

The DEA response:

“Delta-9-THCO and delta-8-THCO do not occur naturally in the cannabis plant and can only be obtained synthetically, and therefore do not fall under the definition of hemp... Thus, delta-9-THCO and delta-8-THCO meet the definition of “tetrahydrocannabinols,” and they (and products containing delta-9-THCO and delta-8-THCO) are controlled in schedule I by 21 U.S.C. § 812(c) Schedule I, and 21 CFR § 1308.11(d).“

However their response is specific to THCO, delta 8 THC has been declared by the courts to be legal.

<https://cdn.ca9.uscourts.gov/datastore/opinions/2022/05/19/21-56133.pdf>

"The panel held that the plain and unambiguous text of the Farm Act compels the conclusion that AK Futures' delta-8 THC products are lawful. Observing that the relevant portion of the Farm Act removes "hemp" from the definition of marijuana in the Controlled Substances Act, the panel concluded that on the available record, the delta-8 THC in AK Futures' e-cigarette liquid appears to fit comfortably within the statutory definition of "hemp"—i.e., the liquid is properly understood as a derivative, extract, or cannabinoid originating from the cannabis plant and containing "not more than 0.3 percent" delta-9 THC. "

Also, there is a case in Texas right now establishing the legality of Delta 8 in regards to synthetic cannabinoids and the federal governments stance.

<https://hometownhero.com/learn/hometown-hero-fights-for-delta-8-legality-in-texas>

"When it reached the Senate, they amended it to ban synthetically derived acids, isomers, and salts of tetrahydrocannabinol.

At Hometown Hero, we extract our Delta-8 THC directly from large quantities of hemp.

However, this naturally occurring Delta-8 THC is still an *isomer* of Delta-9 THC.

In layman's terms, as a chemical, Delta-8 THC has the same "formula" as Delta-9 THC but in a different arrangement."



U. S. Department of Justice
Drug Enforcement Administration
8701 Morrissette Drive
Springfield, Virginia 22152

www.dea.gov

February 13, 2023

Mr. Rod Kight
Kight Law Office PC
P.O. Box 526
Edneyville, North Carolina 28787

Dear Mr. Kight:

This is in response to your letter dated August 17, 2022 and subsequent email dated February 7, 2023, in which you request the control status under the Controlled Substances Act (CSA) of THC acetate ester (THCO). The only substances of which the Drug Enforcement Administration (DEA) is aware of the THC acetate ester are delta-9-THCO (delta-9-THC acetate ester) and delta-8-THCO (delta-8-THC acetate ester). The Drug Enforcement Administration (DEA) reviewed the CSA and its implementing regulations with regard to the control status of these substances.

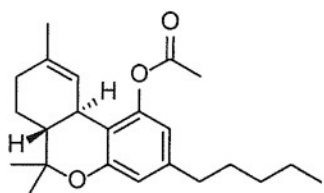
The CSA classifies tetrahydrocannabinols (THC) as controlled in schedule I. 21 U.S.C. § 812, Schedule I(c)(17); 21 CFR 1308.11(d)(31). Subject to limited exceptions, for the purposes of the CSA, the term "tetrahydrocannabinols" means those "naturally contained in a plant of the genus Cannabis (cannabis plant), as well as synthetic equivalents of the substances contained in the cannabis plant and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity to those substances contained in the plant." 21 CFR § 1308.11(d)(31).

Delta-9-THCO and delta-8-THCO do not occur naturally in the cannabis plant and can only be obtained synthetically, and therefore do not fall under the definition of hemp. Delta-9-THCO and delta-8-THCO are tetrahydrocannabinols having similar chemical structures and pharmacological activities to those contained in the cannabis plant. Thus, delta-9-THCO and delta-8-THCO meet the definition of "tetrahydrocannabinols," and they (and products containing delta-9-THCO and delta-8-THCO) are controlled in schedule I by 21 U.S.C. § 812(c) Schedule I, and 21 CFR § 1308.11(d). The Controlled Substances Code Number (CSCN) assigned to these substances are 7370, which is that of tetrahydrocannabinols, and the conversion factors (CF) are 1.00. Because delta-9-THCO and delta-8-THCO are controlled substances, they do not meet the definition of controlled substance analogues under 21 U.S.C. § 813.

