



August 15, 2022

VIA EMAIL – regulations@ocm.ny.gov

New York State Office of Cannabis Management
PO Box 2071
Albany, NY 12220

RE: *Comments on Proposed Regulations: Part 128 - Adult-Use Packaging and Labeling, Part 129 - Adult-Use Marketing and Advertising, and Part 130 – Cannabis Laboratories*

Dear Office of Cannabis Management:

The International Cannabis Bar Association (“INCBA”) is pleased to submit comments to the New York State Office of Cannabis Management (“OCM”) regarding three sets of proposed regulations: new parts 128, 129, and 130 of Chapter II of Subtitle B of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

INCBA is a global cannabis bar association comprised of over 700 member attorneys representing cannabis industry participants nationwide and across the globe. See www.incba.org. Our breadth and depth of knowledge and experience makes INCBA uniquely situated to provide insight into the regulatory hurdles and legal issues faced by industry stakeholders. Our members assist cannabis industry participants from all facets of the industry, including cultivators, processors, manufacturers, distributors, research facilities, testing laboratories, retailers, and more, both plant-touching and ancillary. Specifically, our members provide necessary advice and counsel for industry stakeholders to understand applicable laws and regulations to ensure the greatest possible success while operating within the confines of local, state, federal, and international legal frameworks.

As attorneys well-versed in the cannabis industry, we appreciate the opportunity to provide meaningful and substantive input on the very important issues presented in these proposed regulations. We also applaud the clearly thoughtful efforts of OCM and the Cannabis Control Board (“CCB”) in researching and drafting these regulations, and the consideration you are providing to the public. If you have any questions or comments on the following, please do not hesitate to contact us.

1. Overbroad restrictions on marketing graphics and brand designs will burden licensees.

Proposed Regulations:

- § 128.1(b)(1), (2), (3): “*Attractive to individuals under twenty-one* means labeling, packaging, advertising and marketing that is pleasing or appealing to persons under the age



of twenty-one by using or including, among other things: . . . Cartoons; Bubble-type or other cartoon-like font; Bright colors that are ‘neon’ in appearance”

- § 129.3(a)(5): “No marketing or advertising of cannabis products shall: . . . Use or display colloquial references to marijuana and cannabis or depictions or digital images or icons, whether animated or static, of cannabis, cannabis products, paraphernalia, or the imagery or action of smoking or vaping, including but not limited to ‘stoner’, ‘chronic’, ‘weed’, ‘pot’, or ‘sticky buds’”

Issues Presented:

In the crowded and highly-competitive cannabis industry, licensees must distinguish their brands and appeal to consumers over 21 years old. In that process, many cannabis companies have developed (and trademarked and copyrighted) colorful logos and branding, many of which include bubble-type, bright colors, and references to “weed” and “pot”--terms that many 21-and-older aged consumers have been using their entire lives.

This trend is likely to continue in New York. Whether through marketing creativity or collaborations with licensed businesses in other states (including through intellectual property licensing and/or co-branding agreements), New York licensees also will want to stand out by appealing to age-legal consumers using the same methods. Fonts, colors, and colloquial terms are common and effective ways to advertise and market to that segment of the population.

We fully support the goal of preventing persons under age 21 from purchasing or using cannabis. However, the aforementioned restrictions are far too subjective in nature and incredible vague. How does one determine what might be “pleasing or appealing” to someone 20 versus someone 21? How would one know what might be deemed “colloquial” when talking about a plant that has been in use for thousands of years? This could prove to be an enforcement nightmare for regulators and potentially grounds for litigation against the state.

The proposed regulations include numerous other, less burdensome provisions to achieve the age-gate goal, such as the rules against use of the word “candy,” toys or games commonly used to market products to individuals under the age of twenty-one, and images of persons appearing under the age of twenty-one, (proposed § 128.1(b)(5), (6), and (7)), as well as the important prohibition against creating consumer confusion that may violate federal trademark law (proposed § 128.6(a)(5)). These restrictions will adequately protect underage consumption.

