

Marijuana and the Promotional Products Industry

A discussion regarding the Conflict of Federal and State Laws

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Disclaimer



Under the United States Controlled Substances Act, marijuana is a Schedule I Drug.

QCA does not advocate the use or promotion of substances regulated and restricted under the auspices of the Act.

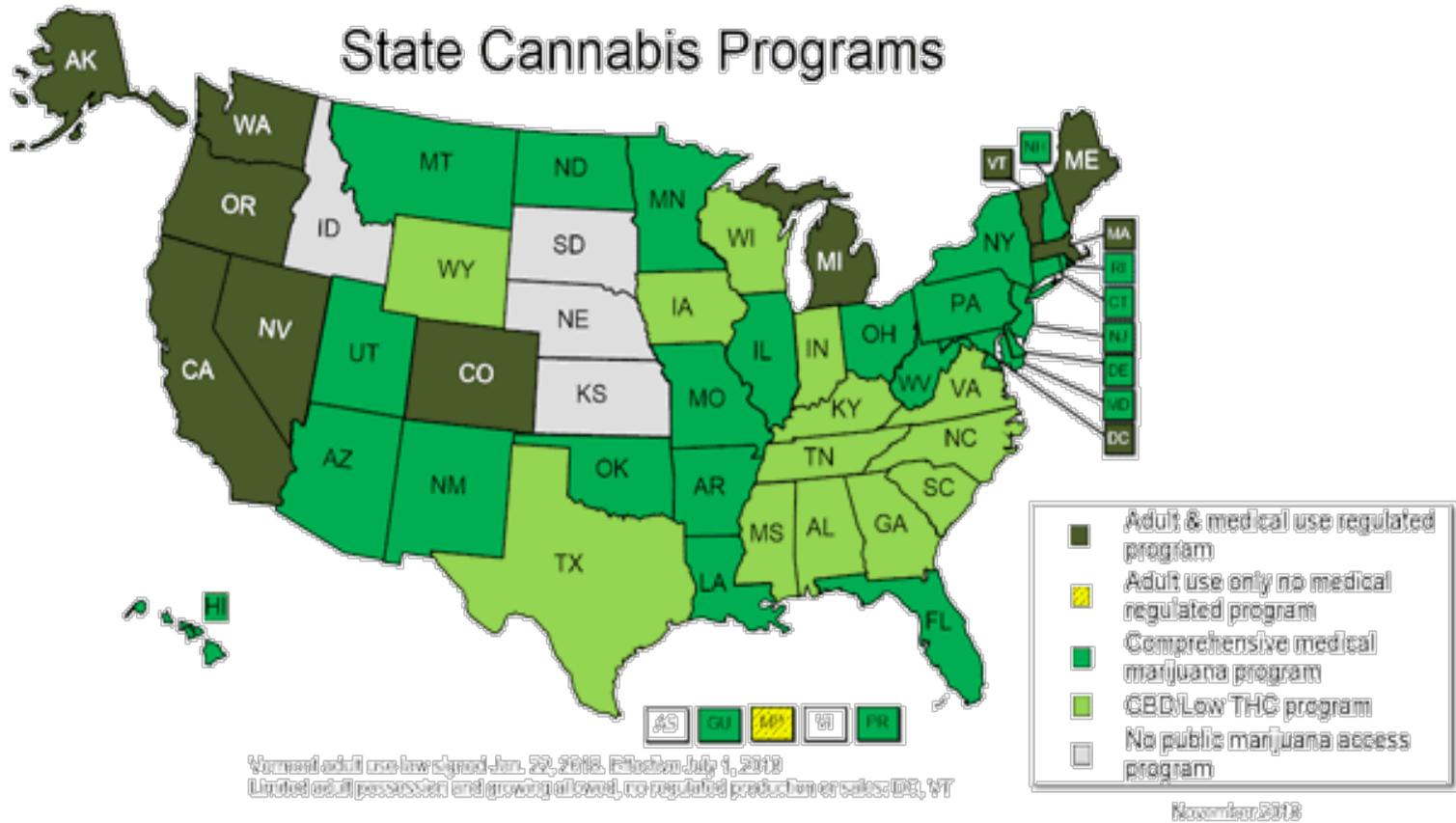
Discussion in the following presentation is not intended to be taken as legal guidance.

