

Legal Marijuana's Uncertain Path Forward

4th Edition: Trends in Marketing Communications Law

Efforts to legalize marijuana took a major step forward in 2016, with four new states voting in November to legalize recreational marijuana use. It is now legal in eight states and the District of Columbia, covering almost one quarter of the country's population, with sales expected to reach over \$21 billion by 2020. However, the future of the market for recreational marijuana will be determined in large part by the position the Department of Justice under President Trump and Attorney General Jeff Sessions takes on enforcement of the federal prohibition on marijuana.

President Obama's Attorney General, Eric Holder, indicated in the so-called "Cole Memo" that, so long as states created and enforced a robust set of regulatory protections, such as keeping marijuana from being sold to children or preventing state-authorized marijuana sales from becoming a cover for organized crime or trafficking operations, the federal government was unlikely to enforce federal law banning marijuana in those states. The Cole Memo, however, does not have the force of law and, instead, was simply a policy position set forth by the Justice Department. If the Trump administration decides not to follow the Cole Memo's guidance, it can choose to ignore it. Additional enforcement could take a number of forms, from shutting down dispensaries to raids by FBI agents to arrests of growers, sellers and distributors.

Signals from the Trump administration have been mixed, with some anti-marijuana talk from senior officials, but no concrete actions as of yet. On the one hand, marijuana enforcement was not a significant issue during the campaign, and President Trump previously has indicated that he thinks the issue was best left up to the states. On the other hand, Attorney General Sessions has a long history of strident opposition to marijuana legalization. When asked specifically about marijuana during his confirmation hearings and, in the words of Tom Angell, the Chairman of Marijuana Majority, his answers were "skillfully evasive." Sessions called some of the Obama-era Department of Justice's guidance on the issue "truly valuable" and has recognized that enforcing the federal ban on marijuana is a resource-intensive enterprise that might not be worth the costs. However, he has more recently noted that "it does remain a violation of federal law to distribute marijuana" and White House press secretary Sean Spicer in February said he anticipates "greater enforcement" of federal laws. Depending on the breadth of the crackdown, creative and media buying agencies could be targeted as well, under the theory that they are aiding and abetting an illegal activity.

As states that recently legalized marijuana spend 2017 drafting their specific marijuana regulations and setting up markets, the specter of a potential change in tone from Washington, D.C. looms in the background.

Key Takeaways

- Anyone interested in entering the marijuana advertising market, or providing marketing or other services, needs to be aware of potential liabilities given that marijuana remains illegal under federal law.
- Because of potential criminal liability under an "aiding and abetting illegally activity" theory, marketers and advertisers should consult legal counsel before engaging in any marijuana-related activities on behalf of

clients. Something as small as creating advertisements that target out-of-state individuals could run afoul of federal commerce regulations.
