



**Canna
BizVA**

Cannabis Business Association of Virginia

August 4, 2022

The Honorable Matthew J. Lohr
Secretary of Agriculture and Forestry
Commonwealth of Virginia

Public Comments: Task Force to Analyze Industrial Hemp Extracts and Other Substances Containing Tetrahydrocannabinol (THC) Intended for Human Consumption

Dear Secretary Lohr,

We appreciate the opportunity to submit written comments to the Task Force to Analyze Industrial Hemp Extracts and Other Substances Containing Tetrahydrocannabinol (THC) Intended for Human Consumption (the “Task Force”). We ask that you consider these comments in conjunction with the oral testimony provided by our lobbyist, Dylan Bishop, at the Task Force’s July 7 meeting.

The Cannabis Business Association of Virginia (“CannaBizVA”) is a non-profit, trade association formed to advocate for the expansion and protection of commercial opportunities for Virginia businesses in the Commonwealth’s regulated cannabis industries. Our membership includes farmers, processors, manufacturers, retailers, laboratory testing facilities, and other ancillary businesses, and we represent their interests collectively.

These comments focus primarily on the Virginia Department of Agriculture and Consumer Services’ (“VDACS”) Food Safety Program, specifically its “regulatory response to chemically-synthesized cannabinoids in foods and beverages” announced on June 30, 2022.¹

These comments will address (1) the absence of a nexus between the recently enacted budget language and the aforementioned regulatory response, (2) inherent enforcement issues, and (3) the legal status of hemp-derived products, including delta-8 THC. Furthermore, these comments (1) respectfully requests this task force propose a change to Virginia Code Section 3.2-5145.5 to conform with Federal law, (2) offers suggestions regarding guidance that would help industry participants maintain compliance under the revised interpretation of the Food & Drink Law, and (3) proposes agency action that would permit processors and manufacturers of products intended for human consumption which contain delta-8 THC to be considered an

¹ <https://www.vdacs.virginia.gov/press-releases-220630-retail-sale-of-thc-infused-edibles.shtml>

approved source to meet the guidelines of the Virginia Food & Drink Law under certain circumstances.

Nexus between Regulatory Action and Enabling Legislation

VDACS' June 30 press release states that "any chemically-synthesized cannabinoid is [now considered] a food adulterant and any person who manufactures, sells, or offers for sale a chemically-synthesized cannabinoid, including delta-8 THC, as a food or beverage is in violation of the Virginia Food and Drink Law" and that the agency's shift in policy was made "in response to provisions included in the budget recently passed by the General Assembly and signed by Governor Glenn Youngkin."² However, the recently enacted budget language wholly lacks *any* reference to "chemically-synthesized cannabinoids."³ Additionally, the recently enacted budget fails to make any substantive amendments to Virginia's Food & Drink Law.⁴ Consequently, it is our position that the present regulatory action lacks the enabling language in the recently enacted budget cited by the Commonwealth as its justification for the policy change. Therefore, we ask that VDACS rescind this change in policy until it can be properly enacted through the notice and comment provisions of the Virginia Administrative Process Act.

Enforcement Issues

By VDACS' own admission, hemp plants naturally contain some level of delta-8 THC.⁵ As such, VDACS' new position only considers "chemically-synthesized" cannabinoids as prohibited food adulterants. However, as presented by the Commonwealth's Department of Forensic Science at the July 7 Task Force meeting, "[t]here is no laboratory testing that will be able to distinguish 'naturally occurring' vs. 'synthetic' delta-8-THC (or any other cannabinoids)." Hence, the Commonwealth has no way to determine whether a food or drink containing delta-8 THC was manufactured using "chemically synthesized" delta-8 THC, which is prohibited, or "naturally occurring" delta-8 THC, which is not, except perhaps by inference or admission.