QCA Members, Applicants and DAC Members are encouraged to engage local counsel in the jurisdictions where your product is to be distributed to clarify specific regulations for your product and business.





State of Marijuana Legalization



Source: National Conference of State Legislatures (www.ncsl.org), accessed 9 November 2018.

Business Analytics and the Marijuana Industry

- 2017: Global legal cannabis market grew by 37% to US\$9.7 billion
 - US market accounted for 90% of sales at US\$8.5 billion
 - Canadian market accounted for 6%
- Forecasted industry growth (2022):
 - US sales projected to be US\$23.4 billion (73% of total market)
 - Canadian sales projected US\$5.5 billion (17% of total market)
 - Growth largely driven by anticipated medical usages
- Ancillary products and services (i.e. professional services, banking, logistics providers, IT, security, etc.)
 - 2017: Estimated additional impact of US\$11 billion
 - Forecasted 2022: US\$42 – US\$57 billion
- 26 Feb 2018: First Nasdaq listing of a grower (LP Cronos Group (Canada))
 - 30 October 2018: Aphria becomes the fifth Canadian grower to list
 - 30 October 2018: New B2B logistics provider featuring industry-specific compliance processes, Wayv, announced
 - 2 November 2018 FDA-approved Epidiolex, a drug containing marijuana for treatment of seizures associated with childhood epilepsy, made commercially available

(Sources: Annual Marijuana Business Factbook (2018) and www.mjbizdaily.com, accessed on 30 October 2018)



What is the Controlled Substances Act?

- Provides enforcement authority to the US Drug Enforcement Agency for restricting access to five categories of substances. Factors considered include:
 - Potential for abuse
 - Safety
 - Addictive potential
 - Legitimate medical applications
- Classifies Marijuana as a Schedule I Drug:
 - High potential for abuse
 - No current accepted medical use in treatment in the United States
 - Lack of accepted safety for use under medical supervision
- Defines “Paraphernalia” as:
 - Any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing substances restricted under the Act into the human body.
- Exempts tobacco and products intended for traditional use with tobacco products.



Federal Conflict of Laws: Dept of Justice vs Congress

Dept of Justice

- 29 Aug 2013: Cole Memo establishes priorities as to prevent:
 - Distribution to minors
 - Revenue from sales funding criminal enterprises
 - Diversion from legal cannabis states to other states
 - State-authorized activity from being used as cover for trafficking of other illegal drugs
 - Use of violence and firearms in cultivation and distribution
 - Exacerbation of public health consequences
 - Cultivation of marijuana on public lands
 - Use or possession on federal property
- 14 February 2014: 2nd Cole Memo applies original Cole Memo criteria to financial crimes associated with marijuana activity
- 4 Jan 2018: Marijuana Enforcement Memo

Rescinds Cole Memos

Congress

- Rohrbacher – Farr Amendment to the Appropriations Act of 2014 directs DOJ not to use funds for enforcing CSA related to marijuana offenses that would prevent states from implementing laws supporting medical marijuana. Requires annual reauthorization:
 - Reauthorized in 2015
 - Reauthorized in 2016
 - Reauthorized in 2017
 - Reauthorized in 2018 for 2019
- 16 August 2016: US v McIntosh upheld limiting DOJ spending on enforcing the CSA in states with medical marijuana reform laws via annual renewal attached to a congressional spending bill.



Can I mail my customer's marijuana promo item?

USPS

- 21 USC Section 843 (b)
Communication Facility:
 - 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.
 - Each separate use of a communication facility shall be a separate offense under this subsection.
 - For purposes of this subsection, the term “communication facility” means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.
- 21 USC Section 843 (c)
Advertisement:
 - It shall be unlawful for any person 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.
- 15 December 2015 Marshall Letter
 - “Mailability” determined by US Postal Inspection Service in accordance with USPS Publication 52.