Proposed Solutions:

We recommend removing the excessive and highly questionable and burdensome advertising, marketing, and labeling restrictions in proposed sections 128.1(b)(1), (2), (3) and 129.3(a)(5), or alternatively, narrowly tailoring these restrictions to allow for broader product competition and innovation.

Given these stringent requirements and broad authority granted to the OCM to determine what is, and what is not permissible, cannabis companies are likely to see increased costs associated with

non-compliance. For example, if a licensee labels and packages 10,000 products only to find out later that its package is non-compliant, it would be forced to print all new labels. This scenario could be avoided by clarifying guidance containing examples of non-compliant packaging and recommendations on how to bring that packaging back into compliance. Alternatively, an optional label/packaging pre-approval process could also be a valuable tool to accomplish the State's goal while providing businesses an opportunity to potentially save significant expenditures should they be unsure.

2. Font and universal symbol size requirements may be unworkable for many product labels and packages.

Proposed Regulations:

- § 128.5(b)(7): "The retail package and any marketing layer shall contain the following information: . . . Any one of the following three universal symbols on the upper left 25% of the marketing layer at a minimum size of 1.25 inch in height for the square symbol, 0.5 inch in width for the vertical symbol, and 0.5 inch in height for the horizontal symbol."
- § 128.5(c): "Required labeling text on the retail package or any marketing layer must be no smaller than 6-point font size."
- § 128.5(g): "The warnings required pursuant to section 128.5(f) of this Part shall be displayed as follows: (3) In text no smaller than size 6 font; (4) Bolded;"

Issues Presented:

Section 128.5 of the proposed regulations require an extraordinary amount of information to be included on product labels. While we appreciate that certain information may appear on labels that may be accordion, expandable, extendable, or layered (§ 128.5(e)), those features are expensive and will increase costs to licensees and consumers. The font and symbol size requirements listed above will likely force these extra layers and packaging features.

Additionally, required inclusion of the New York State identifier with the warning labels diminishes the impact of the warning symbols. Warning symbols are to be used to promote the public health, safety, and welfare of the community and should not be diluted in this manner. Further, the size requirements for the NYS identifier may be in conflict with the requirements contained in the New York State Branding Overview, Guidelines and Architecture. (cdn.esd.ny.gov).

Proposed Solutions:

Cannabis product packaging sizes and shapes can vary widely between different product types. The regulations should incorporate flexibility for products that do not require much packaging, such as single pre-rolls, or single-serving edibles. For example, for these packages the universal symbol could be smaller than 1.25 inch if it occupies a certain percentage of the overall packaging. Additionally, QR Codes could be used to link consumers to additional information about the

products. We also suggest the NYS identifier be placed elsewhere on the packaging and minimum size requirement specified.

3. Rotating warnings could cause licensees to waste time and money, and generate unused packaging and labeling waste.

Proposed Regulations:

- § 128.6(h): “In addition to the required warnings in section 128.5(f) of this Part, the retail packaging or marketing layer shall include any rotating health warnings as determined by the Office.”
- § 129.2(d): “Any marketing or advertising of cannabis or cannabis products shall include one of the following warnings in a rotating manner as directed by the Office, in their entirety in a conspicuous manner on the face of the marketing material or advertisement: (1) "Cannabis may cause impairment and may be habit forming."; (2) “Cannabis can impair concentration, coordination and judgment. Do not operate a vehicle or machinery under the influence of cannabis.”; (3) "There may be health risks associated with consumption of this product."; (4) "Cannabis is not recommended for use by persons who are pregnant or nursing.” or (5) Other warnings as determined by the Board.

Issues Presented:

Warning requirements that can change periodically create numerous challenges for licensees. With each “rotation” of the warnings, to remain in compliance licensees could be forced to develop, order, and purchase new packaging, or place or remove stickers on existing packaging. Products already on shelves can suddenly become non-compliant due to outdated warnings. Obsolete packaging and advertising materials could become unnecessary waste. Processors and distributors may have to recall products already sold and delivered to retail dispensaries, delivery companies, and/or on-site consumption lounges. Licensees may have to remove print advertisements already placed, or cancel contracts with media agencies, for advertisements suddenly deemed out-of-compliance because of ever-changing warning requirements.

