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W. Michael Schuster
University of Georgia Terry College of Business, Mike.Schuster@uga.edu

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W. MICHAEL SCHUSTER*

The legal environment surrounding the cannabis industry is ambiguous and constantly changing. While cannabis is prohibited under federal law, a 2018 statute legalized a variant of the cannabis plant ("hemp") that is low in its most common intoxicating agents. Recognizing this, entrepreneurs began to process hemp to extract and sell chemicals contained therein. Included in this trend is the extraction of Delta-8 Tetrahydrocannabinol (Δ8-THC)—a psychoactive drug with an increasing market presence in states where most cannabis (e.g., "marijuana") is illegal.

As competition in the Δ8-THC field emerged, firms sought to distinguish their wares through brand recognition and federal trademark registration. However, the U.S. Patent and Trademark Office refuses to register these marks—arguing that Δ8-THC does not satisfy the requirement that products be used "in legal commerce." On this point, the USPTO interprets relevant law as criminalizing the sale of Δ8-THC. That conclusion stands in contrast to determinations reached by the Drug Enforcement Agency and federal courts.

This Article addresses the propriety of federal registration of Δ8-THC trademarks. It critically analyzes the intersection of federal drug law, hemp's legalization, and administrative regulations to answer the question. Based on this research, a strong case for the registration of Δ8-THC marks[1] arises. This conclusion has public and private importance.

To seek registration of a Δ8-THC mark, applicants must aver that they use it in commerce. This could amount to admitting to the sale of an illegal drug—depending on the interpretation of somewhat ambiguous regulations. With this in mind, a law and strategy analysis is employed to explain why firms take that risk to seek trademark registration. On this issue, the Article identifies specific current market advantages and future strategic gains that warrant this exposure.

Further, public benefits of Δ8-THC registration are explored. A current concern in this largely unregulated market is the presence of harmful impurities in goods sold for human consumption. This issue can be mitigated by aligning the public interest in safe products with private financial incentives. Specifically, the ability to maintain strong trademark rights encourages the creation of goodwill through the sale of quality products. Recognizing this, firms are encouraged to reduce impurities in their Δ8-THC wares under the belief that this will benefit their reputation and thus increase sales.

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* Mike Schuster is an assistant professor at the University of Georgia Terry College of Business with a courtesy appointment at the University of Georgia School of Law.

1. The term "mark" is used herein as shorthand for "trademark."

INTRODUCTION

Regulation of the cannabis industry is fraught with uncertainty and uneven enforcement. Prior research generally describes how firms navigate the market's ambiguous legal environment to create strategic advantage. This Article focuses the earlier literature by analyzing public and private behaviors at the uncertain intersection of trademark law and cannabis derivatives.

Delta-8 Tetrahydrocannabinol (Δ8-THC) is a chemical occurring in low concentrations in the cannabis plant.[2] It can be extracted in commercially viable quantities through a chemical process.[3] Like many compounds found in cannabis, Δ8-THC is psychoactive (e.g., it elicits a "high").[4] However, unlike the most common active agents in cannabis—such as Delta-9 Tetrahydrocannabinol—Δ8-THC is arguably legal under federal law. Recognizing this possibility, firms have entered the Δ8-THC market,[5] especially in states where cannabis is not generally legal.[6]

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2. Sierra McWilliams, Andrew Goff & Erin Williams, *Regulatory Challenge of New Hemp Products—Delta-8 THC and Other Cannabinoids*, *in* CANNABIS LAW DESKBOOK § 25:11 (Austin Bernstein & Bruce Turcott eds., 2021–2022 ed.) ("Delta-8 THC, as opposed to delta-9 THC, is a cannabinoid usually found in very trace amounts in cannabis plants.").

3. *See* Eric C. Leas, *The Hemp Loophole: A Need to Clarify the Legality of Delta-8-THC and Other Hemp-Derived Tetrahydrocannabinol Compounds*, 111 AM. J. PUB. HEALTH 1927, 1927 (2021) ("Because CBD isomers are similar in structure to THC isomers, they can be converted to THC isomers through a relatively simple series of chemical reactions.").

4. *See* Leas, *supra* note 3.

5. *See* AK Futures LLC v. Boyd St. Distro, LLC, 35 F.4th 682, 695 (9th Cir. 2022) (holding Plaintiff's delta-THC products are lawful under the plain text of the Farm Act and may receive trademark protection; therefore, affirming the grant of a preliminary injunction).

6. *See generally* Melvin D. Livingston, Andrew Walker, Michael B. Cannell & Matthew E. Rossheim, *Popularity of Delta-8 THC on the Internet Across US States, 2021*, 112 AM. J.

As competition in this nascent field emerged, companies began to seek trademark protection for their Δ8-THC wares. The U.S. Patent and Trademark Office (USPTO or "Trademark Office") refuses, however, to register these marks.[7] It maintains a policy that marks must be used "in legal commerce" to be registered, and the Trademark Office believes Δ8-THC is illegal under the Controlled Substances Act (CSA).[8] Its position differs from other governmental bodies, including the Drug Enforcement Administration (DEA).

This Article makes two contributions to this uncertain legal environment. First, Part I examines Δ8-THC's legal status under the Controlled Substances Act and the 2018 Farm Bill. The latter deregulated a low-intoxicant form of cannabis called "hemp," which arguably legalized Δ8-THC derived from hemp. This position has, however, received differing treatment by the courts, DEA, and Trademark Office. Recognizing this divergence, Part 0 evaluates how trademark applications for Δ8-THC *should* be treated. The analysis finds that based on principles of statutory interpretation, administrative deference, and the Trademark Office's own policies and precedent, these marks ought to be registered.

Part 0 then analyzes the private strategic importance of Δ8-THC trademarks and public benefits that may arise if they are registered. Applying a law and strategy approach, this part analyzes the actions of Δ8-THC firms as they seek trademark registrations to secure immediate competitive advantage and future strategic gains. The discussion concludes by describing why registration of these trademarks aligns public and private incentives to ensure that the Δ8-THC available to the public is safe for consumption.

PUB. HEALTH 296, 297 (2022) (describing increased interest in Δ8-THC in states where recreational cannabis is illegal that may indicate increased consumption).

7. *See, e.g.*, Letter from Christina Calloway, Examining Attorney, U.S. Pat. & Trademark Off., to Liam Burns, Bearly Legal Hemp (Oct. 21, 2020) (U.S. Application Serial No. 90036541) (rejecting a Δ8-THC related application for failure to comply with the Controlled Substances Act); Letter from Alexandra El-Bayeh, Examining Attorney, U.S. Pat. & Trademark Off., to Jas Sum Kral, Inc. (Oct. 18, 2021) (U.S. Application Serial No. 90289354) (same); Letter from Alexandra El-Bayeh, Examining Attorney, U.S. Pat. & Trademark Off., to Science Holdings, LLC (Aug. 4, 2021) (U.S. Application Serial No. 90251954) (same); Letter from Jeffrey Look, Examining Attorney, U.S. Pat. & Trademark Off., to Matthew McKinney, STNR Creations, LLC (Aug. 4, 2021) (U.S. Application Serial No. 90160477) (same).

8. This Article only addresses Δ8-THC trademark issues with regard to legal use in commerce and the Controlled Substances Act. Some Δ8-THC marks also face issues with Food, Drug and Cosmetic Act (FDCA) compliance and the legal use in commerce requirement, though this is beyond the scope of the current research. *See* Letter from Jeffrey Look, Examining Attorney, U.S. Pat. & Trademark Off., to Matthew McKinney, STNR Creations, LLC (Aug. 4, 2021) (U.S. Application Serial No. 90160477) (Under the FDCA, "[i]t is unlawful to introduce food to which CBD, an article that is approved as a new drug, has been added into interstate commerce or to market CBD as, or in, dietary supplements, regardless of whether the substances are hemp-derived.") (internal quotation marks omitted).

I. CANNABIS REGULATION AND TRADEMARK LAW

This Part discusses two fields of the law that are integral to this Article. First, the analysis looks to the federal and state regulation of cannabis. A brief history of cannabis's prohibition is given, followed by a discussion of modern regulation and the movement toward legalization. The second Part addresses trademark law and its importance in generating brand recognition. Both federal and state regimes are introduced to prepare for future discussion of apparent inconsistencies in the current treatment of Δ8-THC goods.

A. Cannabis and the Controlled Substances Act

Marijuana and its derivatives come from the *Cannabis sativa* plant—generally referred to as "cannabis" herein.[9] The plant's leaves and flowers are harvested to create these drugs.[10] The primary psychoactive agent in cannabis is delta-9 tetrahydrocannabinol,[11] which may cause euphoria and distorted perception.[12] The "delta-9" connotation references the location of a carbon-carbon double bond within the chemical—an important nuance that we will return to shortly.[13] The drug has medical uses including nausea relief and treatment of anorexia and neuropathic pain,[14] though side effects include paranoia, anxiety, and headaches.[15]

Cannabis was first used recreationally in the United States in the early 1900s.[16] Early prohibitions followed, with Utah and California both outlawing the drug by

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9. Itai Danovitch, *Sorting Through the Science on Marijuana: Facts, Fallacies, and Implications for Legalization*, 43 MCGEORGE L. REV. 91, 93 (2012).

10. *See* United States v. Osburn, 955 F.2d 1500, 1503 n.2 (11th Cir. 1992).

11. Leas, *supra* note 3; *see also* Danovitch, *supra* note 9, at 93 (citing Raphael Mechoulam, Arnon Shani, Habib Edery & Yona Grunfeld, *Chemical Basis of Hashish Activity*, 169 SCI. 611, 611–12 (1970)). There are eighty-five or more activated chemicals in cannabis, including Δ9-THC. Daniel Cressey, *The Cannabis Experiment*, 524 NATURE 280, 282 (2015). "Because of delta-9-THC's ubiquity in most cannabis strains, it is often referred to universally as 'THC,'" though as will be discussed later, other variants of THC can occur in (usually) smaller amounts. Leas, *supra* note 3.

12. Groves v. Comm'r of Soc. Sec., No. 1:09-cv-00537, 2010 WL 3154343, at *4 n.19 (E.D. Cal. Aug. 6, 2010).

13. Leas, *supra* note 3 ("Delta-8-THC is nearly identical in chemical structure to delta-9-THC, differing only by the location of a carbon–carbon double bond.").

14. Danovitch, *supra* note 9, at 94.

15. Troy Farah, *Delta-8-THC Promises to Get You High Without the Paranoia or Anxiety*, DISCOVER (July 24, 2022, 5:25 PM), https://www.discovermagazine.com/health/delta-8-thc-promises-to-get-you-high-without-the-paranoia-or-anxiety [https://perma.cc/X4PV-2GTT] (stating that cannabis "can sometimes spark paranoia and anxiety or trigger dizziness and headaches").

16. Laura M. Rojas, *California's Compassionate Use Act and the Federal Government's Medical Marijuana Policy: Can California Physicians Recommend Marijuana to Their Patients Without Subjecting Themselves to Sanctions?*, 30 MCGEORGE L. REV. 1373, 1378 n.40 (1999); Allison E. Don, Note, *Lighten Up: Amending the Single Convention on Narcotic Drugs*, 23 MINN. J. INT'L L. 213, 216–17 (2014).

1915,[17] and most states followed suit within twenty-five years.[18] Modern federal regulation began with the passage of the 1970 Comprehensive Drug Abuse Prevention and Control Act ("Controlled Substances Act"),[19] though federal taxes had previously been used to discourage use.[20]

The Controlled Substances Act divides drugs into five schedules (I–V).[21] Crimes associated with Schedule I substances bear the greatest penalties,[22] as these drugs are considered to have no medical use and a high risk of abuse.[23] Cannabis is included in Schedule I, alongside drugs like heroin, lysergic acid diethylamide (LSD), and peyote.[24] Federal law broadly criminalizes the manufacture and distribution of drugs in Schedule I.[25] This prohibition includes medical uses.[26]

Federal law allocates the power to place drugs into a particular schedule to the Attorney General,[27] but that authority has been delegated to the DEA.[28] This discretion can, however, be circumscribed by congressional mandate.[29] Indeed, that

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17. Daniel J. Pfeifer, *Smoking Gun: The Moral and Legal Struggle for Medical Marijuana*, 27 TOURO L. REV. 339, 362 (2011); RICHARD JAY MOLLER, MARIJUANA: YOUR LEGAL RIGHTS 11 (Ralph Warner ed., 1981).

18. *See* Allison M. Busby, *Seeking a Second Opinion: How to Cure Maryland's Medical Marijuana Law*, 40 U. BALT. L. REV. 139, 144 (2010).

19. *See, e.g.*, 21 U.S.C. § 801 (2012); *Cooking Up Solutions to a Cooked Up Menace: Responses to Methamphetamine in a Federal System*, 119 HARV. L. REV. 2508, 2516 (2006).

20. Busby, *supra* note 18 ("[T]he federal government also began regulating marijuana under the Marihuana Tax Act of 1937, attempting to curb used of the drug through heavy taxes."); *see also* Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1053–54 (1970)). Other commenters assert that this taxation scheme was intended to raise funds, as opposed to discouraging use. *See* Lauren Males, *Current Trends in Marijuana Regulation*, 6 HLRE: OFF THE RECORD 185, 187 (2016) (stating that the "primary purpose of drug laws in the United States was raising revenue").

21. Elizabeth Chiarello, *The War on Drugs Comes to the Pharmacy Counter: Frontline Work in the Shadow of Discrepant Institutional Logics*, 40 LAW & SOC. INQUIRY 86, 89 (2015).

22. United States v. Reece, 956 F. Supp. 2d 736, 741 (W.D. La. 2013).

23. Martin D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303, 305 n.11 (2011).

24. *See generally* 21 C.F.R. § 1308.11 (2016); *Controlled Substances: Alphabetical Order*, U.S. DRUG ENF'T ADMIN. (2022), https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf [https://perma.cc/FDS4-49H9]. Criminal offenses associated with cannabis derivatives are converted into an equivalent sum of cannabis plant for punishment purposes. U.S. SENT'G GUIDELINES MANUAL § 2D1.1 n.8(D) (U.S. SENT'G COMM'N 2021).

25. 21 U.S.C. § 841(a) (2012).

26. *Id.*; Katharine McCarthy, Conant v. Walters: *A Misapplication of Free Speech Rights in the Doctor-Patient Relationship*, 56 ME. L. REV. 447, 450 (2004).

27. Reece, 956 F. Supp. 2d at 741 (citing Touby v. United States, 500 U.S. 160, 162 (1991)); *see* United States v. Caudle, 828 F.2d 1111, 1111–12 (5th Cir. 1987).

28. Reece, 956 F. Supp. 2d at 741 (citing Caudle, 828 F.2d at 1112 n.1).

29. Zarazua v. Ricketts, No. 8:17CV318, 2017 WL 6503395, at *1 (D. Neb. Oct. 2, 2017); *see also* Haines v. Fed. Motor Carrier Safety Admin., 814 F.3d 417, 429 (6th Cir. 2016) (noting that agencies must comply with statutory law).

authority was invoked in 2018 with the passage of the Agricultural Improvement Act of 2018 ("2018 Farm Bill" or "Farm Bill").[30]

The Farm Bill created a legal distinction between illegal cannabis and "hemp," which is a cannabis variant that is low in delta-9 tetrahydrocannabinol.[31] Specifically, the Act defined legal hemp as any part of the cannabis plant "with a delta-9 tetrahydrocannabinol concentration of not more than 0.3% on a dry weight basis" and any extract from hemp.[32] There is some evidence that this carve out was intended to legalize "industrial" hemp[33] to be used to manufacture products including rope, paper, and cloth.[34] Indeed, this goal seems to have been achieved. After the passage

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30. Agricultural Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 4908, 5018 (2018).