If VDACS plans to enforce the prohibition on "chemically synthesized" delta-8 THC by inference, the logical way of determining whether the delta-8 THC present in the food was "chemically synthesized" would be to determine whether the delta-8 THC exceeds the agency's accepted range for naturally occurring delta-8 THC in the hemp plant. Consequently, we ask that VDACS publicize guidance as to what it considers to be the acceptable range or amount of delta-8 THC that naturally occurs in the hemp plant to aid in the industry's compliance of its interpretation of the Virginia Food & Drink Law.

² *Ibid.*

³ See HB30 (2022), Chapter 2, Item 4-14; <https://budget.lis.virginia.gov/item/2022/2/HB30/Chapter/4/4-14.00/>.

⁴ *Ibid.*

⁵ <https://www.vdacs.virginia.gov/press-releases-220630-retail-sale-of-thc-infused-edibles.shtml>

Legal Status of Products Containing Delta 8

The Commonwealth's definition of "Industrial Hemp" incorporates the Federal definition of hemp and Federal law by reference. By this standard, delta-8 THC is not a federally illicit substance, contrary to what was stated by representatives of the Commonwealth at the July 7 Task Force meeting.

In fact, the U.S. Drug Enforcement Agency (DEA) has held that in light of the language of the 2018 Farm Bill, all hemp-derived cannabinoids, as long as they are under 0.3% *total* delta 9-THC, are not controlled substances and are not illegal under federal law. In a September 2021 letter to the Alabama Board of Pharmacy, a DEA official explained, "The Controlled Substances Act, however, excludes from control 'tetrahydrocannabinols in hemp (as defined under section 1639o of Title 7).' Hemp, in turn, is defined as '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(1). Accordingly, cannabinoids 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."⁶

Furthermore, a recent ruling by the U.S. Court of Appeals Ninth Circuit further supports this interpretation of the 2018 Farm Bill. According to The National Law Review, in a recent trademark violation case involving delta 8-THC products, "The Ninth Circuit found that the plaintiff was likely to succeed on the merits of its trademark claim "because its delta-8 THC products are not prohibited by federal law, and they may therefore support a valid trademark." In so doing, the Ninth Circuit pointed to the plain text of the 2018 Farm Bill and found the Δ8-THC in the plaintiff's products appear to fit comfortably within the statutory definition of 'hemp.'"⁷

Absent a change in federal law, it is clear that the current statute allows, or at the very least does not disallow, products derived from hemp as long as they do not contain a total *delta 9-THC* concentration of greater than 0.3%. Accordingly, CannaBizVA respectfully requests that this Task Force proposes an amendment to Virginia Code Section 3.2-5145.5 to conform with Federal law. Specifically, we request that language is added to clarify that any reference to THC concentration is in fact referring to delta-9 THC, in line with Federal law, as opposed to total THC. In effect, this amendment would permit VDACS' Food Safety Program to consider products containing delta-8 THC, and other synthetic cannabinoids, to be from an approved source under certain circumstances, assuming the products does not contain more than 0.3% delta-9 THC and otherwise comports with the requirements of Virginia's Food & Drink Law and corresponding regulations.

⁶ <https://albop.com/oodoardu/2021/10/ALBOP-synthetic-delta8-THC-21-7520-signed.pdf>

⁷ <https://www.natlawreview.com/article/weeds-thicken-making-sense-ninth-circuit-s-decision-finding-delta-8-legal-under>

Suggestions

CannaBizVA respectfully requests that VDACS rescind its “regulatory response,” which deems “synthetic cannabinoids” as adulterated food additives, as this action lacks the enabling legislation cited by the agency as its justification for the action. Alternatively, CannaBizVA would welcome the opportunity to work with VDACS to find a path forward that could allow delta-8 THC, in certain circumstances, to be considered to be from an approved source to meet the guidelines of the Virginia Food and Drink Law. Finally, CannaBizVA asks that VDACS offer guidance as to what it considers to be the acceptable range or amount of delta-8 THC which naturally occurs in the plant *cannabis Sativa* to aid in the industry’s efforts to comply with the revised policy.

We appreciate your consideration in this regard.

Respectfully,

Mary C. Fox
President, CannaBizVA