Proposed Solutions:

Instead of “rotating” warnings “as determined by the Office,” a fixed set (or sets) of warnings should be developed and made consistent across all product and advertising types. For example, California has one fixed set of warning statements required for labels on manufactured cannabis goods, and another fixed set for nonmanufactured cannabis goods. (Cal. Code of Regulations, title 4, proposed section §17403, §17406). Massachusetts offers another example, which requires a fixed set (or sets) of warnings applicable to product type (e.g., warning labels on edibles include a warning if nuts or known allergens are contained in the product), in addition to a separate rule for advertising viewed by the public, which must include a fixed warning and two additional warnings the establishment may select out of a list of 4-6 acceptable options. (935 CMR 500.105 (4)(a)7).



These revisions would offer licensees predictability and reassurance when they purchase packaging, labeling, and advertising.

4. Co-branding prohibitions will inhibit competition and product innovation.

Proposed Regulations:

- §128.3(a)(1): “A retail package shall not: . . . Contain brand elements beyond one brand logo and the brand name (which has size restrictions but can be any font and color as set forth in this Part)”

Issues Presented:

Co-branding (or cross-branding) offers a unique and profitable way for companies to leverage each other's strengths, expand their footprint, increase brand awareness, and innovate.

Limiting retail packages to one brand logo and name would essentially shut down this commonplace marketing strategy for the entire New York cannabis industry. It is unclear what benefit this restriction would have to the industry. To our knowledge, no other industry is so restricted, and no other state has imposed such a restriction.

Proposed Solutions:

Delete this proposed regulation.

5. Event sponsorship restrictions are misguided, unfair, and inconsistent.

Proposed Regulations:

- § 129.2 (g): “A licensee shall only advertise cannabis products, cannabis paraphernalia, or goods or services related to cannabis or cannabis products by means of. . . if the licensee has reliable evidence that at least 90%, unless otherwise determined by the Office, of the audience for the advertisement is reasonably expected to be twenty-one years of age or older. The burden of proof of the audience composition lies with the licensee.”
- § 129.2 (i): “A licensee may sponsor a charitable, sports, or similar event provided however, a licensee shall not engage in advertising at, or in connection with, such an event unless the licensee has reliable evidence that at least 90%, unless otherwise determined by the Office, of the audience at the event and/or viewing advertising in connection with the event is reasonably expected to be twenty-one years of age or older. Advertising and marketing at eligible events must comply with this Part.”
- § 129.3(a)(20): “No marketing or advertising of cannabis products shall: . . . Sponsor an event using a licensee’s brand, business or trade name,”



- § 129.4(b): “Outdoor marketing or advertising is prohibited on signs and placards in arenas, stadiums, shopping malls, fairs that receive state allocations, and video game arcades, whether any of the foregoing are open air or enclosed, but does not include any such sign or placard located at an adult only facility or as further set out by the Office in guidance”

Issues Presented:

Using the term “reliable” evidence or “otherwise determined” by the Office is ambiguous, subjective and creates confusion for licensees and advertisers. Another source of confusion is that these proposed regulation permits sponsoring events (which would logically include use of the licensee’s brand, business or trade name on advertisements), and the other prohibits it. (Compare 129.2(i) and 129.3(a)(20).) The outdoor marketing and advertising restrictions (129.4(b)) put sponsorship opportunities in even further doubt.

Cannabis is an experiential consumer product; it enhances experiences. Cannabis and events go hand-in-hand, and therefore sponsorship opportunities are critical not only to the development of New York’s cannabis industry but would also provide incomparable opportunity for the event facilitators to earn income from such sponsorships, many of which could be for charitable causes. Cannabis-related museums, festivals, music, and other educational and experiential events will all find support from sponsorship by CCB-licensed companies. Such sponsorship opportunities also offer important incentives for legacy market participants to join the legal, regulated cannabis market, rather than remaining in the illicit market.

