

STATE REGULATION OF HEMP CULTIVATION: USING THE 2018 FARM BILL TO EASE THE REGULATORY BURDEN ON FARMERS

*Kirk E. Mattingly**

I. INTRODUCTION

Hemp is finally poised to become a mainstream agricultural commodity again after years of prohibition as a federally controlled substance.¹ This optimism is the result of provisions included in the 2018 Farm Bill, which was enacted on December 20, 2018.² The Farm Bill removed hemp from the purview of the Controlled Substances Act (CSA) and gave states the option to have “primary regulatory authority over the production of hemp” by submitting plans to the U.S. Department of Agriculture (USDA) that meet certain minimum requirements.³ These 2018 provisions set a radically new direction for U.S. hemp policy and settles legal ambiguities that have arose in recent years.

Some states already permitted farmers to grow hemp pursuant to narrow allowances included in section 7606 of the 2014 Farm Bill, which allowed states to begin researching hemp production via “agricultural pilot programs” but did not change the crop’s status as a controlled substance.⁴ Allowing certain entities to produce hemp while it remained a controlled substance created a legally ambiguous state of affairs, due in part to scant congressional guidance and resistance from executive branch agencies, most prominently, the U.S. Drug Enforcement Administration (DEA).⁵ However, the demand for hemp is strong enough that, as of 2020, forty-seven states have implemented laws pursuant to the 2014 Farm Bill, allowing their farmers to

* J.D. Candidate, May 2020, University of Louisville Louis D. Brandeis School of Law.

¹ See Harmeet Kaur, *Hemp Won’t Get You High (And Other Things to Know Now That It’s Legal)*, CNN (Dec. 20, 2018, 5:10 PM) <https://www.cnn.com/2018/12/15/us/congress-hemp-legalization/index.html>.

² Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 10113, 132 Stat. 4490, 4909 (codified at 7 U.S.C. § 1639o).

³ Section 12619 of the Farm Bill amends 21 U.S.C. § 802(16) of the Controlled Substances Act to exclude hemp from the definition of marijuana and amends § 812(c) to exclude tetrahydrocannabinol (the active compound in marijuana) found in hemp from Schedule I of the Act. *Id.* § 12619.

⁴ See Jonathan S. Miller & Nolan M. Jackson, *The Evolving Law and Regulation of Industrial Hemp in the United States*, 8 J. ANIMAL & ENVTL. L. 12, 19–23 (2017); Agricultural Act of 2014, Pub. L. No. 113-79, § 7606, 128 Stat. 649, 912 (codified at 7 U.S.C. § 5940).

⁵ Miller & Jackson, *supra* note 4, at 19–21.

begin experimenting with hemp production.⁶ Farmers who have participated in these pilot programs have done so under regulatory schemes that are often very burdensome—nowhere near the same experience as growing standard commodities, such as corn or tobacco.⁷ Such regulations were implemented, in part, to comply with the specific demands of section 7606 but also to protect the state and the farmer from the legal uncertainties that developed in the wake of its passage.⁸

Looking forward, the latest federal policy shift leaves many of the burdensome state regulatory measures legally unnecessary. However, state policymakers may still decide to recycle aspects of their states' existing hemp programs.⁹ Section 10113 of the 2018 Farm Bill specifically allows policymakers to do so by incorporating existing laws and regulations into the plans they submit to the USDA by reference, provided the preexisting state rules are not inconsistent with the new federal framework.¹⁰ Unfortunately for the farmer, this means many of the overly burdensome rules may remain in place in some states.¹¹ This possibility seems especially likely when considered in light of factors such as the relative success and positive media coverage of state hemp pilot programs so far and the political capital it took to get the pilot programs off the ground initially.¹²

⁶ *State Industrial Hemp Statutes*, NAT'L CONFERENCE ST. LEGISLATURES, <http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx> (last updated Apr. 16, 2020).

⁷ See J.J. McCoy, *Differing State Hemp Regulations, Fees, Present Knotty Choices for Cultivators*, BENZINGA (Oct. 26, 2018, 10:36 AM), <https://www.benzinga.com/markets/cannabis/18/10/12560736/differing-state-hemp-regulations-fees-present-knotty-choices-for-cul>; see also *infra* Part III.

⁸ See Miller & Jackson, *supra* note 4, at 19–25.

⁹ See *Quarles Submits Kentucky's Industrial Hemp Plan to USDA*, KY. DEP'T AGRIC. (Dec. 20, 2018), <http://www.kyagr.com/KY-AgNews/press-releases/2018/Quarles-Submits-Kentucky-s-Industrial-Hemp-Plan-to-USDA.html>. Kentucky was the first state to submit its section 10113 plan to the USDA. Ryan Quarles, Kentucky's agricultural commissioner, delivered it to U.S. Secretary of Agriculture Sonny Perdue in person at the presidential Farm Bill signing ceremony on December 20, 2018. *Id.* The plan directs the Secretary to existing Kentucky laws and regulations that purport to satisfy the new requirements, plus one new draft regulation that would cover all other specific requirements not covered by the existing statutes and regulations. Letter from Ryan F. Quarles, Comm'r, Ky. Dep't Agric., to Sonny Perdue, Sec'y, USDA (Dec. 20, 2018), <http://www.kyagr.com/KY-AgNews/press-releases/2018/documents/2018KentuckyHempStatePlan.pdf>.

¹⁰ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 10113(a)(2)(B), (3)(B), 132 Stat. 4490, 4909.

¹¹ See, e.g., *supra* note 9.

¹² See, e.g., Editorial, *Our Opinion: Hemp Pilot Program an Early Success for Tar Heel Agriculture*, WILSON TIMES (Sept. 19, 2017), <http://www.wilsonsouth.com/stories/our-opinion-hemp-pilot-program-an-early-success-for-tar-heel-agriculture,96703>; see also *Quarles Submits Kentucky's Industrial Hemp Plan to USDA*, *supra* note 9. The political capital problem may be even more acute for states that have approved hemp programs more recently. For example, Georgia did not pass a section 7606 pilot program until March 2019. Raynor Churchwell, *Georgia Legalizes Hemp Farming*, FARM BUREAU: GA. (May 23,

However, although section 7606 brought great opportunity to the hemp industry, it would be a mistake to allow any remnants of the cloud of uncertainty and drug-related stigma that plagued that regime to continue to hover over states' hemp policies going into the future. This is so especially in light of the unprecedented flexibility in setting their own hemp policies now granted to states by the 2018 Farm Bill. Therefore, this Note takes the position that states should be careful to distinguish which aspects of their current regulatory schemes are actually necessary to encourage the hemp industry in their respective states, in a manner consistent with federal law,¹³ and which aspects were originally enacted solely to comply with the specific demands of section 7606 or to protect against the legal uncertainties it fostered. Furthermore, it argues that, in doing so, states should view the new federal law as an opportunity to craft policies that are sensitive to the agricultural realities of hemp farming and thereby reduce the regulatory burden on farmers.

This Note first provides a brief overview of hemp as an agricultural product and the process by which it was first made illegal because of its association with its botanical cousin, marijuana. Next, it gives an overview of federal legislative efforts to reintroduce hemp as a legal agricultural product, focusing on the 2014 and 2018 Farm Bills. It then analyzes current state hemp regulation, identifying themes that run across multiple states that may no longer serve the same utility under the newest changes to federal hemp policy. Finally, this Note makes recommendations on how states should move forward in light of the new federal policy in order to make state regulation of hemp cultivation friendlier to farmers and, ultimately, the emerging U.S. hemp industry.

II. HISTORY OF HEMP IN THE U.S.: ILLEGALIZATION AND THE PATH TO RE-LEGALIZATION

“The history of hemp in the United States is a tragic one.”¹⁴ The crop once figured richly in this country's agricultural heritage before being cast out as an illegal substance for nearly eighty years.¹⁵ From its glory days to

2019), <https://www.gfb.org/media-and-publications/gfb-news-magazine.cms/post/59/Georgia%20legalizes%20hemp%20farming>.