31. Bogard v. Cnty. Mut. Ins. Co., No. 1:19-CV-00705, 2021 WL 4269991, at *2 (D. Or. Sept. 20, 2021) ("The statutory scheme . . . is a relatively recent development and, historically, federal law did not draw a distinction between marijuana and hemp for purposes of the Controlled Substances Act. The new system, which divides cannabis products into legal hemp and the still-controlled marijuana, was put in place by the Agricultural Improvement Act of 2018 . . . ."); Sierra McWilliams, Andrew Goff & Erin Williams, *Legal Distinctions*, *in* CANNABIS LAW DESKBOOK § 24:2 (2021-2022 ed.); United States v. Rivera, No. 3:20-CR-0020, 2021 WL 3560807, at *3 (D.V.I. Aug. 11, 2021) ("Both marijuana and hemp are plants of the *Cannabis sativa* species, but they differ dramatically in the quantity of the psychoactive substance THC, or delta-9 tetrahydrocannabinol, that they contain.") (quoting United States v. Bautista, 989 F.3d 698, 704 (9th Cir. 2021)).

32. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 4908 (2018). "In order to meet the AIA's definition of hemp, and thus qualify for the exception in the definition of marihuana, a cannabis-derived product must itself contain 0.3% or less [Delta][FN9]-THC on a dry weight basis. It is not enough that a product is labeled or advertised as 'hemp.'" Implementation of the Agriculture Improvement Act of 2018, 85 Fed. Reg. 51639-01, 51641 (Dec. 20, 2018). The Controlled Substances Act previously made an exception to the general prohibition on hemp in the Agricultural Act of 2014, which let states "grow or cultivate [low THC] industrial hemp . . . for purposes of research." 7 U.S.C. § 5940(a) (2014). Additionally, according to the Controlled Substances Act:

> [Cannabis] does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C. § 802(16) (2012). This carve out was only of notable value for non-drug purposes, like the production of "non-drug related commercial products [like] hemp rope and clothing made from hemp plant fiber." Marty Bergoffen & Roger Lee Clark, *Hemp as an Alternative to Wood Fiber in Oregon*, 11 J. ENV'T L. & LITIG. 119, 134 (1996).

33. For example, Congressman James Comer stated: "I am particularly glad to see *industrial* hemp de-scheduled from the controlled substances list." 164 Cong. Rec. H10142-03, H10145 (emphasis added).

34. Daniel Mudd, *You Down with CBD? Yea You Know Me—States Look to Incentivize and Tax Growing Hemp Industry*, J. MULTISTATE TAX'N & INCENTIVES 32, 32, (2019) ("[A] variety of 'industrial hemp' products are being manufactured throughout the country from hemp fibers (e.g., fabric, apparel, insulation, flooring, paper, plastics, rope, car parts, building

of the Farm Bill, over half a million acres were licensed for hemp production and the market was flooded with a variety of hemp products, ranging from textiles to cosmetics.[35] But as will be seen, this legislation had significantly broader influence on the cannabis industry.

B. Cannabidiol (CBD)

For many years, entrepreneurs have tested the legal bounds and market for cannabis variations. As an example, a 1972 U.S. Patent described production of synthetic marijuana (i.e., synthetic delta-9 tetrahydrocannabinol), which has since been marketed as Marinol.[36] The DEA presently regulates the drug as a Schedule III controlled substance[37] with uses for appetite stimulation and the treatment of chemotherapy-related vomiting.[38] While that is an early instance of experimentation in the cannabis market, current entrepreneurs follow in this trend by experimenting with new products whose regulation under existing laws is uncertain.[39] Cannabidiol (CBD) is one such product.

CBD is a chemical found in the cannabis plant that—unlike delta-9 tetrahydrocannabinol—does not elicit a psychoactive response.[40] Advocates assert that the drug has a variety of health benefits, including the treatment of pain and nausea.[41] To this end, firms sell CBD in a variety of products, such as foods,

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materials, etc.).")

35. Hemp Indus. Ass'n v. United States Drug Enf't Admin., 539 F. Supp. 3d 120, 124 (D.D.C. 2021).

36. Unimed, Inc. v. Quigg, 888 F.2d 826, 827 (Fed. Cir. 1989) (citing U.S. Patent No. 3,668,224); U.S. FOOD & DRUG ADMIN., MARINOL® (DRONABINOL) CAPSULES 3 (2004), https://www.accessdata.fda.gov/drugsatfda_docs/label/2005/018651s021lbl.pdf [https://perma.cc/B38N-8F5N] ("Dronabinol, the active ingredient in MARINOL® Capsules, is synthetic delta-9- tetrahydrocannabinol (delta-9-THC). Delta-9-tetrahydrocannabinol is also a naturally occurring component of *Cannabis sativa L.* (Marijuana).").

37. *Controlled Substances: Alphabetical Order, supra* note 24 (with DEA number 7369 covering "Dronabinol (synthetic) in sesame oil in soft gelatin capsule as approved by FDA").

38. U.S. FOOD & DRUG ADMIN., MARINOL® (DRONABINOL) CAPSULES 5–6 (2004), *supra* note 36.

39. *See* Austin Bernstein & Christopher Smith, *Challenges Ahead: Market Evolution, Research, Intrastate Market Stability, and Hemp—Market, Business, and Consumer Evolution*, *in* CANNABIS LAW DESKBOOK § 2:21 (2021–2022 ed.) ("The development of new cannabinoids and synthetic cannabinoids (Delta-8) is a prime example of how an entrepreneurial market struggles to fit neatly into a tight regulatory box.").

40. Gregory L. Gerdeman, *Science is indisputable: Marijuana is Medicine*, TAMPA BAY TIMES (Apr. 8, 2014) https://www.tampabay.com/opinion/columns/column-science-is-indisputable-marijuana-is-medicine/2174111/ [https://perma.cc/A25P-95ZL]. Indeed, CBD actually moderates the influence of cannabis' psychoactive agents. Thomas A. Duppong, *Industrial Hemp: How the Classification of Industrial Hemp as Marijuana Under the Controlled Substances Act Has Caused the Dream of Growing Industrial Hemp in North Dakota to Go Up in Smoke*, 85 N.D. L. REV. 403, 408 (2009).

41. Andrew L. Scherf, *The Societal and Economic Impacts of Recent Dramatic Shifts in State Marijuana Law: How Should Minnesota Proceed in the Future?*, 36 HAMLINE J. PUB. L. & POL'Y 119, 140 (2015).

shampoos, protein powders, and dog treats.[42] While CBD can now be legally produced (leading to multi-billion dollar market expectations),[43] its treatment under the Controlled Substances Act has fluctuated over the past decade.

Prior to the passage of the 2018 Farm Bill, the DEA viewed all CBD as a Schedule I drug.[44] Despite not eliciting a "high," CBD could not be produced without cultivating the cannabis plant, which is a violation of federal law.[45] This changed with the Farm Bill's recognition that hemp (low delta-9 tetrahydrocannabinol) and its extracts are legal.[46] Given that CBD is plentiful in legal hemp, entrepreneurs could now extract and sell legal CBD from hemp.[47] This does not, however, mean that all CBD and means of producing CBD are legal.

The manner through which the chemical is produced is legally significant. Products derived from Schedule I cannabis (including CBD) remain illegal, because "Marihuana Extract[s]" are expressly held to be Schedule I drugs.[48] In contrast,

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42. Alex Malyshev & Ted McDonough, *The Marketing and Sale of Products Containing Hemp and CBD Over the Internet*, 23 J. INTERNET L. 1, 21 (2019). CBD occurring in cannabis can be extracted as CBD oil. Ryan Marcus, *Medicare, Medicaid, and Medical Marijuana: Why Hospitals Should Not Be High on Patient Certification*, 24 ANNALS HEALTH L. ADVANCE DIRECTIVE 1, 3 (2014); Scherf, *supra* note 41, at 140. This oil can then be put into supplements or food. *See* Letter from Cynthia Schnedar, U.S. Food & Drug Admin., to Natural Organic Solutions (Feb. 26, 2015), https://web.archive.org/web/20190424055638/http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2015/ucm436066.htm [https://perma.cc/JV5Y-DY7W]; *Marijuana Gives Hope to Parents of Brain-Damaged Baby*, ABC 7 (Apr. 5, 2016), http://abc7chicago.com/health/parents-of-brain-damaged-baby-find-hope-in-marijuana/1275367/ [https://perma.cc/QM92-PFFB].

43. Jared West, *Nebraska Nonsense: Trojan Horse or Cash Crop?*, 99 NEB. L. REV. 509, 515–16 (2020) ("In the U.S., some estimate the market for CBD is expected to reach $20 billion in the next five years.").

44. Establishment of a New Drug Code for Marihuana Extract, 81 Fed. Reg. 90194, 90194–96 (Dec. 14, 2016) (CBD extracts "fall within the new drug code 7350," which is a Schedule I drug); 21 CFR § 1308.11 (2016); Press Release, DEA, *DEA Eases Requirements for FDA-Approved Clinical Trials on Cannabidiol* (Dec. 23, 2015), https://www.dea.gov/press-releases/2015/12/23/dea-eases-requirements-fda-approved-clinical-trials-cannabidiol [https://perma.cc/6QPQ-RLKT] ("CBD is a Schedule I controlled substance as defined under the CSA."); *Cannabidiol: Barriers to Research and Potential Medial Benefits: Hearing Before the Caucus on International Narcotics Control*, 114th Cong. (2015) (statement of Joseph T. Rannazzisi, Deputy Assistant Drug Enforcement Administration) (CBD is a Schedule I drug.).

45. There was some argument that CBD could be cultivated from legal hemp stalks. *See* 21 U.S.C. § 802(16) (2012) (exempting stalks from illegal cannabis). However, these assertions were dubious with regard to whether the feat could be accomplished and whether the resultant CBD would be legal. *See* W. Michael Schuster & Jack Wroldsen, *Entrepreneurship and Legal Uncertainty: Unexpected Federal Trademark Registrations for Marijuana Derivatives*, 55 AM. BUS. L.J. 117, 154–56 (2018).

46. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 5018 (2018).

47. *See* GenCanna Glob. USA, Inc. v. Jenco Indus. Sales & Servs., LLC, No. 5:19-387, 2020 WL 94512, at *1 (E.D. Ky. Jan. 8, 2020) (discussing "the business of extracting and distilling legal, non-intoxicating cannabidiol ('CBD') from industrial hemp.").

48. Establishment of a New Drug Code for Marihuana Extract, 81 Fed. Reg. 90194,

products derived from hemp (as described in the Farm Bill) are legal.[49] This conclusion relies on the Farm Bill's statement that hemp and "all derivatives, extracts, cannabinoids, [and] isomers" fall outside the scope of the Controlled Substances Act.[50] CBD's status as contraband or legitimate product is thus path dependent; the manner of production determines the product's legality. This path dependency is likewise important to issues surrounding a more recent entrant into the cannabis market: Δ8-THC.

C. Delta-8 THC

As discussed above, delta-9 tetrahydrocannabinol is the primary psychoactive agent in cannabis.[51] However, a market has arisen for a different chemical found in the cannabis plant: *delta-8* tetrahydrocannabinol (Δ8-THC).[52] This variant has the same chemical formula as the more common delta-9 variety,[53] but one carbon-carbon double bond is located at a different place in its structure.[54] Chemical variation of this nature (called isomerization)[55] can—as discussed below—bear legal and pharmacological significance.[56]

90194–95 (Dec. 14, 2016) ("[A]n extract that contained only CBD . . . would fall within the new drug code 7350."); *Controlled Substances: Alphabetical Order, supra* note 24 (with DEA Number 7350 covering "Marihuana Extract" as a Schedule I drug); *see* Wunderwerks, Inc. v. Dual Beverage Co., No. 21-CV-04980, 2021 WL 5771138, at *3 (N.D. Cal. Dec. 6, 2021) (citing 21 U.S.C. § 812(c)(10) and 21 CFR § 1308.11) ("Marijuana *and derived substances* . . . are designated as Schedule I drugs.") (emphasis added).

49. *In re* Stanley Bros. Soc. Enters., LLC, No. 86568478, 2020 WL 3288093, at *6 (T.T.A.B. June 16, 2020) (CBD derived from hemp "falls outside the CSA"); *Examination Guide 1-19: Examination of Marks for Cannabis and Cannabis-Related Goods and Services After Enactment of the 2018 Farm Bill*, USPTO (May 2, 2019), https://www.uspto.gov/sites/default/files/documents/Exam%20Guide%201-19.pdf [https://perma.cc/Y8N7-D7UM] ("Cannabis and CBD derived from marijuana (i.e., Cannabis sativa L. with more than 0.3% THC on a dry-weight basis) still violate federal law[, but] those "derived from 'hemp' as defined in the 2018 Farm Bill [are legal under the CSA in the eyes of the USPTO.]").

50. 7 U.S.C.A. § 1639o (West).

51. Leas, *supra* note 3; Danovitch, *supra* note 9. There are eighty-five or more active chemicals in cannabis, including Δ9-THC. Cressey, *supra* note 11.

52. Farah, *supra* note 15; *see* Green Trading Co. v. Shy, No. 1:20-CV-01787, 2021 WL 3135944, at *2 (D. Or. June 16, 2021), *report and recommendation adopted*, No. 1:20-CV-01787, 2021 WL 3131309 (D. Or. July 14, 2021) (describing expected sales of Δ8-THC).

53. McWilliams, Goff & Williams, *supra* note 2 ("There are more than 100 cannabinoids in cannabis, of which THC and CBD are only the most well-known.").

54. Leas, *supra* note 3 ("Delta-8-THC is nearly identical in chemical structure to delta-9-THC, differing only by the location of a carbon–carbon double bond."); Farah, *supra* note 15 ("The main difference between Delta-8 and Delta-9 comes down to the location of a specific bond between two of the atoms that make up each THC molecule."); McWilliams, Goff & Williams, *supra* note 2 ("[Delta-8 THC] differs from delta-9 THC by having one difference in placement of a double carbon bond.").

55. Isomers have the same number of the same atoms, but in different arrangements. RALPH H. PETRUCCI, WILLIAM S. HARWOOD & F. GEOFFREY HERRING, GENERAL CHEMISTRY: PRINCIPLES AND MODERN APPLICATIONS 91 (8th ed. 2022).

56. *See* McWilliams, Goff & Williams, *supra* note 2 (discussing non-psychoactive CBD

Similar to delta-9, Δ8-THC produces psychotropic effects (a "high"), but at a reduced level.[57] Users report that Δ8-THC is less likely to cause anxiety or sedation and leaves them more clear-headed relative to common cannabis variants.[58] Perhaps unsurprisingly, Δ8-THC has become a significant industry, as evidenced by recent testimony describing over $12.5 million dollars in damages arising from Δ8-THC losses.[59] Similarly, another firm reported nine-month revenues exceeding $60 million for Δ8-THC vaping products.[60] Despite this success, legal questions surround the drug.

Δ8-THC is expressly named as a Schedule I drug under the Controlled Substances Act.[61] There are, however, strong arguments that the 2018 Farm Bill legalized Δ8-THC derived from legal hemp—just as that statute legalized CBD derived from hemp.[62] Recall the Farm Bill's mandate that "derivatives [and] extracts" from legal hemp are beyond the Controlled Substances Act's reach.[63] Further, while that statute specifically defined legal hemp with regard to its low "delta-9 tetrahydrocannabinol concentration," it placed no limitations on Δ8-THC concentrations.[64] Consistent with this understanding, certain government entities believe that Δ8-THC extracted from hemp is legal.[65]

However, a comprehensive analysis requires recognition that the analogy to CBD produced from hemp may be imperfect. CBD occurs at relatively high concentrations within hemp, and thus, it can be efficiently extracted and concentrated to produce

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and its psychoactive isomer, Δ8-THC); *see also* Gerdeman, *supra* note 40 (stating CBD is not psychoactive); United States v. Wright, 515 F. Supp. 3d 277, 282 (M.D. Pa. 2021) (discussing the importance of isomers with regard to controlled substances).

57. Leas, *supra* note 3; ALISON MACK & JANET JOY, MARIJUANA AS MEDICINE?: THE SCIENCE BEYOND THE CONTROVERSY 99 (2000) ("Delta-8-THC is a less potent variant of delta-9-THC, the primary psychoactive ingredient in marijuana."). *But see* Carolynn Conron, *Canada's Marijuana Medical Access Regulations: Up in Smoke*, 6 ALB. GOV'T L. REV. 259, 295 (2013) ("Unlike Delta-9-THC, Delta-8-THC is *not psychoactive*.") (emphasis added); *see also* MITCH EARLEYWINE, UNDERSTANDING MARIJUANA: A NEW LOOK AT THE SCIENTIFIC EVIDENCE 180 (2002).

