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Via email to: regulations@ocm.ny.gov

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

RE: Comments on Proposed Regulations Part 128 and Part 129

Dear Office of Cannabis Management:

On behalf of the New York State Bar Association's ("NYSBA") Cannabis Section, we thank you for the opportunity to comment on the proposed adult-use packaging, labeling, marketing, and advertising regulations. The NYSBA's Cannabis Section is comprised of a diverse group of attorneys who collectively have cannabis practice expertise and are engaged on behalf of NYSBA regarding the evolving legal status of cannabis at both the state and federal level. Upon review of the draft adult-use packaging and labeling, and the adult-use marketing and advertising regulations, we offer the following comments for your consideration and look forward to working with you on finalizing these important rules for New York's nascent adult-use cannabis industry.

The majority of our comments focus on a licensee's need to distinguish itself from the competition. In that regard, many of the proposed rules limit individualized packaging which will eliminate brand competition and stifle innovation. The practical effect of the proposed rules run

contrary to MRTA's objecting of achieving economic success in the adult-use marketplace. In many of the successful adult-use programs across the country, regulators do not enforce generic labeling requirements for products and we hope New York will follow suit.

Section 128.1(d)

Section 128.1(d) creates a broad definition for "*brand or branding"* and includes terms inconsistent with how federal law or New York law references trademarks. Indeed, trademark law both at the federal and state level does not recognize the use of a "name, entity name or doing business as name" as qualifying for protection. Rather, "trademark" as defined by Section 360 of the General Business Law means "any word, name, symbol, or device or any combination thereof used by a person to identify and distinguish the goods of such person, including a unique product, from those manufactured and sold by others, and to indicate the source of the goods, even if that source is unknown."

Suggestion: We recommend changing the definition of "Brand or Branding" to the following:

"Brand or Branding" shall have the same meaning as the definition of Trademark pursuant to Section 360 of the General Business Law.

Sections 128.1, 128.3 & 128.6

Section 128.1(b) creates a broad definition for "*attractive to individuals under twenty-one*" which includes (b)(2) "bubble-type or other cartoon-like fonts," and (b)(3) "bright colors that are neon in appearance." Meanwhile, section 128.3 prohibits a cannabis retail package from being made attractive to individuals under twenty-one and from containing any "pictures, images, or graphics, other than what is required by the Office."

We of course fully support the goal of preventing persons under the age of twenty-one from purchasing or using cannabis. Indeed, the proposed regulations create numerous provisions to achieve this goal like requiring child-resistant and tamper-evident packaging, prohibiting similarities between cannabis products and products like candy, soda, drinks, cookies or cereal, and prohibiting the terms candy or candies. However, in a marketplace anticipated to generate hundreds of millions of dollars for New York State, hundreds of cannabis brands will be competing for market share. Already without the ability to advertise via traditional outlets like television and social media, packaging is one of the only mediums that set apart brands from each other. Hampering a brand's ability to creatively display their product on its package will inevitably harm competition and brand loyalty.

Given these stringent requirements and broad authority granted to the OCM to determine what is, and what is not permissible, licensees 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 packaging is non-compliance, 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.

Suggestion: Remove the excessive and burdensome advertising, marketing, and labeling restrictions in proposed sections 128.1(b), 128.3, and 128.6 which would allow for broader product competition and innovation.

Section 128.6(a)(5)

Section 128.6(a)(5) prohibits retail packaging from displaying any content or from being labeled in any manner that "causes a reasonable consumer confusion as to whether the cannabis product is trademarked, marked or labeled in a manner that violates any federal trademark law or regulation." Like our above concerns, this is another subjective standard that has potential to trip up licensees.

Moreover, the term "cause a reasonable consumer confusion" is misplaced. The legal term of art is "likelihood of confusion" and the Second Circuit law on "likelihood of confusion" consists of a multi-factored analysis. If a licensee is found by a court to have violated a third-party's trademark rights, it will be able to rebrand its product. However, Section 128.7(a) subjects a licensee to suspension, cancelation or even revocation should they be found to violate this provision.