These proposed prohibition on using a licensee’s brand, business or trade name when sponsoring an event are so incredibly restrictive, they would effectively ban sponsorship. Sponsors need to promote their brands at events; it is the primary purpose for sponsoring. If these restrictions are adopted without change, the fallout from lost opportunity will be immeasurable.

Additionally, the types of events where sponsorship opportunities would be allowed are too few. The regulations would narrow sponsorship to events where “at least 90%” of the audience attending and/or viewing the advertisement are over 21 years old. Other states have much lower thresholds, if any at all. For example, in California there are no restrictions on sponsorship, and marketing and advertising is permitted where at least 71.6% of the audience is reasonably expected to be 21 years of age or older—a far less stringent percentage.

Proposed Solutions:

We suggest removing the 90% thresholds for both advertising and sponsorship altogether, or alternatively, removing the advertising threshold and lowering the sponsorship threshold. We also suggest clarifications with respect to terminology as to what is reliable, such as Massachusetts’ “as determined by reliable, current audience composition data” and “shall retain documentation... for a period of one year, or longer if otherwise required by the Commission, or a court or agency with jurisdiction” which provides the licensee an explanation of what is required. (MA 935 CMR 500.105 (4)(a)3. and 4.).

6. Prohibiting cannabis packaging similar to “food, candy, soda, drinks, cookies, or cereal” would unnecessarily stymie the licensed cannabis-infused edibles and beverage sectors.

Proposed Regulations:

- § 128.1(b)(4): “*Attractive to individuals under twenty-one* means labeling, packaging, advertising and marketing that is pleasing or appealing to persons under the age of twenty-one by using or including, among other things: . . . (4) Similarities to products or words that refer to products that are commonly associated with or marketed in a manner so as to be attractive to individuals under twenty-one, including but not limited to, any imitation of food, candy, soda, drinks, cookies, or cereal, in labeling, packaging, advertising, or marketing;”
- 128.6(a)(5): “No retail package or marketing layer shall display any content or be labeled in any manner that: . . . Causes a reasonable consumer confusion [sic] as to whether the cannabis product is trademarked, marked or labeled in a manner that violates any federal trademark law or regulation.”

Issues Presented:

Section 128.1(b)(4) appears to prohibit the use of packaging that would be similar to packaging for “food” and “drinks.” Cannabis edible and beverage products—a growing and important sector of the cannabis industry—include products that can be ingested, like food and drinks. Logically, their packaging will bear similarities to other food and drinks. For example, cannabis beverages come in cans and bottles (just like non-cannabis-infused beverages), and they will likely become a cornerstone of New York’s CCB-licensed on-site consumption lounge industry.

If the intent of this regulation is to prohibit cannabis-infused products that mimic or copy well-known food and drink brands, we fully support that goal. For example, licensees should not be allowed to manufacture chocolate bars with branding and labels that would confuse consumers to believe they are “Hershey” or “Snickers” bars. This problem is adequately addressed by proposed section 128.6(a)(5), quoted above.

As drafted, proposed section 128.1(b)(4) is too confusing, overbroad, and would significantly hinder licensed processors, retailers, and on-site consumption lounges.

Proposed Solutions:

Section 128.1(b)(4) should be revised to give licensees dealing with infused-edible and beverage products greater flexibility and certainty. If standard food and drink packaging is not permitted (even if child-resistant and resealable), then the restrictions should be better defined.



Additionally, OCM should offer licensees the option to request OCM’s preliminary approval of proposed packaging, labeling, marketing and advertising. Other states’ cannabis regulators have offered their cannabis licensees such a service, which can save licensees substantial time and money while serving the intended goal more efficiently.

7. Edible product packages containing more than one serving should be “resealable.”

Proposed Regulations:

- §128.1(s): “*Resealable* means a package that maintains its child-resistant effectiveness, as well as preserving the integrity of cannabis products for multiple servings”

Issues Presented:

“Resealable” is defined but not used in Part 128. The Marijuana Regulation and Taxation Act (“MRTA”) requires that “prior to delivery or sale at a retailer, cannabis and cannabis products shall be labeled according to regulations and placed in a *resealable*, child-resistant package.” Cannabis Law, § 81[2](b.)

