *The Cost of Cash for Unbanked Cannabis Businesses*, FORBES (July 13, 2020, 8:20 AM), <https://www.forbes.com/sites/forbesfinancecouncil/2020/07/13/the-cost-of-cash-for-unbanked-cannabis-businesses/?sh=720edcaef4dd> [<https://perma.cc/6SRT-M3VM>] (stating that “an estimated 70% of cannabis businesses resort to cash-run operations,” often “under the misconception that it is a cheaper or safer alternative

The high account fees are at least partly driven by compliance costs for banks providing the accounts.<sup>48</sup> The paperwork for suspicious activity reporting can be staggering. In 2017, Partner Colorado Credit Union's "subsidiary that serves 220 cannabis-related companies" filed more than 7,000 suspicious activity reports.<sup>49</sup> In comparison, Partner Colorado filed 226 reports for its 33,000 non-cannabis-related customers.<sup>50</sup> Maps Credit Union, an Oregon financial institution that serves about 500 cannabis businesses, filed about 3,000 suspicious activity reports over a two-year period.<sup>51</sup> Maps "maintain[s] a ratio of one full-time [compliance] employee for every 40 cannabis business accounts."<sup>52</sup> Another Oregon financial institution has four full-time employees dedicated to compliance reporting for fifty cannabis-related businesses.<sup>53</sup> At Community First Credit Union in Santa Rosa, California, "one employee manages 24 cannabis businesses in contrast to that one staffer handling 400 other commercial accounts."<sup>54</sup>

Banks serving the marijuana industry also receive more scrutiny from their supervisors. For example, at Partner Colorado, federal and state regulators conducted nine joint examinations in a three-and-a-half-year period, "compared with the industry standard of three."<sup>55</sup> If a bank's compliance efforts fall short, it can expect regulators to bring enforcement actions requiring costly remedial measures.<sup>56</sup>

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to opening a bank account" (citation omitted); Lisa Krieger, *Pot Sellers in Search of a Vault*, DAILY DEMOCRAT (Feb. 11, 2019, 1:14 PM), <https://www.dailydemocrat.com/2019/02/11/pot-sellers-in-search-of-a-vault/> [https://perma.cc/3SR6-M6J9] ("The costs of . . . audits and other verification are passed on to clients through steep monthly fees, making [banking] services prohibitively expensive for many businesses, said Jim Coffis of Green Trade, a Santa Cruz-based trade association for licensed cannabis businesses.").

<sup>48</sup> Herring, *supra* note 46.

<sup>49</sup> Todd Prince, *Marijuana Bankers 'Drowning in a Sea of Paperwork'*, LAS VEGAS REV.-J., Nov. 16, 2018, at B12.

<sup>50</sup> *Id.*

<sup>51</sup> See *Challenges and Solutions Hearing*, *supra* note 20, at 13, 26, 37, 48 (statement of Rachel Pross, Chief Risk Officer, Maps Credit Union) (noting that, when combined with currency transaction reports, "Maps Credit Union in a relatively rural part of Oregon, has filed over 13,000 reports to FinCEN").

<sup>52</sup> Neil Haggerty, *Democrats' Sweep Helps Pot Banking's Cause, but Battle Is Far from Over*, AM. BANKER (Jan. 18, 2021, 9:00 PM), <https://www.americanbanker.com/news/democrats-sweep-helps-pot-bankings-cause-but-battle-is-far-from-over>.

<sup>53</sup> See *Challenges and Solutions Hearing*, *supra* note 20, at 37 (statement of Gregory S. Deckard, Chairman, President & CEO, State Bank Northwest).

<sup>54</sup> Susan Wood, *Northern California Cannabis Industry Banking on Legalization Bills Stalled in Congress*, N. BAY BUS. J. (Nov. 22, 2020), <https://www.northbaybusinessjournal.com/article/industrynews/northern-california-cannabis-industry-banking-on-legalization-bills-stalled/> [https://perma.cc/5LRU-U64E].

<sup>55</sup> Prince, *supra* note 49, at B12 (noting that examinations involved "20-plus" on-site examiners).

<sup>56</sup> See Live Life Federal Credit Union, NCUA No. 21-0105-ER (Feb. 22, 2021) (requiring that a credit union stop opening marijuana-related accounts and implement an automated

### C. *Legacy Cash*

Second, some marijuana-related businesses still have cash they acquired when they did not have access to banking. A bank that is willing to open an account for a marijuana-related business going forward may not be willing to accept this “legacy cash.” Anti-money laundering laws require banks to verify that the money they accept comes from legal sources.<sup>57</sup> Verifying the source of money earned by marijuana-related businesses in years past can be difficult.<sup>58</sup> Banks may require “a detailed forensic audit” before they will accept such cash.<sup>59</sup>

### D. *Card Processing*

Third, marijuana-related businesses still do not have access to major credit and debit card processing networks. MasterCard, Visa, American Express, and Discover all prohibit marijuana-related transactions on their credit and debit card networks in the United States.<sup>60</sup> “Even new fintech person-to-person payment services like Venmo, PayPal and Cash App regularly shut down services for marijuana-related businesses when they catch a whiff of it.”<sup>61</sup> Some marijuana-related businesses seek to “circumvent [payment company] rules by logging a

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system for reconciling point-of-sale data with bank deposits for marijuana-related customers).

<sup>57</sup> 18 U.S.C. § 1957(a) (criminalizing “knowingly engag[ing] or attempt[ing] to engage in a monetary transaction in criminally derived property of a value greater than \$10,000”); BSA EXAMINATION MANUAL, *supra* note 34, at 322-23 (requiring banks to implement heightened due diligence measures for cash-intensive businesses to determine that the business is not being used to launder money). Of course, marijuana money would not be from a legal source because marijuana is illegal under federal law. Nevertheless, it seems likely that regulators would expect banks to verify that the cash came from state-legal marijuana operations that do not implicate federal enforcement priorities. *See supra* notes 30-39 and accompanying text.

<sup>58</sup> Neil Haggerty, *Senate Pot Banking Bill May Add Weapon to Fight Money Launderers*, AM. BANKER (Oct. 4, 2019, 11:59 AM), <https://www.americanbanker.com/news/senate-pot-banking-bill-may-add-weapon-to-fight-money-launderers> (“One industry source . . . said it is still unclear how banks can accept cash from cannabis businesses if the firms don’t have receipts or other documentation. Banks can file suspicious activity reports on unverified funds, but financial institutions may still want more certainty on how to handle legacy cash that they cannot track.”).

<sup>59</sup> *The Definitive Guide to Cannabis Banking*, HYPUR, <https://www.hypur.com/guide-cannabis-banking-how-to-marijuana-banking/> [<https://perma.cc/VF5T-QH26>] (last visited Apr. 13, 2021).

<sup>60</sup> *See* Andrew S. Ross, *Credit Card Firms Balk at Pot Sales*, S.F. CHRON., July 12, 2012, at D1 (quoting representatives from Visa’s San Francisco location, as stating: “Our policy is that Visa cards should only be used in connection with legal transactions. We do not allow the Visa payment system to be used for any illegal activity and have banned illegal transactions on Visa cards”); Peter Rudegeair & AnnaMaria Andriotis, *Fake Sites Trick Lenders, Hide Crime*, WALL ST. J., July 23, 2020, at B10 (“Major card networks don’t allow card purchases of products or services that are deemed illegal, and marijuana is illegal under federal law.”); Robin Sidel, *Plastic and Pot Collide in Colorado*, WALL ST. J., Jan. 7, 2014, at C1.

<sup>61</sup> Michael Taylor, *Bummer About that Pot Cash*, *Business Dude*, SAN ANTONIO EXPRESS-NEWS, Sept. 16, 2018, at C1.

marijuana purchase as a more innocuous-seeming transaction.”<sup>62</sup> However, “[t]inkering with the so-called merchant category codes is considered a severe violation of card-industry rules.”<sup>63</sup> Moreover, federal authorities prosecuted two executives of a state-legal marijuana sales website for bank fraud because they disguised the nature of their business’s transactions to process credit and debit card sales.<sup>64</sup>

New payment companies have developed electronic or card-based methods for marijuana-related transactions,<sup>65</sup> but these payment methods are not as convenient for buyers as using the payment cards that are likely already in their wallets.<sup>66</sup> Absent the ability to use common cards and electronic payments, cash transactions remain common. Cash transactions attract thieves<sup>67</sup> and make marijuana-related businesses harder to regulate and tax.<sup>68</sup>

#### E. *Loans*

Fourth, even banks that provide account services do not lend to marijuana-related businesses.<sup>69</sup> These businesses are also not eligible for Small Business

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<sup>62</sup> Sidel, *supra* note 60, at C1.

<sup>63</sup> *Id.*

<sup>64</sup> See United States v. Weigand, 482 F. Supp. 3d 224, 224 (S.D.N.Y. 2020); see also Rebecca Davis O’Brien, *Two Convicted for Duping Banks in Marijuana Sales*, WALL ST. J., Mar. 25, 2021, at B3 (describing the case and reporting that a jury convicted the executives).

<sup>65</sup> For example, Hypur, an Arizona-based payment company, allows customers to make payments on an electronic Venmo-like platform. Patrick Cooley, *Service Lets You Buy Marijuana Without Cash*, COLUMBUS DISPATCH, Nov. 27, 2019, at B9. Similarly, Seattle-based CanPay provides a payment app that allows customers to pay for marijuana with electronic transfers from their bank accounts. See Jeff Ostrowski, *Fla. Is Pot Payment App’s Top Market*, PALM BEACH POST, July 8, 2018, at D1. And Columbia Care, a marijuana dispensary, offers credit cards that can be used at Columbia Care dispensaries in 12 states. See Ally Marotti, *Marijuana Dispensary Offers Credit Card*, CHI. TRIB., June 15, 2019, at 1-7.

<sup>66</sup> See Cooley, *supra* note 65, at B9 (quoting a marijuana dispensary owner who explained that marijuana buyers “want to use credit cards because ‘that’s what they’re used to in other businesses’”).

<sup>67</sup> See, e.g., Stuart Leavenworth, *When Does Too Much Cash Become a Health Risk? When You Own a Marijuana Shop*, MCCLATCHY D.C. BUREAU (Feb. 7, 2018, 5:36 PM), <https://www.mcclatchydc.com/news/nation-world/national/article198941964.html> (cataloging robberies of marijuana-related businesses); *Thief Steals \$145K in Cash from Marijuana Money Courier*, ASSOCIATED PRESS (Jan. 17, 2020), <https://apnews.com/article/d4c38a4f5f56d4e6b1715decd2f12f1a>.

<sup>68</sup> See Hill, *supra* note 2, at 602-03 (explaining that if cash intensive businesses underreport taxes, states may have difficulty funding their regulatory infrastructure); Sam Kamin, *The Limits of Marijuana Legalization in the States*, 99 IOWA L. REV. BULL. 39, 47 (2014) (“If marijuana exists as a cash only business, the risk of illegal diversion and non-payment of taxes is necessarily magnified.”).

<sup>69</sup> See Monica Mendoza, *A Money Matchmaker for the Legal Pot Industry*, DENVER BUS. J. (Mar. 15, 2017, 2:44 PM), <https://www.bizjournals.com/denver/news/2017/03/14/a-lender-for-the-legal-pot-industry.html>.

Administration loans.<sup>70</sup> As a result, they find themselves shut out of one of the primary sources of financing for other small businesses.<sup>71</sup>

Observers blame the lack of bank lending to the marijuana industry on several factors. First, marijuana is illegal and banks worry about criminal or regulatory ramifications.<sup>72</sup> (Although for banks already providing account services to a marijuana-related business, it is not obvious that lending to that business would increase the bank's risk of criminal prosecution or regulatory action.<sup>73</sup>) Second, because the loans are for an illegal purpose, the bank may not be able to enforce the loan contract in the event the business does not pay.<sup>74</sup> Third, even banks that

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<sup>70</sup> SMALL BUS. ADMIN., SOP 50 10 5(K), LENDER AND DEVELOPMENT COMPANY LOAN PROGRAMS 107-08 (2019), <https://www.sba.gov/sites/default/files/2019-02/SOP%2050%2010%205%28K%29%20FINAL%202.15.19%20SECURED%20copy%20paste.pdf> [<https://perma.cc/U8QE-S4LG>] (stating that direct and indirect marijuana businesses are ineligible for SBA-funded loans); SBA Pacific NW (@SBAPacificNW), TWITTER (Mar. 23, 2020, 7:09 PM), <https://twitter.com/SBAPacificNW/status/1242227023302373377> (“With the exception of businesses that produce or sell hemp and hemp-derived products . . . , marijuana-related businesses are not eligible for SBA-funded services (OMB, 2 C.F.R. § 200.300).”).

<sup>71</sup> See, e.g., ALICIA ROBB & ARNOBIO MORELIX, STARTUP FINANCING TRENDS BY RACE: HOW ACCESS TO CAPITAL IMPACTS PROFITABILITY 2 (2016), [https://www.kauffman.org/wp-content/uploads/2019/12/ase\\_brief\\_startup\\_financing\\_by\\_race.pdf](https://www.kauffman.org/wp-content/uploads/2019/12/ase_brief_startup_financing_by_race.pdf) [<https://perma.cc/DQ2J-HUZM>] (finding that personal/family savings, bank loans, and credit cards were the most common ways for entrepreneurs to fund new business ventures).

<sup>72</sup> See *How to Get Financing for a Marijuana Business*, FINDLAW, <https://public.findlaw.com/cannabis-law/starting-a-cannabis-business/how-to-get-financing-for-a-marijuana-business.html> [<https://perma.cc/N5PJ-W2NK>] (last updated Mar. 31, 2020) (“One of the main reasons banks typically don’t provide loans to marijuana ventures – at least those directly involved with the plant or its derivatives – has to do with the [FDIC]. Generally speaking, the FDIC will not insure a bank that takes on ‘existential’ risks, which would include loans to companies in violation of federal law.”).

<sup>73</sup> As attorneys at the law firm Venable LLP explain:

The . . . FinCEN guidance for serving [marijuana-related businesses] does not distinguish among taking deposits, paying checks, and lending money, which are known as traditional banking services. Although it could be argued that lending to [a marijuana-related businesses] involves providing more direct support to marijuana-related activities than providing a deposit account, and therefore may attract more law enforcement scrutiny, we are not aware of any federal guidance or case law that draws this distinction.

Andrew E. Bigart, Michael J. Bresnick & Matthew B. Bornfreund, *Managing the Funding Gap for Marijuana-Related Businesses in Response to COVID-19*, VENABLE LLP (May 6, 2020), <https://www.venable.com/insights/publications/2020/05/managing-the-funding-gap> [<https://perma.cc/S6R3-GLWQ>].

<sup>74</sup> See *Hammer v. Today’s Health Care II*, No. CV2011-051310, 2012 WL 12874349, at \*2 (Ariz. Super. Ct. Apr. 17, 2012) (“The explicitly stated purpose of these loan agreements was to finance the sale and distribution of marijuana. This was in clear violation of the laws of the United States. As such, this contract is void and unenforceable.”). *But see* *Bart Street III v. ACC Enters., LLC*, No. 2:17-cv-00083, 2020 WL 1638329, at \*5 (D. Nev. Apr. 1, 2020) (explaining that provisions of a loan agreement to a state-legal marijuana businesses involving the “lending [of] money to repay existing debts and purchase land are lawful” and enforceable while provisions providing for a right of first refusal in ownership of the marijuana-related

will handle marijuana dollars may be squeamish about the prospect of repossessing marijuana inventory. Indeed, banks that are not state-licensed marijuana businesses may not legally be allowed to possess it.<sup>75</sup> Fourth, banks may worry that any money or collateral associated with marijuana could be subject to criminal or civil forfeiture.<sup>76</sup> Fifth, because federal bankruptcy protection is unavailable to marijuana-related businesses and their creditors,<sup>77</sup> banks face uncertain consequences if a marijuana-related borrower becomes

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business are illegal and unenforceable); *Ginsburg v. ICC Holdings, LLC*, No. 3:16-cv-02311, 2017 WL 5467688, at \*9 (N.D. Tex. Nov. 13, 2017) (refusing to dismiss a complaint to enforce a loan to a marijuana-related business noting that “federal courts do not take . . . a ‘black-and-white’ approach” and may enforce loans to marijuana-related businesses when the business is not required by the terms of the agreement to violate federal law). *See generally* Luke Scheuer, *Are “Legal” Marijuana Contracts “Illegal”?*, 16 U.C. DAVIS BUS. L.J. 31 (2015) (exploring how conflicting state and federal marijuana laws affect businesses’ abilities to create enforceable contracts).

<sup>75</sup> *See* James A. Kohl, *Nascent Marijuana Industry Struggles for Access to Normal Financing*, NEV. LAW., Nov. 2015, at 16, 18 (“While marijuana appears to be valuable, and it could be pledged as collateral for a loan, upon default, a lender would not be able to take possession of the marijuana because it is not licensed to do so. To a lender, marijuana’s value as collateral is zero.”). Some states have addressed this lender concern with statutory provisions that allow a creditor to temporarily possess and sell marijuana after a debtor defaults. *See, e.g.*, OR. REV. STAT. § 475B.904 (2020). In the absence of such a law, lenders may be able to structure the lending contract “to sell its inventory to a different licensee upon default.” *Marijuana Commercial Loans; Marijuana as Collateral Is THE Issue*, HARRIS BRICKEN: CANNA L. BLOG (Apr. 21, 2014), <https://harrisbricken.com/cannalawblog/marijuana-as-collateral-in-commercial-loans/> [<https://perma.cc/27BK-7N2D>] (“There would be significant tax ramifications, a ton of paperwork, and several other challenges, but it is doable.”).

<sup>76</sup> *See* 21 U.S.C. § 881(a) (stating that “[a]ll controlled substances,” as well as related “raw materials, products, and equipment” and “moneys, negotiable instruments, securities, or things of value” are “subject to [civil] forfeiture to the United States”); *id.* § 853(a) (providing for criminal forfeiture of property “derived from” or “used, or intended to be used, in any manner” to violate the Controlled Substances Act); *Challenges and Solutions Hearing*, *supra* note 20, at 65 (prepared statement of Gregory S. Deckard, Chairman, President & CEO, State Bank Northwest) (“This may sound like an overabundance of caution and extreme risk aversion, but I can assure you the risks are very real and carry potentially catastrophic consequences for community banks, including asset forfeiture of tainted deposits which could put a bank out of business overnight.”); David Migoya, *Financing for Shop Lessors Could Lessen*, DENVER POST, Feb. 19, 2014, at 1A (reporting that Wells Fargo refused to refinance a loan to the landlord of a marijuana dispensary over concern about forfeiture); Victor Roehm, *Commentary, Marijuana-Related Businesses Pose High Risks for Landlords*, DAILY J. COM. (Dec. 11, 2013, 10:44 AM), <https://djcoregon.com/news/2013/12/11/marijuana-related-businesses-pose-high-risks-for-landlords/> (“[T]he money received by a lender in payment for a loan to a marijuana dispensary or growing operation that is legal under state law could nonetheless be seized by the federal government, as could any conceivable form of real or personal property collateral offered by such a business as security for the loan.”).

<sup>77</sup> *In re Medpoint Mgmt., LLC*, 528 B.R. 178, 180 (Bankr. D. Ariz. 2015) (dismissing an involuntary bankruptcy petition brought by the creditors of a state-legal medical marijuana distributor because marijuana is illegal under federal law).



insolvent.<sup>78</sup> Sixth, some banks may not feel confident in their ability to assess the risk and properly underwrite loans for marijuana-related businesses, and others may view the industry as too risky.<sup>79</sup> Seventh, some banks may not lend because their executives and board members are morally opposed to marijuana.<sup>80</sup>

Whatever the reason(s), marijuana businesses must look beyond banks to finance their ventures. Most of these businesses are financed with the personal funds of their owners or with investment from family and friends.<sup>81</sup> This tends to concentrate the industry in the hands of those with personal wealth and contributes to a lack of racial diversity in the state-legal marijuana industry.<sup>82</sup>

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<sup>78</sup> “With bankruptcy relief unavailable, distressed marijuana businesses and their creditors will need to consider alternative forms of relief under state insolvency laws.” Andrew King, *Not Enough Green: Sticky Problems from Insolvency in the Marijuana Business*, ARK. LAW., Summer 2018, at 36, 37. The operation of these state laws may be somewhat uncertain because they have “largely lain dormant for several decades due to the primacy of federal bankruptcy.” *Id.* (citing 15A WILLIAM MEADE FLETCHER & HERBERT S. SCHLAGMAN, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7366 (perm. ed., rev. vol. 1981)); see also Sydney Darling, Marc D. Miceli & Steven Mitnick, *Down the Pipe: No Easy Out for Cannabis-Based Businesses in Distress*, N.J. LAW., Oct. 2018, at 70, 73-74 (discussing state-law alternatives to bankruptcy). Moreover, state-court-appointed receivers may not have the legal authority to operate marijuana-related businesses without the appropriate license. This could hinder or delay a bank’s ability to collect from an insolvent borrower. See Ronald S. Eppen, Michael J. Small & Tamar N. Dolcourt, *Limited Options for Cannabis-Related Company Liquidations*, FOLEY & LARDNER LLP (Apr. 3, 2020), <https://www.foley.com/en/insights/publications/2020/04/options-cannabis-related-company-liquidations> [https://perma.cc/34N8-GZKD] (noting that only Colorado, Washington, and “a handful of other states have” enacted legislation “to allow court-appointed receivers to temporarily manage cannabis businesses”).

