

Cannabis Advertising: Risks and Opportunities

*Legal and Regulatory Considerations for
Premium Publishers*

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Cannabis: The Lingo

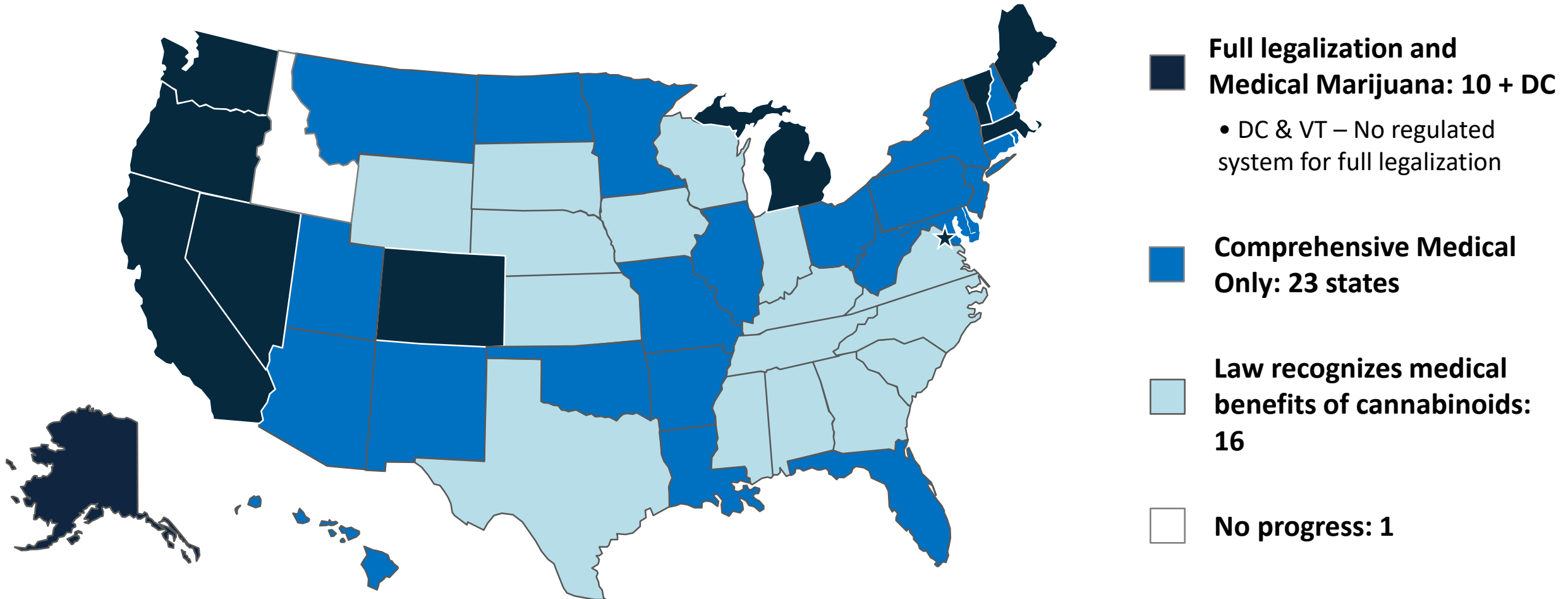
- ▶ **“Hemp”**-Industrial hemp grown under the Farm Bill or lawfully imported hemp, also called **“CSA-Exempt Material”**
- ▶ **“Marijuana”**- Marijuana as defined in the CSA
- ▶ **“Cannabis”**- the entire cannabis plant, inclusive of marijuana and hemp
- ▶ *BUT* “marijuana” is disfavored; states like CA use “cannabis” to refer to MJ

The Controlled Substances Act of 1970

- ▶ **Marijuana** is defined as “all parts of the plant Cannabis sativa L., growing or not; the seeds; the resin extracted; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.”
- ▶ **Industrial Hemp** is defined in the 2014 and 2018 Farm Bills and the laws of most states as:
 - ▶ “the plant Cannabis Sativa L., and any part of such plant ... with a delta-9 THC concentration of not more than 0.3% on a dry weight basis.”
- ▶ Products derived from industrial hemp grown in compliance with state pilot programs under the 2014 Farm Bill **pre-empted** from CSA control.
- ▶ **Marijuana = Schedule 1 Controlled Substance**

