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. I Can't Believe It's Not Skittles! Broad Summary of Advertising and Packaging Regulations for Cannabis Dispensaries in New York State

BY LAUREN WOODS / ON OCTOBER 17, 2023



Photo By Margo Amala on Unsplash

History & Background

Newly passed legislation often represents the changing nature of public opinion and societal attitudes. In New York State, for example, the general public's softening and more accepting view of marijuana consumption was highlighted when the state approved legal marijuana use in a medical setting in 2014.¹ Seven years later, New York State passed the Marijuana Regulation & Taxation Act ("MTRA") and officially legalized "the possession of adult-use recreational cannabis for all adults over the age twenty-one."² A highlight of the act is how it addresses how the current state of cannabis regulation in the state is suboptimal, and how its haphazard policing has contributed to the mass-incarceration of African American and Latinx communities.³ It wishes to acknowledge these negative parts of marijuana's history while setting the stage for the emerging recreational cannabis market.

The passing of the MTRA also brought about the establishment of the Cannabis Control Board (the Board), a New York state entity responsible for the regulation of cannabis cultivation,

“processing, packing, marketing, and sale of medical cannabis, adult-use cannabis and cannabis product, and cannabinoid hemp and hemp extract...” It operates as an independent office within the division of alcoholic beverage control. ⁴ The purpose of the Board is to best suit the interests of public health while also providing regulatory guidance for licensed cannabis manufacturers and sellers.

Between the time the MTRA was passed in 2021 and today, the recreational cannabis market in New York City has embarked on a journey of becoming a legitimate and lucrative industry. The Office of Cannabis Management even has a list of all legal and licensed dispensaries compliant with MTRA on its website so consumers can make sure they are making the safest choice and select from good quality products.⁵ With this growth comes several questions and considerations that are still being balanced out today. Some of those questions revolved around the proper advertising and marketing guidelines that licensed businesses must rely on in the promotion of their brands and products. These questions were addressed through the proposed legislation of N.Y. Cannabis Law §86, a new statute that regulates advertising, packaging, and laboratory testing for adult-use cannabis. Upon review, the Control Board approved the legislation on June 1, 2022. ⁶

For the focus of this article, we will zoom in on the implications and reasoning behind the advertising and packaging guidelines set by the Control Board. Specifically, we will discuss what type of content can be advertised, how the content is advertised (whether that be on the product itself or externally), and to whom the advertisement should be targeted. Depending on further cannabis research and changes in public opinion, it is likely that the Control Board will tweak its guidelines.

Content of Advertisement

Above all else, New York has an end to protecting public health by ensuring that licensed dispensaries are completely transparent with consumers so they can make the most informed purchasing decisions. It is why the state created specific guidelines for licensed dispensaries that engage in brand and product advertisement. Advertisement, as defined by the Control Board, is “any publication, video, use of a brand representative or any other form of media for the purpose of causing, directly or indirectly, the purchase or use of a brand or cannabis product.”⁷ The Control also defines branding in reference to cannabis advertising, describing it as the “name, entity name, or doing business as name, registered trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other identifiable marker that identifies one adult-use cannabis licensee or adult-use cannabis licensee’s cannabis products as distinct from those cannabis products of other adult-use cannabis licensees and is used in...any packaging, labeling, advertising or marketing.”⁸

In relation to their brands, licensed dispensaries are required to provide warnings that provide the consumer with potentially harmful consequences of the consumption of cannabis

products.⁹ The phrasing of each warning can differ but must emphasize, in any shape or form, that there is a chance of a negative effect on the consumer such as addiction or impaired concentration and coordination. In addition, advertisements cannot refer to colloquial references to cannabis (stoner, pot, etc.) and represent any form of overconsumption.¹⁰

