



Branded Merch & the BCC

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About the Speakers



Omar Figueroa, Esq.

Omar earned his Bachelor of Arts in philosophy from **Yale College** in Connecticut and his Juris Doctor from **Stanford Law School** in California. He has been practicing cannabis law in California for more than twenty one years.

Omar is a Director of the **National Cannabis Industry Association** as well as a Director of the **California Cannabis Tourism Association**. He is also a Founding Lifetime Member and former Director of the **International Cannabis Bar Association**, a Lifetime Member of the **NORML Legal Committee**, and recognized with the **Distinguished Counsel's Award** by NORML.

Omar has earned respect for his historic work documenting the legal evolution of cannabis law in California. He has published a series of books which are part of the **collection** of the Stanford Libraries and can be found at the Robert Crown Law Library at Stanford Law School.

Omar's interests are not limited to cannabis, and he has a profound, long-term interest in entheogen law and policy. Omar has served as a **Legal Advisor** to Decriminalize California, a campaign to decriminalize psychedelic mushrooms in California by means of a statewide voter initiative.



About the Speakers



Lauren Mendelsohn, Esq.

Lauren Mendelsohn is a Senior Associate Attorney at the Law Offices of Omar Figueroa, a boutique Northern California-based law firm serving the cannabis and hemp industries. She serves clients of all sizes from all areas of the supply chain with compliance and transactional matters.

Lauren is the former Chair of the Board of Directors of Students for Sensible Drug Policy (SSDP), and she is currently on the Board of Directors of the International Cannabis Bar Association (INCBA) as well as the Advisory Council of the Sonoma County Growers Alliance (SCGA). Lauren enjoys sharing knowledge with others, and frequently speaks at conferences and seminars. She also writes frequently for the Law Offices of Omar Figueroa blog and has appeared in other publications as well.

Lauren earned her J.D. from the University of California, Irvine School of Law and her Bachelor of Science in Psychology from the University of Maryland. She is a proud member of the California State Bar, the Sonoma County Bar Association, the International Cannabis Bar Association, SSDP's Sensible Society, the National Lawyers Guild, California NORML, the National Cannabis Industry Association, the California Cannabis Industry Association, and the ACLU.



The BCC's new “Fact Sheet” on Branded Merchandise

https://bcc.ca.gov/about_us/documents/20151_branded_merch_fact_sheet.pdf

BRANDED MERCHANDISE FACT SHEET

BUREAU OF CANNABIS CONTROL

“Branded merchandise” includes clothing, hats, pencils, pens, keychains, mugs, water bottles, beverage glasses, notepads, lanyards, or cannabis accessories with the name or logo of a state licensed commercial cannabis business. (See Cal. Code Regs., tit. 16, § 5000(b).) Licensees may sell the items enumerated above without first obtaining Bureau approval.

Branded merchandise items that are not specifically identified in section 5000(b) of the Bureau’s regulations cannot be sold without prior written approval from the Bureau.

Licensees selling branded merchandise without the prior written approval from the Bureau may be subject to disciplinary action.

Licensees may email requests for branded merchandise approval to **BCC@dca.ca.gov**. All requests for approval should contain the phrase “Request for Branded Merchandise Approval” in the email subject line. The body of the email should include the following information:

- Licensee name and license number.
- Description of each branded merchandise item to be approved for sale.
- Picture of each branded merchandise item to be approved for sale.

Branded merchandise does not include items containing cannabis or any items that are considered food. (See Cal. Code Regs., tit. 16, § 5000(b).)

A licensed retailer may sell their own branded merchandise to retail customers. Retailers are not authorized to sell the branded merchandise of other licensees.

A licensed distributor may distribute their own or another licensee’s branded merchandise.

Branded merchandise is considered advertising and marketing and is subject to the advertising and marketing requirements of the Medicinal and Adult-Use Cannabis Regulation and Safety Act and the Bureau’s regulations. Branded merchandise:

- Must identify the licensee responsible for the advertising content, including the responsible licensee’s state license number, on the branded merchandise.
- Cannot be sold while a licensee’s license is suspended.
- Cannot be designed in any manner likely to appeal to anyone under 21 years of age.