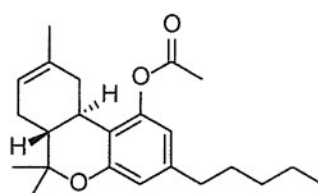
The chemical structures shown below were used to make these determinations. If you have any further questions, please contact the Drug and Chemical Evaluation Section at DPE@dea.gov or (571) 362-3249.

Mr. Rod Kight

Page 2



delta-9-THCO (delta-9-THC acetate ester)
schedule I
CSCN 7370
CF 1.0



delta-8-THCO (delta-8-THC acetate ester)
schedule I
CSCN 7370
CF 1.0

Sincerely,

Terrence L. Boos, Ph.D., Chief
Drug & Chemical Evaluation Section
Diversion Control Division

Cc: Charlotte District Office

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AK FUTURES LLC,
Plaintiff-Appellee,

v.

BOYD STREET DISTRO, LLC, a
California limited liability company,
Defendant-Appellant.

No. 21-56133

D.C. No.
8:21-cv-01027-
JVS-ADS

OPINION

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted March 18, 2022
Las Vegas, Nevada

Filed May 19, 2022

Before: Andrew J. Kleinfeld, D. Michael Fisher,* and
Mark J. Bennett, Circuit Judges.

Opinion by Judge Fisher

* The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

SUMMARY**

Trademark Infringement / Preliminary Injunction

The panel affirmed the district court's grant of a preliminary injunction in favor of AK Futures LLC, a manufacturer of e-cigarette and vaping products, in a copyright and trademark infringement action in which AK Futures alleges that Boyd Street Distro, LLC, has been selling counterfeit versions of AK Futures' "Cake"-branded e-cigarette and vaping products containing delta-8 tetrahydrocannabinol ("delta-8 THC").

The panel wrote that the district court's order, which limited the scope of copyright protection to AK Futures' one registered copyright and granted trademark protection to its six unregistered marks, properly distinguished between trademark and copyright protection.

Boyd Street did not contest the district court's finding that it was selling counterfeit versions of AK Futures' Cake products. Its chief argument was that AK Futures could not own a valid trademark in connection with these products because federal law forbids possession and sale of delta-8 THC. Granting the preliminary injunction, the district court held that the 2018 Agricultural Improvement Act (the "Farm Act") legalized the company's delta-8 THC products.

The panel held that the plain and unambiguous text of the Farm Act compels the conclusion that AK Futures' delta-8 THC products are lawful. Observing that the relevant

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

portion of the Farm Act removes “hemp” from the definition of marijuana in the Controlled Substances Act, the panel concluded that on the available record, the delta-8 THC in AK Futures’ e-cigarette liquid appears to fit comfortably within the statutory definition of “hemp”—*i.e.*, the liquid is properly understood as a derivative, extract, or cannabinoid originating from the cannabis plant and containing “not more than 0.3 percent” delta-9 THC. The panel wrote that because the Farm Act’s definition of hemp is not ambiguous, the panel does not consider agency interpretation, and even if it did, the Drug Enforcement Agency’s view of the Farm Act’s plain text aligns with the panel’s own. The panel wrote that any congressional intent that the Farm Act legalize only industrial hemp, not a potentially psychoactive substance like delta-8 THC, appears neither in hemp’s definition nor in its exemption from the Controlled Substances Act. The panel therefore concluded that AK Futures is likely to succeed on the merits of its trademark claim.

The panel held that Boyd Street failed to overcome the district court’s finding and presumption of irreparable harm absent an injunction. The panel wrote that none of Boyd Streets’ arguments why the injunction is not in the public interest succeed in convincing it that the district court erred.

The panel remanded for further proceedings.



Rod Kight <rod@kightlaw.com>

Control status of hemp-derived THCO acetate

9 messages

Rod Kight <Rod@kightlaw.com>
 To: DPE@usdoj.gov
 Cc: ODLL@dea.gov, ODLP@dea.gov

Wed, Aug 17, 2022 at 1:23 PM

Dear Dr. Boos:

This email is sent to you in your capacity as the Chief of the Drug & Chemical Evaluation Section, Diversion Control Division, of the Drug Enforcement Administration ("DEA") to inquire about the control status of THC acetate ester ("THCO").

As a preliminary matter, I have been unable to find THCO in the current list of controlled substances. Please confirm that I have not overlooked it and that THCO is not currently listed as a controlled substance.

