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The Great Delta-8 Debate: Many Shades of Grey?

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Confused by the legal status of Delta-8? Why wouldn't you be?... it is confusing. Delta-8 is a legally complicated derivative of the *Cannabis Sativa* plant. As the FDA acknowledges, "Delta-8 THC is one of over 100 cannabinoids produced naturally by the cannabis plant"^[1], but its natural presence in Cannabis and the fact that it can be derived from federally legal "Industrial Hemp" does not make legal or safe in the eyes of the federal government or state lawmakers. The complicated process of deriving Delta-8 THC and the frenetic pace of hemp regulatory frameworks trying to keep up with changing laws causes many lawyers and business owners alike legal heartburn.

So, what the heck is Delta-8 and why can I buy it at my local gas station? Well, the answer is most commercially available products containing Delta-8 are derived from "Industrial Hemp," and hemp products are largely unregulated. "Hemp" is no longer federally illegal, and hemp and hemp products can be legally sold throughout the US. But there is no doubt Delta-8 exists in a legal grey area. Why? Because some states have acted to strictly regulate or ban Delta-8 products, while others have kept silent on the issue. Both consumers and manufacturers need clarity to understand the product and its legality.

Take the recent publication of the FDA, warning "It is important for consumers to be aware that Delta-8 THC products have not been evaluated or approved by the FDA for safe use in any context."^[2] Sounds scary, right? If you are a responsible producer of Delta-8 hemp products, no doubt you want the FDA to understand you produce and manufacture safe products. But the FDA is clear these hemp derivative products may not have any "safe use" and "may be marketed in ways that put the public health at risk."^[3] The biggest issue is that Delta-8 products have psychoactive effects for consumers. And people who buy Cheetos, a soda, and some Delta-8 gummies at a gas station, may not know or understand they could get high consuming these products, often more prominently labeled as CBD products, which consumers may see as innocuous. And most products that make you feel weird or good have an age limit. Not so for many Delta-8 hemp-derived products. Thus, the FDA must warn consumers and regulators must act, right?

And they have. Many states have taken their own action to regulate or prohibit Delta-8 products. For example, the Florida Department of

Agriculture published guidance titled "Delta 8" which summarily concludes "any hemp or hemp extract products offered for sale or sold in Florida must comply with all labeling rules and have a certificate of analysis that shows a total THC (THCA x .8777 + THC Delta 9 = total THC) content of 0.3% or less." [4]⁴ In direct contrast, the Colorado Department of Revenue, in conjunction with the Colorado Department of Public Health & Environment, published guidance May 14, 2021, clarifying "that chemically modifying or converting any naturally occurring cannabinoids from industrial hemp is non-compliant with the statutory definition of 'industrial hemp product'" [5]⁵ and specifically prohibiting any process that converts CBD into "delta-9, delta-8, delta-10-THC, or other tetrahydrocannabinol isomers or functional analogs." [6]⁶

And let's legally contrast that with the holding in the Ninth Circuit Court of Appeals in *AK FUTURES LLC, Plaintiff-Appellee, v. BOYD STREET DISTRO, LLC*, [7]⁷ where the Court held "the plain and unambiguous text of the Farm Act compels the conclusion that AK Futures' delta-8 THC products are lawful" as "the delta-8 THC in AK Futures' e-cigarette liquid appears to fit comfortably within the statutory definition of "hemp"—i.e., the liquid is properly understood as a derivative, extract, or cannabinoid originating from the cannabis plant and containing "not more than 0.3 percent delta-9 THC." Legal, illegal, legal? Illegal?

The reality is, for the manufacturer, the lack of clarity around Delta-8 (and other intoxicating cannabinoids that contain below .3% Delta-9-THC) undoubtedly creates business risks. The confusion over the legality of innovative hemp products, like Delta-8 products, may cause banks to reevaluate the risks of working with the hemp industry. Because "compliant" hemp is federally legal, many more banks are openly serving the hemp industry, but not the retail or medical marijuana industries. Congress has not been able to change this, creating a boon for the banks that will work with the state-legal marijuana and hemp industries but still leaving a shortage of banking options for the state-legal marijuana industry. The proliferation of "illegal" hemp products creates a risk that banks will increase compliance checks of hemp clients or, in an abundance of caution, close hemp industry bank accounts. Banking uncertainty creates safety risk and increases the cost of operations due to accounting compliance needed to operate primarily in cash.

Even more dangerous for the industry is the potential that Internal Revenue Code Section 280E would apply if Delta-8 products were ultimately classified as Schedule I or Schedule II. Section 280E limits and sometimes precludes profitability for the retail and medical marijuana industry. Section 280E applies to any substance that is a Schedule I or Schedule II substance under the Controlled Substances Act. The legislative history of section 280E provides that this provision applies to "amounts paid or incurred in the illegal trafficking in drugs listed in the Controlled Substances Act." [8]⁸ So long as courts continue to find Delta-8 hemp-derivatives are carved out of the definition of marijuana in the Controlled Substances Act, Delta-8 products are federally legal and I.R.C. Section 280E presumably does not apply. However, mixed signals on the status of Delta-8 will leave the hemp industry in a morass of uncertainty

about their long-term viability.

[1]5 Things to know about Delta-8 Tetrahydrocannabinol – Delta-8 THC, U.S. Food and Drug Admin., <https://www.fda.gov/consumers/consumer-updates/5-things-know-about-delta-8-tetrahydrocannabinol-delta-8-thc> (May 4, 2022).

[2]*Id.*

[3]*Id.*

[4]Delta 8, Florida Department of Agriculture and Consumer Services, <https://www.fdacs.gov/content/download/94040/file/Delta8.pdf> (last visited June 7, 2022).

[5]Re: Production and/or Use of Chemically Modified or Converted Industrial Hemp Cannabinoids, Colorado Department of Public Health & Environment, <https://cdphe.colorado.gov/hemp-food> (last visited June 7, 2022).

[6]Re: Industry-Wide Bulletin 21-07 – Industrial Hemp Product (Production/Use of Chemically Modified or Synthetically Derived THC Isomers from Industrial Hemp Precursors), Colorado Department of Revenue, <https://sbg.colorado.gov/med/industry-bulletins> (last visited June 7, 2022).

[7]*AK Futures LLC v. Boyd St. Distro, LLC*, 2022 U.S. App. LEXIS 13526 (May 19, 2022).

[8]S. Rept. No. 97-494, Vol. 1, 97th Cong., 2nd Sess. (July 12, 1982) at p. 309.

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