¹³ At the time this Note's publication, the ultimate scope of federal law regarding state regulation of hemp cultivation is uncertain. The uncertainty comes as a result of an interim final rule issued by the USDA in October 2019, which sets further requirements for state and tribal plans not found in the 2018 Farm Bill. *See* Establishment of a Domestic Hemp Production Program, 84 Fed. Reg. 58,522 (Oct. 31, 2019) (codified at 7 C.F.R. § 990.3 (2020)). This rule and its potential effects are discussed in more detail *infra* Part II.E.

¹⁴ Miller & Jackson, *supra* note 4, at 14.

¹⁵ *See id.* at 14–17.

now, hemp's legal status has shifted multiple times.¹⁶ This Part recounts hemp's natural and legal history in order to provide a context for the analysis that follows.

A. Industrial Hemp as an Agricultural Product

The terms “hemp” and “marijuana” refer to two broad categories of *Cannabis sativa L.*¹⁷ However, they are as different from one another as field corn—used for corn meal and animal feed—is from sweet corn—the kind we eat fresh on the cob—though both belong to the classification *Zea mays*.¹⁸ Although they share the same botanical classification, hemp and marijuana are ultimately two different expressions of their shared genetics as a result of generations of breeding for specific traits.¹⁹ Specifically, marijuana is high in the cannabinoid tetrahydrocannabinol (THC), the compound that produces a psychoactive effect.²⁰ Hemp, on the other hand, contains only trace amounts of THC and is incapable of producing a psychoactive effect.²¹ In addition, it possesses other distinguishing traits, depending on the specific cultivar, such as longer fibers and taller growth habit.²² Hemp and marijuana both also contain non-psychoactive cannabinoids, such as cannabidiol (CBD), which have been shown to have therapeutic applications.²³ Hemp varieties now exist that are high in CBD but are very low in THC.²⁴

Humans' relationship to hemp goes back millennia, and we continue to find new uses up through today.²⁵ Historically, hemp was used for paper

¹⁶ See *id.*

¹⁷ *Id.* at 13.

¹⁸ See Julie R. Thomson, *There's a Huge Difference Between the Corn We Eat vs. What Cows Eat*, HUFFPOST (July 20, 2017, 6:00 AM), https://www.huffpost.com/entry/sweet-corn-vs-field-corn_n_596f6718e4b0a03aba868f75; see also Susanne Talbert, *Genus, Species, and Cultivars, Oh My?*, DAVE'S GARDEN (Mar. 9, 2009), <https://davesgarden.com/guides/articles/view/2071> (explaining the relationship of cultivars to species).

¹⁹ See Jeremy Berke, *Mitch McConnell Wants to Legalize Hemp—Here's How It's Different from Marijuana*, BUS. INSIDER (Mar. 27, 2018, 10:38 AM), <https://www.businessinsider.com/what-is-hemp-different-from-weed-2018-3>.

²⁰ *Id.*

²¹ *Id.*

²² See *Hemp vs Marijuana*, MINISTRY OF HEMP, <https://ministryofhemp.com/hemp/not-marijuana/> (last visited July 18, 2020).

²³ Javier Fernández-Ruiz et al., *Cannabidiol for Neurodegenerative Disorders: Important New Clinical Applications for This Phytocannabinoid?*, 75 BRITISH J. CLINICAL PHARMACOLOGY 323 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3579248/pdf/bcp0075-0323.pdf>.

²⁴ See *CBD Hemp Cultivars*, RHIZOSCIENCES.COM, <http://rhizosciences.com/cbd-hemp-cultivars/> (last visited July 18, 2020).

²⁵ See *History of Hemp*, HEMP.COM, <http://www.hemp.com/history-of-hemp/> (last visited July 18, 2020).

products, rope, oil, and textiles, and now is estimated to be used in more than 25,000 products worldwide, including construction materials, cosmetic products, and pharmaceuticals.²⁶ As an agricultural product, hemp is grown generally either for fiber, seed, or CBD.²⁷

In addition to its surprising number of uses, hemp is agronomically unique as well.²⁸ It is a quick-growing, relatively low-maintenance crop that has many environmental benefits not found in other commodity crops.²⁹ Under ideal growing conditions, hemp varieties grown for fiber or seed reach twelve inches in height within three to four weeks of planting, providing up to ninety percent ground shade and virtually suppressing all weed growth, which greatly reduces the need for herbicides.³⁰ In addition, the hemp plant's long tap root is capable of reaching moisture and nutrients out of reach to other crops, making hemp drought tolerant and ideal for implementing into crop rotations.³¹ Furthermore, studies show hemp to be effective at bioremediation, successfully cleaning soils of heavy metals and other contaminants.³²

B. *The U.S. and Hemp: Is It or Isn't It Weed?*

Over thirty countries—including Canada and many European countries—permit the cultivation of hemp as an agricultural product and compete in the world-wide market.³³ Yet, for many years, hemp remained strictly controlled in the United States due to its close association with marijuana.³⁴ Belonging to the classification *C. sativus* it was considered a Schedule I controlled substance under the CSA.³⁵ Until recently, this restrictive regulatory scheme precluded a domestic hemp industry and left the U.S. market dependent on imports.³⁶

²⁶ RENÉE JOHNSON, CONG. RESEARCH SERV., RL32725, HEMP AS AN AGRICULTURAL COMMODITY 2–3 (2018).

²⁷ *Id.* at 2, 6–7.

²⁸ See *Hemp Production*, PURDUE UNIV., <https://purduehemp.org/hemp-production/> (last visited July 18, 2020).

²⁹ See Brian Palmer, *High on Environmentalism*, SLATE (April 12, 2011, 5:11 AM), <https://slate.com/technology/2011/04/hemp-versus-cotton-which-is-better-for-the-environment.html>.

³⁰ *Hemp Production*, *supra* note 28.

³¹ *Id.*; Courtney N. Moran, *Industrial Hemp: Canada Exports, United States Imports*, 26 FORDHAM ENVTL. L. REV. 383, 391 (2015).

³² Andrew Leonard, *Can Hemp Clean Up the Earth?*, ROLLING STONE (June 11, 2018, 3:54 PM), <https://www.rollingstone.com/politics/politics-features/can-hemp-clean-up-the-earth-629589/>.

³³ JOHNSON, *supra* note 26, at 1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See *id.* at 1–3.

However, this prohibitive stance toward hemp production was not always the case. Historically, hemp production played an important role in the nation's economy.³⁷ In fact, it was illegal *not* to grow hemp in some of the original thirteen colonies.³⁸ After the nation's founding, states continued to encourage hemp production and some even chose to subsidize it.³⁹ During World War II, in desperate need of natural fibers for the war effort, the U.S. government started the "Hemp for Victory" campaign, which resulted in the planting of over 400,000 acres of hemp and the building of forty-two hemp mills during the war.⁴⁰

Aside from the emergency hemp crops grown during the war, hemp production declined in the early twentieth century for a variety of reasons.⁴¹ Among these were the emergence of synthetic fibers and technological advances that made harvesting and processing cotton more economical than hemp.⁴² These events began the process of hemp's decline, but it was the subsequent federal regulation of marijuana that sounded the death knell of a once vibrant industry.⁴³

The first federal regulatory hurdle that arose as a result of marijuana regulation was the Marijuana Tax Act of 1937.⁴⁴ The Act came amidst a climate of fear and paranoia about this exotic sounding drug.⁴⁵ By 1933, thirty-three states had passed laws that limited cannabis production to medicinal and industrial uses only.⁴⁶ The Act was meant to bring this worrisome substance under federal control by imposing an exorbitant tax on marijuana sales and imposing stiff penalties on unregistered producers and sellers.⁴⁷ While this legislation was intended to only target the intoxicating version of cannabis, the industrial hemp industry became an "inadvertent victim" of the Act.⁴⁸ It imposed substantial burdens on producers of an already waning crop, such as licensing requirements and onerous shipping

³⁷ Miller & Jackson, *supra* note 4, at 13.

³⁸ Vanessa Rogers, Note, *The Future of Hemp in Kentucky*, 4 KY. J. EQUINE, AGRIC. & NAT. RES. 479, 481 (2012).

³⁹ *Id.*

⁴⁰ *Id.* at 482.

⁴¹ *Id.* at 481.

⁴² *Id.* at 482.

⁴³ See Miller & Jackson, *supra* note 4, at 14.