<sup>79</sup> See James J. Black & Marc-Alain Galeazzi, *Cannabis Banking: Proceed with Caution*, ABA (Feb. 6, 2020), [https://www.americanbar.org/groups/business\\_law/publications/blt/2020/02/cannabis-banking/](https://www.americanbar.org/groups/business_law/publications/blt/2020/02/cannabis-banking/) [https://perma.cc/525C-CGD9] (postulating that it is difficult to assess red flags because doing so requires great knowledge of operations and markets). Bank supervisors may also view loans to marijuana-related businesses as excessively risky. See J. Marcus Painter, *Rents, Refi’s, and Reefer Madness: How Legal Is Legalized Marijuana for Landlords and Their Lenders?*, PROB. & PROP., Jan./Feb. 2015, at 11, 18 (“According to some Colorado bankers, regulators conducting loan reviews have fully excluded income from marijuana-related rents from cash flow calculations, effectively throwing a loan [to a marijuana landlord] into immediate covenant default.”).

<sup>80</sup> See Rachel Zender, *Bud, Bongs & Banks: The Impact of State Legalized Marijuana on Financial Institutions*, 87 UMKC L. REV. 997, 1014 (2019) (citing Telephone Interview with anonymous Federal Reserve bank employee (May 25, 2018)).

<sup>81</sup> See MARIJUANA BUS. DAILY, ANNUAL MARIJUANA BUSINESS FACTBOOK: MIDYEAR UPDATE 252 (Kevin Huhn ed., 8th ed. 2020) [hereinafter MARIJUANA BUSINESS FACTBOOK] (reporting that “more than three-quarters of U.S. cannabis business founders use personal savings” or personal debt (as opposed to business debt) to finance their marijuana-related business).

<sup>82</sup> See ANALYTIC INSIGHT, CANNABIS BUSINESS AND EMPLOYMENT OPPORTUNITY STUDY 17, 23 (2020), [https://www.denvergov.org/content/dam/denvergov/Portals/782/documents/Denver\\_Cannabis\\_Business\\_and\\_Employment\\_Opportunity\\_Study.pdf](https://www.denvergov.org/content/dam/denvergov/Portals/782/documents/Denver_Cannabis_Business_and_Employment_Opportunity_Study.pdf) [https://perma.cc

Some marijuana-related businesses get loans from angel investors, hedge funds, or nonbank capital companies.<sup>83</sup> These loans typically have high interest rates and other unfavorable terms.<sup>84</sup> Other marijuana-related businesses have turned to one of the few venture capital or private equity firms that will invest in marijuana.<sup>85</sup> This, of course, requires the owners of the business to give up partial ownership and, potentially, control of the company.

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/B2EQ-WDA3] (discussing this phenomenon in Denver); Alan Campbell, *As Michigan's Marijuana Industry Booms, the State Wants to Address a Lack of Diversity in Ownership*, WXYZ DETROIT (Sept. 22, 2020, 10:26 PM), <https://www.wxyz.com/news/as-michigans-marijuana-industry-booms-the-state-wants-to-address-a-lack-of-diversity-in-ownership> (blaming the lack of access to capital for the low number of Black people in the Michigan marijuana industry); Nick Charles, *Black Entrepreneurs Struggle to Join Legal Weed Industry*, NBC NEWS (Feb. 11, 2020, 11:51 AM), <https://www.nbcnews.com/news/nbcblk/black-entrepreneurs-struggle-join-legal-weed-industry-n1132351> [<https://perma.cc/ZS7P-X4NW>]; Benjamin Goggin, *Black People Face Big Barriers Entering the Legal Weed Industry*, VICE (Sept. 20, 2018, 4:39 PM), <https://www.vice.com/en/article/yw4pkw/weed-industry-equity-black-business> [<https://perma.cc/45MT-P2S9>].

Of course, better access to bank loans may not be enough to ensure equal access for some racial groups. See Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 818 (2019).

<sup>83</sup> MARIJUANA BUSINESS FACTBOOK, *supra* note 81, at 252; Scott F. Roberts, *Michigan Marijuana Industry Financing Options*, SCOTT ROBERTS LAW (Apr. 9, 2019), <https://scottrobertslaw.com/michigan-cannabis-business/> [<https://perma.cc/BU9R-RKWQ>]. Some marijuana-related companies also use real estate investment trusts (“REITs”) to raise money. See Jack Fersko, Lydia C. Stefanowicz & Charles J. Wilkes, *Legal Marijuana: The Implications for Commercial Real Estate*, N.J. LAW., Oct. 2018, at 54.

<sup>84</sup> See, e.g., Billy Duberstein, *Curaleaf Management Thinks the New Congress Could Pass This Cannabis Bill First*, MOTLEY FOOL (Nov. 29, 2020, 8:53 AM), <https://www.fool.com/investing/2020/11/29/curaleafs-ceo-thinks-the-new-congress-could-pass-t/> [<https://perma.cc/E4Y4-TZGX>] (“Currently, if a cannabis company wants to issue debt . . . , it comes at a very high cost. For instance, in the case of Curaleaf, which is currently sporting some pretty strong revenue growth and margin expansion, the company’s most recent Senior Secured Term Loan Facility closed in January 2020 bore an interest rate of 13%. That’s incredibly high for a growth business in a time of record-low interest rates.”); *How Do Business Loans in the Cannabis Industry Work?*, BESPOKE FIN. (Feb. 27, 2020), <https://bespokefinancial.com/blog/how-do-business-loans-in-the-cannabis-industry-work/> [<https://perma.cc/K27E-G5HG>] (“Private loans are available from non-bank lenders and typically come with rates of between 8 and 25 percent.”); Roberts, *supra* note 83 (stating that lenders typically require 60% loan-to-value ratio).

<sup>85</sup> See MARIJUANA BUSINESS FACTBOOK, *supra* note 81, at 252 (noting that less than 10% of marijuana-related businesses are funded with venture capital or private equity); Marisa Kendall, *Why Venture Capital Investors Are Betting Big on Marijuana*, SAN GABRIEL VALLEY TRIB. (Aug. 30, 2017, 5:42 AM), <https://www.sgytribune.com/2017/05/07/why-venture-capital-investors-are-betting-big-on-marijuana/> [<https://perma.cc/DG6R-URGB>] (explaining that while most venture capital and private equity groups are not interested in marijuana-related businesses, venture capital groups like Casa Verde Capital, backed by rapper Snoop Dogg, and private equity firms like one started by MedMen in Los Angeles, are expanding into marijuana investments).

## II. PROPOSED SOLUTIONS

Against this backdrop, there are several federal legislative proposals designed to address marijuana's banking problems. They range from narrow legislation targeted at banking to more expansive proposals to legalize marijuana. This Part summarizes the three most prominent proposals. It is unclear whether any of these proposals have enough support to be enacted soon.<sup>86</sup>

### A. *The SAFE Banking Act*

The aim of the Secure and Fair Enforcement Banking Act ("SAFE Banking Act"), introduced by Representative Ed Perlmutter (D-CO), is narrow: "to increase public safety by ensuring access to financial services to cannabis-related legitimate businesses and service providers and reducing the amount of cash at such businesses."<sup>87</sup>

The SAFE Banking Act states that federal banking regulators may not "prohibit, penalize, or otherwise discourage a depository institution from providing financial services to a cannabis-related legitimate business or service provider."<sup>88</sup> Other provisions would prohibit regulators from revoking deposit insurance, closing accounts, or downgrading loan classifications for banks whose customers are state-legal marijuana-related businesses.<sup>89</sup> Bank regulators would be instructed to develop uniform examination policies for banks with marijuana-related customers.<sup>90</sup> The SAFE Banking Act, however, would not require banks to serve marijuana-related businesses.<sup>91</sup>

To encourage the Federal Reserve to continue providing transaction services for banks serving marijuana-related customers, the SAFE Banking Act would

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<sup>86</sup> See, e.g., Ben Curren, *After Sweeping the Elections, What Comes Next for Cannabis?*, FORBES (Dec. 3, 2020, 1:57 PM), <https://www.forbes.com/sites/bencurren/2020/12/03/after-sweeping-the-elections-what-comes-next-for-cannabis/?sh=418f244c6469> (expressing optimism that banking measures "could progress, even with GOP control of the Senate," but stating that legalization will likely depend on which political party controls Congress); Duberstein, *supra* note 84 (expressing optimism that some marijuana-related federal legislation could pass in 2021).

<sup>87</sup> SAFE Banking Act of 2019, H.R. 1595, 116th Cong. § 1(b) (2019) (as received in the Senate, Sept. 26, 2019).

<sup>88</sup> *Id.* § 2(a)(2).

<sup>89</sup> *Id.* § 2(a).

<sup>90</sup> *Id.* § 7 ("Not later than 180 days after the date of enactment of this Act, the Financial Institutions Examination Council shall develop uniform guidance and examination procedures for depository institutions that provide financial services to cannabis-related legitimate businesses and service providers.").

<sup>91</sup> *Id.* § 5(a) ("Nothing in this Act shall require a depository institution, entity performing a financial service for or in association with a depository institution, or insurer to provide financial services to a cannabis-related legitimate business, service provider, or any other business.").

protect officers, directors, and employees of Federal Reserve Banks and Federal Home Loan Banks from liability for providing services to those banks.<sup>92</sup>

To address concerns about asset forfeiture, the Safe Banking Act provides that

[a] depository institution that has a legal interest in the collateral for a loan or another financial service provided to an owner, employee, or operator of a cannabis-related legitimate business or service provider . . . shall not be subject to criminal, civil, or administrative forfeiture of that legal interest pursuant to any Federal law for providing such loan or other financial service.<sup>93</sup>

Finally, the SAFE Banking Act would require that banks continue to report suspicious transactions involving marijuana-related businesses consistent “with appropriate guidance issued by [FinCEN].”<sup>94</sup> The Act instructs the Secretary of the Treasury to “ensure that the guidance . . . does not significantly inhibit the provision of financial services to a cannabis-related legitimate business or service provider in” a jurisdiction that has legalized cannabis.<sup>95</sup>

Observers have noted limitations of the SAFE Banking Act. Because it would not change the underlying federal illegality of marijuana, banks could still find themselves in a precarious position if federal officials ever take a more aggressive approach to the enforcement of federal law against borrowers.<sup>96</sup> In addition, under the SAFE Banking Act, bank compliance costs would remain high. “[B]anks would effectively be responsible for ensuring that their marijuana-industry customers are operating in compliance with all applicable state laws, as state-law compliance is a precondition for the legal protection afforded by the act.”<sup>97</sup> Others are concerned that the bill does not adequately address legacy cash or do enough to prevent illegal enterprises from using marijuana-related business to launder their money.<sup>98</sup>

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<sup>92</sup> *Id.* § 4(b) (“With respect to providing a service to a depository institution that provides a financial service to a cannabis-related legitimate business or service provider . . . , a Federal reserve bank or Federal Home Loan Bank, and the officers, directors, and employees of the Federal reserve bank or Federal Home Loan Bank, may not be held liable pursuant to any Federal law or regulation . . . solely for providing such a service . . .”).

<sup>93</sup> *Id.* § 4(d)(1).

<sup>94</sup> *Id.* § 6 (amending 31 U.S.C. § 5318(g) to include requirements for marijuana-related legitimate businesses).

<sup>95</sup> *Id.*

<sup>96</sup> See Black & Galeazzi, *supra* note 79 (noting that if employees of a marijuana-related business faced prosecution it “could adversely affect the viability and creditworthiness of the affected [business and] result in heightened commercial risks for banks” serving that business).

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., Gabriel J. Greenbaum, Note, *What to Do with All This Green: Using Casino Regulations as a Model for Cannabis Industry Banking*, 58 WASHBURN L.J. 217, 219 (2019) (“Though the [SAFE Banking] Act would create a much-needed avenue for banks to do business with the marijuana industry, it fails to address the federal government’s concerns

Despite these limitations, similar bills have repeatedly passed in the House of Representatives but failed to gain traction in the Senate.<sup>99</sup> Proponents of the SAFE Banking Act believe that with a Democrat-controlled Congress in 2021, its chances of passage have increased.<sup>100</sup>

B. *The STATES Act*

The Strengthening the Tenth Amendment Through Entrusting States Act (“STATES Act”) is a more expansive bill introduced by Senators Cory Gardner (R-CO) and Elizabeth Warren (D-MA).<sup>101</sup> The STATES Act would amend the Controlled Substances Act (“CSA”) so that the federal prohibitions on marijuana “shall not apply to any person acting in compliance with State law relating to the manufacture, production, possession, distribution, dispensation, administration, or delivery of marihuana.”<sup>102</sup> Under the Act, conduct that complies with state marijuana laws would not be illegal and could not be the basis for criminal or civil forfeiture of property.<sup>103</sup> Moreover, the STATES Act provides that “proceeds” of a state-legal transaction “shall not be deemed to be the proceeds of an unlawful transaction” under federal anti-money laundering statutes.<sup>104</sup> “The result of this bill would be that 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.”<sup>105</sup>

While the STATES Act does not explicitly mention banking, a press release from the sponsors explains that the bill “[a]ddresses financial issues caused by federal prohibition by clearly stating that compliant transactions are not

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about the possible use of cannabis businesses to facilitate money laundering.”); Haggerty, *supra* note 58 (detailing Senator Mike Crapo’s (R-ID) concerns with the SAFE Banking Act).

<sup>99</sup> See Jonathan D. Salant, *Legal Weed Proponents Look to Congress After Voters in N.J., Other States Approve Ballot Questions*, NJ.COM (Nov. 11, 2020), <https://www.nj.com/marijuana/2020/11/legal-weed-proponents-look-to-congress-after-voters-in-nj-other-states-approve-ballot-questions.html> [<https://perma.cc/F2Z8-Y5CW>] (“While the House-passed SAFE Banking Act is languishing in the Senate, the House twice attached the same provisions to coronavirus stimulus legislation.” (citations omitted)).

<sup>100</sup> See Justin Wingerter, *Advocates and Lobbyists: Odds Look Good*, DENVER POST, Feb 4, 2021, at 1A.

<sup>101</sup> STATES Act, S. 1028, 116th Cong. (2019) (introduced Apr. 4, 2019). An identical measure was introduced in the House of Representative by Earl Blumenauer (D-OR) and David Joyce (R-OH). STATES Act, H.R. 2093, 116th Cong. (2019) (introduced Apr. 4, 2019); see also Colby Itkowitz, *Republican Senator Hopeful Trump Will Back Bill to Protect States’ Rights on Marijuana*, WASH. POST (June 7, 2018, 3:52 PM), <https://www.washingtonpost.com/news/powerpost/wp/2018/06/07/republican-senator-confident-trump-will-back-bill-to-protect-states-rights-on-marijuana/> (identifying the bills’ sponsors and describing the proposed legislation as “a bipartisan congressional effort”).

<sup>102</sup> S. 1028 § 2.

<sup>103</sup> *Id.* § 6(a).

<sup>104</sup> *Id.* § 6(b).

<sup>105</sup> Black & Galeazzi, *supra* note 79.

trafficking and do not result in proceeds of an unlawful transaction.”<sup>106</sup> Some believe that this approach could leave federal regulators with the authority to continue to require suspicious activity reporting for state-legal marijuana transactions.<sup>107</sup>

The STATES Act has not passed either house of Congress.

C. *The MORE Act*

The Marijuana Opportunity Reinvestment and Expungement Act (“MORE Act”), introduced by Kamala Harris (D-CA) in the Senate<sup>108</sup> and Jerry Nadler (D-NY) in the House of Representatives,<sup>109</sup> is the most sweeping of the proposed federal marijuana reform bills. It looks beyond legalization to address the concern that “[t]he communities that have been most harmed by cannabis prohibition are benefiting the least from the legal marijuana marketplace.”<sup>110</sup>

The MORE Act would remove marijuana from the federal list of controlled substances.<sup>111</sup> It would make this change retroactive<sup>112</sup> and provide a path for expungement of nonviolent federal cannabis convictions.<sup>113</sup> Under the MORE Act, states would still be allowed to criminalize marijuana within their

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<sup>106</sup> Press Release, Sen. Elizabeth Warren, Senators Warren and Gardner Reintroduce Bipartisan, Bicameral Legislation to Protect States’ Marijuana Policies (Apr. 4, 2019), <https://www.warren.senate.gov/newsroom/press-releases/senators-warren-and-gardner-reintroduce-bipartisan-bicameral-legislation-to-protect-states-marijuana-policies> [https://perma.cc/28XP-ECV7] (emphasis omitted).

<sup>107</sup> See Black & Galeazzi, *supra* note 79 (“[I]t is unclear how [the STATES Act] would work in practice and whether the federal banking regulators would take the view that transactions with the proceeds of state-legal marijuana transactions are, in fact, no longer illicit transactions subject to [suspicious activity] reporting and other requirements of federal law.”).

<sup>108</sup> MORE Act of 2019, S. 2227, 116th Cong. (2019).

<sup>109</sup> MORE Act of 2020, H.R. 3884, 116th Cong. (2020).

<sup>110</sup> *Id.* § 2(1).

<sup>111</sup> *Id.* § 3.

<sup>112</sup> *Id.* § 3(d).

<sup>113</sup> *Id.* § 10.

borders.<sup>114</sup> However, in states that legalize marijuana, there would no longer be any contradictory federal law.<sup>115</sup>

The MORE Act would create a federal tax on “cannabis product[s].”<sup>116</sup> The revenue collected would be directed toward, among other things, a new Small Business Administration (“SBA”) loan program to allow “socially and economically disadvantaged individuals” to start cannabis-related businesses.<sup>117</sup> The SBA would also administer a grant program to “provide any eligible State or locality funds to develop and implement equitable cannabis licensing programs that minimize barriers to cannabis licensing and employment for individuals adversely impacted by the War on Drugs.”<sup>118</sup> More broadly, the legislation would make “cannabis-related legitimate businesses [and] service providers” eligible for other SBA loans.<sup>119</sup>

Like the STATES Act, the MORE Act does not specifically mention banks or financial institutions. Nevertheless, many commentators believe its marijuana legalization provisions would pave the way for banking the industry.<sup>120</sup>

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<sup>114</sup> A Congressional Research Service report explains:

Under the CSA, states are free to regulate substances that are not subject to the CSA or other federal law provided there is no “positive conflict . . . such that the [CSA and state law] cannot consistently stand together.” Several states currently ban the use of marijuana for both medical and recreational purposes. Others permit the use of some cannabis products for medical purposes while banning recreational use. The MORE Act would not alter those state legal regimes; nor would it affect prior state law criminal convictions for cannabis-related offenses.

JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10556, THE MORE ACT: HOUSE PLANS HISTORIC VOTE ON FEDERAL MARIJUANA LEGALIZATION 3 (2020) (second and third alterations in original) (quoting 21 U.S.C. § 903).

<sup>115</sup> *Id.*

<sup>116</sup> H.R. 3884 § 5(b).

<sup>117</sup> *Id.* §§ 5(a), 6(b)(1).

<sup>118</sup> *Id.* §§ 5(a), 6(b)(2).

<sup>119</sup> *Id.* § 7(f).

<sup>120</sup> See, e.g., Ashley Priest, *Why Is It So Difficult to Get Approved for a Loan as a Cannabis Employee?*, VERIHEAL (Sept. 16, 2020, 10:52 AM), <https://www.veriheal.com/blog/why-is-it-so-difficult-to-get-approved-for-a-loan-as-a-cannabis-employee/> [<https://perma.cc/E5JB-836K>] (stating that the MORE Act “could pave a path for banks being much more open to working with not just cannabis businesses but also those who are employed within them”); Jonathan D. Salant, *House to Vote on Removing the Federal Ban on Marijuana*, NJ.COM (Aug. 30, 2020), <https://www.nj.com/marijuana/2020/08/house-to-vote-on-removing-the-federal-ban-on-marijuana.html> [<https://perma.cc/569Y-5FNP>]; Jeff Smith, *US House Poised to Act This Week on Landmark Marijuana Legalization Bill*, MARIJUANA BUS. DAILY (Nov. 30, 2020), <https://mjbizdaily.com/us-house-poised-to-act-this-week-on-landmark-marijuana-legalization-bill/> [<https://perma.cc/PA6C-J4GU>].

In December 2020, the House passed the MORE Act with voting mostly along party lines.<sup>121</sup> Whether this—or any of the marijuana-related proposals—will gain traction in the new Congress remains to be seen.<sup>122</sup>

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Of course, predicting the impact of proposed legislation is difficult.<sup>123</sup> None of the proposals addresses the legacy cash problem. But would they expand banking services for marijuana-related businesses going forward? Would federal marijuana legalization transform state-legal marijuana-related businesses into sought-after bank customers? Or would the industry still be plagued by few banking choices, high prices, few payment options, limited borrowing opportunities, and other problems?

### III. THE HEMP EXPERIENCE

One indication of the possible impact of federal marijuana legalization comes from the experience of the hemp industry. Hemp and marijuana are both variants of the plant species *Cannabis sativa* L.<sup>124</sup> Until recently, hemp, like marijuana, was largely illegal under federal law. And like marijuana-related businesses, hemp-related businesses struggled to secure adequate banking services.<sup>125</sup> The 2018 Farm Bill legalized hemp federally,<sup>126</sup> potentially opening the door for greater banking opportunities. The hemp industry, however, has been slow to see an increase in banking services.<sup>127</sup> This Part describes the process of hemp legalization and its impact on the availability of banking for hemp-related businesses. It also examines why banks have been slow to embrace the hemp industry.

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<sup>121</sup> See Brooke Staggs, *Orange County's Democratic Leaders Celebrate Historic House Vote to Decriminalize Marijuana*, ORANGE CO. REG. (Cal.) (Dec. 4, 2020, 4:41 PM), <https://www.ocregister.com/2020/12/04/orange-countys-democratic-leaders-celebrate-historic-house-vote-to-decriminalize-marijuana/> (reporting that six Democrats voted against the MORE Act and five Republicans voted for it).

<sup>122</sup> See Haggerty, *supra* note 52 (“Democrats’ control of Congress and the White House has brought financial institutions and cannabis businesses closer than ever to legislation enabling them to work together.”).