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DEPARTMENT OF CONSUMER AFFAIRS

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For the latest updates, follow the Bureau on social media.

BCCWFO.DCA | WEBSITE: WWW.BCCWFO.DCA | CANNABIS CONTROL

PDF 20151



The Problem



**BUREAU OF
CANNABIS
CONTROL**
CALIFORNIA

“Retailers are not authorized to sell the branded merchandise of other licensees.”

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What the Law Says

Business and Professions Code §26151

26151. (a) (1) All advertisements and marketing shall accurately and legibly identify the licensee responsible for its content, by adding, at a minimum, the licensee's license number.

(2) A technology platform shall not display an advertisement by a licensee on an Internet Web page unless the advertisement displays the license number of the licensee.

(3) An outdoor advertising company subject to the Outdoor Advertising Act (Chapter 2 (commencing with Section 5200) of Division 3) shall not display an advertisement by a licensee unless the advertisement displays the license number of the licensee.

(b) Any advertising or marketing placed in broadcast, cable, radio, print, and digital communications shall only be displayed where at least 71.6 percent of the audience is reasonably expected to be 21 years of age or older, as determined by reliable, up-to-date audience composition data.

(c) Any advertising or marketing involving direct, individualized communication or dialogue controlled by the licensee shall utilize a method of age affirmation to verify that the recipient is 21 years of age or older before engaging in that communication or dialogue controlled by the licensee. For purposes of this section, that method of age affirmation may include user confirmation, birth date disclosure, or other similar registration method.

(d) All advertising shall be truthful and appropriately substantiated.

(Amended by Stats. 2017, Ch. 27, Sec. 85. (SB 94) Effective June 27, 2017. Note: This section was added on Nov. 8, 2016, by initiative Prop. 64.)



What the Law Says

Business and Professions Code §26152

26152. A licensee shall not do any of the following:

- (a) Advertise or market in a manner that is false or untrue in any material particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific, or technical matter, tends to create a misleading impression.
- (b) Publish or disseminate advertising or marketing containing any statement concerning a brand or product that is inconsistent with any statement on the labeling thereof.
- (c) Publish or disseminate advertising or marketing containing any statement, design, device, or representation which tends to create the impression that the cannabis originated in a particular place or region, unless the label of the advertised product bears an appellation of origin, and such appellation of origin appears in the advertisement.
- (d) Advertise or market on a billboard or similar advertising device located on an Interstate Highway or on a State Highway which crosses the California border.
- (e) Advertise or market cannabis or cannabis products in a manner intended to encourage persons under 21 years of age to consume cannabis or cannabis products.
- (f) Publish or disseminate advertising or marketing that is attractive to children.
- (g) Advertise or market cannabis or cannabis products on an advertising sign within 1,000 feet of a day care center, school providing instruction in kindergarten or any grades 1 to 12, inclusive, playground, or youth center.
- (h) Publish or disseminate advertising or marketing while the licensee's license is suspended.

(Amended by Stats. 2018, Ch. 923, Sec. 1. (AB 2899) Effective January 1, 2019. Note: This section was added on Nov. 8, 2016, by initiative Prop. 64.)



What the Regulations Say

§ 5000. Definitions.

For the purposes of this division, the definitions in this section shall govern the construction of this division unless otherwise indicated.

- (a) “Act” means the Medicinal and Adult-Use Cannabis Regulation and Safety Act.
- (b) “Branded merchandise” means clothing, hats, pencils, pens, keychains, mugs, water bottles, beverage glasses, notepads, lanyards, cannabis accessories, or other types of merchandise approved by the Bureau with the name or logo of a commercial cannabis business licensed pursuant to the Act. Branded merchandise does not include items containing cannabis or any items that are considered food as defined by Health and Safety Code section 109935.

§ 5041.1 Branded Merchandise Approval.