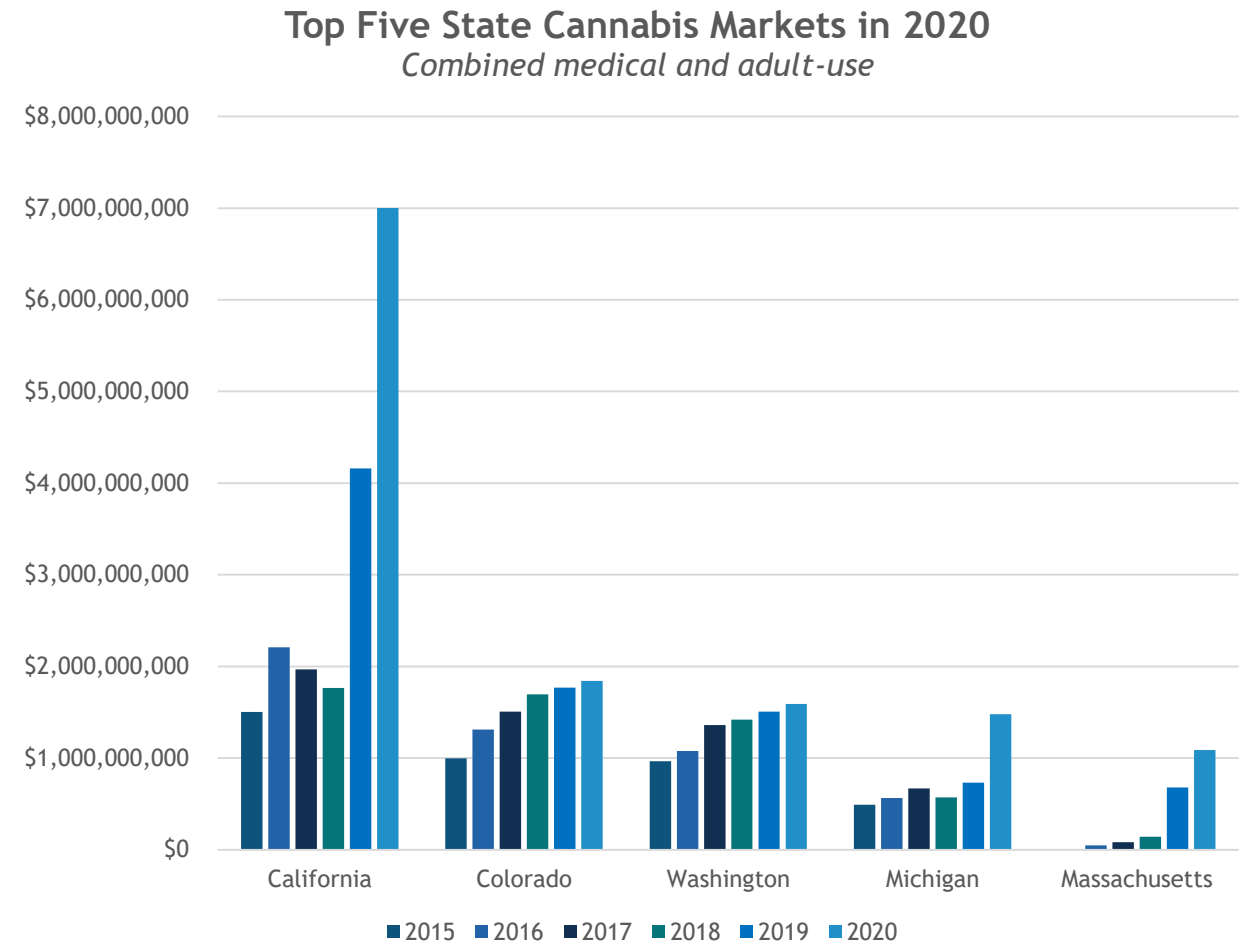
States with Regulated Marijuana Laws

(April 2019)



State of the National Cannabis Market

- ▶ 33 states & DC with medical cannabis and 10 states & DC with adult-use
- ▶ By 2018 over 28 states will contribute to a combined market worth \$8.8 billion
- ▶ By 2020 the market will grow to over \$20.1 billion



Segmented “National Market”