Assuming that THCO is not listed as a controlled substance, my primary question is whether the DEA considers THCO to be a controlled substance analog of delta-9 tetrahydrocannabinol when it is derived from hemp. As you may be aware, THCO can be derived from cannabidiol ("CBD") that has been extracted from hemp. Given that the definition of "hemp" under 7 U.S.C. § 1639o(1) includes "all derivatives", is THCO a controlled substance analog under 21 U.S.C. § 813 when it is derived from CBD?

Thank you for your time and attention to this matter. I look forward to your response, which may be sent via email to this address.

Sincerely,

Rod Kight



Rod Kight

(he/him/his)

Attorney, Kight Law Office

Licensed in North Carolina and Oregon

828-255-9881 | rod@kightlaw.com

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DPE Mailbox <DPE@dea.gov>
 To: Rod Kight <Rod@kightlaw.com>

Thu, Oct 13, 2022 at 4:22 PM

2/13/23, 11:58 AM

Kight Law Office Mail - Control status of hemp-derived THCO acetate

Good afternoon,

Please provide a mailing address to be included on your response letter. A response letter will be sent via email.

Sincerely,

Drug and Chemical Evaluation Section

Diversion Control Division

Drug Enforcement Administration

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x93

[Quoted text hidden]

Rod Kight <Rod@kightlaw.com>
To: DPE Mailbox <DPE@dea.gov>

Thu, Oct 13, 2022 at 5:00 PM

Thank you for your email. Please address the response letter to:

Kight Law Office PC
Attn. Rod Kight, Attorney
PO Box 526
Edneyville, NC 28787

I look forward to your response.

Rod Kight
[Quoted text hidden]

Rod Kight <Rod@kightlaw.com>
To: DPE Mailbox <DPE@dea.gov>

Wed, Feb 1, 2023 at 3:34 PM

Hello. I am following up on this email thread regarding the control status of THC acetate ester ("THCO"). I look forward to your response.

Sincerely,

Rod Kight
[Quoted text hidden]

DPE Mailbox <DPE@dea.gov>
To: Rod Kight <Rod@kightlaw.com>

Thu, Feb 2, 2023 at 9:07 AM

Good morning Mr. Kight,

2/13/23, 11:58 AM

Kight Law Office Mail - Control status of hemp-derived THCO acetate

A response to your letter is pending review by our Office of Chief Counsel. When it is ready, it will be sent to you electronically.

Please don't hesitate to contact us if you have any other questions.

Sincerely,

Drug and Chemical Evaluation Section

Diversion Control Division

Drug Enforcement Administration

Email: DPE@dea.gov

571-362-3249

-

X72

[Quoted text hidden]

Rod Kight <Rod@kightlaw.com>
To: DPE Mailbox <DPE@dea.gov>

Thu, Feb 2, 2023 at 9:16 AM

Thank you.

Rod

[Quoted text hidden]

DPE Mailbox <DPE@dea.gov>
To: Rod Kight <Rod@kightlaw.com>

Tue, Feb 7, 2023 at 1:19 PM

Good afternoon Mr. Kight,

We wanted to confirm the substance in question was in fact delta-9-THCO? Please let us know.

[Quoted text hidden]

Rod Kight <Rod@kightlaw.com>
To: DPE Mailbox <DPE@dea.gov>

Tue, Feb 7, 2023 at 1:34 PM

Hello, thank you for contacting me. I was actually referring to THCO generally, including its various isomers. Is that helpful, or do you need more information from me?

Rod

[Quoted text hidden]

DPE Mailbox <DPE@dea.gov>
To: Rod Kight <Rod@kightlaw.com>

Tue, Feb 7, 2023 at 2:53 PM

Hello,

2/13/23, 11:58 AM

Kight Law Office Mail - Control status of hemp-derived THCO acetate

If you would like for us to review more substances than delta-8-THCO and delta-9-THCO you will need to let us know specifically which substances you would like for us to review. If delta-8-THCO and delta-9-THCO is enough, then we have what we need.

[Quoted text hidden]

JUNE 7, 2021

Hometown Hero Fights for Delta-8 Legality in Texas

As you may know, Hometown Hero is a veteran-owned distributor and manufacturer of Delta-8 THC products located in Austin, Texas.

If you are a Delta-8 THC enthusiast in Texas (or just a fan of our products), you may have been biting your nails well into the Memorial Day Weekend of 2021.

