

kightlaw

January 2, 2023

Re: Legal Status of THCa in Smokable Hemp

This letter is written at your request for REDACTED, regarding the legal status of certain hemp products, namely hemp containing tetrahydrocannabinolic acid (THCa) in concentrations that exceed 0.3% by dry weight. The specific question addressed is: **“Are hemp products, including harvested hemp flowers and buds, that contain THCa concentrations in excess of 0.3% by dry weight controlled substances under federal law when their delta-9 tetrahydrocannabinol (delta-9 THC) concentrations do not exceed 0.3% by dry weight?”** As discussed in this letter, the answer to this question is **“No”**. With respect to harvested cannabis material, the sole factor that distinguishes between lawful hemp and unlawful marijuana is the concentration of delta-9 THC.

The analysis and conclusions contained in this letter are based on the Agricultural Act of 2014 (2014 Farm Act)¹, the Agricultural Improvement Act of 2018 (Farm Bill)², the federal Controlled Substances Act (CSA)³, the Drug Enforcement Administration’s (DEA) recently published Interim Final Rule (IFR)⁴, the DEA’s recently issued letter to the Alabama Board of Pharmacy (Letter)⁵, a DEA letter regarding cannabis seeds and other cannabis materials⁶, and a recent opinion by the Ninth Circuit Court of Appeals⁷. This letter does not address any requirements under the federal Food, Drug & Cosmetic Act and associated regulations by the Food and Drug Administration (FDA).

This letter is solely for REDACTED, but I have been informed it may be shared with select parties. All third parties are specifically advised that this letter is not intended to be legal advice for any party other than REDACTED and should not be construed or relied upon as such. It is accurate as of the date above.

¹ <https://www.govinfo.gov/content/pkg/BILLS-113hr2642enr/pdf/BILLS-113hr2642enr.pdf>

² <https://www.congress.gov/115/bills/hr2/BILLS-115hr2enr.pdf>

³ 21 U.S. Code § 801 *et seq.*

⁴ https://www.dea diversion.usdoj.gov/fed_reqs/rules/2020/fr0821.htm

⁵ <https://docs.google.com/viewerng/viewer?url=https://cannabusiness.law/wp-content/uploads/DEA-letter-re-D8-to-Alabama.pdf&hl>

⁶ <https://s3.documentcloud.org/documents/21580238/21-7692-shane-pennington-cannabis-seeds-tissue-genetic-material-11-18-21-signed-1.pdf>

⁷ *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682 (9th Cir. 2022)

**PART 1- DISCUSSION OF THE ISSUE:
THE CONCENTRATION OF DELTA-9, NOT THCA, IS THE SOLE FACTOR
IN DETERMINING A CANNABIS PRODUCT’S CONTROLLED STATUS**

There are dozens of forms of the tetrahydrocannabinol (THC) molecule. These various forms are called isomers. An isomer is one of two or more compounds that contain the same number of atoms of the same elements but differ in structural arrangement and properties.⁸ There are at least thirty THC isomers⁹, of which THCa and delta-9 THC are two of the most well-known. Additionally, delta-8 THC (D8-THC) and delta-10 THC (D10-THC) have recently gained more attention in the media and marketplace. As discussed below, the only THC isomer that is used to determine whether harvested hemp and hemp products are lawful under federal law is delta-9 THC. The quantity and concentration of other THC isomers, including THCa, are totally irrelevant with respect to the legal status of harvested hemp and hemp products.¹⁰

**PART 2- FEDERAL LAW:
HEMP IS NOT A CONTROLLED SUBSTANCE**

Hemp initially became exempt from the CSA, and thus removed from the list of controlled substances, by virtue of the 2014 Farm Act when produced pursuant to a state’s industrial hemp pilot program. The current Farm Bill, enacted at the end of 2018, removed both “hemp” and “THC in hemp” from the CSA.¹¹ Hemp is lawful throughout the United States (US).

