

## Lack of Federal Cannabis Regulations Continue to Foster Health and Safety Concerns

Cannabis products available to consumers under state legalization laws continue to expand in volume and variety. As the industry grows, so too do the risks and liabilities. Though the U.S. Food & Drug Administration (FDA) keeps far away from medical and recreational marijuana, it maintains considerable power over those businesses deemed legal under state law. A study released last month by the National Academies of Sciences, Engineering and Medicine on the current state of evidence and research in the health impacts of cannabis suggests the FDA's refusal to engage in funding or approval of studies related to cannabis contributes to the health risks to the public.

Unsurprisingly, the federal government has yet to regulate cannabis in the same comprehensive manner as substances that are legal under federal law. The federal government has been nearly silent in addressing the regulatory challenges created by the quasi-legal status of cannabis. Instead, the 2013 memorandum released by former Deputy Attorney General James Cole punted the interests of public health, public safety, and law enforcement to state governments. The problems created by the lack of federal cannabis regulation are made clear with respect to federal health and safety goals and inconsistent state regulations. For example, cannabis-infused edibles are wholly devoid of FDA oversight, and pesticide regulation is left up to the states.

The market for cannabis-infused edibles provides a clear example of the regulatory deficiencies created by the quasi-legal status of cannabis. Edibles are increasing in popularity, and are in fact the second most popular product category in the cannabis market. As a result of the increasing rate of edible consumption, both by medical and recreational users, consumers would likely expect that the federal government either researched or regulated the use of these candy-like marijuana products. To the detriment of consumers who use these products, the FDA has not asserted itself. Medical edibles are intended to mitigate or treat disease, and thus they cannot be regulated as a food by the FDA.

States that allow edibles to be sold must regulate their markets in place of the FDA. Over time, the regulations for edibles have certainly improved, but they are far from perfect. States permitting edibles vary greatly on the numbers involved in serving size and potency regulations (if they have any at all). The lack of robust product labeling regulations has also been a source of great concern. Single-bite items often have large quantities of THC, and serving sizes have been known to be inaccurate or missing. There have been several reports of children ingesting desert-imitating edibles as well as adults ingesting amounts far greater than intended. Emergency room visits and poison control calls have increased in frequency due to cannabis legalization.

Despite the problems, there has been some regulatory success in relation to edibles. States like Colorado and Washington have relatively comprehensive systems, and Colorado has even created a required stamp for edible products themselves rather than merely the packaging. Also, while most edible manufacturers do not meet FDA standards, some producers have decided to self-regulate under the Food Safety Modernization Act, which the FDA calls the "most sweeping reform of our food safety laws in more than 70 years." Furthermore, local governments have begun to set standards as well. San Francisco has created regulations for edibles including required allergen warnings and prohibiting anything "requiring refrigeration or hot-holding" to prevent food-borne illness. Still, states often regulate edibles as if they come from a small restaurant rather than a large-scale manufacturer. Federal regulations would not only be more comprehensive than the current system, but uniformity would better serve the federal public health and safety goals already in place for food products and drugs.

Another example of the regulatory shortcoming created by the quasi-legal status of cannabis can be found in the use of pesticides by cultivators. This serious health issue would usually be



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regulated by the Insecticide, Fungicide, and Rodenticide Act (Act). This Act requires pesticides to be registered with the EPA and then approved only for use on certain crops in specific places. Furthermore, the Department of Agriculture would then test the crops to ensure safe chemical residue levels. Instead, the cannabis industry relies on each state to regulate pesticide use.

In 2015, random testing of approved products in Oregon came back as having failing amounts or illegal kinds of pesticide residue. Since then, more comprehensive state regulations and lab-tracking systems, ensuring producers of failing products do not re-test elsewhere to avoid sunk costs, have helped reduce violations and increase product safety significantly. While Oregon's regulations have improved, and Washington and Colorado both have strong regulations in place, other states are still struggling with regulations. California's guidelines are still in the drafting stages, and as of 2015, the state admitted that no pesticide had been reviewed for safety and human health effects with respect to the use of cannabis.

The health and safety concerns created by a federally unregulated cannabis industry will continue to be problems left to the states. Furthermore, regulations will lack uniformity, leaving consumers guessing as to the safety of different products. The need for uniformity is growing. It is only a matter of time before federal regulators will have to address these issues.

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**If you want to learn more about the issues discussed in this Alert, please contact a member of Cozen O'Connor's Cannabis Industry Team.**

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Marijuana is still classified as a Schedule I controlled substance by the U.S. Drug Enforcement Agency, and as such it remains a federal crime to grow, sell and/or use marijuana. Any content contained herein is not intended to provide legal advice to assist with violation of any state or federal law.