Proposed Solutions:

Edibles product packaging containing more than one serving per package should be “resealable,” as defined in §128.1(s).

8. Prohibitions on “false and misleading” statements and on “promoting” overconsumption and potency are too vague and subjective.

Proposed Regulations:

- §128.3(a)(6) – (8) “No marketing or advertising of cannabis products shall: . . . (6) Be false or misleading, including making any health claims or a representation that use of cannabis has curative or therapeutic effects; (7) Promote overconsumption or rapid consumption; (8) Promote product potency or THC concentration;”

Issues Presented:

Section 128.3(a) contains numerous vague, undefined terms and restrictions that will force licensees to engage in substantial guesswork without further guidance from OCM. The risk of products and advertising/marketing being deemed “non-compliant” can be costly for licensees; non-compliant products may require recalls, result in wasted costs, or worse, result in loss or suspension of licensure.

Proposed Solutions:



To minimize licensee uncertainty, OCM could further define and provide examples of the prohibited labels. For example, what is a “therapeutic effect” that cannot be promoted? What are examples of promoting rapid consumption? What are examples of promoting product potency?

Even better, we reiterate OCM should offer licensees the option to request OCM’s preliminary approval of proposed packaging, labeling, marketing and advertising, which can save licensees substantial time and money while serving the intended goal more efficiently.

9. Prohibitions against promoting price, price reductions, and loyalty programs would discourage competition that benefits consumers

Proposed Regulations:

- §128.6(a)(9): “No retail package or marketing layer shall display any content or be labeled in any manner that: . . . Promotes price, price reductions, or any other discount or coupon”
- §129.3(a)(9): “No marketing or advertising of cannabis products shall: . . . Promote price, price reductions, or any other discount, customer loyalty program, or coupon;”

Issues Presented:

As with any consumable good, price competition benefits consumers. Licensees should be allowed to compete based on providing customers the best value for their money. Prices are one of the most important factors that consumers use when deciding which cannabis products to purchase. There is no comparable restriction imposed on registered organizations under proposed Part 113 (*Cf.* § 113.16). And in fact, New York’s registered organizations regularly and openly promote loyalty through pricing and other means.

Proposed Solutions:

The restrictions on promoting price, price reductions, or any other discount, customer loyalty program, or coupon should be removed altogether, or alternatively, there should be reasonable opportunities to provide offers, restricting only certain types of incentives, such as product giveaways and gifting.

10. Licensees should not be required “to displace the illicit market and inform the consumer of the location of licensed retail dispensaries” through their advertising and marketing.

Proposed Regulations:

- § 129.2(b): “A licensee is permitted to develop advertising and marketing materials, provided the primary purpose of the advertising is to displace the illicit market and inform the consumer of the location of licensed retail dispensaries. . . .”

Issues Presented:

No cannabis licensee should be commandeered into making the “primary purpose” of their advertising and marketing “to displace the illicit market and inform the consumer of the location of licensed retail dispensaries.” Aside from being vague and confusing, this requirement also infringes on licensees’ rights, and their appropriate roles within the industry. Further, if one of the equitable goals of this legislation is to convert legacy operators and consumers from the illicit market to the licit one, incentivizing other companies to demonize legacies is counterintuitive and defeats such purpose.

Proposed Solutions:

This “primary purpose” provision should be deleted.

11. Apparel and other branded merchandise should be eligible for sale and/or gifting by all cannabis licensees and should not be required to include the various warning statements applicable to other advertising and marketing materials.