The Farm Bill defines “hemp” expansively. The definition includes the hemp plant and *“any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis.”*¹² (*emphasis added*)

The sole distinction between lawful cannabis (hemp) and unlawful cannabis (marijuana) is the concentrations of delta-9 THC. Cannabis with delta-9 THC concentrations that do not exceed 0.3% is legal hemp. Cannabis with delta-9 THC concentrations that exceed 0.3% is illegal marijuana. The concentrations of the other cannabinoids in cannabis, including THCa, are

⁸ <https://www.merriam-webster.com/dictionary/isomer>

⁹ See, eg, this website: <https://cannabislifenet.com/amount-of-isomers-in-thc/>. See also, this website: <https://cannabusiness.law/thc-analogs-a-family-divided/>

¹⁰ We note that, while the concentration of THCa is not relevant in determining the legal status of harvested hemp or hemp products, it is relevant in determining the legal status of hemp that has not been harvested. This is because USDA regulations require hemp to be tested for delta-9 THC using a “post-decarboxylation method” before it can be harvested. Because THCa converts to delta-9 THC when decarboxylated the THCa concentration of a pre-harvest hemp sample matters. However, and as discussed in this letter, this only applies to hemp that has not been harvested. It does not apply to harvested hemp and products made from it. Further reading on this issue, including testing standards, can be found at this website: <https://cannabusiness.law/total-thc-and-harvested-hemp/>

¹¹ 21 U.S.C. § 802(16)(B): “The term “marihuana” does not include— (i) hemp, as defined in section 1639o of title 7.”

¹² 7 U.S.C. § 1639o(1)

irrelevant with respect to its legal status. If the delta-9 THC concentration in a hemp product does not exceed 0.3% by dry weight, then it is not a controlled substance under federal law.

IT IS LAWFUL TO TRANSPORT HEMP AND HEMP-DERIVED PRODUCTS IN INTERSTATE COMMERCE

The interstate transfer of hemp is authorized by 7 USC § 1621 subsection 10114(b), which states in relevant part: “*No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (AMA) (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.*”¹³ Although state laws vary with respect to hemp and hemp products, it is absolutely clear that states and Indian tribes may not prohibit the transport of them through their borders.

HEMP AND HEMP PRODUCTS ARE LAWFUL ACCORDING TO THE DEA

I. The Interim Final Rule

The DEA has expressly stated that hemp and hemp products are not controlled substances. On August 21, 2020, the DEA published its Interim Final Rule (IFR) in the federal register¹⁴. In its IFR, the DEA made it clear that:

In order to meet the definition of “hemp”, and thus qualify for the exemption from [S]chedule I, the derivative must not exceed the 0.3% delta-9 THC limit. The definition of “marihuana” continues to state that “all parts of the plant *Cannabis sativa* L.” and “every compound manufacture, salt, derivative, mixture, or preparation of such plant,” are [S]chedule I controlled substances unless they meet the definition of “hemp” (by falling below the 0.3% delta-9 THC limit on a dry weight basis)...” (Emphasis added).¹⁵

The DEA’s IFR continues by stating that the listing for “tetrahydrocannabinols” (ie, “THC”) under 21 U.S.C. 812(c) “does not include tetrahydrocannabinols in hemp”.¹⁶

The DEA’s IFR confirms that hemp products, which by definition must contain no more than 0.3% delta-9 THC on a dry weight basis, are not controlled substances in the US.

II. DEA Public Statements

¹³ <https://uscode.house.gov/statviewer.htm?volume=132&page=4914#>

¹⁴ “*Implementation of the Agriculture Improvement Act of 2018*”, Federal Register Volume 85, Number 163 (Friday, August 21, 2020).

¹⁵ <https://www.govinfo.gov/content/pkg/FR-2020-08-21/html/2020-17356.htm>

¹⁶ See footnote 4.