<sup>123</sup> Cf. Lillian R. BeVier, *Judicial Restraint: An Argument from Institutional Design*, 17 HARV. J.L. & PUB. POL’Y 7, 11 (1994) (“[O]ne of the principal problems that bedevils policymakers is that their good intentions are so frequently sabotaged by unintended, unforeseen, and undesired consequences. Policymakers tend to assume that people will comply with their edicts, and hence they neglect to inform themselves about what will happen when, because compliance is costly or disagreeable, people take quite predictable steps to avoid them.”).

<sup>124</sup> JOHNSON, *supra* note 7, at 1-2.

<sup>125</sup> See sources cited *supra* note 9.

<sup>126</sup> 2018 Farm Bill, Pub. L. No. 115-334, §§ 10113-10114, 132 Stat. 4908, 4908-14.

<sup>127</sup> See *infra* Section III.D.



### A. *Hemp and Its Prohibition*

While marijuana and hemp are both cannabis, each is cultivated for a different use.<sup>128</sup> In the case of marijuana, plants are selected and cultivated to contain high levels of tetrahydrocannabinol (“THC”)—an intoxicating drug.<sup>129</sup> In the case of hemp, plants are selected and cultivated to produce fiber, seeds, or oil.<sup>130</sup> Hemp fiber is used in a variety of products ranging from textiles, to paper, to automotive products.<sup>131</sup> Hemp can even be mixed with lime to make a building material known as hempcrete.<sup>132</sup> Hemp seeds can be eaten by humans and animals.<sup>133</sup> Oil extracted from hemp seeds can be eaten or used in “cosmetics and personal care items.”<sup>134</sup> But the hemp product that has currently captured the bulk of consumer attention is cannabidiol (“CBD”)<sup>135</sup>—“a nonintoxicating compound extracted from *Cannabis sativa* plants.”<sup>136</sup> Products containing CBD or hemp oil “are being marketed for a variety of uses such as sleep aids, pain

<sup>128</sup> See sources cited *supra* note 7.

<sup>129</sup> Jerome H. Cherney & Ernest Small, *Industrial Hemp in North America: Production, Politics and Potential*, 6 *AGRONOMY*, no. 58, 2016, at 1, 8, <https://www.mdpi.com/2073-4395/6/4/58> [<https://perma.cc/7FHL-J34P>] (“Marijuana is chemically characterized by high amounts of THC while hemp is characterized by high amounts of CBD . . . .”); Ernest Small & David Marcus, *Hemp: A New Crop with New Uses for North America*, in *TRENDS IN NEW CROPS AND NEW USES* 284, 284 (Jules Janick & Anna Whipkey eds., 2002) (explaining that historically the term “hemp has been used primarily for the fiber cultigen and its fiber preparations, and marijuana for the drug cultigen and its drug preparations”).

<sup>130</sup> JOHNSON, *supra* note 7, at 2 (“Hemp can be grown as a fiber, seed, or other dual-purpose crop.”); Cherney & Small, *supra* note 129, at 1-2, 6 (explaining that initially hemp was “cultivated virtually exclusively as a bast (stem) fiber source” but that “[i]n the last two decades, there has been increased selection specifically for seeds” and the oil produced from those seeds).

<sup>131</sup> Grégorio Crini, Eric Lichtfouse, Gilles Chanet & Nadia Morin-Crini, *Applications of Hemp in Textiles, Paper Industry, Insulation and Building Materials, Horticulture, Animal Nutrition, Food and Beverages, Nutraceuticals, Cosmetics and Hygiene, Medicine, Agrochemistry, Energy Production and Environment: A Review*, 18 *ENV’T CHEMISTRY LETTERS* 1451, 1454-56, 1558-59 (2020).

<sup>132</sup> Adam Popescu, *Hemp for the Home (Construction, Not Smoking)*, *N.Y. TIMES*, Jan. 30, 2018, at D1 (explaining that hempcrete, a product more like drywall than concrete, can in some climates effectively insulate a house).

<sup>133</sup> Crini et al., *supra* note 131, at 1460.

<sup>134</sup> *Id.* at 1469.

<sup>135</sup> See Alex Williams, *CBD Is Everywhere*, *N.Y. TIMES*, Oct. 28, 2018, at ST1 (“It’s hard to pin down the precise moment when CBD, the vogue cannabis derivative, went from being a fidget spinner alternative for stoners to a mainstream panacea.”); Amanda Chicago Lewis, *A Hidden Origin Story of the CBD Craze*, *N.Y. TIMES* (May 23, 2020), <https://www.nytimes.com/2020/05/23/sunday-review/coronavirus-cbd-oil.html> (“Jennifer Aniston loves beauty products made with it. The N.F.L star Rob Gronkowski sells it. Mike Tyson offers a cannabidiol-infused water called DWiiNK. On Instagram, #cbd is four times as common as #resist.” (citation omitted)).

<sup>136</sup> Harrison J. VanDolah, Brent A. Bauer & Karen F. Mauck, *Clinicians’ Guide to Cannabidiol and Hemp Oils*, 94 *MAYO CLINIC PROC.* 1840, 1841 (2019).

relief, or stress reduction.”<sup>137</sup> However, there has been little research into the effect of CBD and hemp oils, and they “remain an unproven therapeutic option.”<sup>138</sup> As variants of the same species, marijuana and hemp can interbreed.<sup>139</sup> Without chemical testing, it can be difficult to distinguish one variant from another.<sup>140</sup> Even some drug testing may not be foolproof.<sup>141</sup> However, “[t]here is generally an inverse relationship between THC and CBD in *Cannabis*.”<sup>142</sup>

During the colonial period in American history, hemp was a common agricultural product in the United States.<sup>143</sup> It is even sometimes claimed that drafts of the Declaration of Independence were written on hemp paper,<sup>144</sup> but this appears to be unlikely.<sup>145</sup> In any event, the hemp industry withered. In the 1890s, farmers began to move away from hemp because the invention of the

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<sup>137</sup> *Id.* at 1844.

<sup>138</sup> *Id.* at 1841 (recommending that physicians “remain open to the possible future role these products may play in the management of a variety of difficult to treat diseases”).

<sup>139</sup> James DeDecker, *Weighing the Risk of Cannabis Cross-Pollination*, MICH. ST. UNIV. EXTENSION (July 12, 2019), <https://www.canr.msu.edu/news/weighing-the-risk-of-cannabis-cross-pollination> [<https://perma.cc/D85H-S6JK>].

<sup>140</sup> *See, e.g.*, Cynthia A. Sherwood, Davis F. Griffin & Alexander H. Mills, *Even Dogs Can't Smell the Difference: The Death of 'Plain Smell,' as Hemp Is Legalized*, TENN. B.J., Dec. 2019, at 14, 17 (“Both legal hemp and illegal marijuana derive from the plant genus *Cannabis* and have nearly identical smells, textures, tastes, and looks, whether they are being grown, harvested, stored, ingested or smoked.”); Sarah Maslin Nir, *Dude, Drop the Plant, It Won't Get You High*, N.Y. TIMES, Dec. 4, 2019, at A21 (noting that the plants “look and smell alike” and that hemp has been mistaken for marijuana by both thieves and police).

<sup>141</sup> *See* Amanda Chicago Lewis, *CBD or THC? Common Drug Test Can't Tell the Difference*, N.Y. TIMES (Oct. 15, 2019), <https://www.nytimes.com/2019/10/15/science/cbd-the-cannabis-cannabidiol.html> (discussing “a common forensic drug testing method [that] could easily mistake the presence of CBD for THC”).

<sup>142</sup> Cherney & Small, *supra* note 129, at 7.

<sup>143</sup> ECON. RSCH. SERV., USDA, AGES-001E, INDUSTRIAL HEMP IN THE UNITED STATES: STATUS AND MARKET POTENTIAL 3 (2000), [https://www.ers.usda.gov/webdocs/publications/41740/15867\\_ages001e\\_1\\_.pdf?v=1237.7](https://www.ers.usda.gov/webdocs/publications/41740/15867_ages001e_1_.pdf?v=1237.7) [<https://perma.cc/3N5T-WBWW>].

<sup>144</sup> *See, e.g.*, JACK HERER, THE EMPEROR WEARS NO CLOTHES 7 (Leslie Cabarga, Jeff Meyers, Jeremy Stout, Ellen Komp, Lynn Osburn, Judy Osburn, Chris Conrad, Bryce Garner & Carolee Wilson eds., 11th ed. 2000) (“The first draft of the Declaration of Independence (June 28, 1776) was written on Dutch (hemp) paper, as was the second draft completed on July 2, 1776.”); Jack Herer, *The Forgotten History of Hemp*, EARTH ISLAND J., Fall 1990, at 35, 35; *see also* Lundy v. Kentucky, 511 S.W.3d 398, 404 (Ky. Ct. App. 2017); Seeley v. Washington, 940 P.2d 604, 627 n.10 (Wash. 1997) (en banc) (Sanders, J., dissenting).

<sup>145</sup> *Declaration of Independence Paper*, MONTICELLO, <https://www.monticello.org/site/research-and-collections/declaration-independence-paper> [<https://perma.cc/DS9V-ZE77>] (last visited Apr. 13, 2021) (“Thomas Jefferson’s original ‘Rough Draft of the Declaration’ is now in the Jefferson Papers collection at the Library of Congress. According to sources at the Library of Congress, analysis by paper conservators has determined that the paper is most[] likely Dutch in origin. While hemp was commonly used to make paper in Southern Europe during this time, the Dutch were much more likely to use flax or linen rags.”).

cotton gin made cotton a more economically competitive crop.<sup>146</sup> Shortly thereafter, temperance and anti-narcotics movements led to a series of laws that restricted marijuana and also limited hemp.<sup>147</sup> A complete history of U.S. criminal law surrounding cannabis is beyond the scope of this banking-focused Article.<sup>148</sup> It is, however, useful to understand how law aimed primarily at marijuana also constrained hemp.

To illustrate the legal link between marijuana and hemp, consider the treatment of hemp under the CSA when it was passed in 1970. It designated marijuana as a Schedule I “controlled substance.”<sup>149</sup> Under the CSA then, as today, it was illegal “to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance” without at government issued permit.<sup>150</sup> Like earlier laws,<sup>151</sup> the CSA initially defined marijuana broadly to cover all variants of *Cannabis sativa* L., including those variants grown for hemp fiber or seeds.<sup>152</sup> However, the definition of marijuana excluded “the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant” or other products derived from the stocks and seeds.<sup>153</sup> Some have argued that this exclusion from the definition of marijuana was meant to allow cultivation of plants containing a low amount of THC.<sup>154</sup> But, under the language of the statute, growing a hemp plant was treated

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<sup>146</sup> JOHNSON, *supra* note 7, at 11; Trey Malone & Kevin Gomez, *Hemp in the United States: A Case Study of Regulatory Path Dependence*, 41 APPLIED ECON. PERSPS. & POL’Y 199, 201 (2019).

<sup>147</sup> Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1010-48 (1970).

<sup>148</sup> Professors Bonnie and Whitebread have published detailed histories of marijuana law in the United States from the early 1900s to the 1970s. *See generally* RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES* (1st ed. 1974); Bonnie & Whitebread, *supra* note 147.

<sup>149</sup> 21 U.S.C. § 812(c) (1970).

<sup>150</sup> *Id.* § 841(a)(1) (prohibiting marijuana “[e]xcept as authorized by this subchapter”); *id.* § 822(a) (requiring that “[e]very person who manufactures, distributes, or dispenses any controlled substance” must register).

<sup>151</sup> *See, e.g.*, Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551, *invalidated by* Leary v. United States, 395 U.S. 6 (1969); *United States v. White Plume*, 447 F.3d 1067, 1072 (8th Cir. 2006) (“When Congress passed the CSA, it adopted the Tax Act[ of 1937]’s definition of marijuana verbatim.”).

<sup>152</sup> 21 U.S.C. § 802(15) (1970) (amended 2018) (defining marijuana to include “all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin”); *see also White Plume*, 447 F.3d at 1072 (“[T]he CSA . . . criminalized the growing of marijuana whether it was intended for industrial-use or drug-use.”).

<sup>153</sup> 21 U.S.C. § 802(15) (1970) (amended 2018).

<sup>154</sup> *See White Plume*, 447 F.3d at 1072 (holding that “Appellants’ argument that Congress did not intend to criminalize the growing of marijuana for industrial [hemp] purposes is plausible, but ultimately not persuasive” because “[t]he language of the CSA unambiguously

as manufacturing a controlled substance,<sup>155</sup> and farmers had no way produce mature stalks or seeds of hemp without growing the whole plant. The Drug Enforcement Administration (“DEA”) did not issue permits for the commercial cultivation of hemp.<sup>156</sup> Although the CSA’s definition of marijuana allowed people to import hemp stalks, seed, and other hemp-derived products,<sup>157</sup> law enforcement authorities were not always welcoming to imported hemp products.<sup>158</sup>

### B. *The Path to Legalization*

The path to hemp legalization spanned three decades. In the 1990s, proponents of hemp began advocating for legalization. They noted that hemp would not get people high and had useful applications from paper to foods.<sup>159</sup>

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bans the growing of marijuana, regardless of its use”); *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 7 (1st Cir. 2000) (considering and rejecting the plaintiff’s argument that the CSA should be read to allow the cultivation of “non-psychoactive strains of cannabis sativa” for industrial use); Christen D. Shepherd, Comment, *Lethal Concentration of Power: How the D.E.A. Acts Improperly to Prohibit the Growth of Industrial Hemp*, 68 UMKC L. REV. 239, 256 (1999) (arguing that the 1970 CSA did not cover industrial hemp because it adopted the definition of marijuana from 1937 Marijuana Act and “[t]he 1937 Congress made numerous assurances to the industrial hemp industry that the definition did not include their product”).

<sup>155</sup> 21 U.S.C. § 802(14) (1970) (amended 2018) (defining “manufacture” in the CSA to include “production” and “propagation” of controlled substances); *id.* § 802(21) (defining “production” in the CSA to include “manufacture, planting, cultivation, growing, or harvesting”); *White Plume*, 447 F.3d at 1073; *N.H. Hemp Council*, 203 F.3d at 7-8.

<sup>156</sup> See Courtney N. Moran, *Industrial Hemp: Canada Exports, United States Imports*, 26 FORDHAM ENV’T L. REV. 383, 407 (2015) (describing permits issued to researchers at the University of Minnesota, North Dakota State University, the Kentucky Department of Agriculture, and the University of Hawaii); Christine A. Kolosov, Comment, *Evaluating the Public Interest: Regulation of Industrial Hemp Under the Controlled Substances Act*, 57 UCLA L. REV. 237, 246-47 (2009) (stating that the DEA had “only issued one annual permit for a research plot in Hawaii intermittently between 1999 and 2003, and one for a research plot at North Dakota State University (NDSU) in November of 2007” (footnote omitted)).

<sup>157</sup> In 2001, the DEA issued a rule stating that “any product that contains any amount of THC is a schedule I controlled substance, even if such product is made from portions of the cannabis plant that are excluded from the [CSA] definition of marijuana.” Interpretation of Listing of “Tetrahydrocannabinols” in Schedule I, 66 Fed. Reg. 51,530, 51,533 (Oct. 9, 2001). The rule would have prohibited the importing of hemp stocks and seeds, nearly all of which contained at least a small amount of THC. Businesses that imported hemp seed challenged the rule in court. The Ninth Circuit Court of Appeals struck down the rule as inconsistent with the unambiguous language of the CSA excluding stocks and seed from the definition of marijuana. *Hemp Indus. Ass’n v. Drug Enf’t Admin.*, 357 F.3d 1012, 1017-18 (9th Cir. 2004).

<sup>158</sup> See *Innovative Nutraceuticals, LLC v. United States*, No. 18-cv-01400, 2019 WL 3017672, at \*2 (C.D. Cal. Mar. 28, 2019) (describing pre-2019 shipments of hemp seized and destroyed by the U.S. Department of Customs and Border Protection); see also JOHNSON, *supra* note 7, at 24-25 (discussing DEA efforts to prevent the import of hemp containing any THC); *supra* note 157.

<sup>159</sup> HERER, *supra* note 144, at 7 (providing a zealous, but at times preposterous, defense of hemp); Lee Green, *The Demonized Seed*, L.A. TIMES MAG., Jan. 18, 2004, at 12, 12-13 (noting

Advocates were successful in driving consumer interest in hemp-derived products, leading to increased hemp imports.<sup>160</sup> But advocates saw less immediate success on the legalization front.<sup>161</sup>

In 1999, North Dakota became the first state to legalize cultivation of hemp.<sup>162</sup> But North Dakota farmers were hesitant to plant crops that were still illegal under federal law.<sup>163</sup> Ultimately, the hemp legalization movement gained steam as part of the more visible state efforts to legalize marijuana.<sup>164</sup> For example, Colorado's 2012 ballot provision that legalized recreational marijuana also provided "that industrial hemp should be regulated separately from strains of

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that despite his "over-the-top exuberance," Jack Herer "is widely credited with launching the modern hemp movement, a persistent campaign by an eclectic coalition of environmentalists, legislators, rights activists, farmers, scientists, entrepreneurs and others to end the maligned plant's banishment and tap its potential as a natural resource"); John Mintz, *Splendor in the Grass?*, WASH. POST, Jan. 5, 1997, at H1 (describing the emergence of hemp advocacy).

<sup>160</sup> See Edward Epstein, *Hemp-Growing Gardens Proposed for S.F.*, S.F. CHRON., June 8, 1999, at A15 (stating that "imports of hemp products are soaring, to \$75 million in 1997 from \$43 million in 1993"); Mintz, *supra* note 159, at H1 (noting that hemp was a "forgotten crop" until Jack Herer's book "spurred interest" leading to a jump in hemp demand); David Morris, Editorial, *Will U.S. Recover Sanity in Thinking About Hemp (Which Isn't Drug)?*, ST. PAUL PIONEER PRESS, Aug. 26, 1997, at 7A; see also JOHNSON, *supra* note 7, at 5 (providing a chart of U.S. hemp imports showing that they rose from \$1,416,000 in 1996 to \$67,332,000 in 2017).

<sup>161</sup> See Dennis Cauchon, *Pioneer Harvests Hemp Idea into Business*, USA TODAY, Oct. 7, 1998, at 14A (reporting Jack Herer's "disappointment that marijuana legalization has lost its importance as hemp has gone mainstream").

<sup>162</sup> Act of April 17, 1999, ch. 65, 1999 N.D. Laws 231; see also Thomas A. Duppong, Note, *Industrial Hemp: How the Classification of Industrial Hemp as Marijuana Under the Controlled Substances Act Has Caused the Dream of Growing Industrial Hemp in North Dakota to Go Up in Smoke*, 85 N.D. L. REV. 403, 422 (2009) ("In response to the economic and agronomic advantages of producing industrial hemp, the 56th Legislative Assembly (1999) overwhelmingly passed HB 1428 by an 86-7 vote in the North Dakota House and 44-3 in the North Dakota Senate.").

<sup>163</sup> North Dakota farmers went to federal court seeking a declaratory judgment that they would not be prosecuted under federal law for growing hemp with only a state license. The court, however, held that under federal law a DEA license was required for the cultivation of hemp. *Monson v. Drug Enf't Admin.*, 589 F.3d 952, 961-62 (8th Cir. 2009). With the court ruling, North Dakota farmers appear to have temporarily abandoned the idea of growing hemp. See Duppong, *supra* note 162, at 433 ("[G]iven Congress's inability to pass legislation and the federal courts' reluctance to permit production of industrial hemp, it appears that industrial hemp production, even with all of its economic advantages, will unfortunately continue to be a dream rather than a reality for North Dakota farmers."); Michael D. Moberly & Charitie L. Hartsig, *Reaching the End of Our Rope? An Appraisal of the Movement to Legalize Industrial Hemp*, 3 ACCORD LEGAL J. FOR PRACS. 1, 16 (2014) (stating in 2014 that "[t]he United States still has no known commercial producers of industrial hemp").

<sup>164</sup> Cf. Noelle Crombie, *Hemp Is Planted in Farm Bill*, OREGONIAN, Jan. 28, 2014, at A1 (noting that the hemp movement was "invigorated" by federal agencies' statements in 2014 that they "would not challenge marijuana legalization laws in Colorado and Washington").

cannabis with higher [THC] concentrations.”<sup>165</sup> Other states later adopted similar measures.<sup>166</sup>

This left hemp cultivation in much the same legal place as marijuana today: it was illegal to grow hemp under federal law, but some state laws nevertheless allowed it. Convinced that the federal government lacked the resources to enforce the federal law,<sup>167</sup> some farmers began growing hemp commercially with state permits.<sup>168</sup>

Hemp advocates also sought changes in federal law. Legislative proposals in “2005, 2007, 2009, 2011, and 2012 [all] sought to remove restrictions on the cultivation of industrial hemp and amend the CSA to exclude industrial hemp from the definition of ‘marijuana.’”<sup>169</sup> But Congress did not adopt these measures.

The 2014 Farm Bill was the first to implement a change in the federal law.<sup>170</sup> By this time, hemp had support from both Democrats in “marijuana-friendly states” and Republicans in states where hemp held promise as a profitable crop.<sup>171</sup> Nevertheless, the 2014 Farm Bill was a small step focused exclusively on cultivation for research purposes. It stated that “[n]otwithstanding the Controlled Substances Act . . . an institution of higher education . . . or a State department of agriculture may grow or cultivate industrial hemp . . . for purposes of research [or as part of] an agricultural pilot program.”<sup>172</sup> It defined industrial hemp as “any part of” *Cannabis sativa* L. with a THC “concentration

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<sup>165</sup> COLO. CONST. art. XVIII, § 16(1)(c).

<sup>166</sup> See Moran, *supra* note 156, at 421-26 (summarizing state legislation permitting the cultivation of hemp in California, Indiana, Kentucky, Maine, Montana, North Dakota, Oregon, South Carolina, Tennessee, Vermont, and West Virginia).

