

Delta 8 THC

Delta 8 THC is an isomer of Delta 9 (the component of the marijuana plant states like New York and Colorado have legalized for recreational use), meaning on a molecular level, the two are practically the same — with only slight atomic differences.

The majority of Delta 8 products are not extracted from a marijuana plant. Instead, producers of Delta 8 covert plant-derived CBD into Delta 8 using a chemical process called isomerization. This process combines CBD with solvent, acid, and heat to cause a chemical reaction that changes CBD into Delta 8.

The industry behind this is almost completely unregulated.

Implications for Federal Law

General Counsel for the U.S. Hemp Roundtable: “It’s not clear whether Delta 8 products are illegal under the 2018 farm bill, but it is clear that it violates the spirit of the law.”

The DEA’s interim final rule on hemp may provide final guidance, but for now, Delta 8 appears to be federally illegal. According to the DEA’s interim guidance, so-called synthetically derived tetrahydrocannabinols remain a controlled substance. The only issue is that there is no agreed upon definition of what “synthetically derived” means. The DEA is in the process of finalizing this final hemp interim final rule and is reviewing comments.

Regulatory Concerns

The boom of CBD that occurred with the passage of the farm bill has now led to a glut of product. This product is now being offloaded to Delta 8 producers to clear backlogged inventories. In fact, the D8 is more profitable than CBD: Delta 8 cost about \$1,400 per kg whereas CBD isolate sells for \$550 per kg.

While a good portion of the sales of Delta 8 have occurred in states without legal marijuana sales, legal states also see large amounts of Delta 8 sales, due to the price, the lack of regulations, and ability to avoid taxes. Consumers can also have product sent through the mail — which is not allowed in legal marijuana states.

Health of consumers could also be a concern. Little is known about Delta 8. While there exists plenty of evidence that several deaths that resulted from marijuana vaping products in 2019 were tied to devices purchased at legal, licensed, and regulated dispensaries, many were also connected to illicit market devices. With both licit and illicit devices being linked to cases of EVALI, it is entirely plausible that the fault may lie in the new, rapidly developed method of producing vaping oils. Similar issues could arise from the largely unregulated production of Delta 8.

There are many unknown byproducts that result from the production of Delta 8. Producers may cut corners, and others may unknowingly add solvents and introduce other impurities into the process. Harkening back to the 2019 EVALI crisis, several agencies such as the Oregon Liquor Control Commission — which is also tasked with regulating the state’s marijuana industry — issued new rules around the use of additives in vaping products this year. None of these rules carry over to the sale of Delta 8 products.

Underscoring the unregulated aspect of the market is the fact that many YouTube accounts exist for the express purpose of showing how to produce Delta 8.

A further complication is the current state of marijuana testing labs. A recent article by *FiveThirtyEight* detailed the widespread issue of private labs that contract with the marijuana industry and falsify results. Industry insiders also are known to shop their product around to different labs in order to find ones that will give them favorable results.

State of Play:

In April 2021, the Washington State Liquor and Cannabis Board released a statement declaring that THC products created via chemical reactions cannot be sold.

In May 2021, New York State specifically outlawed isomerization reactions that are used to create Delta 8 under an amended regulation for hemp processors.

As of June 2021, Alaska, Arizona, Arkansas, Colorado, Delaware, Kentucky, Idaho, Iowa, Mississippi, Montana, New York, North Dakota, Rhode Island, Utah, Vermont, and Washington have all passed laws either outright banning or further regulating Delta 8. Similar legislative action is pending in Alabama, Illinois, Michigan, Oklahoma, Oregon, and Texas.

Policy Options:

Given the lack of data and research on Delta 8 THC, it is advised to mirror the understood federal prohibition on these products and wait for the updated, final hemp guidance from the DEA and act accordingly.

If federal guidance is updated to allow these products in legal form, legislation could be offered to:

- Include Delta 8 THC under the definition of marijuana and therefore allow it to be regulated according to state regulation of marijuana products.
- Define Delta 8 THC as its own substance and regulate it accordingly.

Further Reading:

[DELTA-8-THC: THE RISE AND FALL OF A CANNABIS "WILD WEST"](#)

-Inverse

[High anxiety over federal weed loophole](#)

-Politico

[America's Pot Labs Have A THC Problem](#)

-FiveThirtyEight

[Delta-8 THC is legal in many states, but some want to ban it](#)

-NBC News