⁴⁴ *Id.* at 15.

⁴⁵ See Robin Lash, *Industrial Hemp: The Crop for the Seventh Generation*, 27 AM. INDIAN L. REV. 313, 319 (2003).

⁴⁶ JOHNSON, *supra* note 26, at 12–13.

⁴⁷ See Lash, *supra* note 45, at 319–20.

⁴⁸ *Id.* at 321.

and processing requirements, not to mention the stigma of being associated with the publicly vilified marijuana.⁴⁹

In 1970, the federal government repealed the Marijuana Tax Act and other illicit drug-related laws and replaced them with the comprehensive Controlled Substances Act (CSA), which made it illegal to “manufacture, distribute, dispense, or possess” certain controlled substances as set out in a tiered system of schedules.⁵⁰ This legislation defined Marijuana the same as the 1937 Act:

[A]ll parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; *but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalk (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.*⁵¹

However, although enforcement of the 1937 Act sought to maintain the distinction between hemp and marijuana, “the DEA took the new position that the two plants were indistinguishable,” both Schedule I substances and illegal to produce without a DEA issued permit.⁵²

Although several states began taking a renewed interest in hemp production beginning in the 1990s, federal policy maintained that hemp was legally indistinguishable from marijuana since the passage of the CSA.⁵³ It was not until the passage of the 2014 Farm Bill that federal policy began to distinguish the two.⁵⁴

C. The 2014 Farm Bill and Resulting Uncertainties

Section 7606 of the 2014 Farm Bill represents the first major federal policy shift in favor of industrial hemp production.⁵⁵ The law—currently still

⁴⁹ *Id.*

⁵⁰ JOHNSON, *supra* note 26, at 13; *see also* 21 U.S.C. § 841 (2012).

⁵¹ Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (repealed 1970) (emphasis added); 21 U.S.C. § 841(16).

⁵² Lash, *supra* note 45, at 322. Courts have repeatedly reaffirmed this interpretation. *See, e.g.,* Monson v. DEA, 522 F. Supp. 2d 1188, 1198 (D. N.D. 2007) (holding that the CSA does not distinguish between varieties of cannabis based on THC content).

⁵³ *See* JOHNSON, *supra* note 26, at 12, 16.

⁵⁴ *Id.* at 13.

⁵⁵ *See id.*

in effect until one year after the USDA promulgates regulations pursuant to the 2018 Farm Bill—allows states to oversee hemp production so long as (1) such production occurs under an agricultural pilot program established by the state “to study the growth, cultivation or marketing of industrial hemp,” and (2) hemp production is legal in the state in which the hemp is produced.⁵⁶ The law also requires that sites on which hemp is grown be “certified by, and registered with, the State department of agriculture.”⁵⁷ In response, forty-seven states have passed legislation addressing hemp production, though not all of these have implemented pilot programs.⁵⁸

The 2014 Farm Bill also provides the first statutory definition of hemp that affirmatively distinguishes it from marijuana.⁵⁹ It defines hemp as “the plant *Cannabis sativa* L. and *any part of such plant*, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”⁶⁰ This definition is important because it creates a legal distinction between hemp and marijuana based on THC content where there was no distinction anywhere in federal policy before.⁶¹ While the CSA excludes certain parts of the plant from its definition of marijuana, this definition of hemp includes *all parts* of the plant *Cannabis sativa* L. so long as it is no more than 0.3% THC.⁶² Although the 2014 legislation did not remove hemp from the purview of the CSA,⁶³ it did provide a legal basis by which state law makers could view hemp as an agricultural crop entirely distinct from marijuana and begin regulating it accordingly.⁶⁴

Ultimately, the 2014 Farm Bill laid out a narrow pathway for state legislatures and departments of agriculture to begin experimenting with how best to reintroduce a crop and reinvent an industry that had been absent in

⁵⁶ See Agricultural Act of 2014, Pub. L. No. 113-79, § 7606(a), 128 Stat. 649, 912 (codified at 7 U.S.C. § 5940).

⁵⁷ *Id.*

⁵⁸ *State Industrial Hemp Statutes*, *supra* note 6. Some states immediately passed laws regarding hemp cultivation in 2014 while it took other states years to do so, such as Kansas, which passed S.B. 263 in April 2018. See Tom Parker, *The Forgotten Crop: Kansas Legislature Legalizes Cultivation of Industrial Hemp*, KAN. FARMERS UNION, <https://www.kansasfarmersunion.com/the-forgotten-crop-2/> (last visited July 18, 2020).

⁵⁹ See Agricultural Act of 2014 § 7606(b)(2).

⁶⁰ *Id.* (emphasis added).

⁶¹ Compare *id.*, with 21 U.S.C. § 802(16) (2012) (defining marijuana).

⁶² Agricultural Act of 2014 § 7606(b)(2). Note that excluding certain parts of the plant from the definition necessarily precludes growing the whole plant in order to obtain those parts. Thus, those excluded parts were exempt from the CSA but could not be grown in the United States.

⁶³ See Moran, *supra* note 31, at 421–23.

⁶⁴ See Tom Angell, *Watch Mitch McConnell Push Hemp Legalization on the Senate Floor*, MARIJUANA MOMENT (June 27, 2018), <https://www.marijuanamoment.net/watch-mitch-mcconnell-push-hemp-legalization-on-the-senate-floor/>.

most states for up to eighty years.⁶⁵ The path is narrow in that “production of industrial hemp is strictly restricted to agricultural pilot programs conducted by state departments of agriculture, institutions of higher education, and/or their contractual designees.”⁶⁶ However, the mandate is “sweeping in its impact” because it exempts all hemp grown pursuant to a state agricultural pilot program from all federal laws, including the CSA, that would otherwise restrict such cultivation.⁶⁷

Nevertheless, because all forms of cannabis remained Schedule I controlled substances under the CSA, other activities related to hemp production remained subject to DEA authority, such as importing viable seed, “which requires DEA registration according to the Controlled Substances Import and Export Act.”⁶⁸ After numerous run-ins between the DEA and state departments of agriculture,⁶⁹ Congress included language in the Consolidated Appropriations Act for Fiscal Year 2016 in order to clear up any confusion as to the intention of the 2014 hemp provisions, stating explicitly that no federal funds can be used “to prohibit the transportation, processing, sale, or use” of hemp grown in accordance with the 2014 Farm Bill.⁷⁰ However, the interbranch conflicts did not end there. Later in 2016, the DEA, U.S. Food and Drug Administration (FDA), and USDA jointly issued their *Statement of Principles on Industrial Hemp*, which gave guidance on “how federal law applies to activities associated with industrial hemp that is grown and cultivated in accordance with the [2014 Farm Bill].”⁷¹ The statement purported to limit hemp production to the purposes of producing fiber and seed and excluded production for CBD.⁷² The statement also claimed that hemp products cannot be sold “for the purpose of general commercial activity,” and hemp seeds cannot be transported across state lines.⁷³

In short, the statement interpreted the 2014 hemp provisions in the most restrictive light possible and, at times, in direct contradiction to the spirit and text of the Farm Bill and the Consolidated Appropriations Act.⁷⁴ Hemp industry leaders, State Agricultural Commissioners, and members of

⁶⁵ See Parker, *supra* note 58.

⁶⁶ Miller & Jackson, *supra* note 4, at 19.

⁶⁷ *Id.*

⁶⁸ JOHNSON, *supra* note 26, at 15.

⁶⁹ See, e.g., Janet Patton, *Kentucky Agriculture Department, DEA Reach Deal on Hemp Seeds; Planting Could Come Soon*, LEXINGTON HERALD LEADER (May 21, 2014, 1:40 PM), <https://www.kentucky.com/news/business/article44489994.html>.

⁷⁰ Miller & Jackson, *supra* note 4, at 21–22.

⁷¹ *Id.* at 28; *Statement of Principles on Industrial Hemp*, 81 Fed. Reg. 53,395 (Aug. 12, 2016).

⁷² Miller & Jackson, *supra* note 4, at 29.

⁷³ *Id.*

⁷⁴ *Id.* at 28–30.

