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THE FATE OF INDUSTRIAL HEMP IN THE 2018 FARM BILL - WILL OUR
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The Fate of Industrial Hemp in the 2018 Farm Bill – Will Our Collective Ambivalence Finally Be Resolved?

Marne Coit

I. Introduction

As a nation, we are at a crossroads in the regulation of industrial hemp, and the 2018 Farm Bill is the time to decide which path we will choose. Congress has an opportunity to clear the path for farmers in the United States (“US”) to participate in this burgeoning market. With an estimated 25,000 uses, industrial hemp is one of those rare crops that has both food and agricultural uses.¹ There is undoubtedly a market for hemp products.² The Hemp Industries Association (“HIA”) estimates that US retail sales of hemp-based products was \$688 million in 2016 – up from \$573 million in 2015.³ By 2020 the industry is estimated to grow to \$1.8 billion.⁴

Considering the projected market growth, one could conclude that growing industrial hemp has a lot of potential for farmers in the US.⁵ However, the biggest impediment to farmers doing so is the current state of the law that regulates this crop.⁶ There is a discrepancy between what Congress seemingly

¹ Logan Yonavjak, *Industrial Hemp: A Win-Win For The Economy And The Environment*, FORBES (May 29, 2013), <https://www.forbes.com/sites/ashoka/2013/05/29/industrial-hemp-a-win-win-for-the-economy-and-the-environment/2/#67b029736f9a>.

² *See id.*

³ HARVEST NEW YORK, INDUSTRIAL HEMP FROM SEED TO MARKET 6 (Cornell University 2017), <http://allegany.cce.cornell.edu/resources/industrial-hemp-from-seed-to-market>.

⁴ Market Size: Hemp Industry Sales Grow To \$688 Million in 2016, HEMP BUSINESS JOURNAL (2017), <https://www.hempbizjournal.com/market-size-hemp-industry-sales-grow-to-688-million-in-2016/>.

⁵ Yonavjak, *supra* note 1.

⁶ *See* H.R. Res. 2642, 113th Cong. (2014) (enacted), <https://www.congress.gov/bill/113th-congress/house-bill/2642/text?overview=closed>; 21 C.F.R. § 1308 (1970), https://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm.

mandated in the 2014 farm bill and the Drug Enforcement Administration's ("DEA") interpretation of the language of the Controlled Substances Act, a statute from 1970.⁷

Under the 2014 Farm Bill, Congress seemingly paved the way for industrial hemp to once again be grown in the US, as it granted authority for states to create industrial hemp pilot programs.⁸ However, the Drug Enforcement Administration's interpretation of the Controlled Substances Act ("CSA") of 1970 still precludes farmers from fully participating in these programs.⁹ The DEA claims that it has authority to regulate all species of *Cannabis sativa* under the CSA, and does not distinguish between marijuana and industrial hemp.¹⁰

In the upcoming 2018 Farm Bill, Congress has the opportunity to clarify that the definition of marijuana does not include industrial hemp, and by doing so simultaneously clarify (and limit) the scope of DEA's authority. In order for farmers, processors, and retailers to move forward, Congress must take this action, and, therefore, restrict DEA's jurisdiction to marijuana. This is the only path forward for a thriving industrial hemp industry in the US.

II. Background

For context, there has been an increasing demand for industrial hemp products in recent years¹¹. However, industrial hemp is not a new crop in the US. From the 1800s through the early 1900s it was grown widely, and was used in a variety of everyday products such as fabrics, twine, and paper.¹² During

⁷ See 21 C.F.R. § 1308.

⁸ RENEE JOHNSON, CONG. RESEARCH SERV., HEMP AS AGRICULTURAL COMMODITY 1 (2017).

⁹ *Id.*

¹⁰ *Id.* at 18.

¹¹ *Market Size: Hemp Industry Sales Grow to 688 Million in 2016*, HEMP BUS. J., <https://www.hempbizjournal.com/market-size-hemp-industry-sales-grow-to-688-million-in-2016/> (last visited Jan. 29, 2018) [hereinafter *Hemp Industry Sales Grow*].

