

MEMORANDUM

To: Indiana Broadcasters Association

From: Scott R. Leisz

Date: April 4, 2023

Subject: CBD and Cannabis Advertising in Indiana

Broadcasting regulations regarding CBD and cannabis are less than clear both federally and within Indiana, but our advice is that broadcasters should not air CBD and/or cannabis advertising.

1. Products with CBD (cannabidiol) are legal to purchase in Indiana – but what about CBD advertising?

As you noted, products with CBD are legal to purchase in Indiana, if they contain no more than 0.3% THC (Ind. Code §§ 15-15-13-6 and 15-15-13-6.5), but there are several caveats to their legality and if a CBD company does not follow the specific regulations, then their CBD would be illegal, and advertising such would also be illegal.

For example, and specific to advertising, Ind. Code Ann. § 24-4-21-4 explains the numerous packaging requirements for CBD. Each package must contain: (1) a scannable bar code or QR code linked to a document that contains information regarding 12 additional aspects regarding the manufacturing of that specific CBD product; (2) the batch number; (3) the address of a web site to obtain batch information; (4) the expiration date; (5) the number of milligrams of low THC hemp extract; (6) the manufacturer; and (7) the fact that the product contains not more than 0.3% total delta-9-tetrahydrocannabinol (THC), including precursors, by weight.

In addition to the specific Indiana regulations for CBD products, there are also federal regulations that broadcasters must keep in mind. Advertising a CBD product can implicate the Federal Food, Drug, and Cosmetic Act (“FDCA”), the Federal Trade Commission Act (“FTCA”), and the Lanham Act (15 U.S.C. § 1125). For example, the FDCA would prohibit CBD companies from making any sort of therapeutic claims since CBD has not been cleared or approved as a drug by the FDA. The FTCA would

prohibit similar advertisements regarding health-related claims of CBD products, as any such claims are unsupported by reliable scientific evidence. The Lantham Act prohibits misleading or false advertising. For example, any claim that CBD kills cancer cells, provides pain relief, or provides anti-inflammatory benefits would be prohibited by any of these Acts.

Additionally, the National Association of Cannabis Businesses is a cannabis self-regulatory organization and has created voluntary national standards regarding many issues but have specifically adopted cannabis-related advertising standards. The National Association of Cannabis Business' advertising standards have created an extensive list of statements that should be included in CBD and cannabis advertising, as well as an even longer list of prohibitions. These standards are considered best practice in cannabis advertising but are not legally binding.

As a result of the above, we recommend that broadcasters do not take CBD advertisements.

2. What's the current situation with cannabis (marijuana) advertising in Indiana?

Indiana does not have any specific regulations regarding cannabis advertising, but because cannabis is still illegal at the federal level (it is a Schedule I controlled substance), federal regulations, such as the FCC, must be considered.

Last summer, the House passed legislation in their funding bill that disallowed FCC funds to be used:

with respect to an authorization for radio or television stations, to deny, fail to renew for a full term or condition the authorization, decline to approve an application for authority to assign the authorization or transfer direct or indirect control of the licensee, require an early renewal application, or impose a forfeiture penalty because the station broadcast or otherwise transmitted advertisements (a) of a business selling cannabis or cannabis-derived products, the sale or distribution of which is authorized in the State, political subdivision of a State, or Indian country in which the community of license of a station is located, or (b) of a business selling hemp, hemp-derived CBD products or other hemp-derived cannabinoid products.

This portion of the funding bill was taken out by the Senate and did not advance, but it demonstrates the vast power that the FCC **currently** has to take away or not renew a station's license.

Additionally, advertising cannabis advertising also violates the Controlled Substances Act.

The National Association of Cannabis Businesses' standards referenced above regarding CBD also apply to cannabis.

As a result of the above, we recommend that broadcasters do not take cannabis advertisements.

3. I live in a border county to another state that allows cannabis purchasing. Can I take advertising for cannabis from another state?

According to the National Association of Cannabis Businesses' standards, which is considered best practice for advertising CBD and cannabis, ads that specifically target people located outside of the applicable licensing state are prohibited.

Additionally, the failed House bill explained above in section 2 was only going to allow broadcasters to broadcast "advertisements of a business selling cannabis or cannabis-derived products, the sale or distribution of **which is authorized in the State.**" Thus, even if that bill were to pass, Indiana broadcasters would still not be able to air cannabis advertisements since it is still illegal here.

As a result of the above, we recommend that broadcasters do not take advertising for cannabis from another state.

4. What's the potential penalty if we air cannabis advertising, anyway?

The potential penalties have been discussed above, but include violations of the Lantham Act, the FTCA, the FDCA, the Controlled Substances Act, and a forfeiture or nonrenewal of a license from the FCC.

As a result of the above, we recommend that broadcasters do not take CBD or cannabis advertising.

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