

The Year in Weed and CBD 2018

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Hemp Designated as Agricultural Product

Earlier this year, former Attorney General Jeff Sessions announced that the Department of Justice rescinded Obama-era guidelines that de-prioritized enforcement of federal marijuana prohibitions against individuals and businesses complying with state laws. In a contrasting move largely made for the benefit of the agricultural industry, the federal government has now legalized the cultivation of industrial hemp.

The [Farm Bill](#) (the “Bill”) helps remove obstacles for the production of industrial hemp only, not recreational or medical marijuana. While hemp will be subject to stringent state and federal regulatory frameworks, opportunities for service providers to the hemp industry will develop quickly. But they must proceed with extreme caution.

The Controlled Substances Act (“CSA”) essentially prohibits the cultivation, possession and distribution of marijuana, and using the Internet to sell it. Until last week, the cannabis plant and derivative compounds were considered illegal. Now, hemp and derivatives with a THC concentration of .3% or less are considered exempt from CSAs defined marijuana prohibitions (e.g., CBD products that satisfy the Bill’s definition of hemp).

The Bill adds to the Agricultural Marketing Act by setting forth that states and Indian tribes may seek exemption from federal regulatory authority over hemp production in their territories if they have submitted a testing inspecting and disposal plan, or if they receive approval from the Secretary of Agriculture. Growing hemp in a state or tribal territory without an approved plan or federal license is still considered unlawful.

There is a clearly policy preference for states, Indian tribes and the federal government to closely coordinate on regulatory compliance and production licensing. Until that is accomplished, the industry remains high-risk.

Marijuana is still illegal at the federal level and open questions remain about the production and sale of hemp. Additionally, overlapping laws and policies are, for the time being, in conflict and other regulations that apply to products such as CBD oil still apply. For example, the FDA still considers hemp-derived cannabidiol products to be illegal.

Online Advertising Considerations for Cannabis Sales

While the feds have quasi-legalized hemp, states continue to legalize cannabis for recreational and medicinal purposes. In fact, more than two dozen states and the District of Columbia have now done so.

Alaska, California, Colorado, the District of Columbia, Maine, Massachusetts, Nevada, Oregon and Washington have all implemented marijuana advertising restrictions. The Golden State's cannabis advertising standards are relatively strict and include, without limitation, a prohibition against making unsubstantiated statements related to health that expressly or by implication suggest a relationship between the consumption of cannabis products and health benefits. Would-be California advertisers must also consult current audience composition data and ensure that no less than 71.6% is reasonably expected to be at least 21 years old.

To a large extent, existing advertising in states where cannabis is legal appear to focus on particular characteristics of different marijuana strains. Danger lies when going further – promoting positive health effects (e.g., disease prevention/cure, anxiety reduction, pain relief, etc.). All those in the chain are potentially liable for deceptive claims, from producers to retailers.

From a federal standpoint, the United States Supreme Court has held that if a product is legal, so are non-deceptive advertisements therefor. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). While the feds have not yet prosecuted a case for publishing a cannabis advertisement in states where it has been legalized, again, marijuana remains illegal at the federal level. In fact, the CSA makes it a crime to “place in any newspaper, magazine, handbill, or other publications, any written advertisement knowing that it has the purpose of seeking or offering illegally to receive, buy, or distribute a Schedule I controlled substance.” It can also be considered a federal crime to engage in a financial transaction involving the proceeds of a CSA violation.

That does not necessarily mean that advertisements are per se unlawful. Rather, they must be approached deliberately and cautiously.

Consider that in one case interpreting the CSA's prohibition on print media advertising, a court held that the publication of third-party advertisements was not a CSA violation because it involved “a mere advertisement or promotion of controlled substances and drug paraphernalia.” Additionally, at least one court has opined that that intermediary website operators that publishing advertisements are not liable for the advertising content.

Also, consider the Rohrabacher-Blumenauer amendment to the federal spending bill, which prohibits the U.S. Department of Justice from using federal funds to interfere with state-legal medical marijuana programs. Thus, prosecutors are arguably unable to initiate charges against state-legal medical marijuana businesses and those who provide products or services to them. The amendment does not apply, however, to state-legal recreational marijuana programs. Publishers of ads for state-legal recreational businesses, even if done in compliance with applicable state law, are exposed to federal prosecution.

