

Delta-What??!!- Delta-8 and Delta-9 Create High Anxiety for Policymakers

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Stores selling Delta-8 and Delta-9 tetrahydrocannabinol (THC) products are everywhere these days! Both Delta-8 and Delta-9 THC are the psychoactive components of the Cannabis Sativa plant, of which both marijuana *and* hemp are two varieties. The only difference between Delta-8 and Delta-9 THC is where a particular double bond is located on the chain of carbon atoms.

The Delta-8 THC products you see in stores are likely hemp-derived. These hemp-derived substances are likely legal in certain circumstances under the 2018 federal Farm Bill. The 2018 Farm Bill federally legalized hemp's "derivatives, extracts, [and] cannabinoids," containing less than 0.3% Delta-9 THC by weight. Notably, the 2018 Farm Bill does not address Delta-8's THC levels. As long as the Delta-8 THC is natural hemp-derived, rather than synthetically derived, these qualifying substances would not be classified as Schedule I controlled substances under the federal Controlled Substances Act (CSA). Thus, [courts](#) and [commentators](#) have generally agreed that these hemp-derived products are removed from federal criminal penalties associated with other cannabis products.

Notwithstanding the non-classification of hemp-derived substances under the CSA, the Drug Enforcement Agency (DEA) sent a response letter dated February 13, 2023, to a cannabis attorney. In this letter, the DEA states that the 2018 Farm Bill covers **naturally occurring** THC in hemp plants. The DEA sought to clarify that it considers products with synthetically created cannabinoids such as Delta-9 THC-O (Delta-9 THC acetate ester) and Delta-8 THC-O (Delta-8 THC acetate ester) as schedule I drugs under the CSA, and thus, federally illegal.

Yes, the legality of Delta-8 products is very confusing, not only at the federal level but also at the state level, where unique state-by-state rules exist within a patchwork of regulatory oversight over cannabis products. Under New Jersey [law](#), "hemp [shall] be cultivated, handled, processed, transported, and sold in the State to **the maximum extent permitted by federal law**." As a result, New Jersey "hemp shop" businesses sell hemp-derived products (which may still produce a high with Delta-8 THC) without the rigorous and expensive licensing requirements imposed on other cannabis products (marijuana-derived) sold in retail dispensaries. As a result, Senator Declan O'Scanlon (R-Monmouth) introduced a [bill](#) to regulate [Delta-8 THC](#) products in New Jersey. Sen. O'Scanlon has called Delta-8 "the bathtub gin of the cannabis space" because of the lack of regulatory oversight.

Neighboring Pennsylvania is experiencing similar confusion. Senators Judith L. Schwank (D-Reading) and Sharif Street (D-Philadelphia) introduced legislation to ban Delta 8 products within Pennsylvania. However, to complicate matters, the US District Court for the Middle District has [held](#) that Pennsylvania law criminalizes hemp products to a greater extent than federal law. To make this even more confusing, the Municipal Police Officers' Education and Training Commission ("MPOETC") [wrote](#) that Delta-9 products with less than .6% THC on a dry weight basis are not scheduled substances but Delta-8 products are illegal.

To complicate matters even more, federal courts in [Indiana](#) and [Hawaii](#) reached different conclusions on whether state laws that ban Delta-9 and Delta-8 products are preempted by the 2018 Farm Bill, meaning some courts could hold that state bans on these hemp products are forbidden.

With the DEA's recent clarification that products with synthetically derived cannabinoids are federally illegal as schedule I drugs, vendors should immediately review their products' composition – do the products contain Delta-8 THC or Delta-8 THC-O? Additionally, the 2018 Farm Bill expires this year. Congress will pass a new Farm Bill in 2023 that could change how these hemp-derived products are regulated.

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National Law Review, Volume XIII, Number 48

Source URL: <https://natlawreview.com/article/delta-what-delta-8-and-delta-9-create-high-anxiety-policy-makers>