

in States in which it has no physical presence and pays no taxes should begin to assess its business activities for potential tax risks. The business activities to review should include (i) the issuance of credit cards, (ii) all types of loans, (iii) accepting of deposits, and (iv) providing financial services (which presumably could include trust services) to or for residents of a State. The amount of activity/revenue derived from residents of a State could, in the future, become a very important tax analysis.

With their ever-growing demand for increased revenue, it is foreseeable that States will increase demands on businesses for the payment of taxes deemed to be sourced within the State. It will be prudent for all businesses, including banks, to be ready for that time.

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## Hemp is Here: How Financial Institutions Can Prepare for Alabama's Newest Industry

by [Whitt Steineker](#) and [Laney Gifford](#)

Centuries after American colonists were required by law to grow hemp, and decades after it was later outlawed by Congress, one of the nation's oldest and most versatile crops appears to be having a moment.

The Jan. 1 enactment of the federal Agriculture Improvement Act of 2018, commonly referred to as the 2018 Farm Bill, marked a significant shift in policy in the United States. The 2018 Farm Bill removed hemp from the Controlled Substances Act's definition

of marijuana and created a framework for individuals to begin cultivating hemp beyond the limited state-approved pilot programs permitted under the previous farm bill.

To put it plainly, the 2018 Farm Bill recognized that hemp is not marijuana. Rather than being used for a psychoactive effect, hemp has multiple industrial uses, such as textiles and plastic substitutes. And unlike marijuana, hemp can be grown, processed, sold, and consumed following the issuance of guidance from the United States Department of Agriculture and approval of state-specific plans governing the hemp industry. As of April of this year, the Alabama Department of Agriculture and Industries had granted over 200 licenses to growers, processors, and universities to grow, cultivate, and research hemp.

What does all of this mean for financial institutions in Alabama? In the coming months and years, the newly-legalized hemp industry is expected to generate tens of billions of dollars of revenue nationwide. From a financial institution's perspective, this presents both opportunities and challenges. As interest in Alabama's hemp industry increases, so too will the number of Alabamians seeking access to Alabama's financial institutions for hemp-related purposes. While not every financial institution may choose to bank hemp, it is still important for all institutions to familiarize themselves with the hemp industry in order to make an educated determination as to how to proceed. This article discusses the three primary steps financial institutions should take to better prepare themselves for the inevitable moment a hemp grower, producer, distributor, or retailer walks through your door and you wonder, "What do I do now?"

### 1. Understand the product

This country's relationship with cannabis is a complicated one, and a brief vocabulary lesson may be a helpful starting point to understand the positive impact of the 2018 Farm Bill. Marijuana and hemp are different strains of the *Cannabis sativa L* plant. Although the Controlled Substances Act historically made no distinction between marijuana and hemp, the 2018 Farm Bill defines hemp as any part of the *Cannabis sativa L* plant, including

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all derivatives and extracts such as cannabidiol (CBD), provided that the plant contains less than 0.3% tetrahydrocannabinol (THC). Any Cannabis sativa L plant or derivative from such a plant with a higher THC level is considered marijuana, which remains a Schedule I substance—the most stringently regulated category of narcotics—under the Controlled Substances Act. Because THC is the psychoactive ingredient in marijuana that produces the feeling of being “high,” a critical difference between marijuana and hemp is that hemp will not produce a “high.”

Hemp generally can be grouped into two categories: industrial hemp and phytocannabinoid rich (PCR) hemp. Industrial hemp is tall, grows outdoors, and is valued for its fiber, which can be used to make various products such as rope, clothing, food, and building materials. These plants contain relatively low amounts of THC and CBD, and they generally are not considered efficient sources for either cannabinoid. PCR hemp, on the other hand, typically is grown indoors and under lights. It is relatively high in CBD, which is used in drugs that treat epilepsy and has been identified as a potential treatment for illnesses such as anxiety, depression, and arthritis. PCR hemp has greater THC content than industrial hemp, and care must be taken to ensure that PCR-gearred plants are grown in a manner that keeps them within the statutory definition of hemp.