- ▶ Federal illegality and patient residency restrictions prevent almost all consumers and products from traveling across state lines
- ▶ Residency requirements in some states to own or operate a cannabis business further complicate matters
- ▶ To deal with this restriction some companies license their intellectual property to cannabis businesses in each state
- ▶ Regulatory structures and requirements, including advertising restrictions, vary significantly between different states

Direct Cannabis Businesses



Cultivation



Infusion



Testing



Sales



Transport

Ancillary Cannabis Businesses



Consumption
Tools



New
Ideas

Grow
Equipment



Business Services

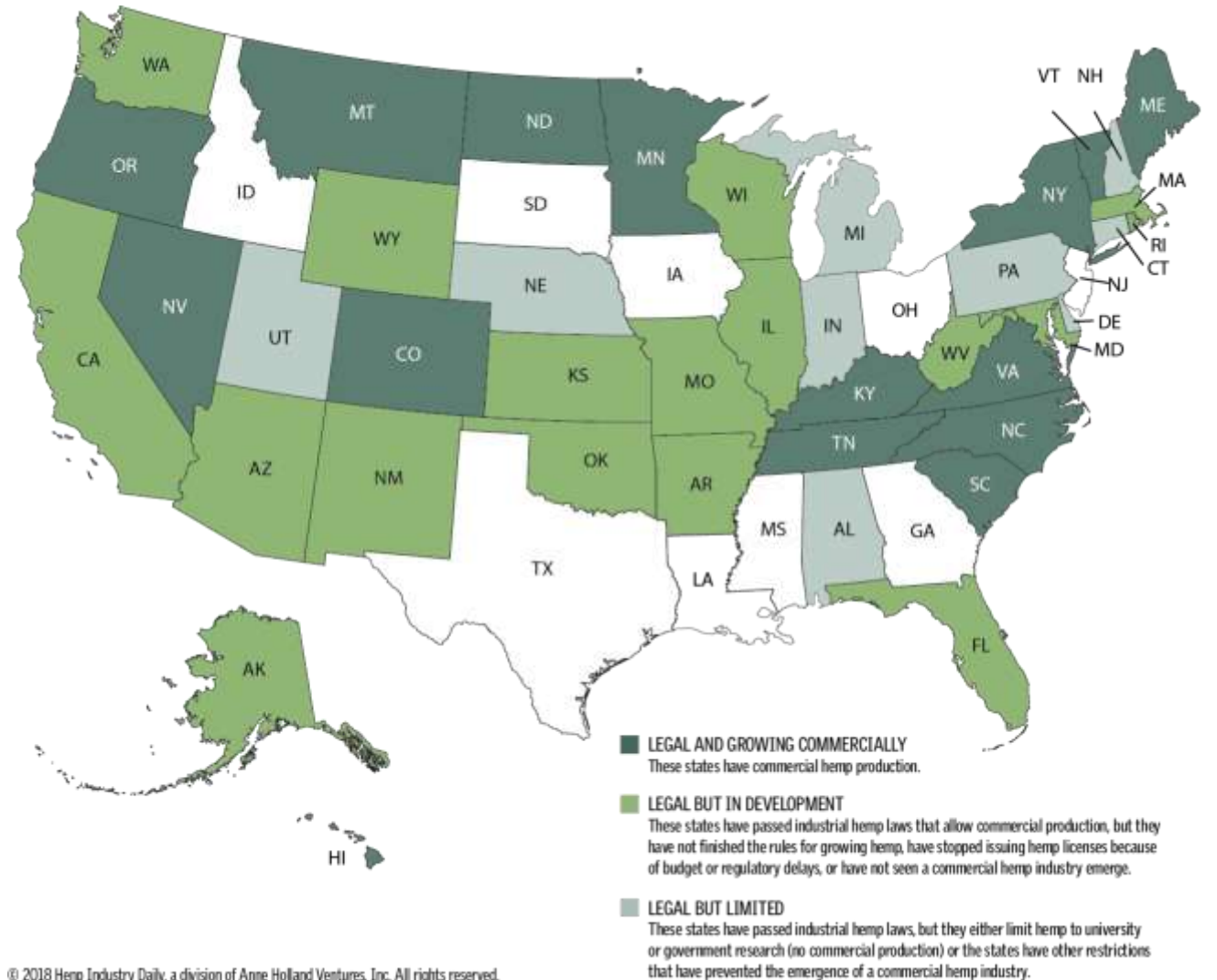


STATES Act – *“Strengthening the 10th Amendment Through Entrusting States”*

- ▶ Co-sponsored by Senators Cory Gardner (R-CO) & Elizabeth Warren (D-MA)
- ▶ Would render the CSA inapplicable to operators in compliance with state cannabis laws
- ▶ “Rule of Construction” provides that conduct in compliance with the Act:
 - ▶ (1) shall not be unlawful;
 - ▶ (2) shall not constitute trafficking in a controlled substance¹ under section 401 of the Controlled Substances Act (21 U.S.C. 841) or any other provision of law; and