- (a) If a licensed distributor, licensed retailer, or licensed microbusiness authorized to engage in distribution or retail sales wishes to sell branded merchandise that is not listed in section 5000, subsection (b), of this division, the licensee must receive written approval from the Bureau.
- (b) To obtain approval, a licensee must submit a written request to the Bureau for approval to sell a specific item of branded merchandise and provide a photograph of the branded merchandise.
Requests may be submitted by mail to the Bureau office or by email to bcc@dca.ca.gov.
- (c) The licensee shall not sell the merchandise until receiving written approval from the Bureau for the specific item of branded merchandise.

Authority: Section 26013, Business and Professions Code. Reference: Sections 26013 and 26152, Business and Professions Code.

Both of these Sections are
from the BCC’s regulations.



What the Regulations Say

§ 5407. Sale of Non-Cannabis Goods.

In addition to cannabis goods, a licensed retailer may sell only cannabis accessories and licensee's branded merchandise. Licensed retailers may provide customers with promotional materials.

Authority: Section 26013, Business and Professions Code. Reference: Sections 26070, 26151 and 26152, Business and Professions Code.

This Section is from the BCC's regulations.



Final Statement of Reasons (FSOR)

§ 5407. Sale of Non-Cannabis Goods

The title of the regulation section has been changed to remove the words “on premises.” This change was necessary to clarify that the requirements applies to all sales, including sales by delivery, which do not occur on the premises.

The section was amended to clarify that licensed retailers may provide customers with promotional materials rather than sell promotional materials. Prior to the proposed amendment, the language of the regulation indicated that retailers may sell cannabis goods, cannabis accessories, branded merchandise, and promotional materials. In many instances, promotional materials such as flyers are not sold to customers. The proposed amendment is necessary to clarify that retailers may provide customers with promotional materials free of cost instead of indicating that a retailer may only sell promotional materials.

The reference section has also been amended to add sections 26151 and 26152 of the Business and Professions Code. This is necessary for accuracy.



Final Statement of Reasons (FSOR)

Regulation Section	15-Day Comment Number(s) and Page Location	Summary of 15-Day Comments	Bureau Response to 15-Day Comments
5407	3394 (p.4284) 3452.1 - 3452.10 (p.4350-4352) 3597.5 (p.4464) 3628.14 (p.4804) 3680.6 (p.5461) 3714.5 (p.5669) 3717.9 (p.5686) 3722.5 (p.5719) 3858.6 (p.6156) 4064.22 (p.6638) 4067.6 (p.6657) 4073.4 (p.6684) 4079.13 (p.6723)	Commenters requests that licensed retailers be allowed to sell other types of products besides cannabis goods and accessories.	The Bureau agrees in part with this comment. Section 5407 has been amended to clarify what items a retailer may and may not sell. A retail license from the Bureau authorizes the retailer to sell cannabis goods, cannabis accessories, and branded merchandise. A retail license from the Bureau does not authorize licensees to sell items that are unrelated to cannabis.
5407	3570.18 (p.4531) 3700.5 (p.5574) 3716.3 (p.5677) 3734.16 (p.5793)	Commenters requests that the word "any" be placed back into the regulation to clarify that a retail licensee may sell branded merchandise from a cultivator or manufacturer.	The Bureau disagrees with this comment. Section 5407 is intended to only allow a licensed retailer to their own branded merchandise. The regulation is not intended to allow retailers to sell branded merchandise obtained from other licensees.
5407	3499.2 (p.4412)	Commenter suggests that the regulation be amended to prohibit licensees from marketing apparel or other branded merchandise to minors.	The Bureau disagrees with this comment. Licensees already must comply with all restrictions regarding marketing to minors found in the Act. Specifying that branded merchandise may not be marketed to minors is not necessary.
5407	3573.9 (p.4559)	Commenter suggests that retailers be prohibited from selling branded merchandise or extending awareness of their brand in any way.	The Bureau disagrees with this comment. The Act allows for licensees to engage in advertising with some restrictions. The Bureau does not believe that it is appropriate to prohibit licensees from engaging in marketing practices that are allowed under the Act.
5409(e)	3710.5 (p.5643) 3898.5 (p.6290)	Commenters believes that retailers should not be responsible for determining the amount of cannabis goods used in a manufactured cannabis product for the purposes of tracking daily sales limits.	The Bureau disagrees with this comment. Retailers are in a good position to know or learn the amount of cannabis concentrates used in the cannabis goods they sell. Retailers must be held responsible for ensuring that they do not sell a customer an