<sup>167</sup> See Memorandum from James M. Cole, *supra* note 35, at 1 (explaining the federal government’s law enforcement priority related to marijuana, including “[p]reventing the distribution of marijuana to minors” and “[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states”); Letter from S. Amanda Marshall, U.S. Att’y (Or.), DOJ, to Earl Blumenauer, Rep., U.S. House of Reps. (Nov. 8, 2013), [http://media.oregonlive.com/politics\\_impact/other/USDOJ%20A%20Marshall%20Letter.pdf](http://media.oregonlive.com/politics_impact/other/USDOJ%20A%20Marshall%20Letter.pdf) [<https://perma.cc/92B4-EPBR>] (“Since ‘industrial hemp’ is marijuana, under the CSA, [the federal] enforcement priorities apply to hemp just as they do to all forms of cannabis.”).

<sup>168</sup> See Marc Adesso, Pirjin Laser & Alex Mills, *An Overview of Industrial Hemp Law in the United States*, 22 U. D.C. L. REV. 85, 89-92 (2019) (describing commercial cultivation efforts in Kentucky and Colorado); Moran, *supra* note 156, at 427-37 (describing permits issued by Colorado, Kentucky, and Vermont); Steven Raabe, *Colorado Farmer Reaps Historic Hemp Harvest*, DENVER POST, Oct. 8, 2013, at 11A (“Colorado farmer Ryan Loflin made history last weekend by harvesting the nation’s first commercial hemp crop in 56 years.”).

<sup>169</sup> Adesso, Laser & Mills, *supra* note 168, at 97.

<sup>170</sup> Agricultural Act of 2014 (“2014 Farm Bill”), Pub. L. No. 113-79, 128 Stat. 649 (codified as amended in scattered sections of 7 and 21 U.S.C.).

<sup>171</sup> Kristen Wyatt, *Hemp Going Legit*, SEATTLE TIMES, Jan. 29, 2014, at A9.

<sup>172</sup> 2014 Farm Bill § 7606(a)(1). This “pilot program” for industrial hemp was only authorized in states where state law allowed it. *Id.* § 7606(a)(2).

of not more than 0.3 percent.”<sup>173</sup> The U.S. Department of Agriculture (“USDA”) issued a statement clarifying that state departments of agriculture could license people to “conduct research under an agricultural pilot program.”<sup>174</sup> Hemp produced under the pilot programs could be sold “[f]or purposes of marketing research . . . but not for the purpose of general commercial activity.”<sup>175</sup>

Nearly all states enacted legislation to allow some cultivation of hemp under either the 2014 Farm Bill’s pilot program or university research provisions.<sup>176</sup> USDA estimates that in 2018, hemp was planted on over 90,000 acres in the United States.<sup>177</sup> But the hemp industry was constrained because hemp still could not be legally grown for commercial purposes.<sup>178</sup> Those growing hemp under the pilot program faced obstacles ranging from difficulty in legally acquiring seeds to trouble accessing credit markets.<sup>179</sup> The success of pilot programs established under the 2014 Farm Bill did, however, lay the groundwork for broader federal legislation to legalize hemp cultivation.

The 2018 Farm Bill legalized hemp.<sup>180</sup> It defined hemp as “any part” of the cannabis plant, including “all derivatives, extracts, [and] cannabinoids” as long as they do not contain “more than 0.3 percent” THC.<sup>181</sup> Under the 2018 Farm Bill the federal government ceded “primary regulatory authority over the

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<sup>173</sup> *Id.* § 7606(b)(2).

<sup>174</sup> Statement of Principles on Industrial Hemp, 81 Fed. Reg. 53,395, 53,395 (Aug. 12, 2016).

<sup>175</sup> *Id.*

<sup>176</sup> See TYLER MARK, JONATHAN SHEPHERD, DAVID OLSON, WILLIAM SNELL, SUSAN PROPER & SUZANNE THORNSBURY, USDA, ECONOMIC VIABILITY OF INDUSTRIAL HEMP IN THE UNITED STATES: A REVIEW OF STATE PILOT PROGRAMS 2 (2020) [hereinafter USDA, STATE PILOT PROGRAM REVIEW], <https://www.ers.usda.gov/webdocs/publications/95930/eib-217.pdf> [<https://perma.cc/PR6V-FY69>] (“Only three States (Idaho, Mississippi, and South Dakota) lacked legislation in place to allow hemp programs after 2018.”); Adesso, Laser & Mills, *supra* note 168, at 86 n.4 (listing hemp pilot project legislation in thirty-nine states).

<sup>177</sup> USDA, STATE PILOT PROGRAMS REVIEW, *supra* note 176, at 2.

<sup>178</sup> Statement of Principles on Industrial Hemp, 81 Fed. Reg. at 53,395; USDA, STATE PILOT PROGRAMS REVIEW, *supra* note 176, at 1 (“Commercial production of hemp outside of the pilot programs was not allowed.”).

<sup>179</sup> USDA, STATE PILOT PROGRAMS REVIEW, *supra* note 176, at 11 (stating the challenges for hemp growers under the pilot program included “acquiring critical production inputs (e. g. seeds, insecticides, herbicides) and credit”); Doug Fine, Opinion, *Grow Hemp, Make Money*, L.A. TIMES, June 26, 2014, at A15 (“Customs officials, at the behest of the Drug Enforcement Administration in May [2014] seized a 286-pound shipment of Italian hemp seed bound for [Kentucky’s] agriculture department. After a weeklong standoff, a federal agency had to be reminded by the federal courts that the law had changed and [the] imports were legal.”); Kristen Wyatt & Bruce Schreiner, *Uncertainty Dominates New Hemp Market*, BISMARCK TRIB., June 8, 2014, at A2 (reporting that some hemp growers under Colorado’s pilot program resorted to purchasing hemp seeds that were not legally grown “for as much as \$10 each”).

<sup>180</sup> See 2018 Farm Bill, Pub. L. No. 115-334, §§ 10113, 12619, 132 Stat. 4490, 4908, 5018 (codified at 7 U.S.C. §§ 1639o-1639s and 21 U.S.C. § 802).

<sup>181</sup> 7 U.S.C. § 1639o(1); see also 21 U.S.C. § 802(16)(B) (stating that “[t]he term ‘marihuana’ does not include . . . hemp”).

production of hemp” to states or Indian tribes that develop USDA-approved plans to “monitor[] and regulate[] [hemp] production.”<sup>182</sup> To be approved, state and tribal plans must include:

- Recordkeeping detailing the land on which hemp is grown.<sup>183</sup>
- Procedures for testing THC concentration levels in hemp crops.<sup>184</sup>
- Procedures for destroying plants and products that are not produced in compliance with federal and state law.<sup>185</sup>
- Procedures for correcting violations of the law and sharing information with federal and local law enforcement.<sup>186</sup>
- Procedures for “conducting annual inspections of, at a minimum, a random sample of hemp producers to verify that hemp is not produced in violation of” federal law.<sup>187</sup>
- Procedures for sharing information about hemp licenses with USDA.<sup>188</sup>
- “[A] certification that the State or Indian tribe has the resources and personnel to carry out the” jurisdiction’s regulatory plan.<sup>189</sup>

The 2018 Farm Bill also instructs USDA to develop its own similarly provisioned plan for licensing and monitoring hemp producers in states without approved plans.<sup>190</sup> Each state can, if it chooses, decline to legalize hemp cultivation within its borders.<sup>191</sup> However, a state or Indian tribe cannot prohibit hemp or hemp products from being transported or shipped through its jurisdiction.<sup>192</sup>

Hemp cultivators who negligently violate federal law by failing to have a state permit, by failing to specify the land on which hemp was grown, or by producing cannabis with a THC content greater than 0.3% are not subject to criminal prosecution.<sup>193</sup> They must, however, remedy the violation.<sup>194</sup> Those that violate

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<sup>182</sup> 7 U.S.C. § 1639p(a)(1).

<sup>183</sup> *Id.* § 1639p(a)(2)(A)(i).

<sup>184</sup> *Id.* § 1639p(a)(2)(A)(ii).

<sup>185</sup> *Id.* § 1639p(a)(2)(A)(iii).

<sup>186</sup> *Id.* § 1639p(a)(2)(A)(iv), (e)(3).

<sup>187</sup> *Id.* § 1639p(a)(2)(A)(v).

<sup>188</sup> *Id.* §§ 1639p(a)(2)(A)(vi), 1639q(d)(2).

<sup>189</sup> *Id.* § 1639p(a)(2)(A)(vii).

<sup>190</sup> *Id.* § 1639q(a)(1)-(2).

<sup>191</sup> *Id.* § 1639p(a)(3)(A) (stating that federal law does not “preempt[] or limit[] any law of a State or Indian tribe that . . . regulates the production of hemp; and . . . is more stringent than” federal law).

<sup>192</sup> *Id.* § 1639o note (Rules of Construction).

<sup>193</sup> *Id.* § 1639p(e)(2)(A).

<sup>194</sup> *Id.* § 1639p(e)(2)(B) (requiring a hemp producer who negligently violates the law “to correct the negligent violation”).



the law “with a culpable mental state greater than negligence” are subject to criminal prosecution.<sup>195</sup>

Under the 2018 Farm Bill, properly licensed hemp cultivators became eligible for federal crop insurance and loan programs.<sup>196</sup>

Beyond cultivation, the 2018 Farm Bill clarified the status of CBD and hemp oil. Under the Act, hemp-derived products are no longer Schedule I controlled substances.<sup>197</sup> However, CBD and oil derived from cannabis plants that were not grown in compliance with federal and state law are still illegal.<sup>198</sup>

### C. *Regulatory Infrastructure*

The 2018 Farm Bill was not a magic wand that suddenly allowed all hemp. It required federal and state regulatory schemes designed to prevent the production and distribution of marijuana under the auspices of hemp.<sup>199</sup> These rules and other regulatory infrastructure took time to develop. Until they were in place, growers could operate under licensing schemes for the 2014 Farm Bill’s pilot programs,<sup>200</sup> but other cultivation of hemp was still illegal under federal law. Without the regulatory infrastructure, there was also confusion over the legality

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<sup>195</sup> *Id.* § 1639p(e)(3)(A).

<sup>196</sup> 2018 Farm Bill, Pub. L. No. 115-334, §§ 11101-11124, 132 Stat. 4490, 4919-35 (codified in scattered sections of 7 U.S.C.).

<sup>197</sup> 21 U.S.C. §§ 802(16), 812(c).

<sup>198</sup> John Hudak, *The Farm Bill, Hemp Legalization and the Status of CBD: An Explainer*, BROOKINGS (Dec. 14, 2018), <https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer/> [<https://perma.cc/W4CA-ABVA>] (“The Farm Bill ensures that any cannabinoid—a set of chemical compounds found in the cannabis plant—that is derived from hemp will be legal, *if and only if* that hemp is produced in a manner consistent with the Farm Bill, associated federal regulations, [associated] state regulations, and by a licensed grower.”).

<sup>199</sup> 7 U.S.C. §§ 1639p-1639r.

<sup>200</sup> *See id.* § 5940(b)-(c); Establishment of a Domestic Hemp Production Program, 84 Fed. Reg. 58,522, 58,540-41 (Oct. 31, 2019) (“The 2018 Farm Bill provided that States, Tribes, and institutions of higher education may continue to operate under the authorities of the 2014 Farm Bill for the 2019 planting season. Under the 2018 Farm Bill, the authority of the 2014 Farm Bill expires one year from the time that USDA establishes the plan and regulations required under the 2018 Farm Bill.”).

of interstate transportation of hemp<sup>201</sup> and products containing CBD and hemp oil.<sup>202</sup>

The first building block in the regulatory infrastructure was USDA rulemaking to describe the requirements for state hemp regulation plans and organize the federal system for hemp permits. USDA did not consider any state or tribal plans or issue any permits until it had established an interim final rule.<sup>203</sup> As a practical matter, jurisdictions could pass legislation allowing for hemp cultivation prior to seeing USDA's regulations. But if a jurisdiction developed its plan and procedures before USDA rulemaking, the jurisdiction risked having to rewrite its plan to bring it into compliance with the federal rules.

USDA issued its interim final rule on Halloween 2019—about ten months after the 2018 Farm Bill became law.<sup>204</sup> This rule largely followed the requirements of the statute, but it also contained some controversial provisions. For example, the rule required hemp to be tested for THC at a DEA-registered lab.<sup>205</sup> Not all hemp producers had access to these labs.<sup>206</sup> After complaints,

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<sup>201</sup> For example, in January 2019, law enforcement officials in Idaho seized a truckload of hemp grown under Oregon's pilot program that was en route to a hemp processor in Colorado. *Big Sky Sci. LLC v. Idaho St. Police*, No. 1:19-cv-00040, 2019 WL 2613882, at \*1 (D. Idaho Feb. 19, 2019), *rev'd on other grounds sub nom.* *Big Sky Sci. LLC v. Bennetts*, 776 F. App'x 541 (9th Cir. 2019). The processor sued in federal court to have the hemp returned, but Idaho maintained that the 2018 Farm Bill's provisions did not legalize intrastate shipment of hemp grown under pilot programs. *Id.* at \*11. The Ninth Circuit declined to address the merits of the case until the state law forfeiture proceeding had been resolved. *Big Sky Sci. LLC v. Bennetts*, 776 F. App'x 541, 541 (9th Cir. 2019). A state court then held that the seizure was lawful because the hemp was being sold for commercial purposes and was therefore not compliant with the 2014 pilot program. *Idaho St. Police v. One White 2013 Freightliner Com. Vehicle*, No. CV01-19-2219, at 29 (Idaho D. Ct. Jan. 21, 2020) ("The only reasonable inference . . . is that he wasn't growing the crop to help the Oregon Department of Agriculture do research, he was trying to make money."). On the other hand, when the DOJ sought to seize hemp grown under a pilot program in West Virginia that was to be transported for processing in Pennsylvania, the federal court declined to allow the seizure and allowed the shipment. *United States v. Mallory*, 372 F. Supp. 3d 377, 388-89 (S.D. W. Va. 2019).

<sup>202</sup> Shannon Smith, Note, *Hemp on the Horizon: The 2018 Farm Bill and the Future of CBD*, 98 N.C. L. REV. ADDENDUM 35, 46 (2020).

<sup>203</sup> Alexandria Burris, *Buying CBD? It's Best to Bring Cash*, INDIANAPOLIS STAR, Oct. 22, 2019, at A1 ("According to the USDA's website, the agency will not review any state plans until federal regulations for hemp production go into effect.").

<sup>204</sup> Establishment of a Domestic Hemp Production Program, 84 Fed. Reg. 58,522, 58,522 (Oct. 31, 2019) (explaining that USDA would operate under the interim final rule for two years until a final rule could be implemented).

<sup>205</sup> 7 C.F.R. §§ 990.3(a)(3)(i), 990.26(e) (2020).

<sup>206</sup> See, e.g., Michael Nepveux, *Changes Needed to Hemp Interim Final Rule as Comments Are Due*, AM. FARM BUREAU FED'N (Jan. 30, 2020), <https://www.fb.org/market-intel/Changes-Needed-to-Hemp-Interim-Final-Rule-as-Comments-Are-Due> [<https://perma.cc/5D4H-CJYM>] ("As of Jan. 30, USDA reported only 44 approved laboratories in 22 different states."); see also Ryan Faircloth, *Fed Rules Cast Cloud on Hemp Industry*, STAR TRIB. (Minneapolis), Jan. 11, 2020, at 1A ("Minnesota does not have a DEA-registered lab (it uses a third-party lab)").

USDA announced it was delaying enforcement of this requirement.<sup>207</sup> The interim final rule also required the destruction of any hemp crop found to contain more than 0.3% THC.<sup>208</sup> Hemp producers generally prefer a rule that allows for mitigation when crops only narrowly miss the threshold, such as extracting the THC, processing the entire plant as biomass, or mixing the “hot” crop with other plants to dilute the overall concentration.<sup>209</sup>

Upon issuance of the interim final rule, USDA began reviewing plans from states and Indian tribes.<sup>210</sup> On December 27, 2019, it announced approval of the first set of plans, including plans from “the states of Louisiana, New Jersey, and Ohio, and the Flandreau Santee Sioux, Santa Rosa Cahuilla, and La Jolla Band of Luiseno Indian Tribes.”<sup>211</sup> USDA approved other state and tribal plans later.<sup>212</sup>

Not all states elected to develop a plan. Hawaii, Mississippi, and New Hampshire chose to let USDA assume regulatory authority over hemp

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<sup>207</sup> Press Release, USDA, USDA, DEA Provide Options for Labs, Disposal of Non-Compliant Hemp Plants (Feb. 27, 2020), <https://www.ams.usda.gov/press-release/usda-dea-provide-options-labs-disposal-non-compliant-hemp-plants> [<https://perma.cc/2JRP-BX6M>]; 7 C.F.R. § 990.3(a)(3)(iii)(H) (2021) (“After December 31, 2022, States and Indian Tribes shall require that only laboratories registered with the DEA may conduct testing [of hemp].”).

<sup>208</sup> 7 C.F.R. § 990.3(a)(3)(i) (2020) (“Lots tested and not certified by the DEA-registered laboratory at or below the acceptable hemp THC level may not be further handled, processed or enter the stream of commerce and the producer shall ensure the lot is disposed of . . . .”); *see also id.* § 990.27(a) (“Cannabis plants exceeding the acceptable hemp THC level constitute marijuana, a schedule I controlled substance under the Controlled Substances Act . . . , and must be disposed of in accordance with the CSA and DEA regulations found at 21 CFR 1317.15.”).

<sup>209</sup> *See* Faircloth, *supra* note 206 (reporting that Minnesota “[s]tate officials have asked the feds to allow remediation . . . , noting that high THC levels can be diluted during processing or by blending hop hemp with plant material that tested below the legal limit”); Press Release, Maine Dep’t of Agric., Conservation & Forestry, The Maine Department of Agriculture, Conservation and Forestry Sends Comments to USDA on Interim Final Hemp Rule (Dec. 4, 2019), <https://www.maine.gov/dacf/about/news/news.shtml?id=1826230> [<https://perma.cc/H6YV-8ZG3>] (“The states corrective action plan should be allowed to include grower requirements to extract from or process the entire plant as biomass when total THC levels are above 0.3% and below 0.5%.”).

<sup>210</sup> Establishment of a Domestic Hemp Production Program, 84 Fed. Reg. 58,522, 58,527 (Oct. 31, 2019).

<sup>211</sup> Press Release, USDA, USDA Approves First State and Tribal Hemp Production Plans (Dec. 27, 2019), <https://www.ams.usda.gov/content/usda-approves-first-state-and-tribal-hemp-production-plans> [<https://perma.cc/QB6F-8UY5>].

<sup>212</sup> *See, e.g.*, Press Release, USDA, USDA Approves Seven State, Tribal Hemp Production Plans (Jan. 27, 2020), <https://www.ams.usda.gov/content/usda-approves-seven-state-tribal-hemp-production-plans> [<https://perma.cc/X9S5-RTR8>] (Delaware, Nebraska, Texas, Colorado River Indian Tribes, Fort Belknap Indian Community, Iowa Tribe of Kansas and Nebraska, and Yurok Tribe); Press Release, USDA, USDA Approves Five State, Tribal Hemp Production Plans (Feb. 20, 2020), <https://www.ams.usda.gov/content/usda-approves-five-state-tribal-hemp-production-plans> [<https://perma.cc/8Q8Y-JZYN>] (Washington, Wyoming, Otoe-Missouria Tribe, Prairie Band Potawatomi Nation, and Santee Sioux Nation).

production within their jurisdiction.<sup>213</sup> In addition, many states, including the large hemp-producing states of Colorado and Kentucky, elected to continue operating under the 2014 pilot program, rather than immediately develop a new plan consistent with the interim final rule.<sup>214</sup> For some states, this decision was driven by the complications associated with constructing a new regulatory framework before the new planting season. Tennessee, for example, needed time “to fine-tune laboratory operations, inspection procedures, and sampling processes before transition[ing] to” a 2018 Farm Bill plan.<sup>215</sup> These impediments to new state plans were exacerbated by the 2020 global coronavirus pandemic.<sup>216</sup> Other states continued operating under their pilot programs because they were displeased with portions of USDA’s interim final rule and thought that hemp producers might be better off under their state’s pilot program.<sup>217</sup> States cannot, however, operate under a 2014 pilot program indefinitely. Originally, the authorization for 2014 pilot programs would have expired on October 31, 2020 (one year after the issuance of the interim final rule),<sup>218</sup> but in appropriations legislation, Congress extended the deadline until September 30, 2021.<sup>219</sup> Absent another extension, states and hemp producers operating under a pilot program will have to transition to a USDA-approved plan, seek federal licensing, or stop cultivating hemp.

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<sup>213</sup> See *Status of State and Tribal Hemp Production Plans for USDA Approval*, USDA, <https://www.ams.usda.gov/rules-regulations/hemp/state-and-tribal-plan-review> [<https://perma.cc/7A9B-GE6G>] (last updated Mar. 22, 2021).

<sup>214</sup> USDA’s webpage lists the following states as operating under the 2014 pilot: Alabama, Alaska, Arkansas, Colorado, Connecticut, Illinois, Kentucky, Maine, Montana, New Mexico, New York, North Carolina, North Dakota, Oregon, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wisconsin. *Id.*

<sup>215</sup> *Tennessee Hemp Growers Get Another Year to Transition to Federal Program*, TENNESSEAN, Dec. 23, 2020, at A4 (reporting that Tennessee expects to operate under a USDA-approved plan in 2021).

<sup>216</sup> Theresa Bennett, *A Patchwork of Regulations: Hemp Pilot Programs Here to Stay Through 2021*, HEMP GROWER (Dec. 15, 2020), <https://www.hempgrower.com/article/hemp-pilot-program-extension-state-regulations-trends-2020-farm-bill/> [<https://perma.cc/E9C8-YVT3>] (“Dozens of states operating under their pilot programs established by the 2014 Farm Bill were suddenly left to not only develop stricter regulations, but also enforce them, all with minimal contact with their colleagues due to social distancing measures.”).