Congress all protested the joint statement.⁷⁵ The agencies subsequently back-peddled somewhat on their stance and did not take enforcement actions regarding the more controversial aspects of their statement.⁷⁶ Furthermore, the joint statement made clear that it “[did] not establish any binding legal requirement.”⁷⁷ Even so, the controversy loomed in the background of all hemp-related activity and likely influenced state hemp policies, as well as created concern among farmers and investors in the hemp industry.⁷⁸

The root of the legal uncertainties surrounding hemp came down to its status as a Schedule I controlled substance despite some flexibility being granted to the states by the 2014 Farm Bill to begin researching it as an agricultural product.⁷⁹ The hemp provisions in the 2018 Farm Bill intended to address these uncertainties.⁸⁰

D. The 2018 Farm Bill

In April of 2018, Senate majority leader Mitch McConnell introduced the Hemp Farming Act of 2018.⁸¹ Although it was never passed by the Senate, the legislation was later incorporated into the 2018 Farm Bill, which was enacted on December 20, 2018.⁸² The 2018 provisions amended the CSA to explicitly distinguish hemp, defined as it was in the 2014 Farm Bill—any part of the plant *Cannabis sativa L.* not over 0.3% THC—from marijuana.⁸³ In addition, the bill also makes hemp eligible for federal crop insurance, allows for certain USDA research funds to be put toward hemp, and orders a

⁷⁵ See, e.g., Letter from Ryan F. Quarles, Comm’r, Ky. Dep’t Agric., to Thomas J. Vilsack, Sec’y USDA; Louis J. Milione, Deputy Assistant Adm’r, DEA; and Leslie Kux, Assoc. Comm’r, FDA (Sept. 12, 2016), <https://www.kyforward.com/wp-content/uploads/2017/12/2016-9-12-Quarles-Letter-Re-Joint-Statement-of-Principles-on-Industrial-Hemp.pdf>.

⁷⁶ Miller & Jackson, *supra* note 4, at 30; see also Bradley E. Markano, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, 90 N.Y.U. L. Rev. 289, 294 (2015).

⁷⁷ Statement of Principles on Industrial Hemp, 81 Fed. Reg. 53,395, 53,396 (Aug. 12, 2016).

⁷⁸ Miller & Jackson, *supra* note 4, at 31.

⁷⁹ The joint statement itself states that the fact that hemp remained a controlled substance was the cause for such a strict interpretation: “Section 7606 did not remove industrial hemp from the controlled substances list. Therefore, Federal law continues to restrict hemp-related activities, to the extent that those activities have not been legalized under section 7606.” Statement of Principles on Industrial Hemp, 81 Fed. Reg. at 53,395.

⁸⁰ See Tom Angell, *Here’s Mitch McConnell’s New Hemp Legalization Bill*, FORBES (Apr. 12, 2018, 12:24 PM), <https://www.forbes.com/sites/tomangell/2018/04/12/heres-mitch-mcconnells-new-hemp-legalization-bill/#697f9f55b5bf>; Agriculture Improvement Act of 2018, Pub. L. No. 115-334, §10113, 132 Stat. 4490, 4909.

⁸¹ *Id.*

⁸² Angell, *supra* note 80.

⁸³ Agriculture Improvement Act of 2018 § 12619.

study of the various state agricultural pilot programs in order to better understand hemp production and the viability of hemp markets.⁸⁴

Section 10113, which amends the Agricultural Marketing Act of 1946, addresses state and tribal authority to regulate hemp production. It provides that a state or tribe may submit its own plan for monitoring and regulating hemp production to the USDA, thereby giving them primary regulatory control over hemp production within their borders once the plan is approved.⁸⁵ If a state does not submit a plan or its plan is not approved, then a plan established by the USDA will govern in its place in states that have legalized hemp production.⁸⁶ At a minimum, the state's or tribe's plan is required to contain the following:

(i) a practice to maintain relevant information regarding land on which hemp is produced in the State or territory of the Indian tribe, including a legal description of the land, for a period of not less than 3 calendar years;

(ii) a procedure for testing, using post-decarboxylation or other similarly reliable methods, delta-9 tetrahydrocannabinol concentration levels of hemp produced in the State or territory of the Indian tribe;

(iii) a procedure for the effective disposal of—

(I) plants, whether growing or not, that are produced in violation of this subtitle; and

(II) products derived from those plants;

(iv) a procedure to comply with the enforcement procedures under subsection (e);

(v) a procedure for conducting annual inspections of, at a minimum, a random sample of hemp producers to verify that hemp is not produced in violation of this subtitle.⁸⁷

Subsection (e), referenced in (iv) above, lays out a protocol for issuing administrative enforcement actions against negligent violations of a state or tribal plan.⁸⁸ For these violations, such as negligently failing to comply with

⁸⁴ *Id.* §§ 11101, 7129, 7605.

⁸⁵ *Id.* sec. 10113, § 297B(a)(1).

⁸⁶ *Id.* sec. 10113, § 297C.

⁸⁷ *Id.* sec. 10113, § 297(a)(2).

⁸⁸ *Id.* sec. 10113, § 297B(e).

state licensing or testing requirements, the state is required to issue a “corrective action plan” in which the grower is given “a reasonable date by which the hemp producer shall correct the negligent violation,” and the grower is then required to report to the State department of agriculture on his or her compliance with the State Plan for at least the next two years.⁸⁹ The bill makes clear that for such negligent violations, the grower is only subject to the administrative actions just mentioned and cannot be subject to criminal or civil actions by federal, state, or local government.⁹⁰ This enforcement scheme represents a drastic change, since, as the law stood vis-à-vis the 2014 Farm Bill, any hemp grown not in accordance with the provisions of section 7606 could be subject to the same enforcement actions as if it were marijuana, on the federal and on the state level, no matter the mental state of the violator.⁹¹

Ultimately, the effect of the new provisions is to further legitimize hemp as an agricultural product.⁹² No longer subject to enforcement, or threats of enforcement, under the CSA, hemp’s legal status leaves little room for gray area.⁹³ Furthermore, the 2018 Farm Bill makes clear that clerical errors on paperwork or unintentionally producing hemp with THC levels above 0.3% will not result in criminal drug offenses for farmers.⁹⁴ In addition, including hemp in federal crop insurance and research programs aids to further normalize a very useful crop that has been stigmatized for years.⁹⁵

Yet, the full scope of the federal government’s control over state regulation of hemp production is still to be determined. Although the text of the 2018 Farm Bill appears to clearly enumerate the minimum federal requirements for state and tribal plans, a subsequent interim final rule by the USDA has raised further issues⁹⁶ that are addressed in the following Section.

E. The USDA’s 2019 Interim Final Rule

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Miller & Jackson, *supra* note 4, at 26.

⁹² See *What Does the Farm Bill Do? Analysis by U.S. Hemp Roundtable General Counsel Jonathan Miller*, HEMPSUPPORTER.COM, <https://hempsupporter.com/assets/uploads/What-Does-the-Farm-Bill-Do.pdf> (last visited July 18, 2020) [hereinafter *What Does the Farm Bill Do?*].

⁹³ *Id.*

⁹⁴ See Agriculture Improvement Act of 2018 sec. 10113, § 297B(e).

⁹⁵ See *What Does the Farm Bill Do?*, *supra* note 92.

⁹⁶ Establishment of a Domestic Hemp Production Program, 84 Fed. Reg. 58,522 (Oct. 31, 2019) (codified at 7 C.F.R. § 990.2–8 (2020)).

In October 2019, the USDA issued an interim final rule outlining the requirements for state and tribal plans.⁹⁷ The USDA accepted comments after its publication and will issue a final rule within two years of its publication.⁹⁸ The interim rule raised concerns for many farmers, state departments of agriculture, companies, and hemp industry groups because it was seen as going beyond the mandates found in the 2018 Farm Bill and creating potentially unworkable rules.⁹⁹ As a result many states opted to postpone submitting plans to the USDA.¹⁰⁰ Instead, they chose to continue operating under their 2014 Farm Bill pilot programs for the 2020 growing season, in hopes that the next iteration of the rule will be more favorable to hemp farming.¹⁰¹

The primary areas of concern center around the rule's requirements on THC testing of hemp crops.¹⁰² The rule requires plans to establish a procedure for testing *all* hemp crops prior to harvest.¹⁰³ Many see this requirement as unnecessary according to the Farm Bill language and for safely growing hemp in general.¹⁰⁴

Furthermore, the testing must be done no more than fifteen days in advance of harvest and be conducted by a DEA certified laboratory.¹⁰⁵ In a letter to Kentucky's agricultural commissioner, the Kentucky Hemp Industries Association explains that "[i]n the best-case scenario, 7 or more days will pass before the test results will be available."¹⁰⁶ This would only leave a week to harvest an entire crop before the fifteen-day deadline, which would be next to impossible for many farmers, especially when factoring in the unknowns associated with farming, such as unpredictable weather and

⁹⁷ *Id.*

⁹⁸ *Id.* at 58,522.