58. Farah, *supra* note 15 ("People report [Delta-8] as being less anxiety-provoking, less sedating and a little more clear-headed than THC."). Further, early evidence suggests distinct medical applications compared to delta-9. Leas, *supra* note 3 ("The pharmacological profile of delta-8-THC also suggests it has antiemetic, anxiolytic, appetite-stimulating, analgesic, and neuroprotective properties, indicating that it may have therapeutic applications and that some of these applications may differ from delta-9-THC.").

59. Green Trading Co., 2021 WL 3135944 at *2 (describing turning 274,000 pounds of hemp into 4,566.7 liters of Δ8-THC, with a value of $12,786,666.60).

60. AK Futures LLC, 35 F.4th at 686.

61. *Controlled Substances: Alphabetical Order, supra* note 24.

62. *See supra* notes 4–5 and accompanying text.

63. 7 U.S.C.A. § 1639o (West).

64. *Id.* (showing no mention of Δ8-THC); AK Futures LLC, 35 F.4th at 690 ("[T]he only statutory metric for distinguishing controlled marijuana from legal hemp is the delta-9 THC concentration level.").

65. *See* Letter from Terrence L. Boos, Drug Enf't Amin., to Donna C Yeatman, Ala. Bd. of Pharmacy (Sept. 15, 2021), https://albop.com/oodoardu/2021/10/ALBOP-synthetic-delta8-THC-21-7520-signed.pdf [https://perma.cc/8L95-UCMU].

CBD goods.[66] In contrast, Δ8-THC occurs naturally in hemp, but in much lower amounts.[67] Thus, while it is possible to extract it from the cannabis plant, many commenters assert that it is not currently feasible to extract Δ8-THC in economically viable quantities.[68] In reality, the drug is commonly produced by taking CBD extracted from legal hemp and chemically altering it to create Δ8-THC.[69]

The relevant question thus becomes: does the Controlled Substances Act regulate Δ8-THC that is produced through a chemical reaction starting with CBD extracted from legal hemp? Recalling that the Farm Bill legalized "derivatives [and] extracts" from hemp,[70] the issue is simplified to whether Δ8-THC produced in this manner constitutes hemp "derivatives [or] extracts." A thorough analysis of the DEA's stance on this issue clarifies that this sort of Δ8-THC *is* a derivative of legal hemp and therefore, is legal itself.[71]

In September of 2021, the DEA issued instructions on the interaction of the 2018 Farm Bill, legal hemp, and Δ8-THC.[72] It stated that Δ8-THC "in or derived from the cannabis plant" is not subject to the federal regulation.[73] The use of the phrase "in or derived from" is important. Per basic canons of construction, the choice to use two different terms indicates two different meanings are conveyed.[74]

The term "in" clarifies that Δ8-THC molecules extracted from legal hemp are legal (similar to the extraction of CBD molecules found in hemp). Further, the phrase "derived from the cannabis plant" clarifies that Δ8-THC molecules created from

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66. *See* Britt E. Erickson, *Delta-8-THC Craze Concerns Chemists: Unidentified By-Products and Lack of Regulatory Oversight Spell Trouble for Cannabis Products Synthesized from CBD*, CHEM. & ENG'G NEWS (Aug. 30, 2021), https://cen.acs.org/biological-chemistry/natural-products/Delta-8-THC-craze-concerns/99/i31 [https://perma.cc/MD72-Z935] (describing "an oversupply of CBD extracted from US-grown hemp"); *see also* Hempchain Farms, LLC v. Sack, 516 F. Supp. 3d 197, 201 (N.D.N.Y. 2021) (describing cannabis strains with "high CBD and low THC content").

67. Leas, *supra* note 3; McWilliams, Goff & Williams *supra* note 2 ("Delta-8 THC, as opposed to Delta-9 THC, is a cannabinoid usually found in very trace amounts in cannabis plants.").

68. *See* Erickson, *supra* note 66.

69. Leas, *supra* note 3 ("Because CBD isomers are similar in structure to THC isomers, they can be converted to THC isomers through a relatively simple series of chemical reactions.").

70. 7 U.S.C.A. § 1639o (West).

71. *See* Letter from Terrence L. Boos to Donna C. Yeatman, *supra* note 65.

72. *Id.*

73. *Id.*

74. United States v. Bean, 537 U.S. 71, 76 n.4 (2002) ("The use of different terms within related statutes generally implies that different meanings were intended.") (quoting 2A N. Singer, Sutherland on Statutes and Statutory Construction § 46:06, p. 194 (6th ed. 2000); Conway v. United States, 997 F.3d 1198, 1204 (Fed. Cir. 2021) ("[T]he use of different terms signals the General Assembly's intent to afford those terms different meanings.") (quoting Bd. of City Comm'rs of the Cnty. of Teller v. City of Woodland Park, 333 P.3d 55, 58 (Colo. 2014); Bank of N.Y. v. FDIC., 453 F. Supp. 2d 82, 93–94 (D.D.C. 2006), *aff'd*, 508 F.3d 1 (D.C. Cir. 2007) ("When 'different terms are used in a single piece of legislation, [a] court must presume that Congress intended the terms to have different meanings.'") (quoting Transbrasil S.A. Linhas Aereas v. Dep't. of Transp., 791 F.2d 202, 205 (D.C. Cir. 1986).

cannabis plant base materials (i.e., CBD extracted from hemp) are likewise acceptable. Indeed, this interpretation is further supported by contrasting it with the DEA's contemporaneous position that Δ8-THC "produced synthetically from *non-cannabis materials*" is a Schedule I drug.[75] As used there, the words "non-cannabis materials" would be superfluous, unless the DEA was opining that Δ8-THC produced from cannabis materials is legal. Such a reading would be improper, as courts presume interpretations that render language superfluous to be incorrect.[76]

The courts have reached a similar conclusion. Indeed, one federal litigant specifically argued that Δ8-THC derived from hemp via a "chemical process" was subject to the Controlled Substances Act because it was "synthetically derived," as opposed to non-synthetic Δ8-THC that comes from hemp.[77] The district court rejected this position. That court stated on the record at the preliminary injunction stage that it believed "hemp-derived" Δ8-THC is legal.[78]

The Ninth Circuit affirmed this finding. In doing so, it emphasized that while a chemical process may be used to extract Δ8-THC from hemp, this does not render the Δ8-THC illegal.[79] To support this proposition, it cited the definition of legal hemp, which includes "derivatives [and] extracts" that have a "delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight

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75. *See* Letter from Terrence L. Boos to Donna C. Yeatman, *supra* note 65 (emphasis added). Indeed, the federal government has shown a willingness to pursue criminal charges against those who produce synthetic drugs that mimic the effects of THC and cannabis. *Synthetic Drug Sales Send a Mother and Her Son to Federal Prison*, U.S. DEP'T OF JUST. (Mar. 2, 2015), https://www.justice.gov/usao-ndia/pr/synthetic-drug-sales-send-mother-and-her-son-federal-prison [https://perma.cc/8E66-6LFK] ("A mother and her son who were convicted of selling synthetic cannabinoids . . . from two eastern Iowa businesses were sentenced today in federal court in Cedar Rapids.").

76. Fed. Express Corp. v. U.S. Dep't of Com., 486 F. Supp. 3d 69, 82 (D.D.C. 2020) ("[T]here is an interpretive 'presumption that statutory language is not superfluous.'") (quoting McDonnell v. United States, 579 U.S. 550, 569 (2016)); Star-Glo Assocs. v. United States, 59 Fed. Cl. 724, 730 (2004), *aff'd on other grounds*, 414 F.3d 1349 (Fed. Cir. 2005) ("[T]he court must avoid an interpretation of a clause or word which renders other provisions of the statute inconsistent, meaningless, or superfluous.").

77. Memorandum in Opposition to Motion for Preliminary Injunction at 7–8, AK Futures LLC v. Boyd St. Distro, LLC, No. 8:21-cv-01027, 2021 WL 4860513 (C.D. Cal, Aug. 6, 2021) (No. 24, at 7–8) (citing Interim Final Rule, Aug. 21, 2020) (to be codified at 21 C.F.R. pts. 1308, 1312), https://www.deadiversion.usdoj.gov/fed_regs/rules/2020/fr0821.htm [https://perma.cc/JRE8-NF2H].

78. Minute Order [In Chambers] Amended Order Regarding Motion for Preliminary Injunction, AK Futures LLC v. Boyd St. Distro, LLC, No. 8:21-cv-01027, 2021 WL 4860513: Plaintiff AK Futures LLC ("Futures") moved for a preliminary injunction, ECF No. 29, at 9 (C.D. Cal., Sept. 9, 2021) (citing Notice of Motion and Motion for Preliminary Injunction re per FRCP 65 and for Leave to Immediately Commence Discovery filed by Plaintiff AK Futures LLC, ECF. No. 15, at Exhibit 11 Declaration of James Clelland, ¶¶ 2–3) (stating that "Delta–8 is a hemp-derived product with less than 0.3% of the psychoactive delta-9-tetrahydrocannabinol compound and is permitted to be sold in interstate commerce under the 2018 Farm Bill.").

79. AK Futures LLC, 35 F.4th at 692. This mimics the DEA's position that "Δ8-THC synthetically produced from non-cannabis materials is controlled under the CSA as a "tetrahydrocannabinol." Letter from Terrence L. Boos to Donna C. Yeatman, *supra* note 65.

basis."[80] The Court closed by opining that a contrary opinion was not possible—noting that the statute is "unambiguous and precludes a distinction based on manufacturing method."[81]

While the DEA and the Ninth Circuit have stated their positions regarding Δ8-THC, other federal agencies take a different view on the drug's legality.[82] Further complicating the legal uncertainty in the cannabis and Δ8-THC market is the constant state of flux surrounding its regulation.[83] A common source of this uncertainty and variation is state-level cannabis laws and their interaction with federal statutes.

D. State Regulation

To this point, we have exclusively addressed federal law and cannabis. However, significant state regulation has occurred in parallel with national mandates. The recent trend at the state level is toward cannabis deregulation.[84] Moves of this nature include medical use regimes,[85] decriminalization,[86] and legalization.[87] Indeed, since California approved cannabis for medical use in 1996,[88] over thirty-five states have introduced a medical-use system, and a number of those allow for recreational use as well.[89] This movement is consistent with evolving public opinion. Support for

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80. 7 U.S.C. § 1639o(1); AK Futures LLC, 35 F.4th at 692.

81. AK Futures LLC, 35 F.4th at 692.

82. *See, e.g.,* U.S. Trademark Application Serial No. 90,036,541, Office Action (dated Oct. 21, 2021) (USPTO trademark examiner stating that Δ8-THC is illegal); U.S. Trademark Application Serial No. 90,289,354, Office Action (dated Oct. 18, 2021) (same); U.S. Trademark Application Serial No. 90,251,954, Office Action (dated Aug. 4, 2021) (same); U.S. Trademark Application Serial No. 90,160,477, Office Action (dated Aug. 4, 2021) (same).

83. Mike Schuster & Robert Bird, *Legal Strategy During Legal Uncertainty: The Case of Cannabis Regulation*, 26 STAN. J.L. BUS. & FIN. 362, 371–78 (2021) (describing different types of uncertainty in the cannabis industry).

84. Lauren Males, *Current Trends in Marijuana Regulation*, 6 HOUS. L. REV. 185 (2016); John T. Holden, Christopher M. Mcleod & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. 113, 116 n.16 (2020) ("[S]tates and the federal government remain at odds over the sale of both medical and recreational marijuana.").

85. Some evidence exists supporting cannabis as a treatment for "nausea and vomiting, anorexia and wasting, neuropathic pain and muscle spasticity." Danovitch, *supra* note 9, at 94.

86. *See, e.g.*, German Lopez, *North Dakota Quietly Decriminalized Marijuana*, VOX (May 10, 2019), https://www.vox.com/policy-and-politics/2019/5/10/18563776/north-dakota-marijuana-decriminalization-legalization [https://perma.cc/QWZ9-QH8V].

87. *See, e.g.*, Love v. Pa. Bd. of Prob. & Parole, No. 149 C.D. 2015, 2015 WL 8145191, at *3 n.12 (Pa. Commw. Ct. Dec. 3, 2015); Males, *supra* note 84, at 186.

88. CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

89. *State Medical Cannabis Laws*, NAT'L CONF. STATE LEGISLATURES (Sept. 12, 2022), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx [https://perma.cc/74TZ-35JA] ("As of February 2, 2022, 37 states and three territories allow for the medical use of cannabis products . . . As of May 27, 2022, 19 states, two territories and the District of Columbia have enacted measures to regulate cannabis for adult non medical use."); *In re Hinton*, No. 8566301 (T.T.A.B. Sept. 28, 2015); United States v. French, No. 1:12-cr-00160,

cannabis legalization was just above 10% in 1970.[90] Approximately fifty years later, over 90% of the population believe that cannabis should be legal in some form (medical or recreational).[91]

Despite these moves toward relaxation of cannabis regulation within the states, the drug remains (in large part)[92] illegal at the federal level.[93] Neither state legislatures nor state referendums have the capacity to change this.[94] Indeed, the President retains a significant amount of discretion regarding whether the federal government will enforce its cannabis prohibitions (e.g., the Controlled Substances Act) in states where it is legal.[95] As an example, one can compare President Obama's largely hands-off approach to cannabis enforcement in states with their own cannabis

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2015 WL 1925592, at *2 (D. Me. Apr. 28, 2015); Raich v. Gonzales, 500 F.3d 850, 865 (9th Cir. 2007). Many jurisdictions have decriminalized cannabis to some extent. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 94C, § 32L (West 2017); *State v. Gradt*, 366 P.3d 462 (Wash. Ct. App. 2016). "[In] January 2014, Colorado became the first state to legalize recreational marijuana." Kathryn Kisska-Schulze & Adam Epstein, *"Show Me the Money!"– Analyzing the Potential State Tax Implications of Paying Student-Athletes*, 14 VA. SPORTS & ENT. L.J. 13, 28 (2014).

90. Patrick A. Tighe, Note, *Underbanked: Cooperative Banking as a Potential Solution to the Marijuana-Banking Problem*, 114 MICH. L. REV. 803, 806 (2016); Marc Fisher & Richard Johnson, *A Brief History of Public Opinion on Marijuana Legalization*, WASH. POST (Feb. 21, 2014), http://www.washingtonpost.com/local/a-brief-history-of-public-opinion-on-marijuana-legalization/2014/02/21/77c04e40-9b4a-11e3-975d-107dfef7b668_graphic.html [https://perma.cc/SG83-SDSE].

91. Ted Van Green, *Americans Overwhelmingly Say Marijuana Should Be Legal for Recreational or Medical Use*, PEW RSCH. CTR. (Apr. 16, 2021), https://www.pewresearch.org/fact-tank/2021/04/16/americans-overwhelmingly-say-marijuana-should-be-legal-for-recreational-or-medical-use/ [https://perma.cc/5TMH-3DJG] ("[A]n overwhelming share of U.S. adults (91%) say either that marijuana should be legal for medical *and* recreational use (60%) or that it should be legal for medical use only (31%). Fewer than one-in-ten (8%) say marijuana should not be legal for use by adults.").

92. *See supra* text accompanying Sections 0.0–0.

93. United States v. Filippi, 622 F. App'x 25, 26 (2d Cir. 2015).

94. *See, e.g.*, Sacramento Nonprofit Collective v. Holder, 552 F. App'x 680, 682–83 (9th Cir. 2014).