<sup>217</sup> Theresa Bennett, *States Follow 2014 Farm Bill amid Concern for USDA’s Interim Final Rule: Update*, HEMP GROWER (May 12, 2020), <https://www.hempgrower.com/article/states-follow-2014-farm-bill-concern-usda-interim-final-hemp-rule/> [<https://perma.cc/7WTS-48B4>] (“While devising a hemp program in compliance with federal regulations is no easy task, a large reason some states are holding onto pilot provisions is because they hope the USDA will adjust its regulations, many of which have drawn fierce criticism and concern throughout the industry.”); see also *supra* notes 205-09 and accompanying text (discussing controversial provisions of USDA’s interim final rule).

<sup>218</sup> Establishment of a Domestic Hemp Production Program, 84 Fed. Reg. 58,522, 58,540-41 (Oct. 31, 2019).

<sup>219</sup> Continuing Appropriations Act, 2021 and Other Extension Act, Pub. L. No. 116-159, § 122, 134 Stat. 709, 714 (2020).

In January 2021 (after many state and tribal plans were approved), USDA published the final version of its hemp rule.<sup>220</sup> One of the key changes was the creation of a larger threshold before cannabis containing more than 0.3% THC was deemed a negligent violation of the law. Under the interim final rule, hemp producers were not negligent if they made “reasonable efforts to grow hemp and the cannabis (marijuana) does not have a delta-9 tetrahydrocannabinol concentration of more than 0.5 percent.”<sup>221</sup> Under the new rule, the threshold THC concentration for a negligent violation is raised to 1.0%.<sup>222</sup> This “provides a greater buffer and reduces farmers’ exposure to risk of violation accrual and license suspension.”<sup>223</sup>

USDA’s final rule also allows farmers to remediate (as opposed to destroy) a crop that initially tests above the acceptable THC level.<sup>224</sup> As USDA explained:

[H]emp producers should have the opportunity to remediate non-compliant crops in order to minimize financial risk associated with the loss of investment in their hemp crop. For this reason, [the] final rule allows remediation activities, either disposing of flower materials and salvaging the remainder of the plant or blending the entire plant into biomass plant material. Through both forms of remediation, producers may be able to minimize losses, and in some cases produce a return on investment while ensuring that non-compliant material does not enter commerce.<sup>225</sup>

While USDA’s final hemp rule took effect on March 22, 2021,<sup>226</sup> the bulk of hemp licensing occurs through state- or tribe-administered plans. States and tribes have not yet had the opportunity to update their laws and hemp administration plans to make them consistent with the final rule.<sup>227</sup> In sum, the licensing of hemp growers is still in a state of flux. In some jurisdictions, hemp growers are operating under plans designed to comply with USDA’s interim final rule. States and tribes may make changes to their plans to reflect the newly

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<sup>220</sup> Establishment of a Domestic Hemp Production Program, 86 Fed. Reg. 5596 (Jan. 19, 2021) (codified at 7 C.F.R. pt. 990).

<sup>221</sup> 7 C.F.R. §§ 990.6(b)(3), 990.29(a)(3) (2020).

<sup>222</sup> 7 C.F.R. §§ 990.6(b)(3), 990.29(a)(3) (2021).

<sup>223</sup> Establishment of a Domestic Hemp Production Program, 86 Fed. Reg. at 5605.

<sup>224</sup> See 7 C.F.R. § 990.1 (2021) (“Remediation refers to the process of rendering non-compliant cannabis, compliant. Remediation can occur by removing and destroying flower material, while retaining stalk, stems, leaf material, and seeds. Remediation can also occur by shredding the entire plant into a biomass like material, then re-testing the shredded biomass material for compliance.”); *id.* § 990.27 (allowing for non-complaint crops to be remediated, but specifying that remediated crops are subject to testing to confirm compliant THC levels).

<sup>225</sup> Establishment of a Domestic Hemp Production Program, 86 Fed. Reg. at 5605.

<sup>226</sup> *Id.* at 5596.

<sup>227</sup> Compare 7 C.F.R. § 990.3(a)(3)(iii)(E) (2020) (stating that state and tribal plans must include “[a]n effective disposal procedure for hemp plants that are produced that do not meet the requirements of” the law), with 7 C.F.R. § 990.3(a)(6) (2021) (“A State or Tribal plan must include a procedure for the disposal *or remediation* of cannabis plants if the sample representing the plant tests above the acceptable hemp THC level.” (emphasis added)).

finalized USDA rule. Other hemp growers are operating under state pilot programs that are supposed to be exclusively for research purposes.<sup>228</sup> These pilot programs are poised to expire, leaving these growers subject to a different regulatory system.

And the regulatory infrastructure does not end with the licensing and testing of hemp crops. The 2018 Farm Bill emphasized that the U.S. Food and Drug Administration (“FDA”) continues to have regulatory authority over hemp-derived products, including CBD.<sup>229</sup> FDA Commissioner Scott Gottlieb wasted no time in explaining “the FDA requires a cannabis product (hemp-derived or otherwise) that is marketed with a claim of therapeutic benefit, or with any other disease claim, to be approved by the FDA for its intended use before it may be introduced into interstate commerce.”<sup>230</sup> In addition, he emphasized that it is illegal to sell “food containing added CBD or THC . . . , or to market CBD or THC products as, or in, dietary supplements.”<sup>231</sup>

So far the FDA has only approved one cannabis-derived drug, Epidiolex, which is used to treat two types of epilepsy.<sup>232</sup> It has warned manufacturers and retailers of other CBD products that they should stop selling dietary supplements and food products claiming to prevent or cure diseases.<sup>233</sup> Some states have

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<sup>228</sup> See Smith, *supra* note 202, at 46 (noting that state pilot programs leave “some activities that were legally questionable under the 2014 Farm Bill—including the commercial sale of CBD products—in murky legal territory for the time being”).

<sup>229</sup> See 7 U.S.C. § 1639r(c).

<sup>230</sup> Press Release, Scott Gottlieb, Comm’r, FDA, Statement from FDA Commissioner Scott Gottlieb, M.D., on Signing of the Agriculture Improvement Act and the Agency’s Regulation of Products Containing Cannabis and Cannabis-Derived Compounds (Dec. 20, 2018), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-signing-agriculture-improvement-act-and-agencys> [<https://perma.cc/FS72-8VS7>].

<sup>231</sup> *Id.* (“This is because both CBD and THC are active ingredients in FDA-approved drugs and were the subject of substantial clinical investigations before they were marketed as foods or dietary supplements.”).

<sup>232</sup> See Press Release, FDA, FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana to Treat Rare, Severe Forms of Epilepsy (June 25, 2018), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-drug-comprised-active-ingredient-derived-marijuana-treat-rare-severe-forms> [<https://perma.cc/M86B-6JX5>].

<sup>233</sup> See, e.g., Letter from Div. of Hum. & Animal Food Operations, FDA, to Skyler R. Johnstone, Principal, Bee Delightful (Dec. 22, 2020), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/bee-delightful-610689-12222020> [<https://perma.cc/4JP8-ZHQQ>] (warning to discontinue offering CBD-infused honey with the claims that, among other things, it would “soothe a sore throat,” “reduce pain from diseases like multiple sclerosis and rheumatoid arthritis,” “alleviate cancer-treatment symptoms,” “reduce acne,” “help epilepsy and Parkinson’s disease symptoms as well as possibly slow the progression of Alzheimer’s disease,” and “reduce blood pressure and prevent heart damage”); Letter from Div. of Hum. & Animal Food Operations, FDA, to Briana Borten & Peter Borten, Members and Owners, The Dragontree Apothecary LLC (Apr. 28, 2020), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/dragontree-apothecary-llc-592743-04282020>

likewise issued statements explaining that CBD is not allowed in food products and dietary supplements and that products should not make CBD-related health claims.<sup>234</sup> Other states, however, allow CBD in food.<sup>235</sup> In short, even when CBD is produced through hemp farming consistent with the 2018 Farm Bill, that CBD still cannot (under federal law) be sold or marketed for many of its purported useful purposes.<sup>236</sup> State law may or may not agree. Nevertheless, it is not difficult for U.S. consumers to find food products containing CBD or CBD products making claims of therapeutic benefits.<sup>237</sup>

#### D. Banking Guidance

All along the path of hemp legalization and regulation, the hemp industry and its advocates have pressed banking regulators for guidance on providing banking services to the industry.<sup>238</sup> Regulators, however, have been reluctant to oblige.

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[<https://perma.cc/VJ9K-WB8D>] (warning to discontinue offering CBD-containing dietary supplements and to discontinue CBD product labels claiming that the products provide relief from colds, the flu, inflammation, anxiety, and muscle pain).

<sup>234</sup> See, e.g., Press Release, N.C. Dep't of Agric. & Consumer Servs., Regulators Notify Industry Regarding CBD Products in the Marketplace (Feb. 8, 2019), <https://www.ncagr.gov/paffairs/release/2019/RegulatorsnotifyindustryregardingCBDproductsinthemarketplace.htm> [<https://perma.cc/R2QD-GD8V>] (stating that “CBD cannot legally be added to any human food or animal feed” and manufacturers and retailers “can . . . not make health claims, including statements that the product may prevent, treat or cure any disease”); CAL. DEP'T OF PUB. HEALTH, FAQ – INDUSTRIAL HEMP AND CANNABIDIOL (CBD) IN FOOD PRODUCTS 2 (2018), [https://www.slocounty.ca.gov/getattachment/f8c672bd-ab44-48b4-a609-30de55f9c7ab/FAQ-Industrial-Hemp-and-Cannabidoil-\(CBD\)-in-Food-Products-2018.aspx](https://www.slocounty.ca.gov/getattachment/f8c672bd-ab44-48b4-a609-30de55f9c7ab/FAQ-Industrial-Hemp-and-Cannabidoil-(CBD)-in-Food-Products-2018.aspx) [<https://perma.cc/WR46-G572>] (“[A]lthough California currently allows the manufacturing and sales of cannabis products (including edibles), the use of industrial hemp as the source of CBD to be added to food products is prohibited.”).

<sup>235</sup> See, e.g., FLA. STAT. § 581.217(3)(e), (7) (2020) (allowing the sale of “hemp extract,” “a substance or compound intended for ingestion, containing more than trace amounts of cannabinoid, or for inhalation which is derived from or contains hemp”); COLO. DEP'T OF PUB. HEALTH & ENV'T, POLICY ON MANUFACTURING FOOD FROM INDUSTRIAL HEMP (2018), [https://www.colorado.gov/pacific/sites/default/files/DEHS\\_MfgFd\\_IndustrialHempPolicy\\_FY18.pdf](https://www.colorado.gov/pacific/sites/default/files/DEHS_MfgFd_IndustrialHempPolicy_FY18.pdf) [<https://perma.cc/GP4R-S2US>] (“[T]he use of all parts of the industrial hemp plant is allowed as a food ingredient in Colorado.”).

<sup>236</sup> USDA, STATE PILOT PROGRAMS REVIEW, *supra* note 176, at 30 (“The potentially most profitable hemp product (i.e., CBD or other oil extracts) can only legally be sold in the United States for a subset of the end uses that potential customers demand. Before food and drug use is allowed, the FDA must consider issues, such as cumulative exposure risks and long-term effects, that may require more research before issuing regulations.”).

<sup>237</sup> Smith, *supra* note 202, at 48 (“Food, drinks, and dietary supplements containing CBD have become increasingly available in recent years. Consumers in many cities can buy CBD-infused drinks and baked goods at local shops; restaurants and bars across the country offer CBD entrees, desserts, and cocktails; and CBD drinks and treats are widely available for purchase online. Dietary supplements like CBD oil and capsules are even more widespread.” (footnotes omitted)).

<sup>238</sup> See, e.g., Andy Barr, Opinion, *Hemp Is Legal and Expanding in Kentucky. The Banking System Needs to Keep Up.*, LEXINGTON HERALD LEADER (June 28, 2019, 4:19 PM),

The first federal guidance on hemp banking was the 2014 FinCEN guidance on “marijuana” banking.<sup>239</sup> As previously explained, that guidance required suspicious activity reporting for marijuana-related transactions.<sup>240</sup> Because, at the time, all cannabis cultivated in the United States was considered illegal marijuana, the guidance applied equally to marijuana and hemp.<sup>241</sup> Under this guidance, many banks that served state-legal or pilot-program hemp-related businesses filed suspicious activity reports.<sup>242</sup> However, it is not clear that suspicious activity reports were required for transactions related to hemp produced in compliance with 2014 Farm Bill pilot programs.<sup>243</sup>

The passage of the 2018 Farm Bill legalizing hemp gave bank regulators a basis to distinguish between marijuana-related businesses and hemp-related businesses. But initially, the NCUA was the only banking regulator to issue new guidance.<sup>244</sup> The Federal Reserve and OCC stated that they did “not plan to issue any guidance because they believe[d] financial institutions [could] legally serve the hemp industry using guidance already in place and they prefer[red] to leave more decision-making power to banks.”<sup>245</sup> FDIC Chairman Jelena McWilliams acknowledged that there was “a lot of uncertainty” surrounding hemp banking, but explained that the FDIC was providing “extensive training with [its] examiners to make sure that . . . they . . . understand what is legal.”<sup>246</sup> Like the

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<https://www.kentucky.com/opinion/op-ed/article232083512.html> (criticizing regulators for failing “to give financial institutions the certainty they need[] to offer banking services to legitimate hemp businesses”).

<sup>239</sup> FINCEN MARIJUANA GUIDANCE, *supra* note 31.

<sup>240</sup> *See supra* notes 30-37 and accompanying text.

<sup>241</sup> The 2014 Farm Bill became law on February 7, 2014. 2014 Farm Bill, Pub. L. No. 113-79, 128 Stat. 649 (codified as amended in scattered sections of 7 and 21 U.S.C.). FinCEN’s marijuana guidance was issued only a week later—before any regulatory infrastructure for pilot programs had been adopted. FINCEN MARIJUANA GUIDANCE, *supra* note 31, at 1; *see also supra* notes 149-58 and accompanying text (explaining marijuana and hemp were treated similarly under the CSA).

<sup>242</sup> *See* FINCEN, DEP’T OF THE TREASURY, MARIJUANA BANKING UPDATE 3 (Mar. 31, 2020), [https://www.fincen.gov/sites/default/files/shared/508\\_293283\\_MJ\\_Banking\\_Update\\_2nd\\_QTR\\_FY2020\\_Public\\_Final.pdf](https://www.fincen.gov/sites/default/files/shared/508_293283_MJ_Banking_Update_2nd_QTR_FY2020_Public_Final.pdf) [<https://perma.cc/JP3M-VDDN>]

<sup>243</sup> *See* Robert Singer, *Banking on Hemp*, CAROLINA BANKER, Spring 2019, at 18, 19 (stating that before the 2018 Farm Bill “[w]hether, and when, to file a ‘suspicious activity report’ was difficult to ascertain”).

<sup>244</sup> *See* Letter from Rodney E. Hood, Chairman, NCUA, to Federally Insured Credit Unions (Aug. 2019), <https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/serving-hemp-businesses> [<https://perma.cc/4NN2-8GDD>].

<sup>245</sup> Barak Cohen & Michael C. Bleicher, *Banking Services for Legal Hemp May Open Door to Broader Cannabis Market*, BLOOMBERG L. (Sept. 27, 2019, 4:00 AM), <https://news.bloomberglaw.com/banking-law/insight-banking-services-for-legal-hemp-may-open-door-to-broader-cannabis-market> [<https://perma.cc/L436-RZ4W>].

<sup>246</sup> *Overnight of Prudential Regulators: Ensuring the Safety, Soundness, and Accountability of Megabanks and Other Depository Institutions: Hearing Before the H. Comm. on Fin. Servs.*, 116th Cong. 31-32 (2019) (statement of Jelena McWilliams, Chairman, FDIC).



other federal bank regulators, she stated that “the FinCEN guidance provide[d] a clear path for banks on what to do” but cautioned that when banks were unsure, they should file suspicious activity reports.<sup>247</sup>

The NCUA’s hemp guidance explained that, due to legalization, credit unions were no longer required to file suspicious activity reports “for the activity of hemp-related businesses operating lawfully, provided the activity is not unusual for that business.”<sup>248</sup> It also assured credit unions that “[l]ending to a lawfully operating hemp-related business is permissible.”<sup>249</sup> Nevertheless, the guidance warned that “[f]or hemp production to be legal under federal law beyond the 2014 Farm Bill pilot, the USDA must first promulgate regulations and guidelines to implement the hemp production provisions of the 2018 Farm Bill.”<sup>250</sup> For hemp-related businesses operating under a pilot program, “a credit union needs to know how to verify the member is part of the pilot program” and must adapt “ongoing due diligence and reporting approaches to any risks specific to participants in the pilot program.”<sup>251</sup> In any event, a credit union serving a hemp-related business “needs to know if the business and the product(s) [are] lawful under federal and state law, and any relevant restrictions or requirements under which the business must operate.”<sup>252</sup>

After USDA issued its interim final rule, the other federal bank regulators followed the NCUA’s lead and issued a joint statement governing hemp banking.<sup>253</sup> Like the NCUA, FinCEN, the Federal Reserve, the OCC, and the FDIC agreed that “banks are not required to file a Suspicious Activity Report . . . on customers solely because they are engaged in the growth or cultivation of hemp in accordance with applicable laws and regulations.”<sup>254</sup> They emphasized that “[w]hen deciding to serve hemp-related businesses, banks must comply with applicable regulatory requirements for customer identification, suspicious activity reporting, currency transaction reporting, and risk-based customer due diligence, including the collection of beneficial ownership information for legal entity customers.”<sup>255</sup> Otherwise, the statement gives little information about specific due diligence measures the regulators expect banks to employ.

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<sup>247</sup> *Id.* at 32.

<sup>248</sup> Letter from Rodney E. Hood, *supra* note 244.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> BD. OF GOVERNORS OF THE FED. RSRV. SYS., FDIC, FINCEN, OFF. OF THE COMPTROLLER OF THE CURRENCY & CONF. OF STATE BANK SUPERVISORS, PROVIDING FINANCIAL SERVICES TO CUSTOMERS ENGAGED IN HEMP-RELATED BUSINESSES (2019) [hereinafter 2019 JOINT HEMP BANKING GUIDANCE], <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20191203a1.pdf> [<https://perma.cc/39WQ-Z96Y>].

<sup>254</sup> *Id.* at 2.

<sup>255</sup> *Id.* at 3 (footnotes omitted).

In June 2020, amid concern that the guidance documents were not providing sufficient detail to encourage banks to serve the hemp industry, FinCEN issued additional guidance.<sup>256</sup> It explained that banks should continue to file a suspicious activity report if:

- A customer appears to be engaged in hemp production in a state or jurisdiction in which hemp production remains illegal.
- A customer appears to be using a state-licensed hemp business as a front or pretext to launder money derived from other criminal activity or derived from marijuana-related activity that may not be permitted under applicable law.
- A customer engaged in hemp production seeks to conceal or disguise involvement in marijuana-related business activity.
- The customer is unable or unwilling to certify or provide sufficient information to demonstrate that it is duly licensed and operating consistent with applicable law, or the financial institution becomes aware that the customer continues to operate (i) after a license revocation, or (ii) inconsistently with applicable law.<sup>257</sup>

In addition, if a hemp-related business is comingled with a marijuana-related business, the bank should continue filing suspicious activity reports as specified in FinCEN's 2014 guidance.<sup>258</sup>

FinCEN's 2020 guidance also discussed the due diligence that regulators expect banks to perform when serving hemp-related businesses. For hemp growers, banks must get either "a written attestation" that the grower has a valid license or a copy of the license itself.<sup>259</sup> In some circumstances, banks should also gather "crop inspection or testing reports, license renewals, updated attestations from the business, or correspondence with the state, tribal government, or USDA."<sup>260</sup>

None of the hemp banking guidance documents said much about banking hemp-related businesses that are not hemp growers, such as manufacturers or retailers of CBD products. Both the 2019 joint hemp guidance and the 2020 FinCEN hemp guidance warned that the FDA has authority to regulate hemp products and that banks should "contact the FDA" for more information.<sup>261</sup> The

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<sup>256</sup> See FINCEN, DEP'T OF THE TREASURY, FIN-2020-G001, FINCEN GUIDANCE REGARDING DUE DILIGENCE REQUIREMENTS UNDER THE BANK SECRECY ACT FOR HEMP-RELATED BUSINESS CUSTOMERS 1 (2020) [hereinafter FINCEN HEMP GUIDANCE], [https://www.fincen.gov/sites/default/files/2020-06/FinCEN\\_Hemp\\_Guidance\\_508\\_FINAL.pdf](https://www.fincen.gov/sites/default/files/2020-06/FinCEN_Hemp_Guidance_508_FINAL.pdf) [<https://perma.cc/LT8M-VDZZ>] (explaining that the additional guidance was "intended to enhance the availability of financial services for, and the financial transparency of, hemp-related businesses in compliance with federal law").

<sup>257</sup> *Id.* at 3.

<sup>258</sup> *Id.* at 4.

<sup>259</sup> *Id.* at 2-3.

<sup>260</sup> *Id.* at 3-4.

<sup>261</sup> 2019 JOINT HEMP BANKING GUIDANCE, *supra* note 253, at 3; FINCEN HEMP GUIDANCE,

NCUA guidance cautioned that credit unions need to know if a customer's "product(s)" are lawful.<sup>262</sup>

E. *Hemp Banking*

What does this mean in terms of banking services for hemp-related businesses? When hemp was effectively illegal under federal law, hemp-related businesses had banking problems just as the marijuana industry did. The 2014 Farm Bill's pilot programs and the 2014 FinCEN marijuana guidance did little to expand banking. Although observers hoped the 2018 Farm Bill's legalization of hemp would open the bank doors, the hemp industry still has banking problems. This Section explains that regulatory uncertainty, compliance costs, and market risk are likely constraining the hemp industry's access to banking services, including credit.

