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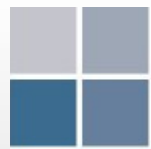
CommLawBlog

Getting Into the Weeds on Marijuana & CBD Advertising

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This Program Will Cover:

- Marijuana advertising
- Regulation on other concerns related to marijuana advertising where legal
- Legalization of CBD and hemp products
- CBD/hemp advertising and regulatory issues to consider when accepting such advertising

Regulation of Marijuana and Hemp Advertising

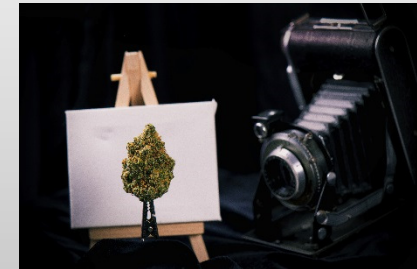
Federal Enforcement

- 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”

- 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 for states 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 percent
 - Remains a Schedule I drug under Drug Enforcement Act
 - Sale, use, or distribution is a felony

- 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 percent on a dry weight basis. – 7 USC § 1639o(1)
 - May be produced, used, sold (and advertised) pursuant to an approved State plan



Regulation of marijuana advertising

Federal Enforcement

- So far, DOJ 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 aforementioned 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. Several states have enacted marijuana 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, station could lose 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
- Unlikely that FCC will get involved unless other agencies take the lead.

Regulation of hemp (and derivatives) advertising

Changes from 2018 Farm Bill

- Adopted procedures for States or Indian Territories to take authority over hemp production
- States or Tribes must submit plans to Department of Agriculture for approval
- Department of Agriculture also directed to develop plan to cover states that do not adopt their own
- USDA must approve or disapprove state and Tribal plans within 60 days of receipt



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

CBD (Cannabidiol, or cannabis oil)

- Would be legal to sell (and advertise) if:
 - State has an approved hemp production plan
 - Product is derived from “hemp” (i.e. THC levels 0.3 % or lower)
 - Business is licensed pursuant to state regulations
- Most approved state plans do not directly regulate advertising of CBD or hemp products, but other state laws may
- FTC (and States) continue to regulate false or unsupported medical claims

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

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

- Food and Drug Administration (FDA) also regulates CBD
 - Has approved only one 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
- Prohibits sale of CBD products claiming to prevent, diagnose, treat, or cure serious diseases



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

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

- State regulation of CBD products
 - Inconsistent among states
 - CA is considering legislation that would make CBD oil ingestibles legal in the state is on hold in even as the state's health department cracks down on places that sell CBD oil ingestibles, and the CA Attorney General has said that it's not clear that inconsistency won't remain even if the state legislation is passed
 - Often inconsistent with Federal regulation
- Jurisdictions that are either taking enforcement action against CBD oil ingestibles or have issued warning to retailers not to sell them include: NYC, ME, and OH (CA??)

Status of state hemp legalization and regulation plans

- U.S. Department of Agriculture has begun reviewing and approving state hemp plans
- Vast majority of states are relying on state plans
 - At this point, only New Hampshire appears to be relying on the USDA licensing and regulatory process
 - 25 states are continuing to rely on regulatory programs developed as part of the 2014 pilot program for industrial hemp production
 - Another 17 states have had new hemp regulatory plans approved this year by the USDA

Status of state hemp legalization and regulation plans (*cont.*)

- A number of states still do not have USDA approval, including:
 - Arizona
 - California
 - Michigan
 - South Dakota
 - Tennessee
- Hemp legalization is pending legislation in Idaho and Mississippi
 - Legislative attempt in Idaho failed earlier this year
- In addition to the state approvals, the USDA has approved 32 tribal regulatory plans with 5 additional tribal plans in various states of review

Got Questions?

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