

New California CBD Law Highlights the Federal / State Regulatory Divide

The Bottom Line

- Assembly Bill 45 in California now permits food and dietary supplement products to include CBD.
- The differing approaches by the California and federal governments highlights the complicated regulatory environment for ingestible CBD products.
- Brands, agencies and media companies looking to get involved in CBD advertising need to remain cognizant of the risks before choosing to delve into the space.

California's newly passed Assembly Bill 45 now explicitly permits cannabidiol (CBD) to be included in food and dietary supplement products and creates advertising and labeling restrictions. This is a stark departure from the California Department of Public Health's prior decision to follow the U.S. Food and Drug Administration's ban on ingestible CBD products, especially as the FDA has only become stricter in recent months by going after more innocuous activities involving CBD.

Epidiolex Changed CBD's Classification

Under the 2018 United States Farm Bill, it is lawful to manufacture industrial hemp, and to sell CBD – marijuana's non-intoxicating cousin – derived therefrom, so long as the product contains less than 0.3% THC. However, due to the approval of Epidiolex, an epilepsy medication, the Food and Drug Administration (FDA) considers CBD to be a drug, and prohibits its use in any food and dietary supplement products.

In 2018, the California Department of Public Health (CDPH) publicly stated that, consistent with FDA guidance, it considered all ingestible products containing CBD to be illegal.

A Reclassification for CBD

This new bill reverses the CDPH's position, and explicitly permits CBD to be included in food and dietary supplement products sold in California.

The bill also:

- Establishes a detailed regulatory system with respect to ingestible CBD products.
- Requires several different warning labels to be included on product packaging.
- Creates a number of advertising requirements, including:
 - A prohibition on untrue health-related statements.
 - A requirement that advertising only be displayed in media where at least 70% of the audience is reasonably expected to be 18 years of age or older.

Meanwhile, the FDA has gone in the exact opposite direction by more strictly policing food and dietary supplements that include CBD. As discussed in a [previous alert](#), the FDA has made efforts to go after CBD marketers that make certain aggressive health claims – including claims that these products can treat a variety of illnesses and conditions such as COVID-19 – but the FDA historically showed little appetite to police the market more broadly.

However, the FDA has issued warning letters in 2021 to a number of manufacturers for more benign marketing practices. For example, the FDA sent a warning letter in July to MB Solutions, LLC / BioSpectrum CBD over the inclusion of CBD in its “Sour Gummy Worms,” “Watermelon Slices,” “CBD Oil Tincture,” and “CBD Gummy Bears,” even though no problematic health claims were identified with respect to those products.

The FDA also recently rejected two New Dietary Ingredient notifications for full-spectrum CBD extracts, finding that there was insufficient evidence to show that ingestible CBD would reasonably be expected to be safe.

For More Information

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