⁹⁹ See, e.g., Richard A. Vance, *State Comments on USDA's Interim Final Rule Governing Hemp Production*, STITES & HARBISON (Feb. 10, 2020), <https://www.stites.com/resources/client-alerts/state-comments-on-usdas-interim-final-rule-ifr-governing-hemp-production?utm;> *Changes Needed to Hemp Interim Final Rule as Comments Are Due*, FARM BUREAU (Jan. 30, 2020), <https://www.fb.org/market-intel/Changes-Needed-to-Hemp-Interim-Final-Rule-as-Comments-Are-Due>; Ryan Faircloth, *New Federal Rules Could Put Minnesota's Booming Hemp Industry 'in Jeopardy,' Ag Officials Warn*, STAR TRIB. (Jan. 10, 2020), <https://www.startribune.com/new-federal-rules-could-put-minnesota-s-booming-hemp-industry-in-jeopardy-ag-officials-warn/566886922/?refresh=true>.

¹⁰⁰ See 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/>.

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ 7 C.F.R. § 990.3(a)(2) (2020).

¹⁰⁴ *See* Vance, *supra* note 99.

¹⁰⁵ 7 C.F.R. § 990.3(a)(2)(i), (a)(3).

¹⁰⁶ Letter from Ky. Hemp Indus. Ass'n to Ryan F. Quarles, Comm'r, Ky. Dep't Agric. (Jan. 7, 2020), <https://kyhia.org/wp-content/uploads/2020/01/KY-HIA-Board-Letter-Quarles-Final.pdf> [hereinafter Letter from Ky. Hemp Indus. Ass'n].

the possibility of equipment malfunctions.¹⁰⁷ Given the fact that many farmers will be harvesting their hemp crops in the same one to two-month window, bottlenecks in processing test results inevitably occur, which would narrow the harvest window even further.¹⁰⁸ The potential for bottlenecking would only increase as a result of the requirement that testing be conducted by DEA certified labs, of which there are only forty-four across twenty-two states.¹⁰⁹ The other option for the farmer is to begin harvesting as soon as the fifteen days begins to run and risk immense amounts of time and money on harvesting a crop that may have to be destroyed if the results come back over 0.3% THC.¹¹⁰

However, in response to the nearly five thousand comments that poured in addressing the interim rule, the USDA has hinted that it is willing to walk back some of the rule's more controversial provisions.¹¹¹ Bruce Summers, USDA administrator for its Agricultural Marketing Service, acknowledged that many of the interim rule's testing requirements are not explicitly required by the text of the 2018 Farm Bill.¹¹² Regarding the burdensome testing requirements, he stated, "That's an issue we are actively working on right now, and expect we may have more information shortly on that issue, but it's something we've heard loud and clear and something we will deal with."¹¹³

The next Part looks at trends in current state hemp regulatory schemes and analyzes how these rules are impacted by the new Farm Bill language, specifically in the areas of applications and licensing, THC testing, and seed procurement.

III. UNNECESSARY RED TAPE: ANALYZING WHICH ASPECTS OF STATE REGULATION OF HEMP PRODUCTION SHOULD CHANGE

Forty-seven states have passed laws authorizing hemp agricultural pilot programs in response to the 2014 Farm Bill.¹¹⁴ The existing state regulatory schemes were crafted to meet the demands of the 2014 Federal legislation, which gave states some flexibility but left hemp's status as a controlled

¹⁰⁷ *See id.*

¹⁰⁸ Chris Clayton, *Hemp: THC Testing Bottleneck Taking Shape*, AGFAX (Feb. 7, 2020), <https://agfax.com/2020/02/07/hemp-thc-testing-bottleneck-taking-shape-dtn/>.

¹⁰⁹ *Id.*

¹¹⁰ *See* Letter from Ky. Hemp Indus. Ass'n, *supra* note 106.

¹¹¹ *See* Theresa Bennett, *USDA Considering Changing Some Hemp Regulations, but THC Limit Isn't One of Them*, CANNABIS BUS. TIMES (Feb. 6, 2020), <https://www.cannabisbusinesstimes.com/article/usda-considering-changing-hemp-regulations-thc-limit-not-one/>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *State Industrial Hemp Statutes*, *supra* note 6.

substance unaffected.¹¹⁵ With the passage of new federal policy, some state laws and regulations likely will have to change,¹¹⁶ while others that are not inconsistent with the new policy can remain.¹¹⁷ However, although it will be convenient for states to keep laws and regulations that are technically allowable under the new law when submitting their new state plans to the USDA, there is much in states' current regulatory schemes that can be changed due to the relaxing of federal policy.¹¹⁸

This Part will identify some of those themes in current state law that were enacted in direct response to the demands of the 2014 Farm Bill and hemp's status as a federally controlled substance. Specifically, this Part analyzes application and licensing procedures, THC testing of hemp crops, and procedures for seed procurement. These aspects of states' regulatory schemes were created in the spirit of—even under the pressure of—a stricter standard that left much more at stake if violated.¹¹⁹ As a result, some aspects of these laws and regulations are no longer necessary and could be replaced with ones that are less burdensome to farmers and to a growing hemp industry.¹²⁰

A. Applications and Licensing

The first issue deals with how states register individual growers. The 2014 law says that hemp may be grown by state departments of agriculture or universities “for purposes of research conducted under an agricultural pilot program or other agricultural or academic research.”¹²¹ While many universities in states where hemp production became lawful have grown hemp for research, state agriculture departments are not growing their own hemp for research per se. Instead, the common approach among states has been to license private farmers,¹²² while the state agricultural department

¹¹⁵ See generally Agricultural Act of 2014, Pub. L. No. 113-79, § 7606, 128 Stat. 649, 912 (codified at 7 U.S.C. § 5940).

¹¹⁶ For instance, state laws that criminally penalize negligent violations of state plans will likely be preempted by the new law. See Agriculture Improvement Act of 2018 sec. 10113, § 297B(e).

¹¹⁷ See *id.* sec. 10113, § 297B(a)(3)(B).

¹¹⁸ See generally *id.*

¹¹⁹ See generally Agricultural Act of 2014 § 7606.

¹²⁰ See Chris Bennett, *What Farmers Need to Unleash a Hemp Beast*, AGWEB (Apr. 10, 2018, 2:21 PM), <https://www.agweb.com/article/what-farmers-need-to-unleash-a-hemp-beast-naa-chris-bennett/> (arguing that relaxing regulatory burdens would be beneficial for hemp farmers).

¹²¹ Agricultural Act of 2014 § 7606(a)(1) (emphasis added).

¹²² Moran, *supra* note 31, at 422–23 (explaining the necessity of a memorandum of understanding between growers and a university or state department of agriculture).

collects data and makes reports.¹²³ Some states, such as North Dakota and Kansas, have put more emphasis on the ‘research’ aspect, requiring applicants to submit more of a formal research proposal in their application, while many other states have not placed such an emphasis on research for purposes of the application process.¹²⁴

In contrast, under the 2018 Farm Bill, hemp’s legality does not hinge on maintaining an image of state-supervised research.¹²⁵ While the law does still require the state to “maintain relevant information regarding land on which hemp is produced,” the states need not structure their applications and registration processes around legitimating their hemp program as a research endeavor and portraying the grower as a sort of agent of the department of agriculture.¹²⁶ States can now register private growers and the land on which they plan to grow hemp based upon the minimum federal requirements.¹²⁷

Basic information about where the hemp will be grown and a sworn statement that the applicant has not previously been convicted of felony involving a controlled substance are the only two essential pieces of information legally required by the 2018 Farm Bill for application purposes.¹²⁸ Some states currently require information beyond this new minimum. Kentucky, for example, currently requires GPS coordinates and maps for each location where hemp will be grown and a background check by the State Police Department paid for by the applicant, among other requirements.¹²⁹ These meet the new standard but in a more burdensome manner.