95. Barack Obama, President of the United States, Remarks by the President in a Youth Town Hall, at *11 (Oct. 14, 2010) (2010 WL 4019651). The Obama administration would still actively enforce these laws to achieve goals such as preventing children from accessing the drug and hindering organized crime. Memorandum from James M. Cole, Deputy Att'y Gen. to all U.S. Att'ys (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf [https://perma.cc/E8QM-AJ9R]. Of course, these policies did not change the Schedule I nature of the drug. *In re* JJ206, LLC, 120 U.S.P.Q.2d (BNA) 1568, 1570 (T.T.A.B. 2016). It is notably possible for Congress to withhold funds for cannabis enforcement in certain situations, which would preclude enforcement by the federal executive. *See* Tom Angell, *Congress Votes to Block Feds from Enforcing Marijuana Laws in Legal States*, FORBES (June 20, 2019), https://www.forbes.com/sites/tomangell/2019/06/20/congress-votes-to-block-feds-from-enforcing-marijuana-laws-in-legal-states/?sh=3e7e9bae4b62 [https://perma.cc/X86Q-X6BA].

regulations[96] with President G.W. Bush's strong enforcement policies.[97] Accordingly, while the federal executive has the power to enforce federal regulation in states where it is legal, it is uncertain exactly if and when it will do so.

The federal Congress has, however, recognized the states' ability to diverge from federal policy in limited circumstances. The (federal) 2018 Farm Bill specifically stated that "no preemption" was intended with regard to the states' ability to further regulate industrial hemp.[98] In such a regulatory environment, states have the ability to criminalize hemp and it derivatives, even if it is legal at the federal level.[99] Consistent with this power, North Dakota has expressly banned chemical alteration of compounds found in cannabis "to create isomers of [THC], including delta-8, delta-9, and delta-10."[100] At present, at least eighteen states have restricted Δ8-THC in some manner.[101]

This patchwork set of state regulations has only increased questions about the legality of Δ8-THC[102] (and cannabis generally).[103] As explored in prior scholarship, uncertainty of this nature can present value to certain businesspeople.[104] This Article addresses this theme as it applies to the Δ8-THC space in Part III, but first, the stage must be set with a discussion of our second relevant area of the law: trademarks.

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96. *See* Kevin J. Fandl, *Presidential Power to Protect Dreamers: Abusive or Proper?*, 36 YALE L. & POL'Y REV. INTER ALIA 1, 10 (2018).

97. *See* Bradley E. Markano, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, 90 N.Y.U. L. REV. 289, 316–17 (2015).

98. 7 U.S.C.A. § 1639p ("Nothing in this subsection preempts or limits any law of a State or Indian tribe that-- (i) regulates the production of hemp; and (ii) is more stringent than this subchapter.").

99. *Farm Bill to Allow States, Tribes to Regulate Hemp Production*, *in* 47 CONTROLLED SUBSTANCES HANDBOOK NEWSL. 8 (2019) ("Each state has controlled substance laws, which are not preempted by the CSA, and the current legislation would allow them to develop hemp production requirements more stringent than those set out in the bill."); *see also supra* notes 49–50, 65–73 and accompanying text.

100. N.D. CENT. CODE ANN. § 4.1–18.1 (West 2021); *see also* LA. STAT. ANN. § 3:1482 (2021) (prohibiting the sale of "[a]ny consumable hemp product without a license or permit.").

101. Alex Malyshev & Sarah Ganley, *Controlling Cannabis and the Classification of Delta-8 THC*, REUTERS (Sept. 22, 2021), https://www.reuters.com/legal/litigation/controlling-cannabis-classification-delta-8-thc-2021-09-22/ [https://perma.cc/7SDK-A4GX] ("As of August 2021, at least 18 states have restricted or banned Delta-8 THC in some way, including: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Idaho, Iowa, Michigan, Mississippi, Montana, New York, North Dakota, Rhode Island, Utah, Vermont, and Washington.").

102. *See, e.g.*, Sanford Nowlin, *Delta-8 Retailers and Users Struggle Through an Uncertain Regulatory Environment*, SAN ANTONIO CURRENT (Oct. 21, 2021), https://www.sacurrent.com/sanantonio/delta-8-retailers-and-users-struggle-through-an-uncertain-regulatory-environment/Content?oid=27375311 [https://perma.cc/QXQ6-453Q] ("[L]egal experts warn that [Δ8-THC] isn't so much legal in Texas as it is operating in an uncertain and unregulated space.").

103. Schuster & Bird, *supra* note 83, at 371–78 (discussing the uncertainty surrounding cannabis regulation).

104. Schuster & Wroldsen, *supra* note 45, at 118.

E. Trademark Law

The trademark system is intended to prevent multiple parties from using trademarks that are likely to cause consumer confusion.[105] Relevant considerations when analyzing the potential for confusion include the type of products or services being sold, the geographic scope of use, and the marks' similarity.[106] Through this regime, consumers should be able to efficiently distinguish what company provides which product when making purchasing decisions.[107] The ability to differentiate a firm's goods from those of its competitors encourages the creation of high-quality wares, under the theory that this investment will ultimately increase sales.[108] Indeed, in some industries, a firm's trademark may be its most important asset.[109]

1. Federal Protection

Rights in a trademark are created through use in commerce.[110] Once a firm establishes rights by using the mark to identify the firm, it can seek federal registration with the USPTO.[111] While not necessary to own a trademark, federal registration provides significant benefits to registrants beyond those available to non-registrants.[112] In important part for the current discussion, federal registration creates nationwide constructive use of the mark.[113] This allows the owner to prevent subsequent adoption of a confusingly similar mark anywhere in the United States, regardless of the actual geographical scope of use.[114] Other firms that were

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105. Lois Sportswear, USA, Inc. v. Levi Strauss & Co., 799 F.2d 867, 871 (2d Cir. 1986)

106. Wiener King, Inc. v. Wiener King Corp., 407 F. Supp. 1274, 1280 (D.N.J. 1976), *rev'd on other grounds*, 546 F.2d 421 (3d Cir. 1976); J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:108 (4th ed. 2017).

107. MCCARTHY, *supra* note 106, § 2:1; MARGRETH BARRETT, INTELLECTUAL PROPERTY: CASES AND MATERIALS 702 (4th ed. 2011); CRAIG ALLEN NARD, MICHAEL J. MADISON & MARK P. MCKENNA, THE LAW OF INTELLECTUAL PROPERTY 867–68 (4th ed. 2014).

108. *In re* Int'l Flavors & Fragrances, Inc., 183 F.3d 1361, 1367 (Fed. Cir. 1999); MCCARTHY, *supra* note 106, § 2:4; BARRETT, *supra* note 107, at 702.

109. Kieran G. Doyle, *Trademark Strategies for Emerging Marijuana Businesses*, 21 WESTLAW J. OF INTELL. PROP. 1,2 (2014).

110. 15 U.S.C. § 1125 (2012).

111. *Id.* Applicants must show use in commerce or, for intent to use applicants, they must show a bona fide intent to use in the future. 15 U.S.C. § 1051 (2021).

112. *See, e.g.*, 15 U.S.C. § 1057(b) (presumption of validity); *id.* § 1065 (incontestability); *id.* § 1117; *id.* § 1121; B & B Hardware, Inc. v. Hargis Indus., 575 U.S. 138, 142 (2015) ("Registration is significant. The Lanham Act confers 'important legal rights and benefits' on trademark owners who register their marks.") (citation omitted); *In re* Brunetti, 877 F.3d 1330, 1344 (Fed. Cir. 2017), *aff'd sub nom*. Iancu v. Brunetti, 139 S. Ct. 2294 (2019) (describing benefits).

113. 15 U.S.C. § 1057(c) (2012).

114. *In re* Beatrice Foods Co., 429 F.2d 466, 472 (C.C.P.A. 1970); Davidoff Extension S.A. v. Davidoff Comercio E Industria Ltda., 747 F. Supp. 122, 128 (D.P.R. 1990); MCCARTHY, *supra* note 106, § 23:109; NARD, MADISON & MCKENNA, *supra* note 107, at 980. There are some limitations associated with this rule. *See* NARD, MADISON & MCKENNA, *supra* note 107, at 980 (discussing certain "restrictions" on nationwide constructive use).

previously using the mark can continue but may be limited in their ability to expand where they use the mark.[115]

To secure registration, an application must satisfy a series of technical requirements, including not being confusingly similar to an existing mark.[116] Should the trademark examiner identify a ground for refusal, this information will be communicated to the applicant in a written "office action" to which responsive arguments or amendments can be made.[117] If the examiner identifies no issues or if all problems are corrected, the application will be published for public review.[118] Assuming no third party successfully establishes that registration is improper,[119] the mark will be registered with the USPTO.[120]

One requirement for registration is particularly relevant with regard to Δ8-THC and cannabis trademarks: the applicant must show that it is using the mark in *legal* commerce.[121] More specifically, the use must be consistent with *federal* law.[122] This rule was established to avoid an "anomalous" position where one branch of the federal government (e.g., the DEA) prohibits an act while the Trademark Office is simultaneously granting protection for marks associated with the prohibited behavior.[123] The legal-use requirement is unimportant for most applicants, but as fully discussed later, it can prove a significant hurdle for cannabis-related marks.[124]

2. State Protection

Federal trademark law exists in parallel with state-level systems[125] with both providing a similar set of rights.[126] State protections can be created through common

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115. Allard Enters., Inc. v. Advanced Programming Res., Inc., 249 F.3d 564, 572 (6th Cir. 2001); MCCARTHY, *supra* note 106, § 16:18; NARD, MADISON & MCKENNA , *supra* note 107, at 980.

116. 15 U.S.C. § 1051–52 (2012); MCCARTHY, *supra* note 106, § 19:10; NARD, MADISON & MCKENNA, *supra* note 107, at 1011.

117. TMEP § 1109.16(b).

118. 15 U.S.C. § 1062; 37 C.F.R. § 2.80 (2015).

119. 37 C.F.R. § 2.101 (2016).

120. 15 U.S.C. § 1051(d)(1) (2012). An intent to use application must establish use before registration will occur. NARD, MADISON & MCKENNA, *supra* note 107, at 1011–12.

121. The Clorox Co. v. Armour-Dial, Inc., 214 U.S.P.Q. 850, 851 (T.T.A.B. 1982); Dessert Beauty, Inc. v. Fox, 617 F. Supp. 2d 185, 189 (S.D.N.Y. 2007), *aff'd,* 329 F. App'x 333 (2d Cir. 2009); 15 U.S.C. § 1051–2; MCCARTHY, *supra* note 106, § 16:18; NARD, MADISON & MCKENNA, *supra* note 107, at 1011. A party that has a bona fide intent to begin using the mark in the future may also submit a trademark application. *Id.* at 1011–12.

122. TMEP § 907 ("[Examiners] must inquire about compliance with *federal laws* or refuse registration based on the absence of lawful use in commerce.") (emphasis added).

123. CreAgri, Inc. v. USANA Health Scis., Inc., 474 F.3d 626, 630 (9th Cir. 2007). As a second policy matter, the legal use requirement encourages parties to consider relevant law before rushing to begin use in commerce. *Id.*

124. *See infra* Part 0.

125. MCCARTHY, *supra* note 106, §§ 16:18.50 n.1, 26.2; NARD, MADISON & MCKENNA, *supra* note 107, at 867.

126. Value House v. Phillips Mercantile Co., 523 F.2d 424, 429 (10th Cir. 1975); GTE Corp. v. Williams, 649 F. Supp. 164, 168 (D. Utah 1986), *aff'd,* 904 F.2d 536 (10th Cir. 1990)

law, statute, or both, depending on the jurisdiction.[127] Recognizing the existence of this bifurcated system, a brief discussion of the state-level trademark system is warranted to show why it is not an equal substitute for federal registration of Δ8-THC marks.

Just like the federal regime, state rights accrue once a mark is used in commerce,[128] though the geographic scope of these rights varies. Common law state trademark rights extend protection within the area that the mark is currently being used[129] or into the region where the use will naturally expand.[130] Many state statutory registration systems provide statewide rights,[131] though this breadth of protection is not uniform.[132] Regardless of the state system, rights only accrue once a trademark owner actually uses a mark in commerce in that state, and these laws will not create rights outside of the jurisdiction.[133]

While federal registration will not supersede state-level rights established through prior use,[134] the geographic disparities are significant. Federal registration creates rights in a trademark across the entire nation, except in areas where another has already used the mark in commerce in a similar manner.[135] Further, once a mark is registered at the federal level, any prior state rights usually become frozen within the actual scope of current geographic use.[136] Thus, while state systems create some rights, they can only provide nationwide protection after the firm engages in

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(footnote and citations omitted).

127. Emerald City Mgmt., LLC v. Kahn, No. 4:14cv358, 2014 WL 3835826, at *3 (E.D. Tex. June 19, 2014), *report and recommendation adopted,* No. 4:14-cv-358, 2014 WL 3809660 (E.D. Tex. Aug. 1, 2014), *aff'd,* 624 F. App'x 223 (5th Cir. 2015); S & S Invs., Inc. v. Hooper Enterps., 862 P.2d 1252, 1254–55 (Ct. App. 1993); GTE Corp. v. Williams, 649 F. Supp. 164, 168 (D. Utah 1986), *aff'd,* 904 F.2d 536 (10th Cir. 1990).

128. Steven J. Eisen & Anne J. Cheatham, *Trademark and Marketing Issues for Financial Institutions*, 60 CONSUMER FIN. L.Q. REP. 194, 198–99 (2006).

129. NARD, MADISON & MCKENNA., *supra* note 107, at 980.

130. Popular Bank of Fla v. Banco Popular de Puerto Rico, 9 F. Supp. 2d 1347, 1355 (S.D. Fla. 1998); Stat Ltd. v. Beard Head, Inc., 60 F. Supp. 3d 634, 639 (E.D. Va. 2014). The area of normal expansion depends on the "size and rate of previous expansion, business activity, advertising, and geographic proximity; accordingly, mere hope of expansion is insufficient to establish such a zone." Dan L. Burk, *Trademark Doctrines for Global Electronic Commerce*, 49 S.C. L. REV. 695, 707 (1998); Blue Ribbon Feed Co. v. Farmers Union Cent. Exch., 731 F.2d 415, 422 (7th Cir. 1984).

131. Lee Ann W. Lockridge, *Abolishing State Trademark Registrations*, 29 CARDOZO ARTS & ENT. L.J. 597, 619–20 (2011); *see, e.g.,* MASS. GEN. LAWS ANN. ch. 110H, § 5(b) (West 2017); TEX. BUS. & COM. CODE ANN. § 16.15(b) (West 2017); Optimal Pets, Inc. v. Nutri-Vet, LLC, 877 F. Supp. 2d 953, 958 (C.D. Cal. 2012).

132. Thrifty Rent-A-Car Sys., Inc. v. Thrift Cars, Inc., 639 F. Supp. 750, 756 (D. Mass. 1986), *aff'd,* 831 F.2d 1177 (1st Cir. 1987).

133. Eisen & Cheatham, *supra* note 128, at 198–99.

134. Dorpan, S.L. v. Hotel Meliá, Inc., 728 F.3d 55, 62 (1st Cir. 2013).

135. Allard Enterps., Inc. v. Advanced Programming Res., Inc., 249 F.3d 564, 572 (6th Cir. 2001).

136. Tana v. Dantanna's, 611 F.3d 767, 780 (11th Cir. 2010); Allard Enterps., Inc., 249 F.3d at 572; *but see* Burk, *supra* note 130*,* at 709 (stating it is feasible "for a prior user that files a tardy concurrent use application to preserve his common-law area of actual usage and zone of natural expansion.").

commerce in all fifty states and navigates each jurisdiction's legal system. Unsurprisingly, firms prefer federal registration when it is available.[137] This will be a theme underlying the following discussions about trademark protection and Δ8-THC.

II. THE USPTO AND CANNABIS-RELATED TRADEMARK APPLICATIONS

The USPTO generally refuses to register cannabis-related trademarks.[138] This is unsurprising, given its classification as a Schedule I drug under federal law.[139] The Trademark Office did, however, reevaluate this stance with regard to CBD marks beginning around 2013.[140] The first Section below describes the evolving approaches to CBD applications, followed by a comparison to the current treatment of Δ8-THC-related marks. Several issues with the current approach are raised, including strong arguments regarding why this refusal appears to be both legally incorrect and inconsistent with USPTO policy.