 - ▶ (3) shall not constitute the basis for forfeiture of property under section 511 of the Controlled Substances Act (21 U.S.C. 881) or section 981 of title 18, United States Code.
- ▶ Passage would increase access to advertising, though national online ads may still be problematic

Hemp Laws by State

- ▶ 41 states with Hemp laws
- ▶ Rapidly changing!
 - ▶ Week by week in many states



2018 Farm Bill

The Return of Hemp as an Agricultural Crop



Amends the Controlled Substances Act to exclude hemp and THC derived from hemp



Defines hemp to include “**all derivatives, extracts, cannabinoids ...** with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis ...”



Establishes federal regulatory framework for hemp



Establishes national hemp regulatory regime: Provides minimum standards for state programs, and federal regulation for states that do not adopt programs

-States cannot prevent interstate transport of hemp through borders



Contemplates commercial sales



Allows farmers to get research grants and crop insurance



Does not amend the FFDCA

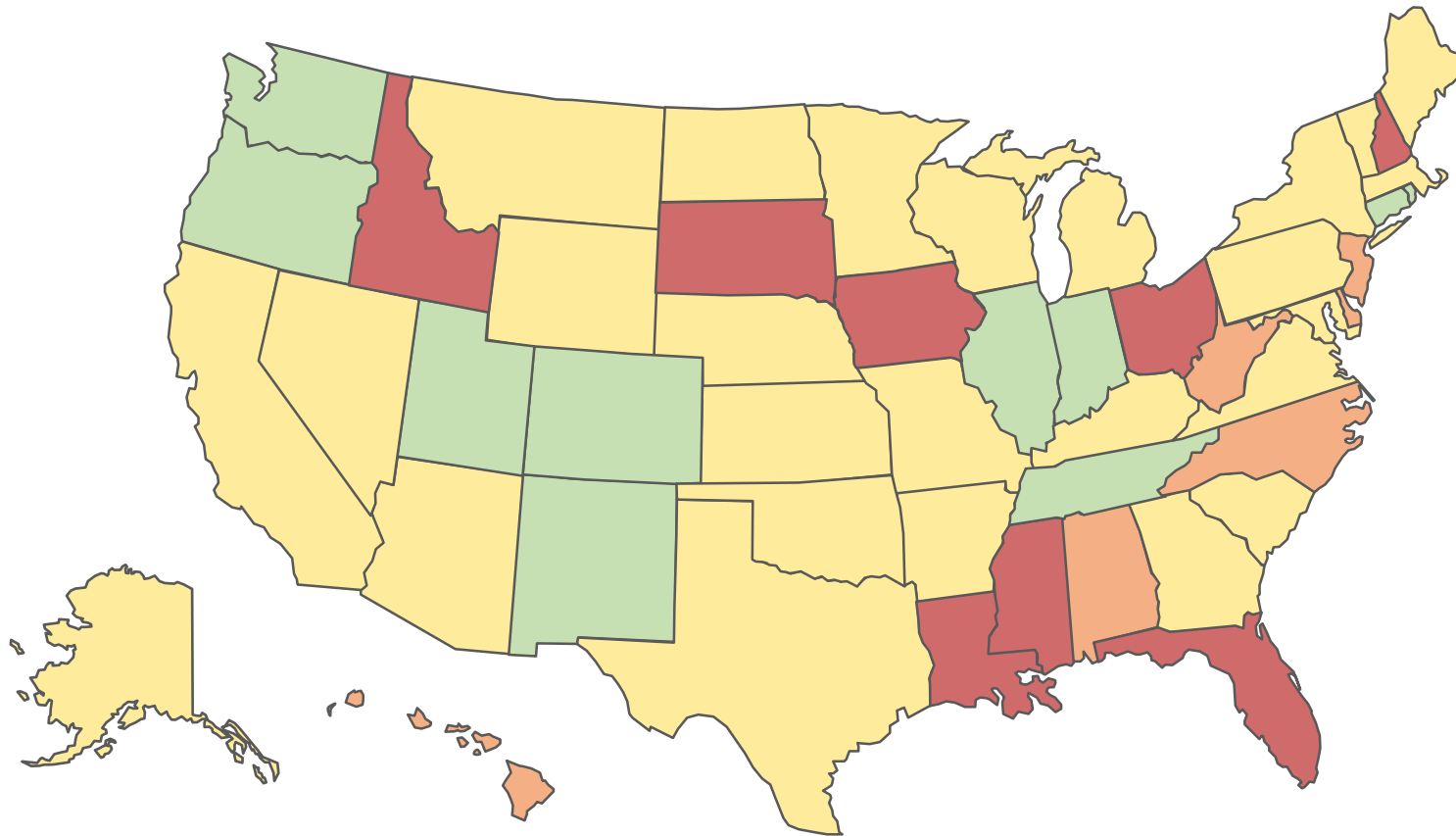
But what about CBD?