That's because if passed, **HB 3948 would have banned Delta-8 THC products** in the Lone Star State.

The good news is that the bill died.

What you may not have known is that **Hometown Hero was working behind the scenes** to fight the proposed ban of Delta-8 THC in Texas.

So if you're looking for a simple rundown about the bill and you're curious about how we helped put a stop to it, you've come to the right place.

Here, we're going to go over:

- What was HB 3948, and how would it have banned Delta-8 THC?
- Delta-8 legality in the United States
- How did Hometown Hero fight against Delta-8 prohibition in Texas?
- How did HB 3948 fail in the 2021 Texas Legislative Session?
- The future of Delta-8 THC in Texas

Let's go.

What Was HB 3948, and How Would it Have Banned Delta-8 THC?

If you're unfamiliar with Texas politics, or you're looking to brush up on it, it's good to know that the Texas State Legislature convenes on regular sessions on odd-numbered years.

A legislative session occurred this year.

One of the proposed laws was House Bill 3948. In a way, the bill was a bit of a double-edged sword.

Early on, **the bill had a broad range of support** from farmers and hemp-based businesses as it expanded hemp research in Texas.

First, it passed through the House.

When it reached the Senate, they amended it to ban synthetically derived acids, isomers, and salts of tetrahydrocannabinol.

At Hometown Hero, we extract our Delta-8 THC directly from large quantities of hemp.

However, this naturally occurring Delta-8 THC is still an isomer of Delta-9 THC.

In layman's terms, as a chemical, Delta-8 THC has the same "formula" as Delta-9 THC but in a different arrangement.

HB 3948 would have banned Delta-8 THC.

Delta-8 Legality in the United States

We're not going to beat around the bush.

The threat was real.

Delta-8 is banned, or its legality has been under threat in many states across the U.S.

Yes, the 2018 Farm Bill legalized Delta-8.

However, as of June 4, 2021, [Delta-8 is banned in the following states:](#)

Alaska, Arizona, Arkansas, Colorado, Delaware, Kentucky, Idaho, Iowa, Mississippi, Montana, New York, Rhode Island, Utah, Vermont, Washington

You may be scratching your head just looking at this list.

In 2012, Washington and Colorado became the first states to legalize recreational marijuana.

So why was it banned in these states?

Protecting Delta-8 legality doesn't just mean facing the traditional opponents of cannabinoids.

It also means going up against the recreational and medical marijuana industries who view the hemp industry, CBD, and Delta-8 THC as potential competitors.

It's a fight coming from *multiple directions*, but we were more than willing to step up to the plate.

How Did Hometown Hero Fight and Win Against Delta-8 Prohibition in Texas?

You didn't know that we were fighting against HB 3948 and for a good reason.

We had to stay quiet about it.

However, for a good idea about how we stood up against Delta-8 prohibition, here's a statement from Hometown

Hero CEO Lukas Gilkey:

"I apologize that we were not more public with our strategy, but because of the nature of politics, it was best that we stayed quiet about our efforts. It turns out we needed a lot of money and key players to make this happen as there were groups fighting to make Delta-8 illegal. One hemp advocacy group and one medical marijuana

company chose to fight us head-on. Despite being a very young industry, we proved that the Delta-8 industry is capable of fighting overreaching and unnecessary cannabis regulation,"

- Lukas Gilkey

We can't take all the credit, though.

We had help from many great brands and organizations, including:

Texas Hemp Federation, Coats Rose Law Firm, Texas Hemp Coalition, Delta Effex, Treetop Hemp Co, Honeyroot, Eighty Six Brand, Pinnacle Hemp

These organizations and companies are heroes to us and should be to you as well.

They are the reason Delta-8 is still legal in Texas.

How Did HB 3948 Fail in the 2021 Texas Legislative Session?

In short, the bill tripped over its shoelaces.

As mentioned earlier, the bill had significant provisions such as expanding hemp research, allowing hemp feed, and more.

It passed through the House, but the Senate amended it.

When this occurs in the Texas Legislature, the bill needs to go to a conference committee.

In other words, the House agreed on the bill, the Senate changed it, which meant that they had to go back to decide on the changes.

No one could agree on HB 3948, the 2021 Texas Legislative Session deadline passed, and the bill died.

The Future of Delta-8 THC in Texas

The legislative session is over.

We fought, and we won.