A. CBD Trademarks

While the Trademark Office has consistently refused registration for marijuana goods,[141] its treatment of cannabis derivatives has historically been less predictable.[142] On this point, CBD-related trademarks are instructive. As previously discussed in Section I.0, CBD derived from hemp has been considered legal under the Controlled Substances Act since the passage of the 2018 Farm Bill.[143] Based on this, CBD marks can now usually be registered.[144] This was not always the case.

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137. Patricia Kimball Fletcher, *Joint Registration of Trademarks and the Economic Value of a Trademark System*, 36 U. MIAMI L. REV. 297, 298 n.7 (1982); Cynthia E. Kernick, *Protecting Your Intellectual Property: An Introduction*, 53 PRAC. L. 49, 50 (2007) ("[F]ederal [trademark] protection is generally preferable.").

138. *In re* JJ206, LLC, 120 U.S.P.Q.2d (BNA) 1568, 1570 (T.T.A.B. 2016); *In re* Morgan Brown, 119 U.S.P.Q.2d (BNA) 1350, 1351 (T.T.A.B. 2016); BBK Tobacco & Foods LLP v. Skunk Inc., No. CV-18-02332, 2020 WL 1285837, at *3 (D. Ariz. Mar. 18, 2020).

139. *Controlled Substances: Alphabetical* Order*, supra* note 24; *Examination Guide 1-19: Examination of Marks for Cannabis and Cannabis-Related Goods and Services after Enactment of the 2018 Farm Bill*, *supra* note 49 ("[T]he USPTO will continue to refuse registration when the identified services in an application involve cannabis that meets the definition of marijuana and encompass activities prohibited under the CSA because such services still violate federal law.").

140. The first CBD-related mark identified by the author was U.S. Trademark Application Serial No. 86,099,419 (filed Oct. 23, 2013).

141. *In re* JJ206, LLC, 120 U.S.P.Q.2d (BNA) at *2; *In re* Morgan Brown, 119 U.S.P.Q.2d (BNA) at *1–2; BBK Tobacco & Foods LLP, 2020 WL 1285837, at *3.

142. Schuster & Wroldsen, *supra* note 45, at 118 (discussing historical uncertainty regarding trademark registrations for CBD-related goods).

143. *Examination Guide 1-19: Examination of Marks for Cannabis and Cannabis-Related Goods and Services After Enactment of the 2018 Farm Bill*, *supra* note 49.

144. Some CBD marks and some Δ8-THC marks will face issues with Food, Drug and Cosmetic Act and legal use in commerce. *See* U.S. Trademark Application Serial No. 90,160,477, Office Action (dated Aug. 4, 2021) (Under the FDCA, "[i]t is unlawful to

Prior to the 2018 Farm Bill, the DEA expressly stated that CBD was a Schedule I drug.[145] However, despite the DEA's position, some trademark examiners (circa 2016) ignored any Controlled Substances Act issues during the examination of CBD-related applications despite their obligation to address all grounds for rejection.[146] For example, one application for dietary supplements "containing hemp and CBD" was registered in 2016 without any mention of CBD-related issues.[147] Several others received similar treatment.[148]

Another approach taken by trademark examiners before the 2018 Farm Bill was to ask whether the CBD was derived from "industrial hemp"[149] or "imported industrial hemp."[150] Several CBD marks were registered after applicants averred that

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introduce food to which CBD, an article that is approved as a new drug, has been added into interstate commerce or to market CBD as, or in, dietary supplements, regardless of whether the substances are hemp-derived.") (internal quotation marks omitted). However, this issue is beyond the scope of the current research.

145. 81 Fed. Reg. 90194–96 (Dec. 14, 2016). The DEA stated asserted that CBD was a Schedule I drug prior to this, though the 2016 statement was the first time it was promulgated in the Federal Register. *See, e.g.*, Press Release, DEA, *DEA Eases Requirements for FDA-Approved Clinical Trials on Cannabidiol*, (Dec. 23, 2015), https://www.dea.gov/press-releases/2015/12/23/dea-eases-requirements-fda-approved-clinical-trials-cannabidiol [https://perma.cc/NK65-3PTX] ("CBD is a Schedule I controlled substance as defined under the CSA."); *Cannabidiol: Barriers to Research and Potential Medial Benefits: Hearing Before the Caucus on International Narcotics Control*, 114th Cong. (2015) (statement of Joseph T. Rannazzisi, Deputy Assistant Drug Enforcement Administration) (CBD is a Schedule I drug).

146. TMEP § 704.01 ("The examining attorney's first Office action must be complete, so the applicant will be advised of all requirements for amendment and all grounds for refusal."); 37 C.F.R. § 2.61(a) (2021).

147. U.S. Trademark Application Serial No. 86,512,991 (filed Jan. 23, 2015).

148. *See* U.S. Trademark Application Serial No. 86,591,721 (filed Apr. 9, 2015) (allowed on Sept. 15, 2015 without any mention of CBD, the CSA, or lawful use); U.S. Trademark Application Serial No. 86,532,277 (filed Feb. 11, 2015) (allowed on Sept. 22, 2015 without any mention of CBD, the CSA, and lawful use); U.S. Trademark Application Serial No. 86,529,465 (filed Feb. 09, 2015) (allowed on Sept. 15, 2015 without any mention of CBD, the CSA, and lawful use); U.S. Trademark Application Serial No. 86,686,604 (filed July 8, 2015) (allowed on Jan. 19, 2016, though subsequently abandoned); U.S. Trademark Application Serial No. 86,455,188 (filed Nov. 14, 2014) (registered on July 5, 2016 with no prosecution).

149. U.S. Trademark Application Serial No. 86,288,363 (filed May 21, 2014), Office Action (dated June 26, 2014); *see also* U.S. Trademark Application Serial No. 86,200,648, Office Action (dated Apr. 3, 2014) ("Is the CBD contained in applicant's goods derived from hemp or marijuana?"), U.S. Registration Certificate (dated May 26, 2015); U.S. Trademark Application Serial No. 86,130,668, Office Action (dated Apr. 3, 2014), Registration Certificate (dated Oct. 14, 2014); U.S. Trademark Application Serial No. 86,402,862, Office Action (dated Oct. 27, 2014), Registration Certificate (dated July 7, 2015).

150. *See, e.g.*, U.S. Trademark Application Serial No. 86,534,748, Examiner's Amendment/Priority Action (dated May 14, 2015); *see also* U.S. Trademark Application Serial No. 86,534,748, Office Action Response (dated June 2, 2015), Examiner's Amendment/Priority Action (dated May 14, 2015), Notice of Allowance (dated Sept. 15, 2015); U.S. Trademark Application Serial No. 86,538,367, Examiner's Amendment/Priority Action (dated June 3, 2015), Office Action Response (dated July 27, 2015), Notice of

their goods were from this sort of hemp—despite the statements being irrelevant to the applicable legal standards.[151] This sort of uncertainty was common at that time for CBD applications. Eventually, the Trademark Office changed course by refusing all CBD-related applications after further guidance from the DEA was issued.[152]

This was the situation until passage of the 2018 Farm Bill. After that enactment, the Trademark Office began registering CBD-related marks if the drug was derived from legal hemp.[153] Restated, the Trademark Office is willing to register a Schedule I drug (CBD),[154] so long as it falls within the definition of legal hemp from the Farm Bill. This point will prove important with regard to consistency in examining Δ8-THC applications. Indeed, several themes arising from CBD-mark examination are also present for Δ8-THC marks.

B. Treatment of Δ8-THC Trademark Applications

The current analysis of the interaction of Δ8-THC marks and the federal trademark laws begins with a December 31, 2021, Freedom of Information Act (FOIA) request to the USPTO.[155] It requested all communications "to trademark examiners instructing them on how to examine trademark applications associated

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Allowance (dated Nov. 10, 2015).

151. Schuster & Wroldsen, *supra* note 45, at 150–56 (describing why these distinctions are legally unimportant).

152. U.S. Trademark Application Serial No. 86,982,881, Office Action (dated Aug. 23, 2017). The communication stated:

> The Drug Enforcement Administration has recently changed Schedule 1 of the CSA to include a new drug code, 7350, for marijuana extract. This definition has been interpreted to include the cannabinoid CBD. . . . Since applicant is selling its smokeless vaporizer pipes for the purpose of consuming the CBD liquids, the goods are unlawful drug paraphernalia under the CSA which is defined to include any device or equipment designed for use or primarily intended for use in connection with the ingestion of an unlawful controlled substance.

Id.; 81 Fed. Reg. 90,194–96 (Dec. 14, 2016) (to be codified at 21 C.F.R. Part 1308); 21 C.F.R. § 1308.11 (2016).

153. *Examination Guide 1-19: Examination of Marks for Cannabis and Cannabis-Related Goods and Services After Enactment of the 2018 Farm Bill*, *supra* note 49. Note that federal courts likewise enforce the hemp/marijuana distinction for federal trademark purposes. Wunderwerks, Inc., 2021 WL 5771138, at *4.

154. 81 Fed. Reg. 90, 194–96 (Dec. 14, 2016) (to be codified at 21 C.F.R. Part 1308) (stating that CBD extracts "fall within the new drug code 7350[,]" which is a Schedule I drug.); 21 C.F.R. § 1308.11 (2016).

155. E-mail from Mike Schuster, Assistant Professor, Univ. of Ga., to Custodian of Records, U.S. Patent & Trademark Office (Dec. 31, 2021, 11:22 AM) (on file with author). In full, the request sought: "Any communications, promulgations, emails, instructions, or other correspondence sent to trademark examiners instructing them on how to examine trademark applications associated with delta-8-tetrahydrocannabinol-related goods or services dated December 31, 2019 or later." *Id.*

with delta-8-tetrahydrocannabinol-related goods."[156] The USPTO's responsive documents indicated that a "Delta-8 [Controlled Substances Act] refusal form paragraph" was drafted in mid-2021.[157] Indeed, this form refusal seems to have been largely adopted.[158] As discussed below, many rejections contained similar language and reached similar results. This standardized approach stands in stark contrast to the varied responses to early CBD-related applications, though commonalities are also found.

To further review the treatment of Δ8-THC applications, the USPTO's Trademark Electronic Search System was consulted for relevant submissions. Specifically, all fields searched for were "delta-8," "delta 8," or "delta8." Review of these applications make several themes clear. As an initial point, the Trademark Office again diverges from the DEA's stance on drug legality. With regard to CBD marks, the USPTO was willing to register marks (implying a belief that CBD was legal)[159] during a period that the DEA stated that CBD was illegal.[160] In contrast, with regard to Δ8-THC, the Trademark Office takes the position that the drug is illegal,[161] despite the DEA's stated opinion to the contrary.[162]

Looking to why the Trademark Office rejects Δ8-THC applications, some examiners simply state that "Delta-8 THC is . . . a Schedule I drug," which therefore cannot be used in legal commerce.[163] This is a proper statement regarding the Controlled Substances Act,[164] but it is an incomplete analysis. As discussed in

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156. The FOIA request was identified as request number F-22-00057 by the USPTO. E-mail from Karon Seldon, USPTO, to Mike Schuster, Assistant Professor, Univ. of Ga. (Feb. 9, 2022, 12:22 PM) (on file with author).

157. E-mails in disclosure accompanying E-mail from Karon Seldon, USPTO, to Mike Schuster, Assistant Professor, Univ. of Ga. (Feb. 9, 2022, 12:22 PM), dated 21 July 2021, 14:24:53 (entitled: "Delta-8 Form Paragraph") and dated 21 June 2021, 10:47:34 (entitled: "Delta-8 RFI Form Paragraph").

158. Redactions in the documents turned over for the FOIA request were redacted significantly, especially with regard to internal deliberations. Thus, the actual substance of the form rejection was not apparent. Rather, the disclosures merely made it apparent that a form rejection was contemplated and apparently put into place.

159. U.S. Trademark Application Serial No. 86,686,604 (filed July 8, 2015) (allowed on Jan. 19, 2016, though subsequently abandoned); U.S. Trademark Application Serial No. 86,455,188 (filed Nov. 14, 2014, 86455188) (registered on July 5, 2016, with no prosecution).

160. *See, e.g.*, *DEA Eases Requirements for FDA-Approved Clinical Trials on Cannabidiol*, *supra* note 145 ("CBD is a Schedule I controlled substance as defined under the CSA."); *Cannabidiol: Barriers to Research and Potential Medial Benefits: Hearing Before the Caucus on International Narcotics Control*, 114th Cong. (2015) (statement of Joseph T. Rannazzisi, Deputy Assistant Drug Enforcement Administration). (CBD is a Schedule I drug).

161. *See, e.g.*, U.S. Trademark Application Serial No. 90,036,541, Office Action (dated Oct. 21, 2020); U.S. Trademark Application Serial No. 90,289,354, Office Action (dated Oct. 18, 2021); U.S. Trademark Application Serial No. 90,251,954, Office Action (dated Aug. 4, 2021); U.S. Trademark Application Serial No. 90,160,477, Office Action (dated Aug. 4, 2021).

162. *See* Letter from Terrence L. Boos to Donna C. Yeatman, *supra* note 65; *see also supra* notes 61–76 and accompanying text (analyzing the DEA's opinion letter).

163. U.S. Trademark Application Serial No. 90,284,195, Office Action (dated July 23, 2021).

164. *Controlled Substances: Alphabetical* Order*, supra* note 24 (listing "THC, *Delta-8*

Section 0.0, there are significant arguments (accepted by both the DEA[165] and federal courts)[166] that Δ8-THC derived from hemp is legal, as per the 2018 Farm Bill.[167]

On that point, some examiners have addressed the interaction between Δ8-THC, legal hemp, and the Farm Bill. Several office actions recognize that hemp and its derivatives are legal, but then assert that this limitation "does not convert Schedule I unlawful goods (e.g., delta-8 THC)" into legal goods.[168] This approach is curious, given the Trademark Office's simultaneous willingness to register Schedule I CBD-related marks[169] if the drug is derived from hemp.[170] There is an apparent contradiction in asserting that the 2018 Farm Bill can convert Schedule I CBD into a legal drug if derived from hemp, but it cannot convert Schedule I Δ8-THC into a

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THC, Delta-9 THC, dronabinol and others" as Schedule I drugs) (emphasis added).

165. *See* Letter from Terrence L. Boos to Donna C. Yeatman, *supra* note 65.

166. Minute Order [In Chambers] Amended Order Regarding Motion for Preliminary Injunction, AK Futures LLC v. Boyd St. Distro, LLC, No. 8:21-cv-01027, 2021 WL 4860513: Plaintiff AK Futures LLC ("Futures") moved for a preliminary injunction, ECF No. 29, at 9 (C.D. Cal., Sept. 9, 2021) (citing Notice of Motion and Motion for Preliminary Injunction re Per FRCP 65 and For Leave to Immediately Commence Discovery filed by Plaintiff AK Futures LLC, ECF. No. 15, Exhibit 11, Declaration of James Clelland, ¶¶ 2–3) (stating that "Delta-8 is a hemp-derived product with less than 0.3% of the psychoactive delta-9-tetrahydrocannabinol compound and is permitted to be sold in interstate commerce under the 2018 Farm Bill."); AK Futures LLC, 35 F.4th at 692.

167. *See supra* text accompanying Section I.C.

168. *See, e.g.*, U.S. Trademark Application Serial No. 90,289,354, Office Action (dated Oct. 18, 2021); U.S. Trademark Application Serial No. 90,251,954, Office Action (dated Aug. 4, 2021); U.S. Trademark Application Serial No. 90,160,477, Office Action (dated Aug. 4, 2021).

169. Establishment of a New Drug Code for Marihuana Extract, 81 Fed. Reg. 90194, 90194–96 (Dec. 14, 2016) (to be codified at 21 C.F.R. Part 1308) (stating CBD extracts "fall within the new drug code 7350," which is a Schedule I drug); Schedule I, 21 C.F.R. § 1308.11 (2016); *see also* U.S. Trademark Application Serial No. 86,982,881, Office Action (dated Aug. 23, 2017). The examiner for that application stated:

> The Drug Enforcement Administration has recently changed Schedule 1 of the CSA to include a new drug code, 7350, for marijuana extract. This definition has been interpreted to include the cannabinoid CBD. . . . Since applicant is selling its smokeless vaporizer pipes for the purpose of consuming the CBD liquids, the goods are unlawful drug paraphernalia under the CSA which is defined to include any device or equipment designed for use or primarily intended for use in connection with the ingestion of an unlawful controlled substance.

