

Marijuana Advertising Summary

Currently, a newspaper accepting advertisements for marijuana would face several legal challenges arising from the fact that marijuana remains a Schedule I controlled substance under federal law, even in states where it is legal. We have outlined these below.

The Controlled Substances Act (“CSA”) makes advertising for Schedule I substances a felony. Under the CSA “[i]t 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,” of which marijuana is one. 21 U.S.C. § 843(c)(1). A companion section of the Act criminalizes digital advertising. *Id.* § 843(c)(2). These offenses are punishable with a fine and up to four years in prison.

1. *The United States Postal Service (“USPS”) takes the position that material containing an advertisement for marijuana is “nonmailable,” both under the CSA and USPS-specific regulations.* In November 2015, the Portland District of the USPS issued a statement on “Mailpieces Containing Advertisements About Marijuana” explaining that such materials were nonmailable. This garnered significant attention, and several members of Congress wrote to the USPS seeking clarification. In a December 2015 letter, the USPS General Counsel Thomas Marshall issued a national policy applying to all postal Districts reiterating that these materials are nonmailable, but making clear that while USPS employees should advise mailers of the standards that apply to marijuana advertisements, they do not have the authority to reject such materials. Instead, they must send a report to the Postal Inspection Service, and the matter would then be turned over to the responsible law enforcement agencies for investigation if appropriate. We understand that in January 2016, the Postal Service contacted several newspapers throughout the country that carried advertisements for marijuana, informing them that they were breaking federal law by including these advertisements and mailing them to subscribers through the postal service.
2. *Although there was hope the Obama-era Department of Justice (“DOJ”) would affirmatively state that it would not prosecute individuals running marijuana advertisements, current Attorney General Sessions has reversed this position.* In August 2013, the DOJ issued a memorandum (sometimes referred to as the Cole memo, after its author, Deputy Attorney General James M. Cole) instructing United States Attorneys that prosecuting marijuana businesses acting legally under state law was not a priority. In December 2014, Congress passed the Rohrabacher-Blumenauer Amendment as part of an omnibus spending bill, prohibiting the Department from using funds allocated under the bill from preventing states that have legalized medical marijuana from implementing those laws. (For example, in an ongoing appeal of an action against five Washington state residents prosecuted for medical marijuana cultivation and use, the DOJ is now taking the position that it did not have the authority to continue its prosecution after December 2014, even though the lawsuit began in 2012.) Against this backdrop, in March 2016 several members of Congress wrote to then-Attorney General Loretta Lynch asking her to make clear that DOJ would not prosecute

individuals for running marijuana advertisements. DOJ did not issue any statement in response. In contrast, current Attorney General Jeff Sessions is known for his strong position against marijuana, notably stating that the drug is “only slightly less awful” than heroin. As had been expected, on January 4, 2018 Attorney General Sessions rescinded the Cole memo, instructing prosecutors to follow “the well-established principles that govern all federal prosecutions” when determining whether to bring an action against marijuana activity.

3. *The amendment that currently protects marijuana operations in states that have legalized the drug for medical use from federal prosecution is set to expire on January 19, 2018.* The Rohrabacher-Blumenauer Amendment expires on January 19, 2018 along with the latest continuing resolution extending current government funding levels. (As it is tied to a spending bill, the Amendment needs to be continually renewed. In an attempt to resolve this, Rep. Dana Rohrabacher introduced the Respect State Marijuana Laws Act in the House in February 2017. It has not progressed out of committee.) In May 2017, Attorney General Sessions sent a letter to Congressional leadership asking them not to renew the Rohrabacher-Blumenauer Amendment. If it is not renewed by the 19th, the DOJ will be able to fund actions against activities revolving around medical marijuana, including advertising, even in states where medical marijuana is legal.

We will continue to monitor these developments and keep you informed. If you have any questions or learn any local facts that may be useful, please feel free to let us know.