Suggestion: Remove this provision in its entirety.

Sections 129.2(i) and 129.3(a)(20)

Section 129.2(i) permits a licensee to sponsor an event under limited circumstances, providing:

> 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.

However, section 129.3(a)(20) provides that "no marketing or advertising of cannabis products shall . . . sponsor an event using a licensee's brand, business, or trade name."

This two provision appear to conflict with each other and licensees and event production companies alike will be left unsure whether cannabis sponsorships are permitted, unnecessarily restricting market opportunity and creativity. Cannabis-related museums, music festivals, concerts and eventually sporting events will all look to cannabis licensees for sponsorship opportunities, yet licensees will be unwilling to participate in fear of violating section 129.3(a)(20).

Suggestion: Remove section 129.3(a)(20) in its entirety.

Section 128.5(6)(h)

In addition to five separate warnings as well as a universal symbol, section 128.5(6)(h) requires retail packaging or marketing layers for cannabis products to include "any rotating health warnings as determined by this office."

Warning requirements that change periodically create challenges for licensees because with each "rotation," licensees will be forced to develop, order and purchase new packaging to remain compliant. Products already on shelves can suddenly become non-compliant because of a new warning required by the OCM and this obsolete packaging will likely become unnecessary waste. Moreover, licensees may have to remove print advertisements already placed or cancel contracts with media agencies for advertisements suddenly deemed out of compliance because of the rotating warning requirement.

Solution: *The OCM can develop a fixed set of warnings for licensees to choose from to include on their packaging, labeling and advertising based on the product type the licensee is packaging, labeling or advertising.*

In the alternative, we suggest that the rule should specify that the OCM will establish a "produced after" date with sufficient lead time for licensees to produce new labeling without waste.

Section 129.2(j)

This section provides that a licensee shall limit the sale of apparel displaying its brand and trademark to the licensee's licensed premise.

Again, the ability for cannabis companies to advertise their brand is severely hampered by the federal prohibition of cannabis and traditional routes of marketing and advertising are closed to these companies. Further limiting their ability to sell branded merchandise, especially new brands entering the cannabis industry, could be the death knell because it limits consumer interaction with the brand. Already established companies – whether existing medical operators in New York or well-known west coast companies migrating east– will have an upper hand at the cost of New York small businesses. Similarly, non-consumer facing licensees like cultivators and processors will have no ability to sell branded merchandise because consumers are not permitted on their premise.

Drawing parallels between MRTA and New York's Alcoholic Beverage Control Law, both pieces of legislation contain gift and service provisions that prohibit undue influence by a supplier or distributor over a retailer's purchasing power. The OCM can achieve the underlying policy behind gift and service provisions by prohibiting retailers from selling apparel of other licensed cultivators, processors or distributors but permitting non-licensees and third-parties to sell a licensee's apparel.

Solution: *We suggest OCM eliminate the sentence "Such apparel shall only be sold by the licensee within the licensed premises."*

Moreover, to address both the "supplier tier" (i.e., cultivators and processors)licensees' desire to market its brand via apparel in consumer-facing locations and the OCM's need to abide by MRTA's gift and service provisions, the OCM can promulgate a rule similar to NYCRR 86.6 – Consumer Advertising Specialties – of the State Liquor Authority. Under 86.6, a consumer advertising specialty is an item with the brand logo that is intended to be given away to consumers, such as "ashtrays, bottle or can openers, cork screws, shopping bags, shirts, hats, etc." There is no limit on the amount of consumer advertising specialties that suppliers can give to retailers, so long as the retailer is not paid or credited in any manner, directly or indirectly, for the distribution of consumer advertising specialties. This way, cultivators, processors and distributors can still manufacture branded apparel for consumers without exposing retailers to the potential of undue influence over the retailer's purchasing decisions.

Thank you for your consideration and we look forward to our continued dialogue working with you on these critical issues.

Sincerely,

Neil M. Willner

Neil M. Willner,
Regulatory Committee Chair, on behalf of the
New York State Bar Association,
Cannabis Section.