¹² JOHNSON, *supra* note 8, at 11.

this time period, it was treated the same as other commonly grown crops.¹³ For example, the United States Department of Agriculture (“USDA”) published crop reports, compiled statistics, and provided assistance to hemp producers with production and distribution.¹⁴

Peak production of industrial hemp in the US was about 1943, when approximately 150 million pounds were produced.¹⁵ Due to a combination of changes in both the law and societal attitudes,¹⁶ production dropped after this time, until 1958 when the last known crop of industrial hemp was grown in the US.¹⁷

As stated earlier, though, there is a resurgence of interest in this crop.¹⁸ Market growth in the retail sector is increasing, which means increased opportunities for producers, manufacturers, and retailers.¹⁹ However, industry growth is hampered by the current confusing and conflicted state of the law.

III. State of the Law – Historical

The heart of the problem is how industrial hemp is defined – and who is defining it. In order to understand the present day complexities of the law, it is important to understand the historical context.

As stated above, up until the mid-1900s, industrial hemp was commonly grown in the US.²⁰ In 1937, Congress passed the Marijuana Tax Act.²¹ This was the first legislative attempt to regulate marijuana in the US, and came about, in part, because of shifting societal attitudes regarding drugs and drug use.²² Although it did not prohibit production outright, it

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 12.

¹⁶ *Id.*

¹⁷ JOHNSON, *supra* note 8, at 12.

¹⁸ *See Hemp Industry Sales Grow*, *supra* note 11.

¹⁹ *Id.*

²⁰ JOHNSON, *supra* note 8, at 12.

²¹ *Id.*

²² *Id.* at 11-12.

did make production much more difficult.²³ The Marijuana Tax Act prohibited individual possession and sale of marijuana.²⁴ It permitted medicinal use, but under this law it became highly regulated.²⁵ In addition to requiring extensive documentation, it also imposed a tax if marijuana was bought, sold, imported, cultivated, or prescribed.²⁶

It is very important to note that the Marijuana Tax Act specifically regulated marijuana.²⁷ It recognized a distinction between marijuana and industrial hemp, and it did not prohibit the production of industrial hemp.²⁸ In fact, during World War II, the federal government encouraged production of hemp for fiber and oil.²⁹

In 1970, there was a significant shift in the law when the Controlled Substances Act (“CSA”) was passed.³⁰ Under the CSA, certain plants and drugs were placed under federal jurisdiction.³¹ Specifically, the DEA was given jurisdiction over *Cannabis sativa*.³² The critical piece here – and what has created complexities through the present day – is that the CSA does not specifically distinguish between marijuana and industrial hemp.³³ The impact of not distinguishing between these two varieties is what causes the most issues for producers, manufacturers, and retailers today.³⁴

Under the CSA, drugs are placed into what is known as “schedules” based on a combination of acceptable medical use

²³ *Id.*

²⁴ *Id.*

²⁵ JOHNSON, *supra* note 8, at 12

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ JOHNSON, *supra* note 8, at 12

³¹ *See id.*

³² *See generally* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513

³³ JOHNSON, *supra* note 8, at 32

³⁴ *Id.* at 31-32.

and abuse potential.³⁵ Marijuana has been identified as a Schedule I drug,³⁶ which means that it is considered to be in the tier with the most dangerous drugs, and has a high potential for abuse and no currently accepted medical use.³⁷ Technically, the CSA does not prohibit the production of industrial hemp outright, but it does implement strict controls.³⁸ For example, if one were to import or grow cannabis seed, one must register with the DEA and obtain a permit to do so.³⁹

Notably, the CSA states that “[t]he term ‘marihuana’ means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof;...and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. **Such term does not include** the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant...**or the sterilized seed of such plant which is incapable of germination**” (emphasis added).⁴⁰

The language in the above definition is not clear and has led to arguments about whether industrial hemp is excluded. If this were the case, then it leads to the conclusion that marijuana is regulated by the DEA, but that industrial hemp is not. For example, hulled hemp seeds, or hemp seed hearts, are sold as a food product.⁴¹ Hemp seed in this form is considered to be non-viable, or incapable of germination.⁴² Because it cannot germinate, one might argue that it fits into the exemption of the definition of marijuana above. However, the DEA maintains that the definition in the CSA includes all categories of *Cannabis sativa*, which they

³⁵ *Drug Scheduling*, DRUG ENF’T ADMIN., <https://www.dea.gov/druginfo/ds.shtml>. (last visited Feb. 3, 2018).

³⁶ 21 U.S.C. §812(c)(10) (2012).

³⁷ 21 U.S.C. §812(b).

³⁸ JOHNSON, *supra* note 8, at 12

³⁹ *Id.* at 17.