While the basics of the hemp industry are easy to grasp, there remains much to be learned, and financial institutions should devote ample time to building their knowledge of the industry. Understanding hemp’s uses can help a financial institution appreciate what exactly its customer means when the customer says he or she works in the hemp or cannabis industry. Financial institutions can use their knowledge of the hemp industry to determine the specifics of their customer’s trade, whether that be growing hemp, manufacturing products from hemp, distributing those products, or operating in a retail capacity, which will ultimately enable those institutions to better advise a particular client on the appropriate course of action. The key to financial institutions building this necessary knowledge and skill is taking a proactive approach by asking both their customers and advisors

the questions necessary to make fully-informed, sound decisions.

## 2. Take appropriate precautions

Passage of the 2018 Farm Bill removed many of the legal risks related to hemp production. As with any innovative industry, however, the hemp industry still retains its own set of unique issues. For example, although legislators like Senator McConnell (R-KY) and Senator Wyden (D-OR) have asked agencies such as the Farm Credit Association (FCA) to make their financial services available to the hemp industry in light of the 2018 Farm Bill, the FCA has yet to advise its institutions on lending to hemp producers. Other lenders have expressed concerns over the fact that the Food and Drug Administration (FDA) has not yet legalized the use of CBD in food or supplements, which could ultimately impact some hemp producers and retailers. Additional concerns include: (1) the possibility that some hemp producers might also grow marijuana alongside hemp; (2) the possibility that hemp customers might commingle legal hemp proceeds with illegal marijuana proceeds; and (3) the fact that the landscape is subject to change once the USDA issues its hemp guidance later this year and Alabama subsequently enacts its own rules governing hemp and hemp-derived products.

To mitigate these concerns, there are several steps financial institutions should take. First, financial institutions should stay abreast of the evolving hemp regulatory regime and instill proper due diligence procedures. Doing so allows financial institutions to have a comfort level that their hemp customers are complying with all regulations, including USDA regulations and/or state plans that are enacted under the 2018 Farm Bill. This includes requiring hemp customers to be licensed by all appropriate agencies and to periodically provide proof of good standing with those agencies. Second, as part of their due diligence procedures, financial institutions should periodically assess the business activities of hemp customers, consider whether those activities remain compliant with the applicable law, and take appropriate actions when they do not. Finally, financial institutions should craft strong representations, warranties, covenants, and other contractual provisions in agreements with customers that are tailored



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to address these hemp-related considerations and minimize institution-related risk.

### 3. Seek guidance before banking hemp customers

While navigating a new industry is rarely easy, Alabama's financial institutions can better prepare themselves for the expansion of hemp production by understanding the product and knowing the appropriate precautions and due diligence procedures that should be in place. Financial institutions unsure of where to begin should seek the guidance of experienced attorneys before Alabama hemp growers, producers, distributors, and retailers turn to them for their hemp-related financial needs. Whether this guidance takes the form of reviewing procedures currently in place or crafting new ones, building thoughtful internal procedures that focus on compliance with the new law is paramount for financial institutions seeking to reap the benefits of this expanding industry. Sooner or later (and likely sooner rather than later), a customer will approach you with a proposal or a question that requires you to give thought to your institution's policy regarding hemp. Financial institutions would be wise to anticipate this situation and take steps to ensure that, whatever course of action they ultimately choose, they can pursue that choice confidently, consistently, and in a manner that is in compliance with applicable regulations.

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## Trust Issues: Alabama Banks Could Be Impacted by Recent Tennessee Legislation

by [Aaron Flinn](#)

For banks with significant trust activities or banks that are considering expansion into new markets, recently passed legislation in Tennessee provides significant benefits that are currently only permitted in Tennessee and South Dakota. Specifically, Tennessee law now permits the creation of special purpose entities (an "SPE") to serve as Trust Advisors for trusts that a Tennessee trust company or bank or a national bank with a physical presence in Tennessee is serving as Trustee. Alabama banks that focus on trust offerings need to be aware of this recent change and the possible ripple effect it could have on their trust services.

Traditionally, a Trustee was charged with all facets of trust administration. Tennessee law, however, authorizes the separation of the traditional trustee roles by allowing for the appointment of a Trust Advisor (also called a Trust Protector) who has the authority to "direct" an exercise of a power held by the Trustee, including investment and distribution decisions. The Trust Advisor can either be an individual or structured as a committee with multiple people

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