This issue was brought up to the BCC, but they rejected it. However, the rule is still subject to challenge.



Penalties

- Would likely be considered a “Tier 2” violation, but possibly also “Tier 1”

California Code of Regulations Disciplinary Order Guidelines - Tier 2

Minimum: revocation stayed, 15 to 30-day suspension, a fine (as determined by the “Fine Formula” below), or a combination of a suspension and fine.

Maximum: revocation

Tier 2 discipline is recommended for:

- Violations with a serious potential for harm
- Violations which involve greater risk and disregard of public safety

Violations of the following codes are representative of this category:

Violation Description	Authority
Unauthorized Sale of Non-Cannabis Goods on Premises	CCR § 5407

California Code of Regulations Disciplinary Order Guidelines - Tier 1

Minimum: revocation stayed, 5 to 15-day suspension, a fine (as determined by the “Fine Formula” below), or a combination of a suspension and fine.

Maximum: revocation

Tier 1 discipline is recommended for:

- violations which are potentially harmful

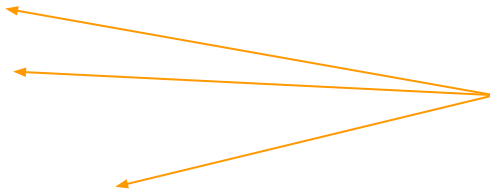
Violations of the following codes are representative of this category:

Violation Description	Authority
Failure to Comply with Advertising and Marketing Requirements	B&P §§ 26151- 26152 CCR §§ 5040-5041



Standards for rules made by California agencies

- Authority
- Reference
- **Consistency**
- **Clarity**
- Nonduplication
- **Necessity**



These standards don't seem to be met for the BCC's rule that licensed retailers can only sell their own branded merch, and not that of other licensees.

Agencies must also consider alternatives and state why the one chosen is the most effective and least burdensome, and set forth reasons for rejecting alternatives that would lessen impact on small businesses.

CA Gov. Code §§ 11349.1, 11346.9



Necessity

- An agency needs to support a regulation with “substantial evidence” for why it is needed in order to effectuate the purpose of the underlying statute.
- “Substantial evidence” includes, but is not limited to, things such as facts, studies, and expert opinion.

*CA Gov. Code §§ 11349(a), 11349.1
OAL’s “Guide to Public Participation in the Regulatory Process”*

Consistency

- A regulation cannot conflict or be contrary to existing laws.
 - Needs to be “reasonably designed to aid a statutory objective”
 - Can’t “alter, amend, enlarge, or restrict” any laws

*CA Gov. Code §§ 11349(d), 11349.1
OAL’s “Guide to Public Participation in the Regulatory Process”*



Clarity

OAL may presume a regulation is unclear if, among other reasons:

- The regulation has more than one meaning.
- The regulation uses language (such as grammar or punctuation) incorrectly.

In this case, Section 5407 of the BCC's regulations contain a typographical error that make it grammatically incorrect and also give it two possible meanings.

- What it says: “....may only sell cannabis accessories **and licensee's** branded merchandise”
- What it should say: “...may only sell cannabis accessories **and [that/the] licensee's** branded merchandise” OR “...may only sell cannabis accessories **and licensees'** branded merchandise” (notice placement of the apostrophe)

CA Gov. Code § 11349(c), 11349.1
OAL's “Guide to Public Participation in the Regulatory Process”

Q & A





Thank you!

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