⁴⁰ 21 U.S.C. § 802(16).

⁴¹ See *Hemp Seed Hearts, Organic*, NOW HEALTH, <https://www.nowfoods.com/natural-foods/hemp-seed-hearts-organic> (last visited Mar. 29, 2018).

⁴² *Hulled Hemp Seeds*, HEMPSEED.CA, <http://www.hempseed.ca/hulled-hemp-seed/> (last visited Feb. 6, 2018).

argue gives them jurisdiction to regulate industrial hemp.⁴³

IV. State of the Law – Present Day

As mentioned above, the DEA has been acting under the presumption that industrial hemp and marijuana are essentially the same, and that they have authority to regulate both. The reason that the scope of DEA's authority is now coming under increased scrutiny is because of a provision in the 2014 Farm Bill. Under §7606, Congress specifically granted authority to universities and state departments of agriculture to grow or cultivate industrial hemp if it is done for the purposes of research under an agricultural pilot program.⁴⁴ These pilot programs can be developed to study the growth, cultivation, or marketing of industrial hemp.⁴⁵ The details for how the pilot programs are run is left up to the individual states, as the law gives states the authority to enact regulations in this area.⁴⁶ The statute does specify that such programs may only be created in states that allow industrial hemp to be grown.⁴⁷

What is particularly significant about this provision in the farm bill is the definition of industrial hemp that is provided. Under this statute industrial hemp, for the purposes of these state pilot programs, is defined as any part of the *Cannabis sativa* L. plant, whether the plant is growing or not, as long as the THC concentration is 0.3% or below.⁴⁸

In and of itself, this provides a clear distinction between what is to be considered marijuana – THC concentration above 0.3%, and industrial hemp – THC concentration of 0.3% or

⁴³ Notice, Statement of Principles on Industrial Hemp, 81 Fed. Reg. 156, 53,395, 53,395-53,396 (Aug. 12, 2016), <https://www.federalregister.gov/documents/2016/08/12/2016-19146/statement-of-principles-on-industrial-hemp> [hereinafter Statement of Principles on Industrial Hemp].

⁴⁴ *State Industrial Hemp Statutes*, NAT' CONFERENCE OF STATE LEGISLATURES (Dec. 13, 2017), <http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx>.

⁴⁵ H.R. Res. 2642, 113th Cong. (2014) (enacted).

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ *Id.*

below.⁴⁹ However, this law does not exist on its own, but rather co-exists with, and has the same legal weight as, the CSA.⁵⁰ And so it creates the appearance of a misalignment or conflict between these two laws.

What Congress failed to do when enacting this law was to specifically amend the definition of marijuana under the CSA to exclude industrial hemp. Instead of creating a straightforward path for those who want to produce or process industrial hemp, in reality, it has created confusion and uncertainty. While states have autonomy, to a certain extent, to create their own industrial hemp programs,⁵¹ the DEA continues to define industrial hemp in such a way as to be within their jurisdiction.

This creates some unusual results. First, it means that not all producers are able to participate in this market. It only provides opportunities for producers who live in states that have since created industrial hemp pilot programs.⁵² For those who do live in states with pilot programs, they are still subject to restrictions within those programs.⁵³ For example, most programs require some type of licensure for producers and manufacturers, and producers may be required to supply certain data to the state programs.⁵⁴

There are additional limitations to growing industrial hemp that do not exist with other crops. If one wants to grow industrial hemp under a state pilot project, one is still required to register with DEA, because it is considered to be a Schedule I drug.⁵⁵ This creates the odd reality for farmers of having to register with the

⁴⁹ JOHNSON, *supra* note 8, at 1-2.

⁵⁰ H.R. Res. 2642, 113th Cong. (2014) (enacted).

⁵¹ Statement of Principles on Industrial Hemp, *supra* note 43, at 53,395.

⁵² *State Industrial Hemp Statutes*, *supra* note 44. As of the time of this writing, at least 34 states had passed legislation related to industrial hemp. *Id.*

⁵³ *See id.* Specific requirements vary by state; details of individual state programs are beyond the scope of this essay. *Id.*

⁵⁴ *See id.*

⁵⁵ *See State Industrial Hemp Statutes*, *supra* note 44. Under some state programs, the state department of agriculture will be the entity that registers with the DEA. *Id.* For example, this is the case under the state industrial hemp pilot program in North Carolina. *See e.g.*, N.C. Gen. Stat. § 106-568.53(1).