Five Common Misperceptions

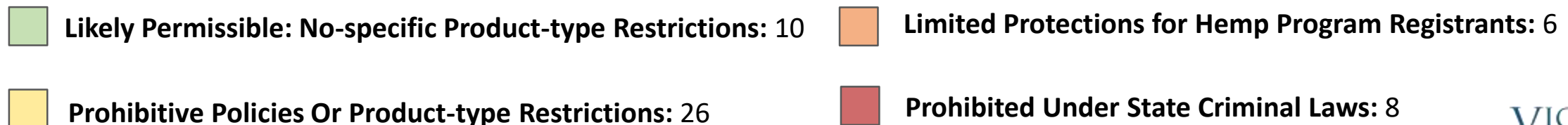
▶ *1. CBD is Legal in Every State*

- ▶ The 2018 Farm Bill exempted hemp and its derivatives from the definition of marijuana under the CSA but it does not require states to do the same
- ▶ Under the 2018 Farm Bill, states are permitted to prohibit hemp production
- ▶ Some states maintain outdated drug laws that do not distinguish between marijuana, hemp and/or hemp-derived CBD, resulting in hemp being classified as a controlled substance under state law
- ▶ Many states prohibit CBD in food and dietary supplements, despite the fact they are widely sold

Hemp-Derived CBD Laws by State



*State Authorizations,
Restrictions, and
Prohibitions Applicable
to the Production and
Sale of Hemp-Derived
Cannabidiol
-As of June 3, 2019-*



CBD: Five Common Misperceptions

▶ 2. *The FDA Doesn't Regulate CBD Products*

- ▶ FDA Position: THC and/or CBD cannot lawfully be added to food or marketed as dietary supplements
- ▶ Warning Letters
- ▶ Public Hearing to Evaluate Options for Regulating Hemp and CBD Products



CBD: Five Common Misperceptions

▶ *3. CBD is Non-Psychoactive*

- ▶ Research indicates that CBD has antipsychotic, anxiolytic (anxiety-reducing), and antidepressant effects
- ▶ Making deceptive claims in advertising is illegal and can result in serious consequences
- ▶ Section 5(a) of the Federal Trade Commission Act prohibits “unfair or deceptive acts or practices in or affecting commerce.”
- ▶ FTC jointly sent warning letters with the FDA to a number of CBD companies
- ▶ Ongoing litigation surrounding the marketing of CBD products demonstrates meaningful risk that false or misleading label claims can cause of action for fraudulent inducement

CBD: Five Common Misperceptions

▶ **4. CBD Has No Side Effects**

- ▶ *Though well-tolerated, CBD can cause side effects*

▶ **5. CBD is A-OK in Pet Products**

- ▶ Association of American Feed Control officials released updated guidelines on May 1, 2019
 - ▶ No part of the hemp plant is approved for pet foods and CBD is considered a drug by the FDA
 - ▶ As such, animal foods that contain CBD as an ingredient may be deemed adulterated and/or misbranded by regulatory agencies, and subject to enforcement actions



Media Risks

Controlled Substances Act Prohibits:

- ▶ Unauthorized use of the internet to “deliver, distribute, or dispense a controlled substance,” such as cannabis, and aiding and abetting the unauthorized use of the internet to do so.
- ▶ Knowing or intentional use of a “communication facility” to commit, cause, or facilitate the commission of a felony violation of the CSA, which includes manufacturing, distributing, or dispensing a controlled substance.