Almost as soon as farmers began contemplating growing hemp under state-legal plans, there was concern about the industry's lack of access to banking services.<sup>263</sup> This is unsurprising because hemp was still treated as illegal marijuana under federal law and banking guidance.<sup>264</sup> Bankers, understandably, chose to treat hemp as marijuana too.

After the adoption of pilot programs under the 2014 Farm Bill, most banks still avoided the hemp industry completely.<sup>265</sup> From the second quarter of 2014 through the second quarter of 2018, fewer than fifty financial institutions per quarter filed a suspicious activity report containing the word "hemp."<sup>266</sup> Banks

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*supra* note 256, at 4.

<sup>262</sup> Letter from Rodney E. Hood, *supra* note 244.

<sup>263</sup> See Tobie Baker, *Hemp Seed For Sale? Not Yet*, JOURNAL (Cortez, Mancos & Dolores, Colo.) (Mar. 6, 2014, 11:29 PM), <https://the-journal.com/articles/18276> [<https://perma.cc/GV5A-WTYG>] (noting "reluctant banking institutions" were a problem for the emerging hemp industry); Steve Raabe, *Upstart Colorado Hemp Industry Launches, but Still Constrained*, DENVER POST, Dec. 28, 2014, at 15W ("Like marijuana entrepreneurs, hemp growers have limited or no access to banking services, said Lynda Parker, vice president of the Rocky Mountain Hemp Association."); Martha Stoddard, *Nebraska Cash Crop? Hemp Grows on Lawmakers Research, Allowed by U.S. Farm Bill, Would Be First Step Hemp vs. Marijuana*, OMAHA WORLD-HERALD, Mar. 14, 2014, at 1A (citing trouble "getting bank loans" as a problem for Colorado's emerging hemp industry).

<sup>264</sup> See *supra* notes 239-43 and accompanying text.

<sup>265</sup> See C.J. Ciaramella, *Rand Paul Presses Jeff Sessions on Industrial Hemp Policy*, REASON (July 7, 2017, 4:15 PM), <https://reason.com/2017/07/07/rand-paul-presses-jeff-sessions-on-indus/> [<https://perma.cc/JJH6-4BEP>] (stating that, notwithstanding the passage of the 2014 Farm Bill and state legislation legalizing hemp, "[a]ccess to banking is still a struggle for the hemp industry, much like the industry for hemp's narcotic cousin, marijuana"); Matt Markgraf & Nicole Erwin, *Kentucky Hemp Is Poised for Progress but Uncertainty Remains*, WKMS (July 31, 2017), <https://www.wkms.org/post/kentucky-hemp-poised-progress-uncertainty-remains#stream/0> [<https://perma.cc/XRN6-2BW3>] (describing pilot program hemp producers who had bank accounts closed when the bank realized the nature of their business); Stradling, *supra* note 9.

<sup>266</sup> Letter from Terri L. Robinson, FOIA Officer, FinCEN, to author (attachment entitled

that provided account services were hesitant to lend.<sup>267</sup> Credit card processors and other payment companies refused to process hemp-related payments.<sup>268</sup>

Oddly, in some places, hemp-related businesses seemed to have more banking trouble than marijuana-related businesses. For example, Oregon has a robust licensing program for marijuana, but under its pilot program, the “registration process for hemp [was] little more than filling out a form and paying a fee.”<sup>269</sup> Banks that served the cannabis industry implemented extensive due diligence requirements.<sup>270</sup> Marijuana-related businesses were better able to meet those “requirements because they already jumped through similar hoops to get their licenses.”<sup>271</sup> In contrast, hemp-related businesses could not provide the same level of documentation to show they were operating lawfully.<sup>272</sup>

Why were banks hesitant to provide banking services to hemp-related businesses operating under pilot programs? Some blamed onerous suspicious activity report requirements established by FinCEN’s 2014 marijuana banking guidance.<sup>273</sup> Others blamed insufficient banking guidance.<sup>274</sup> But many blamed

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“Hemp-Related Businesses Banking with Depository Institutions”) (on file with author). This may underreport the number of financial institutions serving the hemp industry. Some banks may not have mentioned the word hemp in their suspicious activity report. *See id.* at 2 n.1 (“Hemp and marijuana-related terms are reported together in the marijuana compliance Suspicious Activity Reports . . . Differentiating between the two is only possible if the [depository institution] includes the description ‘HEMP’ in the narrative of the [report].”). Other banks may have decided that suspicious activity reports were not required for transactions related to business that were legally operating under a pilot program. *See Singer, supra* note 243, at 19.

<sup>267</sup> *See* Nicole Erwin, *High Hopes for Hemp*, 89.3 WFPL NEWS (June 24, 2016), <https://wfpl.org/high-hopes-for-hemp/> [<https://perma.cc/NX2U-UC4F>] (“FNB Bank Chief Operating Officer Sally Hopkins said the financing of a hemp production operation [under a pilot program] would be [a challenge] for any bank due to the uncertainties surrounding the crop.”); Stradling, *supra* note 9 (stating that “banks won’t loan . . . money to buy hemp seeds or seedlings” to pilot program participants).

<sup>268</sup> *See* Nichols, *supra* note 10, at 48 (suggesting that prior to the passage of the 2018 Farm Bill, hemp farmers did not have access to credit card processing); Daniel Oberhaus, *Colorado Hemp Farmers Are Turning to Bitcoin for Their Banking Woes*, VICE (Nov. 5, 2016, 10:00 AM), <https://www.vice.com/en/article/pgkvqn/colorado-hemp-farmers-are-turning-to-bitcoin-for-their-banking-woes> [<https://perma.cc/RGU4-EV4N>] (reporting that PayPal closed an account selling hemp products and froze the account funds for six months).

<sup>269</sup> Getlin, *supra* note 47, at 33.

<sup>270</sup> *See id.* at 32-33.

<sup>271</sup> *Id.* at 33.

<sup>272</sup> *Id.*

<sup>273</sup> *See Singer, supra* note 243, at 19 (explaining that before 2018, banks avoided hemp in part because FinCEN guidance “set extremely high standards and did not address related parties, such as suppliers, employees and landlords”).

<sup>274</sup> Erwin, *supra* note 267 (reporting that FNB Bank Chief Operating Officer Sally Hopkins remarked that, due to the “many . . . questions that have not been addressed by bank regulators and lawmakers,” banks had difficulty financing hemp producers operating under pilot programs).

the law: hemp was still largely illegal under federal law, and state laws varied widely.<sup>275</sup>

Those who blamed federal law for the lack of hemp banking were hopeful that the 2018 Farm Bill would fix the problem.<sup>276</sup> If the problem was that hemp was illegal, legalizing hemp should fix it, they reasoned.<sup>277</sup>

Although legalization may have increased the number of banks willing to bank hemp-related businesses, the 2018 Farm Bill did not solve hemp's banking problems. As Figure 1 shows, the number of banks filing hemp-related suspicious activity reports increased following the 2018 Farm Bill.<sup>278</sup> However, the total number of banks filing of hemp-related suspicious activity reports remained small.<sup>279</sup> By December 2019, FinCEN used suspicious activity reports to identify 203 banks that were providing services to hemp-related businesses.<sup>280</sup> Of those banks, 142 appeared to serve both marijuana and hemp businesses, while 61 served only hemp businesses.<sup>281</sup> These 203 banks represent about 2% of the financial institutions in the United States.<sup>282</sup>

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<sup>275</sup> See Getlin, *supra* note 47, at 33 (“To the banking system, cannabis is cannabis, but to the customer and the state, industrial hemp is very different from cannabis that contains THC at levels higher than 0.3 percent.”); *Banking Marijuana-Related Businesses*, KRIEG DEVAULT (July 24, 2018), <https://www.kriegdevault.com/insights/banking-marijuana-related-businesses> [<https://perma.cc/K5LG-U5TS>] (“While selling CBD oil that does not exceed statutorily prescribed levels of THC does not pose a risk under Indiana law, financial institutions with federal charters or access to the Federal Reserve’s payment system technically violate federal law . . .”); Tom Banse, *Hemp Clothing Retailer’s Banking Troubles Take More Twists Before Resolution*, NW NEWS NETWORK (Nov. 3, 2017), <https://www.nwnewsnetwork.org/post/hemp-clothing-retailers-banking-troubles-take-more-twists-resolution> [<https://perma.cc/WG8R-KZ6F>] (reporting that Umpqua Bank in Washington initially closed the account of an online hemp retailer because cannabis was prohibited under federal law).

<sup>276</sup> See sources cited *supra* note 10.

<sup>277</sup> See sources cited *supra* note 10.

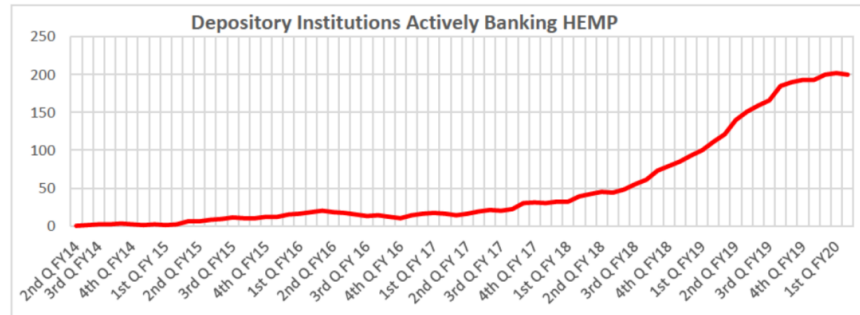
<sup>278</sup> Letter from Terri L. Robinson, *supra* note 266 (attachment entitled “Hemp-Related Businesses Banking with Depository Institutions”).

<sup>279</sup> *Id.*

<sup>280</sup> FINCEN, *supra* note 242, at 3. This FinCEN data may understate the number of banks serving that hemp-industry. Some banks may have concluded that suspicious activity reporting was not required for hemp-related businesses after the passage of the 2018 Farm Bill, even though the joint guidance confirming that conclusion was not issued until late 2019. See 2019 JOINT HEMP BANKING GUIDANCE, *supra* note 253.

<sup>281</sup> FINCEN, *supra* note 242, at 3. In comparison, 536 banks served marijuana-related businesses but had no hemp-related suspicious activity reports. *Id.*

<sup>282</sup> In December 2019, there were 5,177 FDIC-insured banks and 5,236 NCUA-insured credit unions. See FDIC, STATISTICS AT A GLANCE (Dec. 31, 2019), <https://www.fdic.gov/bank/statistical/stats/2019dec/industry.pdf> [<https://perma.cc/GG7B-SWFX>]; NCUA, QUARTERLY CREDIT UNION DATA SUMMARY 2019 Q4, at i (2019), <https://www.ncua.gov/files/publications/analysis/quarterly-data-summary-2019-Q4.pdf> [<https://perma.cc/L34R-EEMW>].

**Figure 1.** FinCEN Suspicious Activity Report Data.<sup>283</sup>

Other data confirms that there are few banks willing to serve the now-legal hemp industry. A December 2019 survey of eighty-five bank executives in Wisconsin found that only 38% of their banks accepted deposits from hemp-related businesses and only 15% of their banks were lending to hemp-related businesses.<sup>284</sup>

The hemp industry's problems accessing financial services extends beyond access to banks and credit unions. Farm Credit Services of America, one of the leading agricultural lenders in Iowa, Nebraska, South Dakota, and Wyoming, said it would not immediately begin lending to hemp growers.<sup>285</sup> Most major

<sup>283</sup> Letter from Terri L. Robinson, *supra* note 266 (attachment entitled "Hemp-Related Businesses Banking with Depository Institutions").

<sup>284</sup> Press Release, Wisconsin Bankers Ass'n, *supra* note 15. Anecdotal reports confirm that banks are hesitant to lend to hemp-related businesses. *See, e.g.*, Cassandra Stephenson, *Bank Hesitates to Grant Loan to Hemp Farm in Tenn.*, TENNESSEAN, Apr. 8, 2019, at A9 (reporting that a hemp farmer had never had trouble getting loan but was denied a loan after an appraiser noticed a hemp license hanging on his wall); Ryland Barton, *Ky. Hemp Businesses Still Have Banking Troubles, Lawmakers Told*, 89.3 WFPL NEWS (Sept. 11, 2019), <https://wfpl.org/ky-hemp-businesses-still-have-banking-troubles-lawmakers-told/> [https://perma.cc/US9P-YHRW] (reporting that Kentucky's Department of Financial Institutions Commissioner Charles Vice told Kentucky legislators that "[b]anks are still hesitant to offer loans or credit card processing capabilities to hemp farmers, processors and retailers because of the plant's similarities to cannabis, even though hemp was legalized by the federal government in 2018" (citation omitted)); Erin Douglas, *Will Anyone Fund Texas' Hemp Industry? Entrepreneurs Struggling to Launch*, HOUS. CHRON. (July 22, 2019, 5:53 PM), <https://www.houstonchronicle.com/business/article/Will-anyone-fund-Texas-hemp-industry-14112021.php> ("Despite the promise of a bonanza from the state's legalization of industrial hemp, a cousin of the marijuana producing cannabis plant, [hemp] entrepreneurs have quickly found that investors and banks they need to finance their enterprises are reluctant to take a chance on the new industry."); Janet Patton, *Cash-Flow, Legal Issues Giving Kentucky Hemp 'Growing Pains.'* LEXINGTON HERALD LEADER, (Oct. 25, 2019, 3:53 PM), <https://www.kentucky.com/news/business/article236029523.html> ("Access to capital continues to be a major issue, especially in the start-up phase . . . . Banks are still extremely reluctant to lend to hemp-based businesses . . . .").

<sup>285</sup> Philip Brasher, *Farm Credit Faces Tough Farm Economy, Hemp Demand*, AGRI-PULSE

payment networks reiterated they would not process CBD-related transactions.<sup>286</sup> In addition, Elavon, Inc., “the largest domestic CBD payment processor” announced that it was ending service to all hemp-related businesses.<sup>287</sup>

This means that many in the hemp industry have experiences like that of Ben and Taryn Marcus who started hemp farming in Maine and found that their long-time banks were closing their accounts.<sup>288</sup> Indeed, hemp banking remains a large enough problem that proponents of the SAFE Banking Act (the bill aimed at facilitating marijuana banking) have included a provision that would require federal bank regulators to issue guidance “confirming . . . the legality of engaging in financial services with businesses selling hemp, hemp-derived CBD products, and other hemp-derived cannabinoid products.”<sup>289</sup>

### 1. Regulatory Uncertainty

One of the remaining barriers to hemp banking is regulatory uncertainty. As Section III.C explains, building a regulatory structure for the hemp industry required USDA rulemaking.<sup>290</sup> It also required that state and tribal governments

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(Apr. 3, 2019, 6:35 AM), <https://www.agri-pulse.com/articles/12066-farm-credit-struggles-with-farm-economy-hemp-demand> (“At least one major association, Farm Credit Services of America . . . is likely to hold off making loans. ‘We’re not going to do anything until the legal and regulatory hurdles are cleared,’ the association’s president and CEO Mark Jensen, told *Agri-Pulse* after the hearing.”).

<sup>286</sup> See Tom Bourlet, *CBD Payment Gateways & PayPal Issues*, CBD SLOTH (Jan. 13, 2021), <https://www.cbdsloth.com/news/business/cbd-payment-gateways-paypal-issues/> [<https://perma.cc/3L4J-EE9S>] (stating that PayPal and Stripe will not process CBD or hemp oil payments); Renee Fabian, *Declined: Why Your Credit Card Company Won’t Let You Buy CBD*, MIGHTY (Aug. 19, 2019), <https://themighty.com/2019/08/cbd-companies-declined-visa-mastercard-paypal/> [<https://perma.cc/SR7G-NDNU>] (“Mastercard, Visa, American Express, PayPal, . . . Stripe and Shopify all refuse to process payments for CBD companies . . .”). In contrast, Square and Discover will process at least some hemp and CBD-related payments. See Bourlet, *supra* (reporting that as of October 2019, Square started processing payments for CBD products, but that processing is subject to “a very strict level of due diligence” and costs more than typical payment processing); Fabian, *supra* (quoting a Discover spokesperson as stating: “Our stance on CBD products is that if merchants offer products that are legal, then there is no issue with acceptance through the Discover Network”).

<sup>287</sup> Jeff Moss, *Four Ways the CBD Industry Can Process Payments Post-Elavon*, FORBES (Aug. 6, 2019, 8:00 AM), <https://www.forbes.com/sites/forbesnycouncil/2019/08/06/four-ways-the-cbd-industry-can-process-payments-post-elavon> (explaining that prior to exiting the business Elavon, a subsidiary of U.S. Bancorp, “was responsible for a rumored 90% of online CBD merchant payment processing in the United States”).

<sup>288</sup> See *supra* notes 11-14 and accompanying text.

<sup>289</sup> SAFE Banking Act of 2019, H.R. 1595, 116th Cong. § 11(a)(2) (2019) (noting that “despite the legalization of hemp, some hemp businesses (including producers, manufacturers, and retailers) continue to have difficulty gaining access to banking products and services”).

<sup>290</sup> 7 U.S.C. §§ 1639q-1639r.

develop hemp regulation plans.<sup>291</sup> This process has been time-consuming and is not yet finished. With the state of the law in flux, several financial service providers indicated that they were hesitant to offer banking services to the hemp industry.<sup>292</sup> Elavon (the once-dominant CBD payment processor) explained, “After several months supporting this merchant segment, it has become clear that the pace of an evolving federal and state regulatory framework makes it extremely difficult to validate the qualifications required to operate within this industry.”<sup>293</sup> MasterCard offered a similar statement:

Our rules require our customers to conduct lawful activity where they are licensed to use our brands. States are currently developing a regulatory framework for the purchase of hemp-based and CBD products, incorporating input from both the USDA and the FDA. Given the complexity and lack of clarity at this time, we cannot support these transactions on our network. As this topic evolves, we will share any new developments regarding the use of our products.<sup>294</sup>

Some believe that the banking situation might improve now that USDA has finalized its rule and states and tribes have established approved plans.<sup>295</sup> It is too soon to evaluate whether these predictions are correct. Others indicate that for some segments of the hemp market, a final USDA rule may not be enough.<sup>296</sup> Businesses focused on CBD manufacturing or sales may need the FDA to approve CBD for use in food and dietary supplements before they can easily access banking services.<sup>297</sup> Problems for CBD-related businesses may be

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<sup>291</sup> *Id.* § 1639p.

<sup>292</sup> Sophie Quinton & April Simpson, *Cannabis Banking Challenges in Legal States Go Far Beyond Pot*, *INS. J.* (Oct. 16, 2019), <https://www.insurancejournal.com/news/national/2019/10/16/545303.htm> [<https://perma.cc/NU9L-ZER3>] (“Banks and credit unions aren’t sure how to serve hemp businesses while regulations are up in the air. So, many are staying away, and thousands of people who have leapt into the rapidly expanding hemp industry this year now have trouble getting bank accounts and accepting debit and credit card payments from customers.”).

<sup>293</sup> Moss, *supra* note 287.

<sup>294</sup> Fabian, *supra* note 286.

<sup>295</sup> See Burris, *supra* note 203, at A1 (stating that Indiana bankers were hesitant to bank hemp because they did not want regulators asking, “Why did you make a loan or take a deposit before the state plan was approved and this entity didn’t have a license?”); Douglas, *supra* note 284 (stating that Texas banks were reluctant to lend because “Texas regulators are several months from adopting rules under which this new industry would operate”).

<sup>296</sup> Vince Sliwoski, *Industrial Hemp and the Banks: Slow Going*, *HARRIS BRICKEN: CANNAL. BLOG* (Jan. 16, 2019), <https://harrisbricken.com/cannalawblog/hemp-is-legal-so-whats-up-with-banks/> [<https://perma.cc/9WDK-5KH9>] (suggesting that banks are waiting not only for USDA and state plans but also for “a wave or two of litigation to interpret the administrative environment”).

<sup>297</sup> See Singer, *supra* note 243, at 19 (stating that “cautious bankers” should wait for USDA hemp rules, an approved state hemp plan, and “[m]ore guidance from the FDA” before banking hemp businesses); Burris, *supra* note 203, at A1 (noting that the lack of FDA guidance “leav[es] merchants to operate in gray areas”).



exacerbated because current banking guidance focuses on hemp farmers, not on CBD manufacturers or retailers.<sup>298</sup>

## 2. Compliance Cost and Legal Risk

Another reason that banks continue to avoid hemp is the cost of compliance and the risk associated with compliance failures.<sup>299</sup> As explained in Section III.C, regulators expect banks to, at a minimum, establish that hemp growers are licensed to grow hemp.<sup>300</sup> Beyond that, banks must assess the risk posed by each customer and undertake additional due diligence consistent with that risk.<sup>301</sup> For most hemp businesses, banks will need to collect periodic financial statements,<sup>302</sup> secure representations and warranties that the business is in compliance with all applicable law,<sup>303</sup> and perform periodic checks to confirm that the business is properly licensed.<sup>304</sup> For hemp growers, the bank may need

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<sup>298</sup> See 2019 JOINT HEMP BANKING GUIDANCE, *supra* note 253, at 3 (“Banks may consider contacting the FDA with hemp-related food, drug, and cosmetic questions.”); FINCEN HEMP GUIDANCE, *supra* note 256, at 4 (“For questions related to FDA-regulated products, financial institutions should contact the FDA.”); Hilary Bricken, *Banking Woes and Wins for Hemp-CBD*, HARRIS BRICKEN: CANNA L. BLOG (Dec. 24, 2019), <https://harrisbricken.com/cannalawblog/banking-woes-and-wins-for-hemp-cbd/> [<https://perma.cc/NP7E-LZNW>] (“Given the fact . . . that we don’t have any guidance from federal banking regulators specific to hemp-CBD companies, you’re unlikely to see financial institutions (which are already extremely conservative creatures) openly or knowingly serving hemp-CBD businesses.”); William Sumner, *Ask Our Experts: Banking Services*, NEW FRONTIER DATA (June 10, 2020), <https://newfrontierdata.com/cannabis-insights/ask-our-experts-banking-services/> [<https://perma.cc/U5WB-WBAS>] (noting that the joint banking guidance “pertains only to hemp cultivation, a delineation which leaves hemp-CBD companies burdened with nebulous legal liabilities” that will make banks “reluctant to engage with the industry”).