Id.

170. *Examination Guide 1-19: Examination of Marks for Cannabis and Cannabis-Related Goods and Services After Enactment of the 2018 Farm Bill*, *supra* note 49 ("[T]he 2018 Farm Bill potentially removes the CSA as a ground for refusal of registration, but only if the goods are derived from 'hemp.' Cannabis and CBD derived from marijuana (i.e., Cannabis sativa L. with more than 0.3% THC on a dry-weight basis) still violate federal law.").

legal drug if derived from hemp. Given that both Δ8-THC and CBD are legally indistinguishable (i.e., both are Schedule I drugs),[171] these stances seem inconsistent.

Several office actions present an additional argument explaining that the Farm Bill's definition of legal hemp does not include most Δ8-THC. The position begins with the factual assertion that Δ8-THC exists in low concentrations in legal hemp, and commercially available Δ8-THC is commonly produced via chemical alteration of CBD derived from hemp.[172] From there, the trademark examiners recognize that legal hemp and its "derivatives, extracts, [and] isomers" are legal, but they assert that Δ8-THC created from chemically altered CBD does not fall within this definition.[173] The argument thus hinges on the interpretation of hemp's "derivatives, extracts, [and] isomers" as presented in the Farm Bill. Indeed, looking only to the language of the Farm Bill, reasonable minds could potentially differ on this interpretation.[174] This is not, however, a legitimate reason to reject Δ8-THC applications. The next subsection shows that relevant Trademark Office policies and tenets of administrative law favor registration of marks for Δ8-THC made by chemical alteration of hemp-derived CBD.

C. USPTO Policies Favor Δ8-THC Registration

Any arguable uncertainty surrounding Δ8-THC should not prevent the USPTO from registering related trademarks for several reasons beyond the substantive question of legality. Initially, the USPTO should defer to the DEA on matters of drug policy. Second, USPTO policy favors invoking the "illegal" use-in-commerce doctrine only when clearly applicable.[175] Given the current uncertainty in the law, Δ8-THC derived from hemp is not "clearly" illegal.

Deference should be afforded to federal agencies regarding the "interpretation of a statute it is entrusted to administer."[176] This is the case with regard to the DEA's

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171. *Controlled Substances: Alphabetical* Order*, supra* note 24.

172. *See, e.g.,* U.S. Trademark Application Serial No. 90,036,541, Office Action (dated Oct. 21, 2020); U.S. Trademark Application Serial No. 90,289,354, Office Action (dated Oct. 18, 2021); U.S. Trademark Application Serial No. 90,251,954, Office Action (dated Aug. 4, 2021); U.S. Trademark Application Serial No. 90,160,477, Office Action (dated Aug. 4, 2021).

173. Indeed, on this point, some examiners have assumed that Δ8-THC is synthesized from CBD, but then have specifically asked the applicant to clarify the point. For example, one examiner asked the applicant to "[d]escribe the process by which the delta-8 THC in applicant's goods is obtained," after stating that most Δ8-THC comes from CBD. U.S. Trademark Application Serial No. 90,222,407, Office Action (dated Oct. 21, 2021).

174. The Ninth Circuit does not, however, share this interpretation. Indeed, it posits that there is no reasonable interpretation of the 2018 Farm Bill other than that Δ8-THC derived from chemically altered CBD from hemp is legal. AK Futures LLC, 35 F.4th at 690.

175. *Examination Guide 1-19: Examination of Marks for Cannabis and Cannabis-Related Goods and Services after Enactment of the 2018 Farm Bill*, *supra* note 49 ("The United States Patent and Trademark Office (USPTO) refuses to register marks for goods and/or services that show a *clear violation* of federal law, regardless of the legality of the activities under state law.") (emphasis added).

176. Serrano v. Berryhill, No. EP-15-CV-132-MAT, 2018 WL 1309861, at *5 (W.D. Tex. Mar. 13, 2018) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837,

interpretation of the Controlled Substances Act.[177] This deference is not, however, absolute. Opinion letters—such as the DEA's September 2021 letter regarding the legality of Δ8-THC derived from hemp—do not receive the strong deference given to a final agency rule.[178] In the current case, the Agency's opinion may be "entitled to respect" if persuasive.[179]

The Supreme Court instructs that the persuasiveness of an agency's opinion is a function of whether it is consistent with statutory text, legislative purpose, and prior positions taken by the agency.[180] The Δ8-THC opinion letter does not diverge from prior interpretations of the 2018 Farm Bill. In fact, it is consistent with earlier distinctions between "synthetic" (i.e., derived only from chemicals) and non-synthetic (i.e., derived from hemp) drugs with regard to the Controlled Substances Act.[181] Further, as there is no compelling statement of purpose for the 2018 Farm Bill, the DEA's interpretation is not inconsistent with its purpose.[182] Lastly, the DEA's expertise in interpreting the Controlled Substances Act favors deference in its interpretation.[183] Taken in sum, the DEA's opinion regarding the legality of Δ8-THC derived from hemp is warranted some deference.

Beyond this, there is an argument that the question of deference to the DEA's opinion letter is not even relevant. An agency has no need to opine on a statute's interpretation where its meaning is clear.[184] To this point, the Ninth Circuit held that

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844 (1984)).

177. *See* United States v. Kelly, No. 2:15-cr-00041, 2016 WL 8732182, at *6 (D. Nev. Apr. 15, 2016), *report and recommendation adopted*, No. 2:15-CR-0041, 2016 WL 3769339 (D. Nev. July 14, 2016), *aff'd*, 874 F.3d 1037 (9th Cir. 2017) ("[T]he Court gives deference to the DEA's statutory interpretation of the CSA. . . .").

178. An agency's final rule may be entitled to strong (Chevron) deference. Teva Pharms. USA, Inc. v. FDA, 514 F. Supp. 3d 66, 97 (D.D.C. 2020). However, "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference." Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000); *see also* Hagans v. Comm'r of Soc. Sec., 694 F.3d 287, 300 n.14 (3d Cir. 2012); Packard v. Pittsburgh Transp. Co., 418 F.3d 246, 252–53 (3d Cir. 2005).

179. Christensen, 529 U.S. at 587

180. Hagans, 694 F.3d at 304.

181. Drug Enforcement Administration's Implementation of the Agriculture Improvement Act of 2018, 85 Fed. Reg. 51639, 51641 (Aug. 21, 2020) (to be codified at 21 C.F.R. pts. 1308, 1312) ("All synthetically derived tetrahydrocannabinols remain schedule I controlled substances," as opposed to those derived from legal hemp); Letter from Terrence L. Boos to Donna C. Yeatman, *supra* note 65 (contrasting Δ8-THC "synthetically produced from non-cannabis materials" and Δ8-THC found "in or derived from" hemp).

182. *See, e.g.*, AK Futures LLC v. Boyd St. Distro, LLC, 35 F.4th 682, 693 (9th Cir. 2022) (disregarding arguments "Congress intended the Farm Act to legalize only industrial hemp, not a potentially psychoactive substance" that were based on a single quote from a legislator). Some parties argue that legal Δ8-THC sales violate the spirit of the 2018 Farm Bill, if not the law itself. McWilliams, Goff & Williams, *supra* note 2 (Some "have argued [this] result violates the spirit of the [2018 Farm Bill, which was] to legalize the non-psychotropic aspects of the cannabis plant."). However, this is insufficient to find the DEA's opinion to be inconsistent with any statement of purpose associated with the 2018 Farm Bill.

183. Hagans, 694 F.3d at 305.

184. Bd. of Governors of Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374

the plain meaning of the 2018 Farm Bill is absolutely certain and allows for no conclusion except that Δ8-THC derived from hemp is legal.[185]

Further, the USPTO maintains a practice of presuming the legality of a use in commerce, unless the application shows a clear "violation of federal law."[186] On this point, the Trademark Manual of Examining Procedure favors deference to a "court or . . . federal agency responsible for overseeing activity" that has addressed the relevant issue.[187] The USPTO's Trademark Trial and Appeal Board gives similar instructions. Recognizing the Agency's relative unfamiliarity with other areas of the law (e.g., the Controlled Substances Act), it stated in a precedential opinion that deference should be given to determinations of relevant agencies or federal courts.[188] Both the DEA and the Ninth Circuit opined that Δ8-THC from hemp is a legal drug.[189] Thus, it is inconsistent with internal guidelines for the USPTO to reject Δ8-THC applications for not being used in legal commerce.[190]

A final point on statutory interpretation and deference is warranted. The USPTO has repeatedly stated in office actions that Δ8-THC derived through chemical alteration of CBD derived from hemp is "synthetic" and, therefore, illegal under the Controlled Substances Act.[191] In each instance, the examiner cited a Forbes.com article for the proposition that "Delta-8 products are made synthetically from

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(1986); Doe v. Miller, 573 F. Supp. 461, 467 (N.D. Ill. 1983) ("[C]ourts should not defer to an agency's opinion when, as in this case, it is inconsistent with the clear meaning of a statute as revealed by its language, purpose, and history.").

185. AK Futures LLC, 35 F.4th at 692; Letter from Terrence L. Boos to Donna C. Yeatman, *supra* note 65.

186. *In re* Stanley Bros. Soc. Enterps., LLC, No. 86568478, 2020 WL 3288093, at *5–6 (T.T.A.B. June 16, 2020); TMEP § 907 ("Generally, the USPTO presumes that an applicant's use of the mark in commerce is lawful and does not inquire whether such use is lawful unless the record or other evidence shows a *clear violation of law*.") (emphasis added).

187. TMEP § 907 (stating that examiners "must inquire about compliance with federal laws or refuse registration based on the absence of lawful use in commerce when a court or the responsible federal agency has issued a finding of noncompliance under the relevant statute or where there has been a per se violation of the relevant statute").

188. *In re* Stanley Bros. Soc. Enterps., LLC, No. 86568478, 2020 WL 3288093, at *5–6 (T.T.A.B June 16, 2020).

189. AK Futures LLC, 35 F.4th at 690; Letter from Terrence L. Boos to Donna C. Yeatman, *supra* note 65.

190. It is notable that Δ8-THC is illegal under some *state* laws. This is unimportant for purposes of USPTO policy. *In re* Stanley Bros. Soc. Enterprises, LLC, No. 86568478, 2020 WL 3288093, at *5–6 (T.T.A.B. June 16, 2020) (asking whether a use is legal under *federal* law); TMEP § 907 (Examiners "must inquire about compliance with *federal laws* or refuse registration based on the absence of lawful use in commerce.") (emphasis added).

191. U.S. Trademark Application Serial No. 90,036,541, Office Action (dated Oct. 29, 2021); U.S. Trademark Application Serial No. 90,522,254, Office Action (dated Nov. 14, 2021); U.S. Trademark Application Serial No. 90,520,933, Office Action (dated Oct. 23, 2021); U.S. Trademark Application Serial No. 90,289,354, Office Action (dated Oct. 18, 2021); U.S. Trademark Application Serial No. 90,251,954, Office Action (dated Aug. 4, 2021); U.S. Trademark Application Serial No. 90,160,477, Office Action (dated Aug. 4, 2021); U.S. Trademark Application Serial No. 90,343,170, Office Action (dated Aug. 20, 2021); U.S. Trademark Application Serial No. 90,562,035, Office Action (dated Dec. 13, 2021).

CBD."[192] Reliance on this citation is improper for two reasons. First, Forbes's use of the term "synthetic" does not necessarily mean the same thing as when the DEA states that Δ8-THC "synthetically produced from non-cannabis materials" is a Schedule I drug.[193] The mere fact that a popular news outlet uses the term "synthetic" does not mean that the relevant legal standard is satisfied. Second, citing to a news website for legal conclusions might be appropriate before the relevant federal agency opines on the matter. However, the USPTO continues to cite to the Forbes article into 2022[194]—after the DEA's opinion letter was issued in September 2021.[195]

III. THE IMPORTANCE OF DELTA-8 THC REGISTRATIONS

The above discussions of trademark registrations for Δ8-THC have real-world implications. Initially, these registrations are strategically valuable to market competitors hoping to develop goodwill in the Δ8-THC market and create potential first mover advantages if cannabis products become generally legal. Second, registration of these marks incentivizes the creation of quality products in the industry.[196] This, in turn, mitigates concerns that Δ8-THC firms sell products created using unsafe ingredients[197] or with insufficient quality control to remove harmful chemicals.[198]

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192. Will Yakowicz, *Delta-8 THC Offers a Legal High, but Here's Why the Booming Business May Soon Go Up in Smoke*, FORBES (Mar. 12, 2021) https://www.forbes.com/sites/willyakowicz/2021/03/12/delta-8-thc-offers-a-legal-high-but-heres-why-the-booming-business-may-soon-go-up-in-smoke/ [https://perma.cc/ZQ9H-7HQP].

193. Letter from Terrence L. Boos to Donna C. Yeatman, *supra* note 65.

194. *See* U.S. Trademark Application Serial No. 90,036,541, Office Action (dated Jan. 21, 2022).

195. U.S. Trademark Application Serial No. 90,562,035, Office Action (dated Dec. 13, 2021) (almost two months after the DEA's letter was issued); U.S. Trademark Application Serial No. 90,522,254, Office Action (dated Nov. 14, 2021); U.S. Trademark Application Serial No. 90,520,933, Office Action (dated Oct. 23, 2021); U.S. Trademark Application Serial No. 90,289,354, Office Action (dated Oct. 18, 2021); U.S. Trademark Application Serial No. 90,036,541, Office Action (dated Oct. 29, 2021). Indeed, the DEA's letter has been cited by the USPTO. U.S. Trademark Application Serial No. 90,036,541, Office Action Response (dated Dec. 1, 2021). The Trademark Office has made a similar, if less obvious error in citing to the FDA website for the proposition that "additional chemicals are needed to convert other cannabinoids in hemp, like CBD, into delta-8 THC (i.e., *synthetic conversion*)." U.S. Trademark Application Serial No. 90,036,541, Office Action (dated Jan. 21, 2022) (emphasis added). Again, the fact that the FDA makes a broad assertion that Δ8-THC is made through a "synthetic conversion" does not necessarily mean that the Δ8-THC is "synthetically produced from non-cannabis materials" and thus, satisfies the DEA's standard for Schedule I treatment. Letter from Terrence L. Boos to Donna C. Yeatman, *supra* note 65.

196. *See* Katya Assaf, *The Dilution of Culture and the Law of Trademarks*, 49 IDEA 1, 77 (2008).

197. *5 Things to Know about Delta-8 Tetrahydrocannabinol–Delta-8 THC*, FDA, https://www.fda.gov/consumers/consumer-updates/5-things-know-about-delta-8-tetrahydrocannabinol-delta-8-thc [https://perma.cc/CH2K-ECU8] ("Some manufacturers may use potentially unsafe household chemicals to make delta-8 THC.").

198. Erickson, *supra* note 66 (describing Δ8-THC products that contain "by-products and other unwanted compounds").

A. Private Strategic Benefits

There is a growing body of literature on strategic behavior within the U.S. cannabis industry.[199] This research describes how firms seeking competitive advantage in this market navigate a legal environment characterized by constant regulatory change and inconsistent enforcement of relevant laws.[200] Application of the lessons from this literature explains many firms' recent choices to enter a legally unsettled Δ8-THC market. Furthermore, that research also rationalizes firms' decisions to pursue Δ8-THC trademark registrations, even though doing so requires admitting that it is selling the drug[201] while some uncertainty regarding the legality of Δ8-THC continues to exist.

