

## Shawn Hauser Comments on the Legality of Delta-8 THC in the U.S.

*This interview was conducted by CBD Oracle via email on September 20, 2023.*

### **About Shawn Hauser:**

Shawn Hauser is a partner at Vicente LLP, where she co-chairs the firm's Hemp and Cannabinoids Department and serves as a leading member of the firm's Psychedelics and Emerging Therapies practice. She helps cannabis, hemp, and psychedelics businesses navigate the intersections between state and federal law, including cannabis and psychedelics laws and food and drug laws as they evolve.

You can read Shawn's full bio here: <https://vicentellp.com/people/shawn-hauser/>

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**CBD Oracle:** *In your opinion, based on the 2018 Farm Bill, is delta-8 legal federally?*

**Shawn Hauser:** No, to be legally sold in interstate commerce, a product must be legal under the Federal Food, Drug, & Cosmetic Act. No Delta-8 product on the market is compliant with the FDCA.

Whether or not Delta 8 is considered legal hemp (and not a controlled substance), is debated. The DEA very clearly takes the position that most Delta 8 on the market is not, because the way its produced, in DEA's view, renders it a synthetic substance and therefore not within the definition of legal hemp under the 2018 Farm Bill. However, the 9<sup>th</sup> circuit and others take the position that Delta-8 THC products are legal hemp derivatives under the 2018 Farm Bill. While there is some debate and challenge to the DEA's conclusions regarding Delta 8 THC and the 2018 Farm Bill, the agency will nevertheless retain the ability to enforce its position under the Controlled Substances and Federal Analogue Act--despite the 9th Circuit ruling in *AK Futures Ltd. Liab. Co. v. Boyd St. Distro, Ltd. Liab. Co.*, 35 F.4th 682 (9th Cir. 2022). Regardless of its debated status as a controlled substance, Delta 8's illegality under the Federal Food, Drug, and Cosmetic Act makes it federally illegal.

**CBD Oracle:** *Which states do you think have the most sensible approach to regulating delta-8? What can we learn from these states?*

I don't think any state has a perfect solution, because it's very difficult for states to adopt effective regulatory approaches given the current federal legal landscape for both cannabis and hemp. The cannabis plant needs to be federally legal and subject to consist product safety standards that are consistent and practical to enforce, rather than be subject to the arbitrary

legal lines between cannabis and hemp that differ from state to state and intersect with the federally illegal marijuana market, causing enforcement challenges and consumer confusion.

I do think there are some smart state approaches that should inform an effective federal framework and best state practices. Utah and West Virginia, for example, have good models as far as product and/or retail registrations and lists of permitted products. A growing number of states have imposed age limits and robust testing methods that are sufficient to test for contaminants, residual solvents, and heavy metals and ensure product safety. Many states, including Colorado, Oregon, and others have adopted significant packaging and labeling requirements appropriate for these products, as well as advertising and marketing regulations that prohibit marketing targeted towards minors and false and misleading marketing. States like Florida have are allocating appropriate resources to enforce such laws.

***CBD Oracle: What's next for delta-8?***

I think the coming years could see more restrictive federal laws or guidance supporting the DEA's position, with it being possible that the 2018 Farm Bill amends the definition of hemp to be more limiting, or that Congress propose a regulatory framework for hemp that limits synthetics, semi-synthetics or THC content in finished hemp products. Any federal action will undoubtedly take some time, and in the meantime, we will continue to see states vary significantly in their approach—with some states prohibiting these products or only allowing them in marijuana dispensaries, and others allowing them with some form of regulatory frameworks on these products—including manufacturing, testing, and labeling standards. I think we will continue to see state enforcement agencies struggle with enforcing online sales and securing the appropriate resources and infrastructure to act as mini-FDA's in the federal FDA's vacuum.

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