Proposed Regulations:

- §129.2(c): “Any marketing or advertisement of cannabis or cannabis products shall include the following statements, in a conspicuous manner on the face of the marketing material or advertisement or be read aloud clearly at the same volume and pace as the rest of the advertisement.: ‘For use only by adults 21 years of age and older. Keep out of reach of children and pets. In case of accidental ingestion or overconsumption, contact the National Poison Control Center hotline 1-800-222- 1222 or call 9-1-1. Please consume responsibly.’”
- §129.2(d): “Any marketing or advertising of cannabis or cannabis products shall include one of the following warnings in a rotating manner as directed by the Office, in their entirety in a conspicuous manner on the face of the marketing material or advertisement: (1) "Cannabis may cause impairment and may be habit forming."; (2) “Cannabis can impair concentration, coordination and judgment. Do not operate a vehicle or machinery under the influence of cannabis.”; (3) "There may be health risks associated with consumption of this product."; (4) "Cannabis is not recommended for use by persons who are pregnant or nursing.” or (5) Other warnings as determined by the Board.”
- §129.2(j): “[A]pparel shall only be sold by the licensee within its licensed premises.”
- §129.2(j): “The universal symbol as determined in Part 128.4(b)(8) of this Title cannot be used in branded apparel.”
- §129.3(a)(22): “No marketing or advertising of cannabis products shall: . . . Produce any items for sale or promotional gifts, such as T-shirts or novelty items, bearing a symbol of or references to cannabis. This prohibition shall not pertain to cannabis paraphernalia sold to consumers.”



Issues Presented:

Within established state-legal cannabis industries, non-consumable branded merchandise (such as apparel/clothing, bags, pens, keychains, mugs, water bottles, lanyards, stickers, pins, and posters) are important revenue sources for licensees, as well as important marketing tools to compete with other licensees. Restricting the rights to use promotional gifts, or to sell a licensee's branded merchandise to only that licensee, and only within its licensed premises, would severely choke this important revenue source and marketing tool.

Furthermore, it would be impractical to include the same set of warnings and statements that apply to "[a]ny marketing or advertising of cannabis or cannabis products" (§129.2(c) and (d)) on most branded merchandise. A different set of rules should apply.

For example, in California the Department of Cannabis Control's proposed regulation section 15041.1 covering "Branded Merchandise" allows sales of branded merchandise (defined to include clothing) by *any* licensee, as long as the merchandise is not "designed in any manner that is attractive to children" and the licensee's license number (Cal. Code of Regulations, title 4, proposed section 15041.1(b),(c).) No other warnings are required to be printed on the merchandise.

By contrast, under New York's proposed rules there is no distinct carve-out for branded merchandise (including apparel) that could be considered marketing materials. License numbers are required "on all advertising and marketing" under §129.2(k), and the universal symbol may not be used on branded apparel under §129.2(j). But the additional warning statements required for all advertising and marketing under §129.2(c) and (d) are not expressly excluded for branded merchandise.

Proposed Solutions:

Licensees should be allowed to gift T-shirts and other branded merchandise (including "novelty items") as a marketing tool.

The prohibition on selling other licensee's branded merchandise under §129.2(j) also should be eliminated. All cannabis licensees should be allowed to sell the branded merchandise of other cannabis licensees, just as they could their own.

Finally, branded merchandise should be expressly deemed not to be "marketing or advertising" subject to the extensive statement and warning requirements of §129.2(c) and (d).

12. Provisional licenses should be granted to laboratories who certify that they are in the process of obtaining ISO17025 accreditation.

Proposed Regulations:

- §130.2(b)(2)(i) At the time of application for a cannabis laboratory permit, the Board may require information regarding a cannabis laboratory, including, but not limited to: (i) proof of ISO/IEC 17025 accreditation.
- §130.5(a)(i) An applicant for a cannabis laboratory permit may be granted a provisional permit for a period not to exceed twelve (12) months, provided it has: (i) obtained ISO/IEC 17025 accreditation, or accreditation that is based on ISO/IEC 17025 accreditation by any other laboratory accreditation authority approved by the Office.
- §130.7(a) A cannabis laboratory shall maintain ISO/IEC 17025 accreditation, or an accreditation that is based on ISO/IEC 17025 accreditation by any other laboratory accreditation authority approved by the Office.
- §130.10 A cannabis laboratory shall maintain an ISO/IEC 17025 accreditation, or accreditation that is based on ISO/IEC 17025 accreditation by any other laboratory accreditation authority approved by the Office.
- §130.23(e)(4) A certificate of analysis shall include, but not be limited to, the following: (4) permit identifier issued by ISO/IEC 17025 accreditation, or accreditation that is based on ISO/IEC 17025 accreditation by any other laboratory accreditation authority approved by the Office.
- §130.29 (a) A cannabis laboratory's permit shall be deemed summarily suspended for the following reasons: (8) failure to maintain ISO/IEC 17025 accreditation, or accreditation that is based on ISO/IEC 17025 accreditation by any other laboratory accreditation authority approved by the Office.

Issues Presented: The regulations as drafted will require laboratories to obtain ISO 17025 accreditation before a cannabis license is granted. ISO 17025 accreditation can be a costly and time-consuming process for laboratories to obtain before they are confident they will be granted a license. Further, requiring laboratories to maintain ISO 17025 to apply for and receive a license is likely to significantly limit the number of licensed laboratories in the state thereby creating a potential bottleneck in the process by which cannabis products can come to market. In many other states there is a one-year grace period to obtain the ISO 17025 accreditation after the lab is open, as long as the lab shows proof that they are in the process of accreditation and have registered with a third-party accrediting auditing body.

Proposed Solutions: New York should adopt the approach followed by many other states that grants provisional licenses to laboratories who certify that they are in the process of accreditation and have registered with a third-party accrediting auditing body. A provisional licensee should be granted a one-year grace period to obtain ISO 17025 accreditation.

13. A list of required analytes and acceptable limits should be published swiftly to discourage laboratories from developing methods that are relatively insensitive for different compounds.

Proposed Regulations:

- §130.22 (c) Testing for contaminants in cannabis product or medical cannabis, and any other intermediates or forms shall include, but not be limited to, microorganisms, foreign material, metals, moisture content and water activity, mycotoxins, pesticides, residual solvents, 37 terpenoids, and any other analyte or group of analytes determined by the Office, consistent with the acceptable limits determined by the Office for each of the foregoing.
- §130.22 (d) The Office shall make available a list of required analytes, their acceptable limits and approved testing methods on the Office’s website and in any other manner as determined by the Board.

Issues Presented: The regulations do not specify which analytes must be testified nor do they specify the acceptable limits or sensitivities for testing such analytes. The list of required analytes and their applicable limits and the sensitivities for testing such analytes should be published swiftly to allow laboratories ample time to satisfactorily develop methods to test each analyte at the required sensitivities and applicable limit. This is particularly necessary because certain dangerous pesticides can be difficult to detect at low limits and developing methods can require a lengthy process. Without specified limits, whether it be an action limit or a maximum limit of detection, laboratories are encouraged to set up methods that are relatively insensitive for testing compounds – meaning they would not fail samples except the those with exceedingly high levels of such compounds. Meanwhile, laboratories with more sensitive methods are motely like to fail more samples and lose customers to the labs with the insensitive methods, therefore encouraging “lab shopping.” This would also permit inferior and unsafe products to enter the New York market.

Proposed Solutions: OCM and CCB should swiftly publish a list of required analytes well in advance of granting provisional licenses and include either action limits or maximum limits of detection for each analyte.

Conclusion

We encourage OCM and CCB to revise the proposed regulations to generally improve prospects for the smooth and successful development of New York’s adult-use cannabis market. The regulations should provide future licensees with certainty and clarity. As industry stewards, we are hopeful the above points of concern can be adequately resolved through this opportunity to improve proposed Parts 128, 129, and 130. As knowledgeable professionals with significant experience in cannabis law and policy across the nation, we would be happy to further assist with any of these points or others in gathering data and resources from our experience with other states.



Thank you for the consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "CJ Davis", is positioned below the word "Sincerely,".

Christopher J. Davis, Executive Director,
on behalf of The International Cannabis Bar Association