Courier-Delivered

- FedEx and UPS adhere to federal guidelines regarding transportation of marijuana.
 - Drug sniffing dogs
 - Inspection facilities
 - Report suspicious parcels
- If shipping across state lines, product may run afoul of destination prohibitions against advertising and / or paraphernalia.
- No legal precedent at this time.
- No corporate policies or guidance published from shippers at this time.
- Unclear how product promoting a marijuana brand would be treated.



USPS Published Guidance



NOVEMBER 27, 2015

MAILPIECES CONTAINING ADVERTISEMENTS ABOUT MARIJUANA

If a mailpiece contains an advertisement for marijuana, that mailpiece is nonmailable as explained below:

Domestic Mail Manual (DMM) 601.9.4.1 restricts any advertising, promotional, or sales matter that solicits or induces the mailing of any article described in PUB 52 as hazardous, restricted, or perishable is nonmailable except that such matter relating to controlled substances, radioactive materials, restricted liquids and powders, battery-powered devices, odd-shaped items in envelopes, and switchblades and ballistic knives, as described in PUB 52, is mailable if it contains packaging instructions and any other mailing limitations under PUB 52, 508.9.0, and 508.10.0 (18 USC 1716).

- If an advertisement solicits the mailing of controlled substances such as marijuana, it would violate USPS mailing standards.
- Marijuana is classified as a Schedule I controlled substance in USC 21 812(c)(10).

USC 21 843(c) does make it unlawful to place an ad in any publication with the purpose of seeking or offering illegally to receive, buy, or distribute a Schedule I controlled substance. It does not include material which advocates the use of a similar material, which advocates a position or practice, and does not attempt to propose or facilitate an actual transaction.

- If an advertisement advocates the purchase of clinical marijuana through a Medical Marijuana Dispensary, it does not comply with USC 21 843(c).
- The authority for enforcing the Controlled Substances Act and implementing laws rests primarily with the Drug Enforcement Administration (DEA) under the Department of Justice.

The USPS cooperates with all other agencies in preserving the laws of the United States.

Per Publication 52, Hazardous, Restricted, and Perishable Mail, 453.31 Controlled Substances, if the distribution of a controlled substance is unlawful under 21 U.S.C. 801 or any implementing regulation in 21 CFR 1300, then the mailing of the substance is also unlawful under 18 U.S.C. 1716. Controlled substances and drugs that contain controlled substances are acceptable in the domestic mail only under limited specified conditions.

If there are any questions regarding advertising marijuana through the mail, please call the Portland District Mailing Requirements Office at (503) 294-2417.

-- Portland District Mailing Requirements



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Common State Restrictions on Marijuana Advertising

- Limits marketing to minors based on tobacco settlement as upheld in *Commonwealth Brands, Inc. v. U.S. 678*:
 - Depictions designed to appeal to a person under 21 (cartoons, toys, etc.)
 - Depicts a person under 21 consuming a marijuana product
 - Promotes a lifestyle
- Restricts marketing health claims:
 - Restricts false and misleading claims
 - Restricts representing marijuana usage as curative or therapeutic without scientific data supporting the claim

(Compiled from “State-by-State Guide to Cannabis Advertising Regulations” at www.leafly.com, accessed on 29 Oct 2018)

Other Federal Challenges to Working with the Marijuana Industry

- Taxes: Section 280E of the Internal Revenue Code limits deductions for business:
 - No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.
- IP: Brand protection, the US Patent and Trademark Office and the Moral Utility Doctrine
 - USPTO authorized to deny patent and trademark protection for inventions and other IP found to be “illegal,” “immoral” and/or contrary to the “health and good of society.”
 - MedMen exceptions? (stylized marijuana leaf, word “cannabis”)





Resources



- Drug Enforcement Agency (www.dea.gov)
- National Conference of State Legislatures (www.ncsl.org)
- Marijuana Business Factbook (2018) (www.mjbizdaily.com)
- Leafly (www.leafly.com)
- American Bar Association, Section of Science & Technology Law (www.americanbar.org/groups/science_technology/)
 - William B. Baker, Potomac Law Group (wbaker@potomaclaw.com)
 - Chair, ABA Science & Technology Section



Questions?

(Submit your questions through the question bar in the webinar control panel located in the upper right hand corner of your screen.)



Thank you!

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