The fact that Kentucky is not alone in having an onerous application process reveals that states may want to reevaluate the *purpose* of the application and the proper role of the state agricultural department with respect to hemp production before continuing on with the same approach to the application process. With the passage of the new federal law, the once necessary purpose and function of state hemp programs—research-oriented

¹²³ See, e.g., N.D. DEP’T AGRIC., 2017 INDUSTRIAL HEMP PILOT PRODUCER DRIVEN RESEARCH (2018), <https://www.nd.gov/ndda/sites/default/files/2017%20NDDA%20Industrial%20Hemp%20Pilot%20Project-Report%20final%20review.pdf>.

¹²⁴ See, e.g., *Applications for Industrial Hemp Research Program*, KAN. DEP’T AGRIC., <https://agriculture.ks.gov/divisions-programs/plant-protect-weed-control/industrial-hemp/industrial-hemp-applications> (last visited July 18, 2020).

¹²⁵ See generally Agriculture Improvement Act of 2018, Pub. L. No. 115-334, sec. 10113, § 297B(a)(2)(A), 132 Stat. 4490, 4909.

¹²⁶ See *id.* sec. 10113, § 297B(a)(2).

¹²⁷ See *id.*

¹²⁸ See *id.* sec. 10113, § 297B(a)(2)(A)(i), (e)(3)(B).

¹²⁹ KY. REV. STAT. ANN. § 260.862(2)(d) (Westlaw through the end of the 2020 Reg. and First Extraordinary Sess.); 302 KY. ADMIN. REGS. 50:020 (2020).

gatekeepers that must closely monitor the people and activities relating to a federally controlled substance—is no longer required.¹³⁰ State departments of agriculture can change their application processes to reflect how that change in purpose and function affects the nature of their relationships to the growers.

B. THC Testing of Hemp Crops

Another area of state hemp regulation that is affected by the new federal law is the testing of hemp crops for THC content. The 2014 legislation did not mandate regular testing over each hemp crop.¹³¹ However, because the bill carved out an exemption from the CSA for hemp not exceeding 0.3% THC content, it is easy to see why many state pilot programs instituted rigorous testing rules to ensure hemp produced in that state was under that limit.¹³² Even so, not all states handle the issue of testing the same. For instance, some states such as Kentucky and Washington mandate pre-harvest testing of all hemp crops.¹³³ Vermont's initial hemp program conducted testing on a volunteer basis but did not subject each crop to pre-harvest testing.¹³⁴ Similarly, in Colorado, the department of agriculture may conduct random testing of up to 100% of registered growers but does not require pre-harvest testing of each crop.¹³⁵ However, the text of the 2014 Farm Bill does not explicitly favor one approach over the other.¹³⁶

Whereas the 2014 law was silent on the issue of mandatory testing, the new 2018 law does address the issue.¹³⁷ One of the requirements for a state plan submitted to the USDA is that it establish “a procedure for conducting annual inspections of, at a minimum, a random sample of hemp producers to

¹³⁰ See generally Agriculture Improvement Act of 2018 sec. 10113, 297B(a)(2)(A).

¹³¹ See Agricultural Act of 2014, Pub. L. No. 113-79, § 7606, 128 Stat. 649, 912 (codified at 7 U.S.C. § 5940).

¹³² *Id.*

¹³³ See KY. DEP'T AGRIC., PROCEDURES FOR SAMPLING, THC TESTING, AND POST-TESTING ACTIONS (Feb. 4, 2019), https://www.kyagr.com/marketing/documents/HEMP_LH_Procedures_for_Sampling_THC-Testing_and_Post-Testing_Actions.pdf; *Frequently Asked Questions: Wisconsin's Industrial Hemp Pilot Research Program*, WIS. DEP'T AGRIC., <https://datcp.wi.gov/Documents/IHFAQ.pdf> (last updated March 13, 2019).

¹³⁴ See Morgan True, *Vermont to Initiate Hemp Testing Pilot Program*, VTDIGGER (Jan. 18, 2017), <https://vtdigger.org/2017/01/18/vermont-initiate-hemp-testing-pilot-program/>.

¹³⁵ See *Industrial Hemp Inspection and Sampling*, COLO. DEP'T AGRIC., <https://drive.google.com/file/d/1WzbYqcW9mx3b7QXXyrYy8gwrXeF1Ynw/view> (last updated Jan. 14, 2020).

¹³⁶ See Agricultural Act of 2014, Pub. L. No. 113-79, § 7606, 128 Stat. 649, 912.

¹³⁷ Compare Agricultural Act of 2014 § 7606, with Agriculture Improvement Act of 2018, Pub. L. No. 115-334, sec. 10113, § 297B(a)(2)(A)(v), 132 Stat. 4490, 4909.

verify that hemp is not produced in violation of this subtitle.”¹³⁸ This language suggests that testing of less than the entire pool of registered growers is sufficient.¹³⁹ Therefore, pre-harvest testing of every hemp crop is still not necessary, and the new statutory language should give states added security in not doing so.

C. Seed Acquisition

The next aspect of state hemp regulation to consider is seed acquisition. One of the ironies of the 2014 hemp provisions is that the law allowed states to grow or cultivate hemp under certain conditions but said nothing about how they were supposed to acquire seed for planting—a clear disconnect between policy making and agricultural reality.¹⁴⁰ Under the 2014 hemp provisions, viable hemp seed was still considered a controlled substance, and the DEA’s stance was that “hemp plants and seeds may not be transported across state lines” and can only be imported from suppliers outside the U.S. “by persons registered with the DEA to do so.”¹⁴¹ As a result, obtaining seed proved difficult in the early stages of state pilot programs.¹⁴² For example, in 2014 the Kentucky Department of Agriculture attempted to import 250 pounds of viable hemp seed from Italy for use in its hemp pilot program.¹⁴³ The DEA seized the shipment, and Kentucky brought suit in federal district court.¹⁴⁴ The litigation was settled informally, and Congress took measures in 2016 to prevent future occurrences like this one,¹⁴⁵ but events such as this seemed to have left an impression on how states handle seed procurement.¹⁴⁶

For example, in July 2018, the Virginia Department of Agriculture admitted in its pilot program Registration Guide that “the legality of hemp research program participants transferring hemp planting seeds or clones

¹³⁸ Agriculture Improvement Act of 2018 sec. 10113, § 297B(a)(2)(A)(v).

¹³⁹ *See id.*

¹⁴⁰ *See* Luke Runyon, *Industrial Hemp Could Take Root, If Legal Seeds Weren't So Scarce*, NPR (May 28, 2014, 3:31 AM), <https://www.npr.org/2014/05/28/316332782/industrial-hemp-could-take-root-if-legal-seeds-werent-so-scarce> (“[T]oday U.S. hemp seed is scarce. It’s technically still illegal to import viable seed . . .”).

¹⁴¹ Statement of Principles on Industrial Hemp, 81 Fed. Reg. 53245, 53396 (Aug. 12, 2016).

¹⁴² *See* Ryan Grim & Matt Ferner, *Kentucky Sues DEA to Free Its Impounded Hemp Seeds [UPDATE]*, HUFFPOST (May 14, 2014, 12:18 PM), https://www.huffpost.com/entry/dea-kentucky-hemp_n_5324120.

¹⁴³ *See* Matt Ferner & Ryan Grim, *Kentucky Puts Hemp Planting on Hold After DEA Seed Seizure*, HUFFPOST (May 16, 2014, 1:18 PM), https://www.huffpost.com/entry/kentucky-cancels-hemp-gro_n_5338125.

¹⁴⁴ *Id.*

¹⁴⁵ *See supra* note 70 and accompanying text.