DEA to grow a crop that is seemingly legal. There are few other crops that require producers to jump through as many regulatory hoops in order to obtain seed and be permitted to grow them.

It has also created complications for farmers who want to purchase seed to plant industrial hemp. Under the CSA, industrial hemp plants and seeds cannot be transported across state lines; this applies to driving the seed or plants across state lines, as well as mailing or shipping seed.⁵⁶ So, for example, if a producer lives in a state with a pilot program such as North Carolina and wants to purchase seed from Colorado (also a state with a pilot program), and is stopped in a state in between, the producer could potentially be charged with possession of a controlled substance under criminal law.⁵⁷

The result is potential fines and/or a prison sentence under both state and federal law.⁵⁸ This seems like a harsh result for a producer who is trying to obtain seed to plant a crop.⁵⁹

In August of 2016 the DEA, USDA and Food and Drug Administration (“FDA”) issued the Statement of Principles on Industrial Hemp in an attempt to clarify the positions of the three federal regulatory agencies that are most involved in regulating industrial hemp.⁶⁰ The purpose was to inform the public so that people could participate in state pilot programs and still be in compliance with federal law.⁶¹

Notably, the guidance document specifically states that “Section 7606 did not remove industrial hemp from the controlled substances list. Therefore, Federal law continues to restrict hemp-

⁵⁶ 21 U.S.C. § 822

⁵⁷ *See id.*

⁵⁸ *See* BRIAN T. YEH, CONG. RESEARCH SERV., DRUG OFFENSES: MAXIMUM FINES AND TERMS OF IMPRISONMENT FOR VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT AND RELATED LAWS i, 8, n. 25 (2015)

⁵⁹ *See e.g., Hemp seeds bound for Colorado seized at U.S.-Canada border*, CBS NEWS (June 19, 2014), <https://www.cbsnews.com/news/hemp-seeds-bound-for-colorado-seized-at-u-s-canada-border/> (demonstrating instances when the DEA has tried to block the sale of industrial hemp seed). In response, Congress passed an appropriation law that restricted federal agencies, including the DEA, from interfering in activities that are permitted under the 2014 Farm Bill. JOHNSON, *supra* note 8, at 1.

⁶⁰ Statement of Principles on Industrial Hemp, *supra* note 43, at 53,395.

⁶¹ *Id.*

related activities, to the extent that those activities have not been legalized under section 7606.”⁶² In addition, it also explains that the provision in the farm bill “did not eliminate the requirement under the Controlled Substances Import and Export Act that the importation of viable cannabis seeds must be carried out by person registered with the DEA to do so.”⁶³

Perhaps most telling was the statement that section 7606 of the farm bill “left open many questions regarding the continuing application of Federal drug control statutes to the growth, cultivation, manufacture, and distribution of industrial hemp products, as well as the extent to which growth by private parties and sale of industrial hemp products are permissible.”⁶⁴

Indeed, the farm bill did seem to open many questions, as discussed above. Unfortunately, the Statement of Principles did not do much to resolve them. We are still left in a reality in which a crop is seemingly legal, yet is hampered by the restrictions placed upon it by criminal drug laws.

The DEA has taken actions that seem to be at odds with the language and intent of section 7606. For example, in December of 2016, the DEA published a final rule stating that a new drug code would be used for extracts of marihuana.⁶⁵ The term “marihuana extract” is defined as “an extract containing one or more cannabinoids that has been derived from any plant of the genus *Cannabis*...”⁶⁶ The agency stated that these extracts would remain listed as Schedule I drugs, and that anyone who handled them would be required to register with the DEA accordingly.⁶⁷ This is notable because it would impact a significant portion of the industrial hemp industry that is focused on producing and/or retailing cannabidiol (“CBD”).⁶⁸ CBD is a non-psychoactive

⁶² *Id.*

⁶³ JOHNSON, *supra* note 8, at 35.

⁶⁴ Statement of Principles on Industrial Hemp, *supra* note 43, at 53,395.

⁶⁵ Establishment of a New Drug Code for Marihuana Extract, 81 Fed. Reg. 90,194, 90,194 (Dec. 14, 2016) (to be codified 21 C.F.R. pt. 1308).

⁶⁶ *Id.*

⁶⁷ *Id.* at 90,195-90,196.