Media Risks

Controlled Substances Act Prohibits:

- ▶ Placing 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 controlled substance.
- ▶ Knowingly or intentionally us[ing] the Internet, or caus[ing] the Internet to be used, to advertise the sale of, or to offer to sell, distribute, or dispense” controlled substances.



BUT...

- ▶ SC has held in *Abuelhawa* that CSA's prohibition on the use of a "communication facility" is aimed at those who "coordinat[e] illegal drug operations," which should exclude those who publish ads for a third-party. *Abuelhawa v. United States*, 556 U.S. 816, 823–24 (2009)
- ▶ Likewise, aiding and abetting liability requires the intent to facilitate the entire underlying crime, but intending to profit from publishing ads for a cannabis business is not the same as intending to facilitate the cannabis business' sale of cannabis.
- ▶ Government "must prove the commission of the predicate drug offense beyond a reasonable doubt in order to sustain a conviction under section 843(b)." *United States v. Dotson*, 871 F.2d 1318, 1322 (6th Cir. 1989)
- ▶ Rohrabacher-Blumenhauer Amendment – precludes DOJ spending arising from state-legal medical cannabis

Status of Major Media Forums

▶ Radio & TV

- ▶ Federal Communications Commission (FCC) has not banned cannabis ads, but other government agencies could be seen as making running those ads subject to prosecution, which could theoretically impact FCC license.
- ▶ Never tested (to public knowledge)

▶ Print Media

- ▶ State by state restrictions on cannabis advertising
- ▶ CSA
- ▶ Perceived reputational risk

Online Platforms – Social Media

▶ Facebook

- ▶ Promoting drugs and drug-related products, including prescription and recreational drugs, is prohibited
- ▶ Allow cannabis advocacy content
- ▶ Cannabis companies prohibited from running ads even in states where cannabis is legal
- ▶ Similar approach to tobacco advertising; more restrictive than alcohol

▶ Instagram

- ▶ Owned by Facebook – same policies apply



Online Platforms – Social Media

▶ Twitter

- ▶ Prohibits ads for illegal goods in its ads policies
- ▶ Drugs and Drug Paraphernalia section lists “illegal drugs, recreational and herbal drugs, accessories associated with drug use, drug dispensaries, and depictions of hard drug use” as examples of prohibited ad content

▶ LinkedIn

- ▶ Policy: “Even if legal in the applicable jurisdiction, LinkedIn does not allow ads related to prescription pharmaceuticals, drugs or any related products or services. Ads that promote illegal drugs, highs, herbal medicines and treatments, psychoactive effects of substances, or aids to pass drug tests are all prohibited.”

▶ Snapchat

- ▶ Prohibits ads that “encourage or glamorize drug use,” as well as ads for illegal or recreational drugs or drug paraphernalia

Social Media “Influencers”



- ▶ Difficult to establish brands without access to social media
- ▶ “Back door” to social media is inviting (paying) “influencers” to promote products
- ▶ Influencer analytics platform Traackr analyzed the top 250 cannabis influencers finding that edibles producers like Incredibles and Wana increased their use of influencers by 32% in 2018, and delivery services such as Eaze, greenRush and SpeedWeed increased their use of influencers by 29%

Social Media “Influencers”

- ▶ BUT paid advertisers must comply cannabis marketing and advertising rules
 - ▶ FTC + state regulation
 - ▶ If paid, are they in same position as premium publishers?
- ▶ Imputed agency = liability for cannabis companies

FTC Regulation – Wild Card

- ▶ Empowered to investigate and prevent unfair methods of competition, and unfair or deceptive acts or practices affecting commerce
- ▶ Silent on the marijuana ads
- ▶ Historically aggressive on unsubstantiated health claims or endorsements suggesting positive health effects
- ▶ Guidance on endorsements and testimonials in advertising
 - ▶ Relationship (ads) must be disclosed
 - ▶ Cannot be false or misleading
- ▶ Unclear whether the FTC will take a more active role when it comes to the regulation of state-legalized cannabis promotion