¹⁴⁶ *See* Miller & Jackson, *supra* note 4, at 20–21.

across state lines is uncertain” and recommends that growers consult their lawyer first before buying hemp seed from across state lines.¹⁴⁷ While Virginia takes a matter-of-fact and hands-off approach, other states established more elaborate and stricter processes for acquiring hemp seed, presumably to help stave off federal executive branch interference.¹⁴⁸ For example, in Tennessee, for all domestic seed purchased outside the state, the grower must submit a request with the state three weeks in advance and the seed must be shipped to the department of agriculture for review and approval.¹⁴⁹ The grower is responsible for shipping costs to the department and for arranging to retrieve the seed from the state once approved.¹⁵⁰

Since hemp is no longer a controlled substance under the new Farm Bill provisions, states should not have to worry about DEA interference when it comes to procurement of seed shown to have tested at or below 0.3% THC.¹⁵¹ While it is important to take some measures to see that quality hemp genetics—including lawful THC levels—are entering the state, there is no longer the same impetus for states to keep such tight control over the seed procurement process.¹⁵² Therefore, the seed procurement process among growers and seed suppliers is an area of hemp regulation that states will want to reevaluate due to the new federal policy.

The above analysis illustrates several regulatory issues that bear directly on the farmer. Since the utility of these rules is impacted by the 2018 Farm Bill, states should reform them as they move forward into the next phase of legal hemp production in the United States. The next Part makes recommendations for how states might do so.

¹⁴⁷ See VA. DEP’T AGRIC., VIRGINIA INDUSTRIAL HEMP PROGRAM RESEARCH GROWER, DEALER, AND PROCESSOR REGISTRATION GUIDE (2018) (on file with the author) [hereinafter VA. REGISTRATION GUIDE]. Virginia’s advice appears to have been sound. See, e.g., Jake Zuckerman, *US Attorney Files Civil Suit Against WV Hemp Farm*, CHARLESTON GAZETTE-MAIL (Sept. 22, 2018), https://www.wvgazette.com/news/politics/us-attorney-files-civil-suit-against-wv-hemp-farm/article_9a6ff103-7f6c-5f80-a028-92877ae1502f.html (reporting on a civil lawsuit initiated by the U.S. Attorney for the Southern District of West Virginia against a farmer for transporting hemp seed from Kentucky across state lines into West Virginia).

¹⁴⁸ TENN. DEP’T AGRIC., DOMESTIC SEED IMPORT REQUIREMENTS (2020), https://preprod.tn.gov/content/dam/tn/agriculture/documents/planthealth/Domestic_Seed_Import_Requirements.pdf.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 12619, 132 Stat. 4490, 5018.

¹⁵² See *id.*

IV. MOVING FORWARD: REGULATING HEMP PRODUCTION IN A LESS BURDENSOME WAY

With the passage of the 2018 Farm Bill, states are now free to reinvent how they regulate hemp production.¹⁵³ They should take the opportunity to do so, and they should regulate in the least burdensome way possible. The following will review the issues of licensing and applications, THC testing, and seed acquisition discussed above and make recommendations on how states can make rules in these areas that reduce the burden on farmers and are consistent with federal law.

A. Applications and Licensing

When it comes to registration of farmers under state hemp programs, states should do away with any requirement for research proposals. For most states, this requirement was likely more of a formality used to show compliance with the 2014 Farm Bill than an actual demand that farmers take an academic approach to their hemp crop.¹⁵⁴ Now that the research component is no longer a federal requirement, hemp research on the state level should not be done away with, but the responsibility should be explicitly shifted to state agriculture agencies and extension services.

Because growers no longer must be viewed as research agents of the state, states may choose to do away with the *licensing* paradigm altogether and opt instead for a more barebones *registration* model to reflect a change in the nature of the relationship between state and farmer.¹⁵⁵ The purpose of

¹⁵³ See generally Agriculture Improvement Act of 2018 § 10113.

¹⁵⁴ See *Seventeen States Are Flat-Out Ignoring Federal Hemp Laws and Markets Are Thriving*, FOUND. FOR ECON. EDUC. (June 28, 2018), <https://fee.org/articles/seventeen-states-are-flat-out-ignoring-federal-hemp-laws-and-markets-are-thriving/>; see generally Agricultural Act of 2014, Pub. L. No. 113-79, § 7606, 128 Stat. 649, 912.

¹⁵⁵ What the label implies is not insignificant. “Registrant” connotes being officially acknowledged by, or on file with, the state as doing something that is already allowed. “Licensee” implies that one has been given special permission to do something. Thus, the choice of name implies something of how the state views the purpose of the application process and its relationship to the grower. Virginia is one state that recently changed the nomenclature employed by its hemp program to refer to growers from “licensee” to “registrant.” See VA. REGISTRATION GUIDE, *supra* note 147. While no official materials cite the above reasoning for the change, the shift is nonetheless interesting and was likely not arbitrary.

It is also worth noting the nomenclature used in the text of the 2018 Farm Bill regarding the relationship between hemp grower and governing state authority. When mandating that the U.S. Secretary of Agriculture establish a federal plan that will apply to states that do not submit their own plan, or whose plan is not approved by the USDA, the law provides that “[t]he Secretary shall establish a procedure to issue *licenses* to hemp producers.” Agriculture Improvement Act of 2018 sec. 10113, § 297C(b) (emphasis added). However, when referring to the requirements for state plans, the text does not employ the term

this model should be to collect the necessary information required by the 2018 Farm Bill in order to prove eligibility and nothing more.¹⁵⁶ The application process could achieve this purpose by simplifying procedures for confirming location of hemp crops and criminal background.

For instance, states could do away with the requirement to pre-identify field locations at the time of applying, as Canada has already done.¹⁵⁷ In Canada, farmers only must report the location a minimum of fifteen days before planting, which gives them much more flexibility in developing their crop plans.¹⁵⁸ Additionally, farmers could save on added paperwork and expense by not being subject to background checks.¹⁵⁹ A sworn statement that the individual has had no felony convictions relating to a controlled substance in the last ten years should be sufficient.¹⁶⁰ Making such reforms will simplify an arduous application process and also lessen the administrative costs associated with growing hemp, which can amount to thousands of dollars in some states.¹⁶¹

B. THC Testing

When setting policies for THC testing of hemp crops, states should first do away with mandatory pre-harvest testing for each crop.¹⁶² Not only is such a policy rendered unnecessary by the language of the 2018 Farm Bill, it is also expensive and burdensome.

“license.” See sec. 10113, § 297B(a). The text supports the interpretation that states have wide discretion in how they define the relationship between their departments of agriculture and hemp growers.

In general, shifts in official nomenclature may prove vital in the effort to destigmatize hemp as an agricultural commodity. Since the initial legislation in the 2014 Farm Bill, hemp has commonly been referred to as “industrial” or “industrialized” hemp. See Agricultural Act of 2014 § 7606. However, in the 2018 Farm Bill, it is referred to simply as “hemp.” See Agriculture Improvement Act of 2018 § 10113. In 2019, Montana followed suit, amending references to “industrialized hemp” in their hemp laws to “hemp.” S.B. 177, 66th Leg., Reg. Sess. (Mont. 2019) (enacted). Once again, these changes likely are not arbitrary and suggest a linguistic trend geared toward normalizing the crop.

¹⁵⁶ See Agriculture Improvement Act of 2018 sec. 10113, § 297B(a)(2)(A) (outlining the minimum requirements for state plans).

¹⁵⁷ See Angela Lovell, *Simpler Regulations for Hemp Growers*, GRAINNEWS (Feb. 10, 2017), <https://www.grainnews.ca/2017/02/10/simpler-regulations-for-hemp-growers/>.

¹⁵⁸ *Id.*

¹⁵⁹ Montana legislation enacted in April 2019 did away with the requirements for criminal background checks and fingerprinting of applicants. S.B. 177, 66th Leg., Reg. Sess. (Mont. 2019); see also Tyler Manning, *Hemp Bills Headed to Bullock’s Desk*, INDEP. RECORD (Apr. 24, 2019), https://helenair.com/news/local/hemp-bills-headed-to-bullocks-desk/article_71e72dde-de5b-58a9-bb9d-b84f8b3213d1.html.

¹⁶⁰ See Agriculture Improvement Act of 2018 sec. 10113, § 297B(a)(2)(A).

