

## Interview With Neil Willner Regarding THCA Laws

*This interview was conducted by CBD Oracle via email in December 2023 and is provided here for full transparency. Learn more about [CBD Oracle's Editorial Policy](#).*

### **About Neil Willner:**

Neil M. Willner is an experienced cannabis attorney at Royer Cooper Cohen Braunfeld LLC and co-chair of the firm's Cannabis Group. He focuses his practice on the cannabis industry and provides counsel to hemp and marijuana companies across all parts of the supply chain on regulatory and compliance issues. Neil also participates on cannabis-related trade association committees including the New York State Bar Association's Cannabis Law Section, the International Cannabis Bar Association, and the American Trade Association for Cannabis and Hemp (ATACH). [Read full bio →](#)

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**CBD Oracle:** *Before considering specific state laws, does the "total THC" standard adopted by the USDA apply to finished products, or just hemp plants pre-harvest?*

**Neil Willner:** Under the plain language of the 2018 Farm Bill, the total THC requirement contained in the USDA regulations applies to just pre-harvest hemp. However, in a non-binding letter dated June 9, 2023, the DEA opined – in a convoluted way – that because Farm Bill regulations require testing using post-decarboxylation or other similarly reliable methods, “THCA must be converted to delta-9 THC and for the purposes of enforcing the hemp definition, the delta-9-THC level must account for any delta-9-THCA in a substance.”

**CBD Oracle:** *Is THCA flower (sourced from a compliant hemp plant) exempt from the controlled substances bill if it meets the 0.3% delta-9 THC threshold, even if it has higher quantities of THCA?*

**Neil Willner:** Technically, yes. However, many in the industry find it very difficult to believe that legally grown hemp that has less than 0.3% total THC 30 days pre-harvest will miraculously have 15% or greater total THC post-harvest.

**CBD Oracle:** *Assuming there are no other relevant restrictions in state law (e.g. a ban on flower or inhalable products), does the existence or absence of a state-level "total THC" standard for finished products or hemp overall determine whether THCA flower is legal in the state?*

**Neil Willner:** Yes, in light of ambiguity contained in the 2018 Farm Bill and lack of consideration for THCA flower, state law generally controls the issue.

**CBD Oracle:** *It is unlikely that a plant could meet the 0.3% THC + 0.877\*THCA pre-harvest standard and have (using a real-world example) 27% THCA at harvest. If such a product was made by spraying THCA onto compliant hemp flower, would the result still be considered "hemp"?*

**Neil Willner:** If the THCA was extracted from compliantly grown hemp, then I suppose it would be technically legal hemp under the Farm Bill. It would be no different than “D8 Flower” that we see in the marketplace where D8 is sprayed onto compliantly grown hemp flower.

**CBD Oracle:** *What would you say to a client interested in selling THCA flower as hemp, if you were asked to advise them in a legal context? Is there a significant legal risk? (assuming there is no explicit "total THC" standard in relevant state law)*

**Neil Willner:** I think there is a significant practical risk of enforcement against anyone selling THCA flower as hemp given the near impossibility from distinguishing it from marijuana. Should a company's driver with a batch of THCA flower get pulled over with THCA flower, good luck convincing law enforcement it's legal hemp. This is especially so, in light of the DEA's June 9, 2023 letter that concludes that “cannabis-derived delta-9-THCA does not meet the definition of hemp under the CSA because upon conversion for identification purposes as required by Congress, it is equivalent to delta-9 THC.”

**CBD Oracle:** *Do you expect to see enforcement actions against sellers of THCA products in future?*

**Neil Willner:** Yes, and we have already started seeing enforcement actions.

**CBD Oracle:** *If a company was found to be faking or doctoring a Certificate of Analysis to make their product appear compliant or more potent, what action could be taken against them?*

**Neil Willner:** This is extraordinarily risky because the company would not only be selling illegal marijuana, it would also be subject to myriad criminal fraud allegations and consumer protection actions by state attorney generals.

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