⁶⁸ *Id.* at 90,195.

compound that can be derived from industrial hemp, and can be used as a dietary supplement.⁶⁹ The DEA's rule stating that these extracts would fall under their jurisdiction and be classified as Schedule I drugs seemed to contradict the farm bill provision. Although the agency did provide further clarification in March of 2017,⁷⁰ this situation is evidence of the need for greater clarification across the board about the DEA's role in regulating industrial hemp and hemp products.⁷¹

V. Next Steps

The current legal status of industrial hemp leaves the industry in limbo. Congress has the authority to remedy this. Perhaps the most straightforward approach is to provide a fix in the upcoming 2018 Farm Bill. First, Congress can expressly state that the industrial hemp pilot programs are permanent. Section 7606 on its face does not seem to sunset;⁷² however, there is also no express language stating that it is a permanent program. In fact, the language specifically refers to the state programs as being "pilot programs", seemingly indicating a non-permanent nature.⁷³

In addition, Congress can specifically clarify and amend the definition of marijuana under the CSA to exclude industrial hemp. This would have the effect of clearing up any current discrepancies between the language of the current farm bill and DEA's interpretation of the language of the CSA. In so doing, Congress could take the additional step of clarifying the scope of

⁶⁹ RENEE JOHNSON, CONG. RESEARCH SERV., POTENTIAL USE OF INDUSTRIAL HEMP IN CANNABIDIOL PRODUCTS 1 (2016), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/IF10391.pdf>.

⁷⁰ *Clarification of the New Drug Code (7350) for Marijuana Extract*, DIVERSION CONTROL DIV. OF THE U.S. DEP'T OF JUSTICE (Mar. 9, 2017), <https://www.deadiversion.usdoj.gov/schedules/marijuana/index.html>.

⁷¹ See Larry K. Houck & Riëtte van Laack, *Hemp Industries Association Seeks Contempt Against DEA; Alleges Violation of 2004 Hemp Order*, HYMAN, PHELPS & MCNAMARA, P.C.: FDA L. BLOG (Feb. 23, 2017), <http://www.fdalawblog.net/2017/02/hemp-industries-association-seeks-contempt-against-dea-alleges-violation-of-2004-hemp-order/>; see Colleen Keahey, *Hemp Industries Association Sues DEA Over Illegal Attempt to Regulate Hemp Foods as Schedule I Drugs*, HEMP INDUSTRIES ASSOCIATION (Feb. 6, 2017), <https://www.thehia.org/HIAhempnewsreleases/4594319>.

⁷² See H.R. Res. 2642, 113th Cong. (2014) (enacted).

⁷³ JOHNSON, *supra* note 8, at 13-14.

DEA's authority by drawing a bright line between marijuana and industrial hemp.

To go one step further, after removing the regulation of industrial hemp from the DEA's authority, Congress could expressly preempt this area of law. This would eliminate the state programs altogether and level the playing field by permitting all producers and processors the opportunity to enter this market if they choose, regardless of what state they reside in.

Congress could also choose to pass separate, freestanding legislation that would essentially serve the same function as above. Such legislation has been introduced, but so far **has not been passed into law**. For example, the Industrial Hemp Farming Act was introduced in the House of Representatives in July of 2017.⁷⁴ The purpose of the bill was to amend the CSA to exclude industrial hemp from the term marihuana.⁷⁵

VI. Conclusion

Congress provided the opportunity for states to create industrial hemp pilot programs in the last farm bill. This demonstrates a clear intent to have industrial hemp be a legitimate, legal crop. And societal norms seem to have shifted in favor of allowing this crop to be grown for food and other uses, as is evidenced by the steadily increasing market in industrial hemp. However, the current state of the law creates confusion about the legality of industrial hemp and leaves a potentially profitable industry in limbo. It is understandably difficult for potential producers and manufacturers to engage in this industry under the current state of the law. Congress took a step in the right direction by allowing for the industrial hemp pilot programs and providing a means (although still limiting) for states to move forward. Now Congress must take the next step and remove the remaining legal and regulatory obstacles so that producers, manufactures and retailers can move forward confidently with their businesses. The

⁷⁴ Industrial Hemp Farming Act of 2017, H.R. 3530, 115th Cong. (2017), <https://www.congress.gov/115/bills/hr3530/BILLS-115hr3530ih.pdf>.

⁷⁵ *Id.*

next step is not necessarily complicated, but it is one that Congress needs to take action on. It is time to remove any ambiguity and move forward.