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MEMORANDUM FOR MEMBERS ON THE ISSUE OF RUNNING ADVERTISING FOR RECREATIONAL MARIJUANA SALES

Missouri has joined the group of states this year that are permitting sale of marijuana for recreational use. This brings up special challenges for newspapers who are faced with the prospect of accepting needed advertising dollars while worrying about protecting their precious postal permit.

As counsel for Missouri Press Association, I have looked into this issue and want to make members fully aware of the issues that exist. As a lawyer, I cannot say running such ads are without any risk. I am aware papers may read this through and decide the risk is minimal enough to proceed. Others will not take any risk. My goal is to simply outline the issues and let you make an informed decision as you proceed.

The recreational marijuana product that will be sold in licensed shops in Missouri qualifies as a “federally controlled substance” under the U.S. Code’s Controlled Substance and, according to that act, the advertising of such a product using the U.S. Mail is a felony. Thus, if you mail your newspaper product using the Postal Service, you take a risk that federal charges conceivably could be filed against your company.

And, yes, telling a newspaper what it can and cannot publish raises significant First Amendment issues. This dichotomy has not yet been specifically addressed by the U.S. Supreme Court. However, the U.S. Supreme Court has said that commercial speech is protected if it concerns “lawful activity”.¹ Given the change of the drug’s status under Missouri law, it would seem likely that this activity would pass that test. A Washington State court made that exact ruling in 2019² in regard to a marijuana shop that hung a sign saying “POT” in its front window, in violation of state law as to the number of retail signs that could be displayed.

¹Referring to *Central Hudson Gas & Electric v Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343 (U.S.N.Y., 1980), referring to one point of the four-point test used to determine if commercial speech is protected by the First Amendment.

²See:
<https://reason.com/2019/12/24/a-christmas-miracle-washington-court-overturms-marijuana-sign-rules-that-banned-string-lights-spelling-pot/>

Also of note is that in 2016, when the issue first arose about newspapers mailing papers containing ads for CBD products, the U.S. Postal Service's general counsel went on record that the Service's policy is that postmasters (and managers of the Business Mail Entry) do not have authority to determine whether a piece of mail is or is not able to be mailed, and also have no authority to refuse to accept content for mailing in the stream of mail handled by the Postal Service.³ The policy of the Postal Service is that local authorities may make a complaint regarding such a matter to the postal inspector's office and that office, along with the Department of Justice, has authority to determine what, if any, action will result. *Therefore, this is not a decision your local post office has the authority to act on and they cannot refuse to accept your newspapers due to advertising issues.*

Back in 2016, when the CBD issue was being discussed, President Barack Obama instructed the Department of Justice to issue a statement that there would be no prosecutions on the federal level in regard to that advertising. There has been no statement issued by President Joe Biden in regard to this issue, pro or con. And no legislation is presently moving in Congress that would relate to this issue.

Authorities in the industry have indicated to me they believe the risk of being prosecuted for running marketing ads is "fairly low." I agree with that assessment. Having said that, however, **none of us giving legal advice are able to say there is no risk whatsoever to you if you want to run these ads.** Each of you must make your own risk assessment and decide what you want to do.

I would hope that if a publication in this country finds itself defending such a lawsuit, it would also find the associations supporting the industry standing behind it in bearing the cost of the litigation to get this issue resolved, due to the need to protect First Amendment issues.

I'm happy to talk further about this with members if they have questions.

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³ A copy of this letter may be found at:
[http://media.oregonlive.com/marijuana/other/2015/12/17/USPS%20Response%20on%20Marijuana%20Ads%20\(1\).pdf](http://media.oregonlive.com/marijuana/other/2015/12/17/USPS%20Response%20on%20Marijuana%20Ads%20(1).pdf)