¹⁶¹ See McCoy, *supra* note 7.

¹⁶² The feasibility of this recommendation and others in this Section may depend on the final iteration of the USDA’s rule on hemp production. See *supra* Part II.E.

Next, states should focus their resources on testing hemp crops bound for consumption and completely forego testing on varieties grown for fiber. This would be logical since fiber crops are not meant for consumption and therefore, do not present any of the supposed risks associated with elevated THC content.¹⁶³ Also, hemp fiber, while showing great potential for construction materials and paper, is the least lucrative market for farmers at the moment and, therefore, presents a greater financial risk.¹⁶⁴ Thus, foregoing testing on fiber crops could be a boon to the fiber industry as well as give farmers more incentive to grow it. Even if the USDA ultimately requires states to test all hemp crops for now,¹⁶⁵ states should continue to lobby for policies in line with the above recommendations.

C. Seed Acquisition

In light of the changes in federal policy, states should also liberalize the seed procurement process. First, states should end any practice that requires seed to be shipped directly to the department of agriculture for inspection, as this is costly and inefficient. Furthermore, farmers should not have to state which variety they intend to grow on their application and should not be required to have their seed pre-approved by the state before purchasing. Ending such practices would give the farmer more flexibility to make the right agricultural decisions for that growing season, rather than being forced to plan around unnecessary regulatory requirements.

States should instead focus their regulatory efforts on labeling and certification requirements for seed breeders and distributors to ensure hemp seeds meet the proper legal requirements. Such companies are better equipped to bear the regulatory burden than farmers. Now that viable hemp seed is no longer a controlled substance, an industry around plant breeding

¹⁶³ A 2016 study analyzed the potency of 38,681 samples of illicit marijuana seized between 1995 and 2014. Mahmoud A. ElSohly et al., *Changes in Cannabis Potency Over the Last 2 Decades (1995–2014): Analysis of Current Data in the United States*, 79 *BIOLOGICAL PSYCHIATRY* 613 (2016). The study showed an increase in the potency over time from about four percent THC in 1995 to about twelve percent in 2014. *Id.* at 613. Therefore, even if a hemp crop contained one percent THC, over three times the federal limit and extremely rare for hemp crops, it would still be twelve times less potent than the average marijuana found on the black market today. See Matthew Van Deventer, *Hot Hemp: How High THC Levels Can Ruin a Legal Hemp Harvest*, WESTWORD (Feb. 14, 2018), <https://www.westword.com/marijuana/hot-hemp-how-high-thc-levels-can-ruin-a-legal-hemp-harvest-9963683> (“In . . . five growing seasons . . . the [Colorado Department of Agriculture] has dealt with just a handful of crops that have spiked over 1 percent [THC] . . .”).

¹⁶⁴ See Jerome H. Cherney & Ernest Small, *Industrial Hemp in North America: Production, Politics, and Potential*, 6 *AGRONOMY* 58, 62 (2016).

¹⁶⁵ See *supra* Part II.E.

and seed distribution will soon follow. Therefore, regulation of that market should replace regulation of the farmer.

States can still encourage certain hemp varieties they find to be safe and reliable by establishing state seed certification programs, such as the one found in Colorado.¹⁶⁶ However, limiting seed choice to *only* cultivars approved by the state is not advisable.¹⁶⁷ This approach limits the farmer's ability to choose what is best for her specific growing season and could possibly stifle potentially superior genetics from being introduced into the market. Still, having a policy of prohibiting varieties that have consistently tested over 0.3% THC, or have some other highly undesirable trait, may be prudent, as this would buttress less stringent THC testing policies if known violators are excluded from being planted.

D. Additional Considerations

In order to expand the hemp industry and create more economic opportunities for farmers, state policy makers should address other issues outside the scope of just regulating hemp production. For example, based on current research, states may want to take necessary action to approve hemp as an ingredient for livestock feed, as this would create another economic opportunity for farmers and compliment states' livestock industries.¹⁶⁸ In addition, states that have not done so should implement clear policies expressly legalizing CBD products. CBD is currently the largest and fastest growing hemp market.¹⁶⁹ However, despite the recent de-scheduling of hemp, statements by the FDA have called the legality of CBD-containing food and supplements into question.¹⁷⁰ Therefore, states should take clear

¹⁶⁶ CDA Announces Colorado's 2017 CDA-Approved Certified Hemp Seed Varieties, COLORADO.GOV (Dec. 4, 2017), <https://www.colorado.gov/pacific/agmain/news/1242017-cda-announces-colorado's-2017-cda-approved-certified-hemp-seed-varieties>.

¹⁶⁷ In Canada, farmers may only grow varieties approved by the federal government. See *List of Approved Varieties for the 2020 Growing Season: Industrial Hemp Varieties Approved for Commercial Production*, CANADA.CA, <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/producing-selling-hemp/commercial-licence/list-approved-cultivars-cannabis-sativa.html> (last updated June 19, 2020).

¹⁶⁸ See generally COLO. DEP'T AGRIC., A STAKEHOLDER REVIEW OF THE FEASIBILITY OF INDUSTRIAL HEMP BY-PRODUCTS AS ANIMAL FEED INGREDIENTS (2017), <https://www.colorado.gov/pacific/sites/default/files/CDA%20Report%20on%20Hemp%20in%20Animal%20Feed%2012-29-2017.pdf>.

¹⁶⁹ See Chavie Lieber, *Hemp is Now Legal. That's Huge for the CBD Industry*, VOX, <https://www.vox.com/the-goods/2018/12/13/18139678/cbd-industry-hemp-legalization-farm-bill> (last updated Dec. 28, 2018, 3:49 PM).

¹⁷⁰ *Id.*; see also Press Release, Statement from FDA Commissioner Scott Gottlieb, M.D., on New Steps to Advance Agency's Continued Evaluation of Potential Regulatory Pathways for Cannabis-Containing and Cannabis-Derived Products, FDA (Apr. 2, 2019), <https://www.fda.gov/news-events/press->

action to protect those markets within their borders to ensure greater economic opportunities for farmers.

Finally, as the USDA attempts to rework its hemp regulations, states should join with hemp industry groups to continue to demand a final rule on state regulation of hemp production that is true to the text and the spirit of the 2018 Farm Bill. The USDA has acknowledged the incongruity between its interim final rule and the language of the Farm Bill.¹⁷¹ So in the meantime, states should continue to identify sensible policies and make their preferences known to the USDA. Even if the next iteration of the rule remains excessively burdensome, the recommendations in this note may still serve as guidance for future regulatory reform.

The above recommendations represent several ways for states to take advantage of new federal hemp policy in order to lessen the regulatory burden on farmers. However, the list is not exhaustive. State legislators should take time to truly appreciate the regulatory flexibility afforded by the hemp provisions in the 2018 Farm Bill and strive to find ways to make that flexibility work for the benefit of farmers.

V. CONCLUSION

With the passage of pro-hemp policies on the federal level, the potential for farmers to reap benefits from the crop has greatly expanded.¹⁷² However, a new approach to regulating the cultivation of this crop will be needed on the state level in order to realize its fullest potential. Stricter state policies may have been advantageous previously, helping to create investor confidence amid legal uncertainties as well as protecting institutions and farmers from federal enforcement actions. Now, however, new policies on the federal level call for reevaluation of those stricter policies. In developing new policies, states should make the farmer's agricultural and economic interests a top priority, taking care to grant as much flexibility as possible and limit unnecessary burdens.

announcements/statement-fda-commissioner-scott-gottlieb-md-new-steps-advance-agencys-continued-evaluation. (“[I]t is unlawful to introduce food containing added CBD . . . into interstate commerce, or to market CBD . . . products as dietary supplements.”).

¹⁷¹ See *supra* Part II.E.

¹⁷² See Sarah Bowman, ‘Biggest Thing to Happen to Agriculture in my Lifetime’: Hemp Could Soon Be Grown in Indiana, INDIANAPOLIS STAR (Jan. 21, 2019, 6:00 AM), <https://www.indystar.com/story/news/environment/2019/01/21/farm-bill-2018-means-hemp-could-soon-grow-in-indiana-for-cbd-oil-fibers/2514915002/>.