<sup>299</sup> Mengqi Sun, *Banks Navigate Hazy Regulations to Serve Cannabis Businesses*, WALL ST. J. (Oct. 26, 2020, 5:30 AM), <https://www.wsj.com/articles/banks-navigate-hazy-regulations-to-serve-cannabis-businesses-11603704601> (“The reason that bankers are so reluctant to get into [the cannabis] industry is primarily the compliance; [there are] very intensive compliance requirements, more than any other industry,’ said Mel Barnes, chief operations officer at Oklahoma State Bank.” (second alternation in original)).

<sup>300</sup> FINCEN HEMP GUIDANCE, *supra* note 256, at 2-3.

<sup>301</sup> See generally 2019 JOINT HEMP BANKING GUIDANCE, *supra* note 253; FINCEN HEMP GUIDANCE, *supra* note 256; Letter from Rodney E. Hood, *supra* note 244.

<sup>302</sup> See FINCEN HEMP GUIDANCE, *supra* note 256, at 3; Vince Sliwoski, *Hemp Banking for Credit Unions: Five Key Question*, HARRIS BRICKEN: CANNA L. BLOG (Jan. 5, 2021), <https://harrisbricken.com/cannalawblog/hemp-banking-for-credit-unions-five-key-questions/> [<https://perma.cc/3QVB-UGDU>] (stating that banks should request hemp-related customers provide “copies of business financing documents”).

<sup>303</sup> See Whitt Steineker & Laney Gifford, *Hemp Is Here: How Financial Institutions Can Prepare for Alabama’s Newest Industry*, ALA. BANKERS ASS’N BD. BRIEFS, May-June 2019, at 2, 3-4 (“[F]inancial institutions should craft strong representations, warranties, covenants, and other contractual provisions in agreements with customers that are tailored to address these hemp-related considerations and minimize institution-related risk.”).

<sup>304</sup> See FINCEN HEMP GUIDANCE, *supra* note 256, at 3 (stating that a bank should consider gathering “license renewals [and] updated attestations”); see also Steineker & Gifford, *supra*

to confirm the hemp is growing on the permitted land, the crop does not contain impermissibly high levels of THC, the business has appropriate disposal protocols for hemp-related products, the hemp is being sold to a licensed processor in a state where hemp is legal, and the purchaser is not using the hemp to make an impermissible product (like a dietary supplement).<sup>305</sup> Some banks serving the hemp industry conduct site inspections and perform lab tests.<sup>306</sup> For hemp processors, manufacturers, or retailers, the bank may need to confirm the hemp-related product was grown by a properly licensed farmer in compliance with the law, the product does not contain impermissibly high levels of THC, the product is not added to food or dietary supplements, and any seller is not making health claims.

Because each state or tribe's regulatory plan is different, the necessary due diligence varies from state to state.<sup>307</sup> For example, some states license hemp processors but other states do not.<sup>308</sup> Some states allow smokable hemp while others do not.<sup>309</sup> States also have different THC testing protocols for hemp plants.<sup>310</sup> Bank regulators want to see that each bank has written hemp-specific

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note 303, at 3 (stating that bank due diligence includes "requiring hemp customers to be licensed by all appropriate agencies and to periodically provide proof of good standing with those agencies").

<sup>305</sup> See Letter from Rodney E. Hood, *supra* note 244; Sliwoski, *supra* note 302 (stating that banks might request that hemp-related customers produce "product disposal protocols"); Sun, *supra* note 299 (stating that Peoples Bank, a community bank in Newton, N.C., "questions [its hemp-related customers] on every step, gathering details on what they are growing, how they are growing it and how they are harvesting the crop").

<sup>306</sup> See Sun, *supra* note 299.

<sup>307</sup> See Sliwoski, *supra* note 302.

<sup>308</sup> For example, Kentucky licenses hemp handlers and processors. KY. REV. STAT. ANN. § 260.862(1)(a) (West 2021) (giving the Kentucky Department of Agriculture authority to "[l]icense persons who wish to cultivate, handle, process, or market hemp"); 302 KY. ADMIN. REGS. 50:031 § 2(4) (2021) ("Any person who does not hold a processor/handler license from the department shall not process, handle, broker, or market hemp or other cannabis that does not fall within the definition of a 'publicly marketable hemp product' at any location within the commonwealth."). In contrast, while North Carolina requires hemp processors to "register" with its Industrial Hemp Commission, it clarifies that "[t]he Industrial Hemp Commission does not have authority to license or monitor the registered processors." *Industrial Hemp Pilot Program: Registered Processors*, N.C. DEP'T OF AGRIC. & CONSUMER SERVS., <http://www.ncagr.gov/hemp/processorsinfo.htm> [<https://perma.cc/H4NC-6KKS>] (last visited Apr. 13, 2021) (noting that although the Commission's webpage provides a list of hemp processors "[t]he list is provided as a service . . . and does not imply the processors are active or in good standing with the Commission or other participants").

<sup>309</sup> See 302 KY. ADMIN. REGS. 50:070 (2021) (prohibiting hemp cigarettes and cigars); *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541 (7th Cir. 2020) (holding that an Indiana law banning smokable hemp in Indiana was not preempted by the 2018 Farm Bill); Frank Tice & Jack Meadows, *Interstate Transactions for Industrial Hemp*, in *CANNABIS LAW* 300:400, Westlaw (database updated Dec. 2020) ("Kentucky's hemp program prohibits certain types of smokeable hemp while most other states do not have prohibitions on smokeable hemp.").

<sup>310</sup> Quinton & Simpson, *supra* note 292 ("In Oregon, for instance, the top 8 inches of plants are tested 28 days before harvest for THC; in Tennessee, a portion of the top third of plants

compliance programs that are consistent with federal, state, and tribal law in each of the jurisdictions where the bank has customers. Because the law is unsettled, banks must update their policies and procedures often.<sup>311</sup>

But it is not just a matter of drawing up hemp compliance policies and then collecting and reviewing documents from hemp-related businesses. Under the law, the line between legal hemp and marijuana is thin. Hemp that is not grown in strict compliance with the 2018 Farm Bill and applicable state law is marijuana.<sup>312</sup> For example, as discussed, “hot” hemp that exceeds the 0.3% THC content is illegal.<sup>313</sup> Because hemp growers have little experience, the quality of hemp seed is still developing, and THC content can be influenced by variables like crop watering and weeds, it is easy for a hemp grower to end up with plants that exceed the 0.3% threshold.<sup>314</sup> “In 2019, more than half of all hemp crops grown in Hawaii were hot.”<sup>315</sup>

If purported “hemp” is instead marijuana, there are unpleasant consequences for both the business and the bank.<sup>316</sup> Under USDA’s interim final rule, the illegal crops or products were destroyed.<sup>317</sup> This could leave a borrower with no income to repay a bank loan.<sup>318</sup> USDA’s final rule improves this situation by

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are tested 30 days before harvest. Colorado only tests the top 2 inches of hemp plants.”).

<sup>311</sup> See Jessica Caballero, *Initiating a Hemp Banking Program*, ABA BANK COMPLIANCE, Jan.-Feb. 2021, at 14, 17 (“Perhaps the most daunting part of designing a program for serving hemp-related businesses is the complex and dynamic legal environment. Changes to the legality of certain products or changes in licensing requirements can also impact the amount of regulatory risk [an] institution incurs.”).

<sup>312</sup> 7 U.S.C. §§ 1639p(e), 1639q(c).

<sup>313</sup> *Id.* § 1639p(e)(2)(A)(iii).

<sup>314</sup> See Donnelle Eller, *Hemp Farmers Hit Host of Hurdles*, DES MOINES REG., Nov. 24, 2020, at A4 (reporting that hemp crops in Iowa tested “hot” after the plants became stressed from weeds and a lack of water); Sun, *supra* note 299 (“‘It is actually very easy for a hemp producer to inadvertently, or perhaps not, produce a product that is legally classified as [marijuana] rather than hemp,’ said Dan Roda, co-founder and chief executive of fintech company Abaca in North Little Rock, Ark., which provides banking services to cannabis businesses.” (alteration in original)).

<sup>315</sup> Eric Sandy, *Hawaii Farmers Prepare for Nov. 1 Transition to USDA Program*, HEMP GROWER (Oct. 13, 2020), <https://www.hempgrower.com/article/hawaii-hemp-farmers-transition-usda-licensing/> [<https://perma.cc/H27S-BW47>]; *cf.* Establishment of a Domestic Hemp Production Program, 86 Fed. Reg. 5596, 5604 (Jan. 19, 2021) (“As of November 2020, twenty States and nine Tribes operating under the 2018 Farm Bill reported 4,192 licensed producers representing 6,166 acres planted. Of these acres planted, there were 231 disposals representing 730 acres disposed due to not meeting the 0.3 percent acceptable hemp THC level.”).

<sup>316</sup> Barry A. Abbott & James B. Zack, *Current Banking Issues in the Cannabis Industry*, 72 CONSUMER FIN. L.Q. REP. 390, 396 (2018) (“While the Farm Act opens new avenues to financial institutions to take deposits and lend money to legal ‘hemp’ producers and sellers, there is significant legal risk in the event any producers produce such products that exceed a 0.3-percent THC level.”).

<sup>317</sup> See 7 C.F.R. §§ 990.3(a)(3)(i), 990.27 (2020).

<sup>318</sup> See USDA, STATE PILOT PROGRAMS REVIEW, *supra* note 176, at 30 (“A significant risk

allowing farmers to remediate hot crops.<sup>319</sup> However, it may not be possible to remediate all crops.<sup>320</sup> Those remediated will likely yield lower than initially expected prices,<sup>321</sup> potentially impacting a borrower's ability repay loans. In addition, regulatory guidance suggests that banks should file suspicious activity reports for customers whose cannabis does not meet the legal definition of hemp.<sup>322</sup> There is, for example, no guidance that relieves banks from filing suspicious activity reports for customers whose cannabis tests above the 0.3% THC limit for hemp but below the 1.0% threshold for a negligent violation of the law. Finally, repeated violations or cannabis that significantly exceeds the 0.3% THC level may cause law enforcement, hemp regulators, and bank supervisors to conclude that the customer (and perhaps the bank) were knowingly violating criminal law.<sup>323</sup>

All of this leaves many banks unwilling to perform the additional required compliance associated with hemp-related accounts. The banks that do provide services do so only with higher customer fees.<sup>324</sup>

### 3. Credit and Market Risk

Finally, some banks are hesitant to lend to hemp-related businesses because those businesses are risky. In addition to the compliance and legal risk

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in hemp markets is managing levels of THC. If a product tests higher than 0.3 percent THC, it cannot legally be sold or possessed for sale. Income goes to zero and additional costs for disposal and legal risks are incurred.”).

<sup>319</sup> See *supra* notes 224-25 and accompanying text.

<sup>320</sup> The Arizona Department of Agriculture reports that of the twenty-five lots that tested hot during the 2019-2020 growing season and elected to attempt remediation, nineteen were able to successfully reduce THC below 0.3%. See Letter from G. John Caravetta, Assoc. Dir., Arizona Dep't of Agric., to USDA Agric. Mktg. Serv. 2 (Oct. 2, 2020), [https://downloads.regulations.gov/AMS-SC-19-0042-5645/attachment\\_1.pdf](https://downloads.regulations.gov/AMS-SC-19-0042-5645/attachment_1.pdf) [<https://perma.cc/GY2R-NH3R>] (stating that remediation “may not be an option for crops that are significantly over the legal threshold”).

<sup>321</sup> See *id.* (“[T]he market value for the [remediated] milled and blended biomass may be reduced . . .”).

<sup>322</sup> See FINCEN MARIJUANA GUIDANCE, *supra* note 31, at 3 (stating that banks must file suspicious activity reports for “financial transactions involving a marijuana-related business”); FINCEN HEMP GUIDANCE, *supra* note 256, at 3 (stating that suspicious activity reports should be filed for hemp-related businesses that operate “inconsistently with applicable law”); 2019 JOINT HEMP BANKING GUIDANCE, *supra* note 253, at 3 (stating that banks need not file suspicious activity reports for hemp businesses that are operating “in accordance with applicable laws and regulation”); Letter from Rodney Hood, *supra* note 244 (stating that suspicious activity reports are not required for “hemp-related businesses operating lawfully”).

<sup>323</sup> See 7 U.S.C. § 1639p(e)(3) (providing that violations of hemp law with “a culpable mental state greater than negligence” should be reported to law enforcement officials); 21 U.S.C. § 802(16) (excluding only hemp with “a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent” from the definition of marijuana in the CSA (quoting 7 U.S.C. § 1639o(1))).

<sup>324</sup> Sliwoski, *supra* note 302.

previously described, bankers must evaluate the credit and market risk for an industry that, until recently, did not legally exist. This is not an easy task, but some pitfalls are readily apparent.

First, most farmers are inexperienced in growing hemp. Accordingly, startup costs will be high as they acquire the necessary expertise and equipment.<sup>325</sup> For example, many hemp farmers harvesting their crops learned that “[c]utting the crop down and drying it in the field like hay for several days degraded the CBD content and ultimately reduced the value of the crop[, but w]et baling caused mold and fermentation, ruining the crop completely.”<sup>326</sup> To avoid these problems, some farmers are experimenting with mechanized harvesting techniques that allow the hemp to be harvested and dried quickly.<sup>327</sup> With such a steep and expensive learning curve, some farmers failed.<sup>328</sup> It can be difficult for bankers evaluating loan applications to decide which farmers will succeed.

In addition, evaluating the opportunity for profit in the hemp industry is difficult. When Congress legalized hemp, many new farmers rushed to plant the crop. In 2019, “[a]cres of cultivated hemp in the U.S. surged to more than 285,000 . . . from 78,000 in 2018.”<sup>329</sup> Colorado Commissioner of Agriculture

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<sup>325</sup> See USDA, STATE PILOT PROGRAMS REVIEW, *supra* note 176, at 16 (“As an industry originates, there are typically relatively few producers or consumers with high startup costs including initial investments and research (i.e., infant industry.)”); Arian Campo-Flores & Cameron McWhirter, *Farmers Rushed into Hemp, but Now They Face a Glut*, WALL ST. J., Dec. 2, 2019, at A3 (describing a farmer who discovered that seed he purchased “from the Western U.S. didn’t grow easily in the Tennessee soil”); Eller, *supra* note 314, at A4 (explaining that production costs were higher than expected because farmers were forced to weed crops by hand due to lack of herbicide for hemp).

<sup>326</sup> Laura Drotleff, *Insiders Share Harvest, Storage Tips to Avoid Costly Mistakes in Hemp Farming*, HEMP INDUS. DAILY (Feb. 26, 2020), <https://hempindustrydaily.com/insiders-share-tips-on-harvesting-industrial-hemp-and-storage/> [<https://perma.cc/T5HN-W89X>].

<sup>327</sup> *Hemp Market Participants Assess Impact of 2020 Harvest, Look Ahead to 2021*, HEMP BENCHMARKS (Dec. 2, 2020) [hereinafter *Hemp Market Participants Assess Impact*], <https://www.hempbenchmarks.com/hemp-market-insider/impact-of-2020-harvest-look-ahead/> [<https://perma.cc/ACF2-TC4F>] (describing a West Texas grower who used mechanized harvest techniques to get “800 [plus] acres cut, baled, and dried in about a three to four week period” (alternation in original)).

<sup>328</sup> USDA, STATE PILOT PROGRAMS REVIEW, *supra* note 176, at 16 (noting that “rapid turn-over is often observed” in infant industries); Colton Lochhead, *Hemp Industry Is Having a Rough Go*, LAS VEGAS REV.-J., Dec. 26, 2020, at 1B (interviewing hemp farmer who said, “[P]eople [took] their life savings, spent it all growing [hemp] and ended up with nothing”); Grace Schneider, *Some Hemp Farms Still Feel Burned from 2019*, COURIER-J. (Louisville, Ky.), June 7, 2020, at A9 (“Of 960 farmers [in Kentucky] who sought licenses [in 2019], 157 indicated they will not grow hemp in 2020 and instead obtained required permits to store last year’s crop in hopes of selling it sometime this year.”); Grace Schneider, *Hemp Giant Announces Bankruptcy*, COURIER-J. (Louisville, Ky.), Feb. 7, 2020, at A6 (“After debts mounted for months, Kentucky industrial hemp giant GenCanna Global USA confirmed . . . it has filed for Chapter 11 bankruptcy.”).

<sup>329</sup> Campo-Flores & McWhirter, *supra* note 325, at A3.

Kate Greenberg described it as “a mad rush.”<sup>330</sup> This created a glut of hemp and led the price of hemp biomass to plummet.<sup>331</sup> The market was so grim that, by the end of 2019, some hemp growers were unable to sell their crop.<sup>332</sup> Consumer CBD prices also decreased.<sup>333</sup> In an apparent market correction, hemp production fell in 2020.<sup>334</sup> But because some farmers stored the hemp they could not sell, it may take several years for the supply of hemp to stabilize.<sup>335</sup>

Moreover, demand for hemp products is as uncertain as the supply. Forecasts of the demand for CBD have been bullish<sup>336</sup> but in the long run may pan out. Many hope that CBD will prove therapeutic for a variety of ailments.<sup>337</sup> But

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<sup>330</sup> Mona Zhang & Paul Demko, *Hemp Was Supposed to Boost Farmers. It's Turned Out to Be a Flop.*, POLITICO (May 25, 2020, 6:30 AM), <https://www.politico.com/news/2020/05/25/hemp-farmers-275046> [<https://perma.cc/BMM6-3T33>].

<sup>331</sup> Lochhead, *supra* note 328, at 1B (“Prices of hemp biomass, essentially the whole plant chopped up, dropped nearly 80 percent from April 2019 to April 2020, from \$38 per pound to just \$8.10 per pound, according to a report from Hemp Industry Daily, which covers the hemp industry.”); Bob Sechler, *Hemp Hindrance?: First Group of Texas Hemp Growers Will Be Facing a Price Slump on Crop*, AUSTIN AM.-STATESMAN, Mar. 8, 2020, at E1; Jeff Platsky, *How NY's Hemp Boom Turned into an Early Bust*, ROCHESTER DEMOCRAT & CHRON., Mar. 6, 2020, at A10.

<sup>332</sup> See Isabella Jibilian, *For Many U.S. Farmers Who Planted Hemp, CBD Boom Leaves Bitter Taste*, REUTERS (Nov. 3, 2019, 1:24 PM), <https://www.reuters.com/article/us-usa-hemp-farmers/for-many-u-s-farmers-who-planted-hemp-cbd-boom-leaves-bitter-taste-idUSKBN1XD0GE> (“About 65% of U.S. hemp farmers lack a buyer for their crop [in 2019], leaving them few alternatives, according to a July survey by Whitney Economics.”).

<sup>333</sup> See Ivan Morneo, *CBD Prices Are Falling as Companies Seek New Consumers. Is That a Good Thing?*, HEMP INDUS. DAILY (Aug. 7, 2020), <https://hempindustrydaily.com/consumer-cbd-prices-are-falling-as-companies-seek-new-consumers-is-that-a-good-thing/> [<https://perma.cc/R33M-AJW2>].

<sup>334</sup> See *Hemp Market Participants Assess Impact*, *supra* note 327 (“[I]t is virtually certain that [2020]’s output of cannabinoid-rich biomass will be down significantly from [2019], likely by roughly half.”); Fran Howard, *Oversupplied CBD Hemp Market Hit by Pandemic*, AGRI-PULSE (Sept. 16, 2020, 6:25 AM), <https://www.agri-pulse.com/articles/14473-oversupplied-cbd-hemp-market-hit-by-pandemic> (“While it is difficult to get accurate data from the fledgling and highly-complex market, industry estimates for 2020 acreage predicts a 40-50% drop in planted acres from [2019].”).

<sup>335</sup> See *Hemp Market Participants Assess Impact*, *supra* note 327 (noting that “a large overhang from 2019’s harvest [is] still weighing on the market,” but acknowledging that the quality of stored hemp may have deteriorated); Joan Oleck, *Legal Hemp, Notably CBD, Generates Astonishing Revenues. So Why Is the Industry Struggling So Hard?*, FORBES (Dec. 24, 2020, 5:38 PM), <https://www.forbes.com/sites/joanoleck/2020/12/24/legal-hemp-notably-cbd-generates-astonishing-revenues-so-why-is-the-industry-struggling-so-hard> (“In 2020, 48 percent of farmers surveyed have reported left-over inventory.”).

<sup>336</sup> See Robert McCoppin, *When Pot Calls*, CHI. TRIB., July 17, 2020, at 1-1 (reporting that in 2019 hemp was a \$4 billion market that was projected to “reach \$20 billion in sales by 2025”).

<sup>337</sup> See generally CANNABIS AS MEDICINE (Betty Wedman-St Louis ed., 2020) (discussing the promise of cannabis for treating or managing osteoporosis, brain injury, cancer, diabetes, gastrointestinal conditions, mental health disorders, insomnia, pain, anxiety, depression,

demand for CBD may sour if some of the benefits cannot be scientifically substantiated<sup>338</sup> or if CBD is discovered to have negative side effects.<sup>339</sup> Declining interest in CBD might lead the hemp industry to shift its focus from CBD to fiber and seeds, causing price volatility in those market segments.<sup>340</sup>

Finally, the hemp industry, like other industries, is influenced by economic conditions and noneconomic forces. For example, in northern California, hemp producers were threatened by wildfires.<sup>341</sup> And many hemp-related businesses felt the economic sting produced by the 2020 coronavirus pandemic and accompanying advice that people should stay at home to avoid infection.<sup>342</sup> Given these factors, it seems likely that hemp will experience significant price volatility in the short term as the market calibrates supply with demand.<sup>343</sup> In this environment, only the most risk-tolerant banks will consider lending.