In cannabis markets, firms must determine their level of risk aversion regarding future regulatory change, interpretation, and enforcement.[202] Examples of this uncertainty in the industry include the disagreement between the USPTO and the DEA regarding the legality of Δ8-THC[203] and the varied enforcement choices made

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199. Colleen M. Baker, *Entrepreneurial Regulatory Legal Strategy: The Case of Cannabis*, 57 AM. BUS. L.J. 913, 915 (2020); Peter Bowal, Kathryn Kisska-Schulze, Richard Haigh & Adrienne Ng, *Regulating Cannabis: A Comparative Exploration of Canadian Legalization*, 57 AM. BUS. L.J. 677, 708 (2020); Mark J. Cowan, *Taxing Cannabis on the Reservation*, 57 AM. BUS. L.J. 867, 911 (2020).

200. Schuster & Bird, *supra* note 83, at 373 (describing "substantive uncertainty" and "enforcement uncertainty" surrounding the cannabis industry). Professor Bird describes five tiers of legal strategy. *See* Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J.L. BUS. & FIN. 1, 17 (2008); Robert C. Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, 56 MIT SLOAN MGMT. REV. 81, 82–86 (2014). An unsophisticated approach to navigating a legal environment is to attempt to avoid or turn a deaf ear to legal obligations and consequence. Robert C. Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, 56 MIT SLOAN MGMT. REV. 81, 82 (2014). This is called *avoidance*. *Compliance* is a second tier of strategy where a firm recognizes that legal obligations are a cost of business and attempts to conform to these requirements. Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J.L. BUS. & FIN. 1, 17 (2008). *Prevention* firms will proactively take steps to avoid future legal complications, including employee training and proactively planning for future obligations. *Id.*at 23–26. The apex of legal strategy is most sophisticated means of strategically navigating the legal environment are *advantage* (using legal acumen to create proactive benefits). Robert C. Bird & David Orozco, Finding the Right Corporate Legal Strategy, 56 MIT SLOAN MGMT. REV. 81, 84–85 (2014), and *transformation* (creating repeated, sustainable value through strategic legal behaviors); Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J.L. BUS. & FIN. 1, 14 (2008); *see also* Mike Schuster, David Mitchell & Kenneth Brown., *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177, 210–13 (2019) (describing how copyright policing costs can be transformed into a revenue source).

201. Emily Pyclik, *Obstacles to Obtaining and Enforcing Intellectual Property Rights in the Marijuana Industry*, 9 AM. U. INTELL. PROP. BRIEF 26, 44–45 (2018); Sam Kamin & Viva R. Moffat, *Trademark Laundering, Useless Patents, and Other IP Challenges for the Marijuana Industry*, 73 WASH. & LEE L. REV. 217, 247 (2016).

202. *See* Schuster & Bird, *supra* note 83, at 385–86 (describing uncertainty in the cannabis industry).

203. *See* Letter from Terrence L. Boos to Donna C. Yeatman, *supra* note 65 (stating that Δ8-THC created from hemp is legal); U.S. Trademark Application Serial No. 90,284,195, Office Action (dated July 23, 2021) (stating that Δ8-THC is illegal).

by U.S. presidents over the last few decades.[204] Depending on their risk tolerance, companies must decide whether to move forward with cannabis-based business plans or delay until the regulatory environment is more certain.

Firms taking the "safe" approach engage in what the law and strategy literature calls "compliance" strategies.[205] Compliance firms recognize legal obligations and interpret these standards conservatively to avoid illegal behaviors.[206] This "wait and see" approach insulates the firm from possible legal consequences, but as described below, this choice may have significant competitive drawbacks in the cannabis industry.

Compliance firms differ from firms practicing "avoidance" strategies.[207] Avoidance firms choose to circumvent legal obligations[208] or interpret the law in a self-serving manner to avoid legal hurdles.[209] This approach is not usually viewed as a mature strategy[210] because a firm often reaches a bad end when legal obligations and enforcement behaviors catch up to it. However, the cannabis and Δ8-THC markets may be outliers where avoidance is a strategically beneficial approach, relative to compliance. This theme holds true for decisions to both enter the Δ8-THC market *and* to seek federal trademark protection for those goods.

Firms practicing an avoidance strategy will proceed in the Δ8-THC market without regard to limitations arising from relevant law (i.e., the Controlled Substances Act).[211] Assuming commercial success, they will develop goodwill and a customer base in the Δ8-THC market while competitors practicing compliance strategies wait on the sideline. This risk-inducing "avoidance" strategy creates potential legal exposure[212] (and raises ethical questions arising from ignoring pertinent legal issues).[213] However, firms have been willing to enter the market

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204. *See supra* notes 95–97 and accompanying text.

205. *See* Bird, *supra* note 200, at 17 ("[C]ompliance firms view their legal resources as cost centers. Adherence to legal rules is a necessary expense of doing business. Compliance firms, however, do not pursue illegal behavior to avoid costs."); Bird & Orozco, *supra* note 200, at 83–84 ("Companies operating in the compliance pathway recognize that the law is an unwelcome but mandatory constraint on their activities. In such companies, managers view compliance mainly as a cost that needs to be minimized.").

206. Bird, *supra* note 200, at 17.

207. Bird & Orozco, *supra* note 200, at 82 ("[Avoidance firms] make the conscious choice to disregard or remain willfully blind to the legal consequences of their company's actions. The prevailing attitude in such cases is that the law presents an obstacle to their desired business goals.").

208. *See* Bird & Orozco, *supra* note 200, at 82.

209. Bird, *supra* note 200, at 14.

210. Schuster & Bird, *supra* note 83, at 385.

211. *See* Leas, *supra* note 3, at 1928 (stating legal loopholes "have created a new marketplace for delta-8-THC products that uses sophisticated sourcing and distribution strategies designed to evade cannabis and hemp laws and appeal to consumers but also resemble a legitimate business"). For a general discussion of strategy and legal loopholes, see generally Daniel T. Ostas, *Corporate Counsel, Legal Loopholes, and the Ethics of Interpretation*, 18 TEX. WESLEYAN L. REV. 703 (2012); Daniel T. Ostas, *The Ethics of Corporate Legal Strategy: A Response to Professor Mayer*, 48 AM. BUS. L.J. 765 (2011).

212. Bird & Orozco, *supra* note 200, at 82–83.

213. *See* Robert Hughes, *Doing the Right Thing: When Moral Obligation is Enough*,

despite these concerns.[214] Implicitly, they are deciding that the future strategic and immediate commercial benefits outweigh any legal concerns,[215] especially given the generally relaxed enforcement of anti-cannabis regulations.[216]

Competition among firms that enter the Δ8-THC market (and the cannabis market generally) create another set of strategic choices. Within consumer goods markets, a firm's trademarks may be among its most valuable assets.[217] Federal registration is not, however, generally available for traditional cannabis goods (i.e., marijuana).[218] Moreover, if a firm chooses to seek federal registration for its cannabis or Δ8-THC mark, it must aver that it is using the mark in business (e.g., selling cannabis or Δ8-THC).[219] This could be admitting to criminal behavior in a sworn statement.[220] These factors must be taken into account when deciding a trademark strategy in this market.

KNOWLEDGE@WHARTON (Nov. 19, 2015), https://knowledge.wharton.upenn.edu/article/doing-the-right-thing-when-moral-obligation-is-enough/ [https://perma.cc/3YYZ-VK5U]; *see also* Robert C. Hughes, *Breaking the Law Under Competitive Pressure*, 38 LAW & PHIL. 169, 169 (2019) (asking if firms are morally required to obey laws while competitors break them to seek advantage).

214. *See* Schuster & Bird, *supra* note 83, at 386 (describing the current cannabis legal environment as presenting "cannabis firms with the problematic question of whether to avoid running afoul of cannabis regulations or deliberately ignore prohibitions that formally exist but are largely unenforced").

215. Indeed, it could be argued that Δ8-THC firms actually take a strategically advanced position by recognizing the legal prohibition on traditional cannabis (i.e., marijuana) and turning this into a competitive advantage by selling an arguably legal marijuana alternative (Δ8-THC).

216. *See* Tom Angell, *supra* note 95 (describing Congress' 2019 choice to prevent certain cannabis enforcement activities at a federal level); Trevor Hughes, *New Marijuana Laws in 2019 Could Help Black and Latino Drug Dealers Go Legal*, USA TODAY (Feb. 24, 2019), https://www.usatoday.com/story/news/2019/02/21/marijuana-legalization-2019-black-latino-dealers-now-getting-help/2838959002/ [https://perma.cc/A5QG-92VZ] (describing the low level penalties associated with cannabis in Oakland, California); Katherine Berger, Note, *ABCs and CBD: Why Children with Treatment-Resistant Conditions Should Be Able to Take Physician-Recommended Medical Marijuana at School*, 80 OHIO STATE L.J. 309, 328 (2019).

217. Doyle, *supra* note 109, at 2.

218. Stephanie Geiger-Oneto & Robert Sprague, *Cannabis Regulatory Confusion and Its Impact on Consumer Adoption*, 57 AM. BUS. L.J. 735, 751 (2020); *see In re* JJ206, LLC, 120 U.S.P.Q.2d (BNA) at *2; *see also In re* Morgan Brown, 119 U.S.P.Q.2d (BNA), at *1–2; BBK Tobacco & Foods LLP, 2020 WL 1285837, at *3 (D. Ariz. Mar. 18, 2020).

219. *See, e.g.*, 37 C.F.R. § 2.20 (2021) (describing a declaration regarding a trademark application recognizing that "willful false statements [in the application] . . . are punishable by fine or imprisonment, or both, under (18 U.S.C. 1001), and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom").

220. Pyclik, *supra* note 201, at 34 ("If a trademark owner admits that their mark is associated with illegal goods in commerce, this is perilous because a trademark owner will risk federal criminal prosecution by admitting this on the record."); Kamin & Moffat, *supra* note 201, at 247 (asserting use in commerce with regard to a marijuana mark "would be an admission, under oath, that the owner of the mark is violating the Controlled Substances Act"); Dustin Boone, Note, *Puff, Puff, Patent: Identifying and Addressing the Tensions Between the Medical Marijuana Industry, Patent Law, and the Controlled Substances Act*, 38 CARDOZO

Firms pursuing a conservative trademark strategy may engage in "trademark laundering"—the act of registering a mark in some field related to cannabis.[221] For example, a firm could secure a registration for "Super Green" for ashtray products, while it simultaneously uses that mark for ashtrays *and* cannabis goods. This strategy hopes that parties searching the trademark registry might find the "Super Green" registration and then decide to not adopt the name to avoid any potentially costly legal entanglements. These legal entanglements could come from a trademark owner asserting a meritorious infringement claim or from a hyper-aggressive party asserting a losing claim that is still expensive to deal with.[222]

This potential for litigation (or threatened litigation) could create *de facto* deterrence that prevents others from later adopting the relevant trademark.[223] Thus, from a conservative strategic perspective, the applicant benefits by not having to aver that it is selling potentially illegal Δ8-THC or cannabis because it is only seeking protection for ashtrays (or similar non-cannabis products).[224] This behavior represents an avoidance strategy where the firm recognizes a legal impediment and chooses to sidestep it while arguably distorting the regulation's intent.[225] But while this approach reduces legal risk, it also limits the potential upside. Trademark laundering creates no actual trademark rights in cannabis-specific goods; as described below, this limitation is significant from a strategy perspective.

Other firms are willing to undertake greater legal risk in exchange for greater commercial and strategic returns. Beginning in 2020, applicants began to submit trademark filings where they admit to selling (potentially illegal) Δ8-THC in

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ARTS & ENT. L.J. 473, 486 (2020) ("Additionally, if an individual is forthcoming and states in their trademark application that the trademark is associated with marijuana, they risk opening themselves up to federal criminal prosecution for admitting this under oath.").

221. Kamin & Moffat, *supra* note 201, at 251–52.

222. The primary cost arising from a losing claim would be attorney's fees. The defendant can potentially recover attorney's fees if it establishes that the case is "exceptional." 15 U.S.C.A. § 1117 (West). To recover under this rule, the defendant must both win at trial and then establish that the plaintiff's behavior satisfied the standard for an award of attorney's fees. 87 C.J.S. *Trademarks, Etc.* § 373.

223. This dissuasion technique is particularly effective against firms that are just starting to consider adopting a new mark, and thus, have invested very little in the mark relative to the cost of potential litigation and having to rebrand if they lose the lawsuit. Stacey Dogan, *Bullying and Opportunism in Trademark and Right-of-Publicity Law*, 96 B.U. L. REV. 1293, 1313 n.92 (2016); *see* Upjohn Co. v. Am. Home Prods. Corp., No. 1:95CV237, 1996 WL 33322175, at *24 (W.D. Mich. Apr. 5, 1996) (describing "the ease with which a different mark could have been selected").

224. Indeed, it appears that firms may be engaging in trademark laundering regarding Δ8-THC goods. For example, one application seeks registration of a mark for use with clothing goods that will likewise be used for Δ8-THC products. *See* U.S. Trademark Application Serial No. 97,010,593 (filed Sept. 3, 2021) (asserting use in multiple international classes, including 025 (for "[c]lothing, namely, t-shirts, sweatshirts, polo shirts, jackets, tops, pants, shorts, dresses, headwear, and hats") and 030 (for "cookies and brownies . . . containing CBD and Delta-8 tetrahydrocannabinol (THC) extracts.")); *see also* U.S. Trademark Application Serial No. 97,061,834 (filed Oct. 6, 2021) (for "DELTA 8 *ACCESSORIES*") (emphasis added).

225. *See* Schuster & Bird, *supra* note 83, at 385–86.

commerce.[226] Undertaking this risk (i.e., filing a Δ8-THC application) may bring about two distinct benefits. The first can be characterized as an avoidance strategy. If the firm is willing to subject itself to the legal uncertainty surrounding Δ8-THC sales, it may reap the reward of trademark protections that are specific to that industry. In contrast to trademark laundering—which relies on extra-legal deterrent effects—a trademark registration creates actual legal rights within the Δ8-THC market. Restated, if a party can secure a Δ8-THC trademark registration, they have a nationwide right to sue others who adopt their mark for Δ8-THC sales.[227] This protection is significantly stronger than trademark laundering—which relies on *de facto* deterrence arising from risk averse firms' decisions to avoid potential litigation. That reason alone will incentivize some parties to continue to attempt to secure Δ8-THC registrations.

A second benefit is more forward thinking. While the Δ8-THC market is growing, it remains miniscule relative to what the cannabis market could be if state and federal regulation continues to recede.[228] A recent report from Barclays estimated that the domestic cannabis market would be worth twenty-eight billion dollars if it were legalized at the federal level.[229] Should this occur, firms with an established brand will have significant first-mover advantages.[230] Prior Δ8-THC registrations further this goal, despite the fact that the trademark's scope does not technically cover marijuana or delta-9 tetrahydrocannabinol (i.e., a registration for Δ8-THC goods technically only covers Δ8-THC).

Federal trademark registration gives the owner nationwide rights to exclusive use of a mark for a particular type of product *and associated goods*.[231] Given the

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226. *See supra* Section 0.0 and accompanying text (discussing the identification of Δ8-THC trademark applications).

227. This assumes that the defendant did not adopt the mark before the plaintiff began using it in commerce.

228. Chris Roberts, *The Feds Are Coming for Delta-8 THC*, FORBES (Sept. 17, 2021, 3:59 PM), https://www.forbes.com/sites/chrisroberts/2021/09/17/the-feds-are-coming-for-delta-8-thc/?sh=1f5fd4c06d27 [https://perma.cc/YXN2-5K8S] ("If the Delta-9 THC in marijuana was legal, demand for Delta-8 THC—a synthetic product, created to fulfill the market inefficiency posed by drug prohibition—would evaporate. If federal marijuana legalization happens, Delta-8 will be a nonfactor."); *see* Jonathan Boyar, *Unlocking Value in the Cannabis Market Jim Hagedorn Has a Strategy for Navigating Legalization*, FORBES (Jan. 6, 2022, 12:55 PM), https://www.forbes.com/sites/jonathanboyar/2022/01/06/unlocking-value-in-the-cannabis-market-jim-hagedorn-has-a-strategy-for-navigating-legalization/?sh=3711e34a7e03 [https://perma.cc/4AP5-9DWY] ("Legalization at the state level has created a burgeoning market, which is expected to grow rapidly, from an estimated $20 billion in 2020 to nearly $200 billion by 2028.").

