

HIGH RISK ALERT: THE PROMOTION OF CANNABIS ON SOCIAL MEDIA

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Social media is a critical component of most companies' marketing strategies, but it is also one of the most difficult marketing tools to square with the new federal cannabis regulatory regime.

Section 17 of the Cannabis Act imposes a blanket prohibition on the promotion of cannabis, cannabis accessories or any services related to cannabis, unless (among other restrictions) steps are taken to prevent young people (persons under 18) from accessing or viewing the promotion.

Preventing young people from accessing a venue, event or even a website where cannabis-related promotions are displayed may be fairly straightforward with usual age verification mechanisms, but controlling young people's access to cannabis-related social media accounts presents far more logistical challenges. Even having a closed social media account or profile to which followers have to request access does not solve the problem, because it is difficult, if not impossible, to incorporate an adequate age verification step into that access request.

There are additional risks associated with social media, because once content is shared by other users, the original poster of the content may lose control of the content. This means that if a cannabis company previously shared content that is offside of the regulations and now is tasked with bringing itself into compliance, it may continue to be liable for re-shared content that is now out of its direct control. Furthermore, the Cannabis Act extends liability to publishers of cannabis-related promotions, so even those who share or forward prohibited content may be exposed to liability.

The promotion of cannabis products or services using influencer marketing, the social media marketing tool du jour, is particularly dangerous under the new regulatory regime. Not only is influencer marketing apparently explicitly prohibited by section 17(1)(c) of the Cannabis Act, it may be viewed as appealing to young persons, which is also expressly prohibited under s. 17. It is also easy to lose control over the content generated by influencers as the influencers ultimately are in charge of their own profile and posts.

Attempting to skirt around the Cannabis Act and Regulations by engaging in "covert" influencer marketing to create distance from a promotion is equally as risky. This practice, also known as "astroturfing", is when an influencer creates a false impression that they are not remunerated by or associated with the company whose product they are promoting, to make it appear their endorsement is impartial, grassroots and spontaneous.

This practice very likely runs afoul of new advertising and competition law guidelines which now require influencers to disclose if they have a "material connection" with the producer/retailer/marketer of a product.

In general, it is unclear whether the mandates of public health and protection of young people underscoring the federal cannabis regulatory regime are intended to act as a total bar to cannabis-related social media promotions, or whether there will still be some space for limited activity.

For example, some cannabis producers have opted to "mask" their social media profiles by promoting brand names only and not referencing their cannabis products or services directly, instead posting images evocative of but unrelated to cannabis and directing users to "learn more" by clicking through to their age-gated website. In the absence of explicit guidance from Health Canada at this stage, it remains to be seen whether this approach will be permissible under the new regime.

On the plus side, it is anticipated Health Canada will be using educational and other soft enforcement tools at first after October 17 to bring entities into compliance as industry benchmarks are set.

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