In addition to the IFR, the DEA has indicated in three recent public statements that cannabinoids and other cannabis materials are not controlled substances when their delta-9 THC concentrations do not exceed 0.3% on a dry weight basis:

1. DEA's First Public Statement- Town Hall Meeting

The DEA's first public statement is in the form of a video webinar called a "Town Hall with USDA and DEA" conducted by the Florida Department of Agriculture and Consumer Services (FLDACS) on June 24, 2021. In the Town Hall webinar, the DEA representative stated the following:

"[W]hat I want to say, and I'll be very, very deliberate and clear. At this time, I repeat again, at this time, per the Farm Bill, the only thing that is a controlled substance is delta-9 THC greater than 0.3% on a dry-weight basis." (emphasis added)¹⁷

2. DEA's Second Public Statement- Letter to the Alabama Board of Pharmacy

The DEA publicly addressed the legal status of the various forms of THC in hemp again in the form of a response letter to the Alabama Board of Pharmacy (ABOP) dated September 15, 2021. In this letter, Terrence L. Boos, Ph.D., Chief of the DEA's Drug and Chemical Evaluation Section of the Diversion Control Division, responds to the ABOP's request for the controlled status of delta-8 THC. After differentiating between the legal status of marijuana and hemp, both of which are botanically "cannabis sativa l", the DEA states:

"[C]annabinoids extracted from the cannabis plant that have a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis meet the definition of "hemp" and thus are not controlled under the CSA."

Additionally, the DEA states the following in a footnote:

"The Agricultural Improvement Act of 2018 (AIA), Pub. L. 115-334, § 12619, amended the CSA to remove "tetrahydrocannabinols in hemp" from control. See 21 U.S.C. § 812, Schedule I(c)(17). As noted, however, "hemp" is defined to "mean the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9-tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. 1639o. Thus, only tetrahydrocannabinol in or derived from the cannabis plant—not synthetic tetrahydrocannabinol—is subject to being excluded from control as a "tetrahydrocannabinol[] in hemp." (emphasis added)¹⁸

¹⁷ The pertinent portions of the webinar can be viewed at this website: <https://cannabusiness.law/is-d8-from-hemp-a-controlled-substance-dea-says-no/>

¹⁸ Ibid.

3. DEA's Third Public Statement- Response Letter Regarding Seeds and Cannabis Materials

In response to an inquiry regarding the DEA's interpretation of its implementing regulations regarding cannabis the DEA stated in a letter dated January 6, 2022: “[M]aterial that is derived or extracted from the cannabis plant such as tissue culture and any other genetic material that has a delta-9-tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis meets the definition of “hemp” and thus is not controlled under the CSA.” (emphasis added)¹⁹

These public statements by the DEA all clearly indicate that products containing less than 0.3% delta-9 THC on a dry weight basis are lawful. REDACTED products with no more than 0.3% delta-9 THC on a dry-weight basis are not controlled substances under US federal law and conform to the Farm Bill, the CSA, and the IFR.

NINTH CIRCUIT COURT OF APPEALS CONFIRMS THAT HEMP PRODUCTS ARE NOT CONTROLLED SUBSTANCES

The federal Court of Appeals for the Ninth Circuit recently issued an opinion regarding hemp products, specifically products containing delta-8 THC, in the context of a trademark dispute. In its opinion, the Ninth Circuit noted that “the only statutory metric for distinguishing controlled marijuana from legal hemp is the delta-9 THC concentration level.” (emphasis added)²⁰

CONCLUSION

Harvested cannabis material, including buds and flowers, containing delta-9 THC concentrations that do not exceed 0.3% by dry weight are lawful hemp under federal law, regardless of their concentrations of THCa or any other cannabinoid. As discussed in this letter, this conclusion is supported by all three branches of the federal government: by Congress in the hemp provisions of the Farm Bill, by the Executive in the DEA's IFR and other public statements, and by the federal courts in the Ninth Circuit ruling.

Sincerely,



Rod Kight,
Attorney

¹⁹ <https://s3.documentcloud.org/documents/21580238/21-7692-shane-pennington-cannabis-seeds-tissue-genetic-material-11-18-21-signed-1.pdf>

²⁰ *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682 (9th Cir. 2022)