#### IV. LESSONS FOR THE MARIJUANA INDUSTRY

The marijuana industry can learn from the hemp industry's banking experience. Hemp's experience suggests that legalization alone—or narrower measures assuring banks that they can serve customers in strict compliance with state law—will not result in immediate, widespread marijuana banking. Most banks require a clear regulatory structure enabling them to verify whether customers are following the law. Guidance from banking regulators can help by

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migraines, Autism, and arthritis).

<sup>338</sup> Cf. COMM. ON HEALTH EFFECTS OF MARIJUANA, BD. ON POPULATION HEALTH, NAT'L ACADS. SCIS., ENG'G & MED. & PUB. HEALTH PRAC., *THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS* (2017), [https://www.ncbi.nlm.nih.gov/books/NBK423845/pdf/Bookshelf\\_NBK423845.pdf](https://www.ncbi.nlm.nih.gov/books/NBK423845/pdf/Bookshelf_NBK423845.pdf) [<https://perma.cc/J74N-VWW7>] (conducting a review of scientific research related to the health effects of cannabis and finding areas where existing study is not sufficient to suggest therapeutic benefits).

<sup>339</sup> Cf. Marilyn A. Huestis, Renata Solimini, Simona Pichini, Roberta Pacifici, Jeremy Carlier & Francesco Paolo Busardò, *Cannabidiol Adverse Effects and Toxicity*, 17 *CURRENT NEUROPHARMACOLOGY* 974, 978-79 (2019) (compiling pre-clinical and clinical studies on adverse effects and toxicity of cannabidiol).

<sup>340</sup> Cf. Dan Gunderson, *Minnesota Hemp Industry Still Trying to Catch Fire*, ST. PETER HERALD (Mar. 3, 2021), [https://www.southernminn.com/st\\_peter\\_herald/news/state/article\\_b768d0a5-baac-5524-9653-ff7a5eca33a3.html](https://www.southernminn.com/st_peter_herald/news/state/article_b768d0a5-baac-5524-9653-ff7a5eca33a3.html) [<https://perma.cc/QZ8J-E7TS>] (predicting a boom in hemp fiber and grain and fiber production expands into those markets).

<sup>341</sup> Anita Chabria, *In Cannabis Country, They Hope the Pot Doesn't Burn*, L.A. TIMES, Sept. 25, 2020, at A1 (reporting that wildfires in northern California threatened state-legal cannabis crops worth about \$20 million).

<sup>342</sup> See Corinne S. Kennedy, *Once-Hot TN Hemp Industry Takes Hit*, COM. APPEAL (Memphis, Tenn.), Dec. 9, 2020, at A7 (reporting that hemp retailers had been squeezed by the declining economic conditions and the decrease in store foot traffic).

<sup>343</sup> USDA, STATE PILOT PROGRAMS REVIEW, *supra* note 176, at 16 (“As an industry transitions into the growth stage, there is an influx of consumers who expand demand even as producers continue to expand supply, with potential to add more volatility in the markets. There can be periods with both increasing supplies and rising prices that attract new producers. Prices can then fall rapidly as capacity expands.”).

clarifying the amount of due diligence banks must perform for marijuana-related customers. However, even with legalization and regulatory certainty, market conditions may hamper lending. While the legal marijuana industry is in its infant stage, market volatility makes lending risky. Once the industry matures, banking will be more available but may remain costly as banks navigate the regulatory structure that will (presumably) still surround marijuana.

A. *Legislation Might Not Lead to Banking*

Narrow legislative measures like those proposed in the SAFE Banking Act will not lead to widespread, inexpensive marijuana banking. The SAFE Banking Act leaves in place a burdensome suspicious activity reporting scheme that drives up account costs and dissuades many from banking the marijuana industry now.<sup>344</sup> As long as suspicious activity reporting is required for marijuana-related businesses, banking the industry will be difficult and costly.<sup>345</sup> In addition, many banks and payment processors cite marijuana's illegal status under federal law as the reason they do not bank the industry.<sup>346</sup> The SAFE Banking Act would not change that.

Federal legalization of marijuana is also unlikely to immediately solve the marijuana industry's banking problems. Hemp legalization did not throw open the doors of all banks. Instead, most banks waited on the sidelines as federal, state, and tribal officials worked to develop a regulatory framework to oversee the industry.<sup>347</sup> If Congress legalized marijuana, it seems likely this same dynamic would play out in marijuana banking. Marijuana would not become broadly legal. Instead, federal, state, and tribal officials would have to create a new regulatory framework. This would involve deciding which products are legal and specifying who may grow, process, sell, and buy them. Even states that have already legalized marijuana would have to adjust their regulation to conform to a new federal structure. In the years immediately following legalization, while the law and regulatory structure is developing, most banks, including the largest financial service providers, are likely to avoid the industry.<sup>348</sup> Indeed, some banks currently serving the marijuana industry may discontinue their service to allow time to adjust their compliance programs.

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<sup>344</sup> See SAFE Banking Act of 2019, H.R. 1595, 116th Cong. § 6 (2019) (as received in the Senate, Sept. 26, 2019) (stating that financial institutions' suspicious activity reporting "shall comply with appropriate guidance issued by the Financial Crimes Enforcement Network"); *Challenges and Solutions Hearing*, *supra* note 20, at 7 (statement of Rep. Ed Perlmutter, Member, Subcomm. on Consumer Prot. & Fin. Insts. of the H. Comm. on Fin. Servs.) (explaining that the SAFE Banking Act "maintains the flexibility of the Financial Crimes Enforcement Network (FinCEN) by requiring continued filing of suspicious activity reports"); see also *supra* notes 94-95 and accompanying text.

<sup>345</sup> See *supra* notes 49-53 and accompanying text (describing the burden imposed by suspicious activity reports).

<sup>346</sup> See *supra* notes 3, 60 and accompanying text.

<sup>347</sup> See *supra* notes 292-94 and accompanying text.

<sup>348</sup> See Robert Channick, 'A Green Sweep,' CHI. TRIB., Nov. 10, 2020, at 2-1 (stating that



B. *Regulatory Uncertainty Hurts Banking*

Beyond legalization, the hemp experience teaches us that the content of the regulatory structure matters for marijuana banking. Because banks must conduct sufficient due diligence to determine whether their customers are operating in compliance with federal, state, and tribal law,<sup>349</sup> regulatory structures that allow banks to verify legal compliance are more likely to lead to banking.

The hemp experience shows that the content of the federal regulatory structure matters for banking. Under USDA's interim final rule, the legal consequence of cannabis that exceeded the allowed THC content was complete destruction of the non-compliant cannabis crop.<sup>350</sup> Diligent and honest growers, however, could not be certain that their cannabis crop would not test above the legal limit.<sup>351</sup> Moreover, no amount of bank due diligence could confirm that a hemp customer who was complying with the law today would not be out of compliance when its product was tested. If a customer's cannabis crop tested hot, the bank risked loss from credit extended to the customer and would likely be required to file suspicious activity reports.<sup>352</sup> Unsurprisingly, many banks thought this regulatory system presented too much risk. USDA recognized the chilling effect this approach had on banking and amended its hemp rule to allow remediation of non-compliant cannabis.<sup>353</sup> The final rule also increases the threshold of THC allowed before noncompliance is considered a negligent violation.<sup>354</sup> As policy makers consider cannabis regulatory schemes, they should avoid creating situations where it is difficult for the industry and banks to confirm compliance with the law, as the consequences of non-compliance are financially significant.

The hemp experience also shows that robust state licensing programs may facilitate banking. When, under the Oregon hemp pilot program, state licensing required little information, banks were more hesitant to offer banking services to hemp-related businesses than to the more heavily regulated marijuana-related

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legalization of marijuana was not likely to induce large banks to start serving the industry); Whitt Steineker, *3 Cannabis Legislation Predictions Ahead of the 2020 Election*, HEMP GROWER (July 6, 2020), <https://www.hempgrower.com/article/3-cannabis-legalization-predictions-2020/> [<https://perma.cc/94AQ-UZQG>].

<sup>349</sup> See, e.g., 31 C.F.R. § 1020.210(b)(2)(v)(B) (2021) (requiring banks to conduct ongoing customer due diligence that allows them to report any suspicious transactions).

<sup>350</sup> See 7 C.F.R. § 990.3(a)(3)(i) (2020).

<sup>351</sup> See *supra* notes 314-15 and accompanying text.

<sup>352</sup> See *supra* notes 318, 322 and accompanying text.

<sup>353</sup> See 7 C.F.R. § 990.27 (2021) (allowing noncompliant cannabis crops to be remediated); Establishment of a Domestic Hemp Production Program, 86 Fed. Reg. 5596, 5650 (Jan. 19, 2021) (“Commenters expressed concern that the 0.3 percent THC ceiling and the required disposal of cannabis testing above 0.3 percent THC would hinder the ability of hemp producers to obtain insurance, loans, or other financial services.”).

<sup>354</sup> See 7 C.F.R. §§ 990.6(b)(3), 990.29 (2021); Establishment of a Domestic Hemp Production Program, 86 Fed. Reg. at 5605 (describing how the previously low THC threshold for negligent violations “jeopardized” hemp growers’ access to credit).

businesses.<sup>355</sup> In essence, the state licensing of marijuana provided information that banks could rely on as part of their compliance processes and reduced bank compliance risk.

This experience is consistent with evidence from marijuana industry itself. In Washington, the state tightly regulates marijuana and tracks both plant and product from growth through sale to consumers.<sup>356</sup> The state shares the tracked information with banks and other financial service providers, making it easier for them to confirm that licensees follow state law and do not violate federal enforcement priorities.<sup>357</sup> As a result, banking options for marijuana-related businesses in Washington are relatively robust.<sup>358</sup> In contrast, California initially delegated the task of overseeing marijuana businesses to local governments.<sup>359</sup> They were slow to adopt statewide comprehensive regulations.<sup>360</sup> As a result, banks have a more difficult time confirming that a business is following state law and fewer banks are willing to serve the marijuana industry.<sup>361</sup>

This is not to suggest that overly burdensome regulatory structures are the key to banking services. Rather, cannabis regulators should consider how they can streamline the compliance process for banks by making it clear who is properly licensed and what they are licensed to do. Bank regulators also play a role in streamlining compliance processes and reducing compliance burdens.

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<sup>355</sup> See *supra* notes 269-72 and accompanying text.

<sup>356</sup> See WASH. ADMIN. CODE § 314-55-083(4) (2021) (“To prevent diversion and to promote public safety, marijuana licensees must track marijuana from seed to sale. Licensees must provide the required information on a system specified by the [Washington State Liquor Control Board].”); see also Margaret Chon, *Tracermarks: A Proposed Information Intervention*, 53 HOUS. L. REV. 421, 451 (2015) (describing Washington’s “seed-to-sale framework for legalized marijuana”).

<sup>357</sup> See Annie Zak, *PayQwick CEO: Washington’s Marijuana Tracking System Makes Electronic Payments Possible*, PUGET SOUND BUS. J. (Aug. 17, 2015, 1:41 PM), <https://www.bizjournals.com/seattle/blog/health-care-inc/2015/08/payqwick-ceo-washingtons-marijuana-tracking-system.html> [<https://perma.cc/H89G-6LKL>] (“The marijuana is being tracked from seed to sale. What that barcode allows us to do as a payment processor is trace it from the sale to the seed so we know it’s legal marijuana.”).

<sup>358</sup> *Landing a Bank Account*, *supra* note 44 (quoting attorney Hilary Bricken explaining that Washington state has robust banking options for marijuana businesses because it is “‘protectionist,’ with a ‘significant residency requirement,’ plus ‘a small industry population’ and a single regulatory entity that oversees everything”).

<sup>359</sup> See Sam Kamin, *What California Can Learn from Colorado’s Marijuana Regulations*, 49 U. PAC. L. REV. 13, 13, 16-19 (2017) (explaining that between 1996 and 2006 marijuana regulation in California “was largely left to local governments, which adopted regulations varying from the robust to the permissive”).

<sup>360</sup> See *id.* at 13 (explaining that although California legalized medical marijuana in 1996, “it would be twenty more years before the state adopted robust, state-wide regulations for the production and sale of medical marijuana”).

<sup>361</sup> See Krieger, *supra* note 47 (reporting that, in 2019, only five credit unions in California would bank the marijuana industry and each of them had a waiting list for new marijuana-related customers); Mandelbaum, *supra* note 46, at 50 (blaming California’s lack of access to banking for medical marijuana businesses on “light touch” regulation by local government).

Following hemp's legalization, most federal banking regulators believed additional guidance was not necessary.<sup>362</sup> It took regulators nearly a year to issue the joint hemp banking guidance.<sup>363</sup> During the interim, some banks serving hemp-related businesses continued to file suspicious activity reports<sup>364</sup>—reports that the guidance eventually explained were not required. Banks waited even longer for additional clarity about due diligence requirements.<sup>365</sup> This may have prevented some banks from entering the market and kept banking costs high for hemp-related businesses at banks that did enter the market.

If it was not clear before, it should be clear now: banks considering providing services to cannabis-related businesses want to know what their regulators expect of them. When regulators provide direction about the amount and types of information banks must gather, it reduces banks' legal risk and increases the likelihood that banks will offer services to the industry. Because federal bank regulators were reluctant to issue hemp guidance, Congress should include a requirement that the regulators adopt guidance in any marijuana legalization legislation.

### C. *Credit, Market, and Other Risks Remain*

Over time, if Congress legalizes marijuana, the regulatory structure stabilizes, and the compliance requirements are clarified, more banks will serve the marijuana industry.<sup>366</sup> At the same time, decreased compliance costs and competition among banks would reduce the cost of banking services for marijuana-related businesses. But even at this stage, marijuana-related businesses should expect to have fewer banking options and pay more for banking services than the average business.

As the hemp experience illustrates, legalization creates a new industry where product supply may not be well calibrated with demand. After hemp's legalization, many new farmers entered the market.<sup>367</sup> Consequently, the amount of hemp produced far exceeded the demand, causing hemp prices to plummet.<sup>368</sup> Many businesses failed.<sup>369</sup> In this volatile environment, banks were hesitant to lend.

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<sup>362</sup> See *supra* notes 246-48 and accompanying text.

<sup>363</sup> See generally 2019 JOINT HEMP BANKING GUIDANCE, *supra* note 253.

<sup>364</sup> See FINCEN, *supra* note 242, at 3 (describing the number of hemp-related suspicious activity reports file in 2019).

<sup>365</sup> See FINCEN HEMP GUIDANCE, *supra* note 256.

<sup>366</sup> Cf. Caitlyn Cullen, Note, *Nipped in the Bud: How Legal Disparities Create Financial Growth Hurdles in the State-Sanctioned Marijuana Industry and Why Bankruptcy Courts Can Provide a Remedy*, 74 U. MIAMI L. REV. 310, 313-14, 334 (2019) (discussing JP Morgan and Bank of America's willingness to finance investment in a Canadian cannabis companies after recreational marijuana was legalized in Canada).

<sup>367</sup> See *supra* notes 329-30 and accompanying text.

<sup>368</sup> See *supra* notes 331-33 and accompanying text.

<sup>369</sup> See sources cited *supra* note 328.

In Canada, marijuana legalization also led to market volatility. Initially, demand for the newly legal marijuana outpaced supply.<sup>370</sup> This attracted many producers to the market, created an oversupply, and drove down prices.<sup>371</sup> Among the new market entrants were deep-pocketed tobacco and alcohol companies.<sup>372</sup> Some worry that this “cannabis colonialism” is “shoulder[ing] out competitors and smaller businesses.”<sup>373</sup>

If marijuana is federally legalized in the United States, the industry should expect similar volatility.<sup>374</sup> While legalization may increase demand for marijuana-related products, it will also attract new growers, processors, and retailers. “Most experts agree that cannabis production will commoditize, and as this happens, agriculture giants will be best positioned to bring their efficiencies at scale to this industry, as well as their technology for optimizing genetics, propagation, and other techniques not currently available in the cannabis industry.”<sup>375</sup> Many similarly believe that alcohol, tobacco, pharmaceutical, food, and beverage companies will enter the marijuana industry.<sup>376</sup> These companies may crowd out smaller businesses, including businesses that participated in the marijuana market before full legalization. Some marijuana-related businesses will fail. Given the risk, many banks will be hesitant to finance a modern-day gold rush. Small businesses without cannabis experience are those most likely to be without financing options. As the industry consolidates and matures, bank

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<sup>370</sup> Robin Levinson-King, *Why Canada’s Cannabis Bubble Burst*, BBC NEWS (Dec. 29, 2019), <https://www.bbc.com/news/world-us-canada-50664578> [<https://perma.cc/MJR6-KDYB>].

<sup>371</sup> *Id.*

<sup>372</sup> Paul Demko, *Beer and Cigarette Makers Join the Pot Lobbying Parade*, POLITICO (Apr. 25, 2019, 10:32 AM), <https://www.politico.com/story/2019/04/23/beer-cigarette-makers-pot-lobbying-1375148> [<https://perma.cc/2YLN-WGAN>] (“Altria, the tobacco giant better known for Marlboros, recently took a \$1.8 billion stake in the cannabis company Cronos Group. Constellation Brands, which makes Corona beer, has spent money on cannabis lobbying after making a major investment in Canopy Growth, a Canadian marijuana company.”).

<sup>373</sup> Naomi Martin, *O Cannabis! On a Pot Factory Farm*, BOS. GLOBE, Nov. 24, 2019, at A1.

<sup>374</sup> See Jeff Smith, *What Marijuana Companies Can Learn from Federal Legalization of Hemp*, MARIJUANA BUS. DAILY (Feb. 27, 2020), <https://mjbizdaily.com/what-marijuana-companies-can-learn-from-federal-legalization-of-hemp/> [<https://perma.cc/K26A-2X8R>] (quoting attorney David Wunderlich stating that marijuana legalization would cause “retail and wholesale prices to fall because of commoditization of the product”).

<sup>375</sup> Kris Krane, *Cannabis Attracts Big Tobacco, Alcohol, and Pharma. Which Big Industries Will Join Next?*, FORBES (Dec. 19, 2018, 2:42 PM), <https://www.forbes.com/sites/kriskrane/2018/12/19/cannabis-attracts-big-tobacco-alcohol-and-pharma-which-big-industries-will-join-next> (citation omitted).

<sup>376</sup> Frank Robison, *Going Green: Legal Considerations for Marijuana Investors and Entrepreneurs*, 6 AM. U. BUS. L. REV. 57, 80 (2016) (stating that legalization will “pav[e] the way for tobacco and alcohol” companies to invest in the industry, displacing existing small producers); Krane, *supra* note 375 (“But alcohol and tobacco are hardly the only industries set to expand into the growing cannabis economy. Other industries like pharma, agriculture, and non-alcoholic beverages can all benefit from an end to cannabis prohibition.”).

financing options are likely to become more available, but this process could take years.

But even a mature marijuana industry will likely have fewer and more expensive banking options than the average business. Marijuana would remain a highly regulated, high-risk industry. Like businesses that handle alcohol, tobacco, firearms, adult entertainment, gambling, and a variety of other regulated activities, businesses that handle marijuana should expect their financial institutions to require proof that they are operating within the law.<sup>377</sup> Because banks' compliance costs are higher for high-risk accounts, those customers pay more for banking services.

#### CONCLUSION

It is sometimes said that a banker is someone who lends you an umbrella when the sun is shining but wants it back when it starts to rain.<sup>378</sup> This clever adage highlights the reality that, although banks are in the business of taking risk, they are often rather conservative in their risk-taking. The cannabis business is inherently risky. This means that there is no easy fix for marijuana's banking problems. While marijuana legalization is likely a necessary first step to widespread banking, hemp's banking experience shows that legalization alone is insufficient. Banks need regulatory structures that allow them to verify that their cannabis-related customers are compliant with the law. Federal, state, and tribal cannabis regulators should consider this as they adjust the regulatory framework underpinning the industry. Bank regulators can also encourage banking by clearly describing what due diligence and reporting measures are required for banks serving cannabis-related businesses. However, even if marijuana is legalized and its regulatory structure is carefully crafted to encourage banking, some banks may still decide the credit, market, and other risks are too high to justify serving the industry. Marijuana is likely to remain a

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<sup>377</sup> Cf. Beuerlein, *supra* note 44 (noting that “[t]he issues with banking cannabis are similar to issues banks face in other highly regulated industries” like “check cashers, payday loans, pawnshops and guns and ammo”).

<sup>378</sup> The original source of this saying is uncertain. It is frequently attributed to Mark Twain. See, e.g., Niels B. Schaumann, *The Lender as Unconventional Fiduciary*, 23 SETON HALL L. REV. 21, 36 n.53 (1992). But it is not clear Mark Twain deserves the credit. See *A Banker Lends You His Umbrella When It's Sunny and Wants It Back When It Rains*, QUOTE INVESTIGATOR (Apr. 7, 2011), <https://quoteinvestigator.com/2011/04/07/banker-umbrella/#note-2125-1> [<https://perma.cc/LA8V-7NGV>]. Ben Bernanke and Mark Gertler cite Ambrose Bierce as the original source. See Ben Bernanke & Mark Gertler, *Monetary Policy and Asset Price Volatility*, ECON. REV., Fourth Quarter 1999, at 17, 20. Much previous legal scholarship, however, seems content to leave it unattributed. See, e.g., David A. Livdahl, *From the Red River to the Yellow River*, 26 COLUM. J. ASIAN L. 373, 392 (2013); Ben Jakubowicz, Note, *What the HECM Is a Reverse Mortgage: The Importance of the Home Equity Conversion Mortgage in an Aging America*, 54 U. LOUISVILLE L. REV. 183, 187 n.35 (2016).

high-risk industry where compliance costs translate to expensive banking services.