Selected

California Cannabis (MJ) Advertising Regulations

- ▶ Licensing information, including licensee names and license numbers, must be legibly included on all advertisements
- ▶ Licensees cannot publish or disseminate advertising or marketing that is attractive to children
- ▶ Ads cannot contain the use of objects, such as toys, inflatables, movie characters, cartoon characters, or include any other display, depiction or image designed in any manner likely to be appealing to minors or anyone under 21 years of age



Selected

California Cannabis (MJ) Advertising Regulations

- ▶ Cannabis broadcast, cable, radio, print and digital communications may only be displayed after a licensee has obtained “reliable up-to-date audience composition data”
- ▶ Must utilize a method of age affirmation to verify the recipient is 21 or older before initiating communication
- ▶ May not advertise free cannabis goods or giveaways of any type of product, including non-cannabis products

Selected

California Cannabis (MJ) Advertising Regulations

- ▶ Must be truthful and appropriately substantiated and not containing falsities directly or by ambiguity, inference or omission
- ▶ Must not create a misleading impression by using irrelevant, scientific or technical matter.
- ▶ *Additional restrictions on billboards and outdoor advertising*
- ▶ *May also be local restrictions overlying state restrictions*

California Advertising Case Study:



- ▶ Online platform facilitating orders directly linked to platform, in addition to reviews and community features
- ▶ Bureau of Cannabis Control (BCC) sends Feb. 2018 cease and desist letter stating WM is “aiding and abetting in violations of state cannabis law”
 - ▶ WM platform includes ‘rogue shops’ – unlicensed dispensaries

California Advertising Case Study:



- ▶ WM says BCC has no jurisdiction over WM as unlicensed technology provider
- ▶ ... Nothing happens ... State or Federal... Despite Cole Memo priorities
- ▶ BUT... Gov. Newsom's 2019 budget trailer bill would create authority for licensing authorities to impose fines against unlicensed businesses... TBC?

Advertising Risks are Clear and Well Documented...

▶ *... But where there is Risk, there is also Opportunity...*

- ▶ First to market advantage
- ▶ Rare new industry with market disruptor characteristics
- ▶ Meteoric rise of CBD as panacea product with pricing upside
- ▶ Ongoing, expedited march toward federal legalization – a question of ‘when’ according to most pundits
- ▶ Traditional brands increasingly entering the space – wagging the tail

Advertising Strategies for Publishers



Localized publications

- Print media is optimal
- Billboards



Geofencing to legalized markets



Mobile digital advertising campaigns at concerts, colleges



Age screening/gating for online content

- Already standard on cannabis industry websites



Compliance with state advertising restrictions

- Regulations can be extensive

Advertising Strategy – Avoiding Scrutiny



- ▶ Know your state regulations
- ▶ Make sure a CBD product not sold in a dispensary is hemp-derived, not cannabis derived
- ▶ Avoid advertising hemp-derived CBD-infused foods, drinks, and supplements
- ▶ Make sure there is evidence to support health or medical product claims

Advertising Strategy – Avoiding Scrutiny

- ▶ Establish exclusionary zones that prohibit advertisements of products illegal for sale to minors in alignment with state laws
- ▶ Avoid showing consumption
- ▶ Use flat fee pricing model rather than strategic ad/sales alignment
- ▶ Avoid advertising specific cannabis products or product promotions
- ▶ Respect a cease and desist letter

Advertising Strategy – Diligence

Taking a page from the banking industry, create a scaled down vetting program drawing on traditional KYC (Know Your Customer) standards:

- ▶ Verify licensing or registration status online periodically
- ▶ Verify business license status on the Secretary of State's website periodically
- ▶ Verify the entity's income is solely from state-legal cannabis or hemp-derived CBD activities by obtaining the gross receipts or sales amounts for the entity listed on its latest federal tax filings and comparing them to the gross amount income recorded by the traceability program for the time period cited on the entity's latest federal tax filing.

Advertising Strategy – Diligence

- ▶ Verify neither the entity nor any of its owners have had any convictions or enforcement actions that may jeopardize the entity's licensing status by
- ▶ Perform periodic OFAC checks
- ▶ Require periodic compliance audit reports from the entity (quarterly audits are suggested, but frequency can be altered to as little as once a year).



Questions?



Thank You!



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