229. Michael Sheetz, *Barclays Estimates US Weed Market Would be $28 Billion if Legalized Today, Growing to $41 Billion by 2028*, CNBC (May 1, 2019, 9:38 AM), https://www.cnbc.com/2019/05/01/barclays-us-cannabis-market-28-billion-if-legalized-today.html [https://perma.cc/HG5M-KCKG].

230. Schuster & Bird, *supra* note 83, at 394.

231. Irene Calboli, *The Sunset of "Quality Control" in Modern Trademark Licensing*, 57 AM. U. L. REV. 341, 348 (2007) ("[T]he core of trademark rights resides in the ability of trademark owners to exclude unauthorized parties from using similar marks on identical or confusingly similar products.") (citing Lanham Act § 1, 15 U.S.C. § 1051 (2000 & Supp. V

similarity of Δ8-THC to delta-9 tetrahydrocannabinol (e.g., chemical structure, psychoactive effects, etc.),[232] a Δ8-THC registration likely creates rights with regard to cannabis goods generally—if the latter becomes federally legal.[233] Accordingly, firms that began generating brand recognition and goodwill through Δ8-THC sales will enjoy significant first-mover advantages over their competitors within the general cannabis market.[234]

Forward-thinking legal approaches of this nature are "advantage" strategies because they represent the use of legal acumen to create proactive benefits for the firm.[235] Indeed, given the relative nascence of the cannabis market, such advanced strategies are uncommon in the field.[236] Recognition of this strategic value explains *why* firms are wise to value Δ8-THC registrations and why they have taken steps to secure these protections.

While Δ8-THC applications have not proven to be successful to this point, this does not foreclose the possibility of registration going forward. The USPTO has previously shown a willingness to vary its approach to earlier cannabis derivatives, especially in the presence of an ambiguous legal environment.[237] Indeed, Δ8-THC applicants are attempting to further their own goals by increasing legal ambiguity in ways that prior CBD applicants did.

In early CBD trademark applications (i.e., before CBD was easily registerable[238]), parties would often make dubious legal claims that seemed reasonable while CBD

2005)); Alexa Lewis, *Respecting Third-Party Intellectual Property Rights on the Internet*, FED. LAW. 12, 13 (2011) ("[T]he trademark owner has the right to exclude others from using the similar marks in association with similar products and services if doing so will cause consumers to be confused in connection with the source of those products and services.").

232. *See* Robert McCoppin, *Boom Time for Marijuana Sales in Illinois, as Industry Expands with New Products — but Minority Businesses Get Left Behind*, CHI. TRIB. (Jan. 1, 2022, 5:00 AM), https://www.chicagotribune.com/marijuana/illinois/ct-illinois-marijuana-2021-review-20220101-6ltav5lghfba3awognltyrzs4m-story.html [https://perma.cc/SQ6M-2NC7] (referring to Δ8-THC as "weed [i.e., delta-9 tetrahydrocannabinol] light"); Jordyn Noennig, *Delta-8-THC Sold in Wisconsin Can Get Users High*, MILWAUKEE J. SENTINEL (Jan. 5, 2022, 6:01 AM), https://www.jsonline.com/story/entertainment/2022/01/05/delta-8-wisconsin-known-weed-light-openly-sold-across-state/8824846002/ [https://perma.cc/78SE-EPNA] (same).

233. *See* Schuster & Bird, *supra* note 83, at 394 ("Parties that have already cultivated brand value in th[e CBD] market can expect their investments to blossom as cannabis moves towards the possibility of full federal legalization."); Schuster & Wroldsen, *supra* note 45, at 159–60 ("In the face of continually evolving marijuana laws, forward-thinking legal strategists may identify today's CBD trademarks as the cornerstone for future trademark protection in the much broader and more lucrative legal marijuana market."). This behavior has previously been described with regard to CBD-marks. Schuster & Bird, *supra* note 83, at 394. While the strategic benefits of a CBD registration are significant, a Δ8-THC trademark is more likely to cover marijuana/delta-9 tetrahydrocannabinol and thus, it is more strategically valuable. This is because Δ8-THC is closer to traditional marijuana in its use (commonly for its psychoactive effects), as compared to non-psychoactive CBD.

234. Schuster & Bird, *supra* note 83, at 394.

235. *See* Bird & Orozco, *supra* note 200, at 84–85.

236. *See* Schuster & Bird, *supra* note 83, at 394–95.

237. *See* Schuster & Wroldsen, *supra* note 45, at 146.

238. *See Examination Guide 1-19: Examination of Marks for Cannabis and Cannabis-*

regulation was uncertain.[239] Firms seeking Δ8-THC registrations have followed this approach by, for instance, making absolute statements about the legality of their products when the relevant law is not so clear. For example, one pending application claims Δ8-THC "products that are legal in concordance with the 2018 farm bill."[240] This mimics a successful CBD-applicant's arguments that their products were "legal in interstate commerce," despite the uncertainty surrounding CBD's legal status at that time.[241] Whether such behaviors will ultimately prove successful is uncertain. However, given the strategic value of Δ8-THC trademark registrations described above and the significant arguments that these marks should be registered,[242] it can be expected that firms will continue to pursue these applications.

B. Potential Benefits for the Consuming Public

Beyond private, strategic benefits, federal registration of Δ8-THC trademarks can create pro-social externalities that mitigate concerns about the drug. Commenters worry about the market's lack of government oversight.[243] They allege that the want of regulation disincentivizes investment in quality control, which ultimately leads to products being sold that contain unwanted (and potentially dangerous) impurities.[244] Relevant to this concern, prior research argues that a firm's ability to secure trademark protection encourages the production of high-quality goods.[245] This subsection addresses the intersection of these issues.

Related Goods and Services After Enactment of the 2018 Farm Bill, *supra* note 49.

239. Schuster & Wroldsen, *supra* note 45, at 148 ("Under current law, these statements [about CBD's legal status] are likely legally incorrect, but the ambiguous state of the law at the time allowed firms to make questionable assertions, such as these, to obtain federal trademarks.").

240. U.S. Trademark Application Serial No. 97,124,420 (filed Nov. 15, 2021). Similarly, some applicants claiming hemp-derived products seem to assert legality by stating that their products contain less than 0.3% Δ8-THC. *See* U.S. Trademark Application Serial No. 97,163,491 (filed Dec. 9, 2021); U.S Trademark Application Serial No. 97,124,355 (filed Nov. 15, 2021). This is particularly curious given that there is no legal rule explicitly exempting low-level Δ8-THC. Whether this is due to a misunderstanding or an attempt to confuse the situation is unclear.

241. U.S. Trademark Application Serial No. 86,315,166 Office Action Response (dated Oct. 31, 2014), Registration Certificate (dated Aug. 29, 2016). The DEA would later foreclose this avenue of argument. 81 Fed. Reg. 90194, 90194–96 (Dec. 14, 2016).

242. *See supra* Sections 0.0, 0.

243. *See* Timmen L. Cermak, *4 Things to Know About Delta-8-THC, the New Cannabis Drug*, PSYCH. TODAY (Jan. 20, 2022), https://www.psychologytoday.com/us/blog/healing-addiction/202201/4-things-know-about-delta-8-thc-the-new-cannabis-drug [https://perma.cc/4NDC-WHUJ] (describing the "lack of regulation" of 8-THC); *see also* Kaitlin Sullivan, *Delta-8 THC Is Legal in Many States, but Some Want to Ban It*, NBC NEWS (June 28, 2021, 8:10 AM), https://www.nbcnews.com/health/health-news/delta-8-thc-legal-many-states-some-want-ban-it-n1272270 [https://perma.cc/A62X-G56G] (describing the sale of unregulated 8-THC products as a possible "public health risk").

244. Cermak, *supra* note 243 ("The lack of regulation raises concerns about inaccurate labeling and contaminants.").

245. Katya Assaf, *The Dilution of Culture and the Law of Trademarks*, 49 IDEA 1, 77

As discussed previously, (arguably) legal Δ8-THC comes from hemp[246]—which itself is legal under the 2018 Farm Bill.[247] However, given Δ8-THC's relatively low concentration in most hemp, firms commonly create it through chemical alteration of CBD that has been extracted from legal hemp.[248] These chemical reactions can potentially introduce unwanted side products.

While still a nascent market, evidence exists that some Δ8-THC goods do in fact contain these unwanted side products.[249] One study evaluated twenty-seven different types of Δ8-THC from multiple manufacturers and found that each of them contained "reaction side-products, including heavy metals."[250] The U.S. Food and Drug Administration echoes these concerns, stating that "delta-8 THC product[s] may have potentially harmful by-products."[251]

Additional criticisms assert that Δ8-THC firms are intentionally adulterating their wares with "cutting agents."[252] These agents are added to drugs to enhance the product's volume by diluting the relevant chemical[253] or to boost the effect of the

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(2008) ("Particularly, trademark rights are granted in order to encourage trademark owners to invest in the quality of their goods and services, thereby creating and maintaining the goodwill of their businesses."); Stephanie M. Greene, *Sorting Out "Fair Use" and "Likelihood of Confusion" in Trademark Law*, 43 AM. BUS. L.J. 43, 70 (2006); Julie Manning Magid, Anthony D. Cox & Dena S. Cox, *Quantifying Brand Image: Empirical Evidence of Trademark Dilution*, 43 AM. BUS. L.J. 1, 2 (2006).

246. *See supra* notes 3–4 and accompanying text (discussing the legality of Δ8-THC; *Controlled Substances: Alphabetical* Order*, supra* note 24 (listing Δ8-THC as a Schedule I drug).

247. 7 U.S.C.A. § 1639o (West).

248. McWilliams, Goff & Williams, *supra* note 2 ("Delta-8 THC, as opposed to delta-9 THC, is a cannabinoid usually found in very trace amounts in cannabis plants."); Erickson, *supra* note 66; Leas, *supra* note 3 ("Because CBD isomers are similar in structure to THC isomers, they can be converted to THC isomers through a relatively simple series of chemical reactions. The main method of converting CBD to delta-8-THC yields a solution containing delta-8-THC and delta-9-THC as well as other byproducts from the associated reactions. This solution can be further processed to remove delta-9-THC and then added to various consumer goods for consumption or application.").

249. Lester Black, *How Mitch McConnell Accidentally Created an Unregulated THC Market*, FIVETHIRTYEIGHT (Oct. 18, 2021), https://fivethirtyeight.com/features/how-mitch-mcconnell-accidentally-created-an-unregulated-thc-market/ [https://perma.cc/W4WT-YUE5] (describing the presence of side products in Δ8-THC production).

250. Cermak, *supra* note 243 ("The authors investigated 27 delta-8 products from 10 brands and found none of them were accurately labeled, 11 contained unlabeled cutting agents, and all contained reaction side-products, including heavy metals.").

251. *5 Things to Know About Delta-8 Tetrahydrocannabinol – Delta-8 THC*, *supra* note 197.

252. Sullivan, *supra* note 243 ("There is still very little known about delta-8 THC itself and in an unregulated market, products that contain the compound can easily be cut with toxic materials consumers have no way of knowing about.")

253. Julian Broséus, Natacha Gentile & Pierre Esseivaetet, *The Cutting of Cocaine and Heroin: A Critical Review*, 262 FORENSIC SCI. INT'L 73, 74 (2016) ("Typically, cutting agents refer to diluents (pharmacologically inactive and readily available substances) and adulterants (pharmacologically active substances, usually more expensive or less available than diluents).") (emphasis omitted).

substance.[254] In a largely unregulated market, consumers may intend to obtain "pure" Δ8-THC, but instead might purchase a product laden with a variety of unlabeled or unwanted chemical additives.[255]

Federal- and state-level regulation of Δ8-THC manufacture and distribution is an obvious answer to several of the above concerns. However, registering trademarks for Δ8-THC can bring private financial interests into line with the public goal of reducing impurities. At present, firms in this market have relatively little incentive to attempt to garner goodwill in a trademark. The lack of federal trademark registration encourages other firms to free ride on any positive brand recognition.[256] Restated, why would a firm try to make an outstanding product (i.e., Δ8-THC that is free of impurities) if others are likely to sell inferior wares using their brand? Not only does this undercut their sales, but it also sullies their trademark by creating associations with another's inferior products.

The trademark system addresses this problem by recognizing firms' exclusive rights in their marks.[257] This prevents the free-riding problems described above. And in turn, companies are encouraged to invest in the manufacture of quality products and creation of firm goodwill, since others will not be able to appropriate their trademarks without being sued for infringing a federally registered mark.

Through this mechanism, the incentive structure presented to private firms is brought into line with public policy. Government oversight may serve to reduce impurities in Δ8-THC products, but private financial gain arising from goodwill in a brand can simultaneously incentivize Δ8-THC firms to do the same. Companies are encouraged to sell pure products if they can capture any resultant goodwill in a trademark that they have the exclusive rights to use. Thus, beyond the private benefits discussed previously, the federal registration of Δ8-THC trademarks can likewise create social benefits.

CONCLUSION

The intersection of cannabis and trademark law presents a variety of uncertain legal issues and novel policy considerations. In recent years, difficult questions

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254. Jeffrey D. Pope, Olaf H. Drummer & Hans G. Schneider, *The Cocaine Cutting Agent Levamisole is Frequently Detected in Cocaine Users*, 50 PATHOLOGY 536, 536 (2018) ("Cutting agents are used for economic reasons, but also to enhance or mimic the target substance and to aid in the administration of the drug.").

255. Sullivan, *supra* note 243 ("'It's not delta-8 that's dangerous, it's what it could be mixed with in an unregulated market,' said Steven Hawkins, CEO of the U.S. Cannabis Council, a trade group that represents state-licensed cannabis companies and legalization advocates.").

256. It is possible that firms engaged in commerce in the Δ8-THC market may have some rights under common law (i.e., un-registered rights). However, these rights will be limited. For instance, a mark that is not registered at the federal level does not enjoy nationwide constructive use. *See* 15 U.S.C. § 1057(c) (2012).

257. Assaf, *supra* note 196, at 77 ("Particularly, trademark rights are granted in order to encourage trademark owners to invest in the quality of their goods and services, thereby creating and maintaining the goodwill of their businesses."); Greene, *supra* note 245, at 70; Magid, Cox & Cox, *supra* note 245, at 2.

regarding registration of trademarks for cannabis derivatives have been presented to the USPTO. The most current challenge arose with regard to Δ8-THC goods. In response, the Trademark Office presently rejects all applications associated with the drug because it is not legal for use in commerce. This Article presents several reasons why this approach is questionable.

Initially, the DEA and federal courts have both opined that Δ8-THC is legal, so long as it is sourced from hemp.[258] A critical reading of the DEA's opinion letter on the issue shows this conclusion to be true, regardless of if Δ8-THC molecules are extracted from hemp or if the Δ8-THC is created by chemical alteration of CBD extracted from hemp.[259] While neither of these determinations are binding on the USPTO, its own guidelines suggest deference to conclusions reached by relevant administrative agencies and the courts.[260] This strongly supports the position that Δ8-THC marks should be registered.[261]

This conclusion has substantial public and private significance. With regard to private concerns, Section 0.0 employed prior law and strategy research to explore the immediate and future strategic benefits arising from Δ8-THC registrations. Indeed, these gains explain why firms are willing to admit to selling Δ8-THC in a trademark application, despite some uncertainty if such sales are legal. Moreover, a willingness to register these marks can bring about social gains. Concerns regarding impurities in Δ8-THC goods can be mitigated by incentivizing firms to generate high quality products to enhance value in their federally registered trademarks. This gain can, of course, only arise if the Trademark Office will register these marks.

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258. *See* Letter from Terrence L. Boos to Donna C. Yeatman, *supra* note 65; AK Futures LLC v. Boyd St. Distro, LLC, 35 F.4th 682, 692 (9th Cir. 2022).

259. *See supra* notes 178–185 and accompanying text.

260. *See supra* notes 186–190 and accompanying text.

261. As discussed throughout, this article only addresses issues associated with the Controlled Substances Act. Other legal issues could potentially be raised. *See supra* note 8.