



Getting into the Weeds of CBD & Marijuana Advertising

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January 29, 2020



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This Program Will Cover:

- Differences between marijuana and hemp
- Advertising of marijuana
- Advertising ancillary businesses
- Advertising of CBD and hemp-derived products

Regulation of Marijuana and Hemp Advertising

Federal Enforcement



- Controlled Substances Act – 21 U.S.C. § 843

“It shall be unlawful for any person knowingly or intentionally to ***use any communication facility in committing or in causing or facilitating*** the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II”

Regulation of Marijuana and Hemp Advertising (cont.)

- Sale, use, or distribution of marijuana remains a felony offense under the Act
- Violation of the communications provisions may also be a felony and a felony conviction could jeopardize a person or company's ability to hold an FCC license
- 2018 Farm Bill – 7 USC § 1639o
Adopted mechanism to legalize, and regulate production of hemp and derivative products



Hemp vs. Marijuana

- Marijuana
 - Cannabis plant or derivatives with THC levels greater than 0.3%
 - Remains a Schedule I drug under Drug Enforcement Act
 - Sale, use, or distribution is a felony in many states and at the federal level



Hemp vs. Marijuana

- Hemp
 - Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3% on a dry weight basis. – 7 USC § 1639o(1)
 - May be produced, used, sold (and advertised) pursuant to an approved state plan or “default” federal plan



Regulation of marijuana advertising

Federal Enforcement



- So far, Department of Justice has been “hands-off” in states where marijuana is legal, focusing instead on marijuana businesses that trigger these more serious issues:
 - Distribution to minors;
 - Revenue to criminal enterprises, gangs and cartels;
 - Distribution to states where it remains illegal;
 - Using authorized marijuana sales as a cover for other illegal activity;
 - Violence/firearms in the cultivation and distribution of marijuana;
 - Drugged driving and other public health impacts;
 - Growing of marijuana on public lands; and
 - Marijuana possession or use on federal property

Regulation of marijuana advertising (*cont.*)



Federal Enforcement

- FCC has cautioned broadcasters to NOT accept ANY marijuana advertising
- Regardless, any broadcaster accepting marijuana advertising should use diligence to ensure client is not engaged in any of the listed serious violations and is properly licensed in the state

Regulation of marijuana advertising (*cont.*)



Federal Enforcement

- Federal Trade Commission (FTC) has not been highly involved
 - Generally regulates truthfulness of advertising, not legality of the product
 - But will crack down on false or unsupported claims of medical benefits
- IRS and Treasury regulations restrict banks ability to do business with marijuana distributors
 - Has forced marijuana business to be conducted mostly in cash

Regulation of marijuana advertising (*cont.*)

State Enforcement

- State laws may also restrict advertising generally and several states have enacted marijuana specific advertising laws
- Generally focused on ensuring advertising does not reach children, E.g., Colorado:
 - Advertising only allowed where advertiser has “reliable evidence” that no more than 30% of the audience is reasonably expected to be under 21 years old
- Laws generally target advertiser, not stations accepting advertising
- But if ad violated state law, a station could lose a defense that it was simply advertising a legal product in a legal manner

Regulation of marijuana advertising (*cont.*)

Potential for Significant Changes at any time

- Changes may come from states, Department of Justice, and/or Federal Trade Commission
 - States continue toward greater legalization
 - Federal legislation has been introduced that would decriminalize marijuana entirely
- Unlikely that FCC will get involved unless other agencies take the lead

Concerns with Advertising Across State Lines

- Generally, FCC allows advertising of businesses on any station as long as business is legal where conducted
- BUT, marijuana is still illegal at federal level, as is transport across state lines
- Stations accepting advertising should look at laws of state of business and of station
- “Causing or facilitating” transport across state lines could increase potential liability
- Especially if transport is to a state that has not liberalized marijuana laws

Advertising for Ancillary Business

- PSAs
- Physicians
- Non-marijuana products sold by dispensaries
- Marijuana business consultants
- Political advertisements
- CBD Oil

Regulation of hemp (and derivatives) advertising

Changes from 2018 Farm Bill

- Adopted procedures for states or tribal territories to take authority over hemp production
- States or tribes must submit plans to Department of Agriculture for approval
- Department of Agriculture adopted “interim” plan for states that do not have plans
 - Effective for up to two years as state plans are finalized
- Currently a number of states and tribes have submitted plans, and USDA has started approving plans



Regulation of hemp (and derivatives) advertising (*cont.*)

CBD (Cannabidiol, or cannabis oil)

- Would be legal to sell (and advertise) if:
 - Product is derived from “hemp” (*i.e.* THC levels 0.3 % or lower)
 - Produced under approved hemp production plan (state or federal)
 - Business is licensed pursuant to state regulations
 - Product complies with FDA requirements
- State plans (when adopted) may also directly regulate advertising of CBD or hemp products

Regulation of hemp (and derivatives) advertising (*cont.*)

CBD (Cannabidiol, or cannabis oil)

- FTC (and states) continue to regulate false or unsupported medical claims
- Prohibits sale of CBD products claiming to prevent, diagnose, treat, or cure serious diseases
- Monitor claims of products' legal status
- Same broadcaster obligation as with other false ads

Regulation of hemp (and derivatives) advertising (*cont.*)

CBD (Cannabidiol, or cannabis oil) (*cont.*)

- Food and Drug Administration (FDA) also regulates CBD
 - Has approved a single prescription epilepsy drug containing CBD
 - Prohibits sale of CBD to be taken orally or marketed as a dietary supplement
 - Topical applications containing CBD are not prohibited, provided topical use is not intended to be used to “diagnose, cure, mitigate, treat or prevent disease”



Regulation of hemp (and derivatives) advertising (*cont.*)

CBD (Cannabidiol, or cannabis oil) (*cont.*)

- State regulation of CBD products
 - Inconsistent among states
 - A number of states are considering legislation that would make CBD ingestibles legal in the state (along with states that are adopting new laws to regulate hemp production and sales)
 - Uncertainty is the watchword for these new state laws concerning ingestibles; even in states that legalize ingestible CBD products, conflict may remain between state and local health departments that cite FDA regulations and state law
 - Laws regarding ingestibles may be inconsistent with Federal regulation
- Many jurisdictions have taken enforcement action against CBD oil ingestibles or have issued warning to retailers not to sell them

Got Questions?

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