While the Federal Trade Commission has, thus far, been conspicuously silent on the marijuana-related advertising front, it has historically been quiet aggressive when it comes to taking action against those that make unsubstantiated health claims or use endorsements suggesting positive health effects. Perhaps this is due to the already existing broad-sweeping criminal consequences surrounding various marijuana-related activities. Query whether the FTC will take a more active role

when it comes to the regulation of state-legalized cannabis promotion.

In 2018, the National Advertising Division inquired into a company's substantiation for CBD-related claims that the product treated cancer. However, the NAD's jurisdiction is national in scope. Thus, NAD arguably has no present authority to regulate state-specific retail and medical marijuana advertising activities that do not possess an interstate commerce component.

In contrast, the FDA has issued warning letters to companies making health claims about dietary supplements containing cannabidiol. It has not, however, taken action against those that disseminate promotional materials with representations about the health benefits of marijuana.

The CSA classifies marijuana as an illegal drug. Whereas, states are more flexible in their approach.

However you cut it, the legal regulatory dichotomy complicates cannabis advertising and carries with it clear and present risk. While doing so comes with no guarantees – at a bare minimum – publishers that want to minimize liability exposure should assess the purpose of advertisements, ensure businesses being advertised are licensed, familiarize themselves with applicable restrictions, and design and implement advertising compliance measures that comply with state and local regulations.

What currently appears to be regulatory indifference will not last. Good cause exists to be wary of an expansive regulatory view of third-party publisher liability.

NACB Establishes Cannabis Advertising Standards

The National Association of Cannabis Businesses recently finalized [advertising standards](#) designed to establish a trustworthy and ethical business space, protect consumers and satisfy regulators.

Similar to California Business and Professions Code § 26150, the NACB standards define an advertisement as a written or verbal statement, illustration or depiction that is calculated to induce sales of cannabis or cannabis products, in any media. The term “advertisement” does not include, without limitation, editorial or other reading material, or non-commercial material that is not intended to induce sales and that does not propose an economic transaction.

All advertising for cannabis or cannabis products must accurately and legibly identify the licensee responsible for its content and include specific statements, including but not limited to, that the product is for use only by adults who are not underage (retail), that the product is for use only by authorized patients (medical), a warning that there may be health risks associated with consumption, and a warning for women who are pregnant or breastfeeding.

Advertisements may describe intended physical or psychological effects only if such statements comply with specifically defined packaging and labeling standards, and include warnings that the effects may vary and have not been approved by the U.S. Food and Drug Administration.

As with any advertising content, false or misleading claims are prohibited. As are advertisements that contain health, medical or disease claims about cannabis or a cannabis product that do not conform with specifically defined packaging and labeling standards.

The standards also set forth prohibited advertising content for cannabis businesses, including, but not limited to, promotion of excessive consumption and content depicting any person inhaling, exhaling or ingesting cannabis.

In term of digital advertising, the NACB standards set forth that a cannabis establishment that advertises via web page must ensure that individuals visiting the web page are not underage by employing a neutral age-screening mechanism before allowing users to access the website. A “neutral age-screening mechanism” means an age verification page or pop-up that contains a data-entry point that allows users to enter their age accurately, and restricts or permits access accordingly. The use of a check box stating “I am over 21 years old” would not be considered a neutral age-screening mechanism, according to the NACB, although a text box or drop-down to enter the user’s full birth date would suffice.

Advertising or digitally marketing via unsolicited pop-up advertisements by a cannabis establishment is prohibited. Additionally, cannabis establishments may not engage in advertising or digital advertising that is directed towards location-based devices, including but not limited to cellular phones, unless the advertising or marketing is a mobile device application installed on the device by the owner of the device who is not underage, and includes a permanent and easy opt-out feature

Digital advertisements that are intended to be forwarded by users shall include instructions to individuals downloading the content that they should not forward these materials to underage persons. The NACB standards also set forth guidance pertaining to the use of social media, as well.

The standards require that cannabis businesses maintain “clear and complete” records of their advertising activities and audience composition data, for a period of no less than two years.

New York Calls for Legalizing Recreational Marijuana Use

New York Governor Andrew Cuomo has made no secret during 2018 that he intends to enact legislation that would regulate the retail sale of cannabis. New York City Mayor Bill DeBlasio has also publicly endorsed legalization. Notably, in July 2018, a New York State Department of Health Study concludes that “[a] regulated marijuana program enjoys broad support and would have significant health, social justice, and economic benefits.” It also states that regulating marijuana may lead to a reduction in the use of synthetic cannabinoids.