There are further guidelines depending on the medium of the advertisement. For example, magazine ads, tweets, or anything that does not contain any moving picture or audio must include 1) the licensee's name and license number and 2) a warning that says "For use only by adults twenty-one years of age and older. Keep out of reach of children and pets. In case of accidental ingestion or overconsumption, contact the Poison Center hotline 1-800-222-1222 or call 9-1-1. Please consume responsibly." These requirements also apply to advertisements that contain both auditory and visual elements, like an Instagram reel or TV ad, or solely auditory advertisements, like radio or podcast.¹¹

Where You Can and Cannot Advertise

The Control Board has also set out the appropriate physical locations for cannabis advertisements. In pursuit of its aim of not marketing cannabis to individuals under the legal age, which shall be discussed in the next section, the Board prohibits Licensees from displaying their advertisements within 500 feet of a school or childcare center.¹² It is also prohibits the display of advertisements in public transit vehicles and stations or billboards.¹³

Packaging and To Whom It Can Be Marketed

While the prospect of recreational cannabis is exciting, it reasonably comes with concerns, one being the way it is marketed and to whom the marketing is targeted towards. As cannabis manufacturers have embarked on many positive and creative ventures in terms of product development, issues have arisen where some retailers have sold products that bear a drastic resemblance to food stuffs that are often consumed by individuals under twenty-one. While many licensed dispensaries sell products that come in edible "gummy" forms that taste just like candy, the external packaging cannot look like so much like a widespread commercial snack that the under twenty-one crowd will be attracted to it.

The Control board specifically states that a product should not be any imitation of any "food, candy, soda, drink(s), cookie, or cereal" that looks like a product that is marketed to individuals under the legal age.¹⁴ In terms of color schemes and font aesthetics, licensed dispensaries are also prohibited from using bubble-type or other cartoon-like font; bright colors that are "neon" in appearance (saturation value greater than 60%). They also cannot use terms such as "candy" or "candies" (or variants in spelling), symbols, images, characters, public figures, phrases, toys, or games that are commonly used to market products to individuals under the age of twenty-one.¹⁵ Websites must also have a prompt or some type of

feature where you must confirm that you are at or above the legal age for cannabis consumption.¹⁶

The “appealing to under twenty-one” standard is not set in stone criteria. The guidelines that the Control Board sets out seem to rely on the assumption that it applies to things that seem “child-like” and juvenile. Designers for dispensaries must be cognizant and constantly aware of changing commercial trends that are popular amongst the younger generation, in this case Gen Z and below [need to elaborate here]

Why This Matters

The guidelines for advertising and marketing set out by the Board are still likely to evolve and change over time. This can depend on many things, one being whether cannabis remains classified as a Schedule 1 substance under the Controlled Substances Act.¹⁷ Future changes in society’s acceptance of marijuana and more research on its effects can potentially prompt the declassification of it to a lower schedule (Schedule 2, Schedule 3, etc).¹⁸ . However, we are moving in the right direction in learning more about the drug and its potential new position in the market. Today, legally licensed dispensaries wish to change and uplift the narrative, recognize the responsibility of promoting positive and healthy cannabis consumption, and mitigate the lingering disproportionate effects of the war on drugs. Currently, a licensee found to not be compliant with guidelines set forward by the Cannabis Control Board risk their licensee being cancelled, suspended, or revoked or other enforcement actions as Authorized by the Marijuana Regulation and Taxation Act (MTRA), Cannabis Law, and Title 9 of the New York Codes, Rules and Regulations.¹⁹ This in turn may slow the pace of creative innovation in the recreational cannabis industry. However, the regulatory scheme for recreational cannabis is in its very rudimentary and development stage, leaving an opportunity for dispensaries to tacitly maneuver their way around the regulations.²⁰ To avoid this, New York should continue of its work on creating clear advertising and packaging guidelines. These guidelines will not only assist those companies wishing to break into the industry, but also legitimize it.

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8. Id. at 5.
9. See Id. at 19 (“Cannabis can be addictive” “Cannabis can impair concentration and coordination. Do not operate a vehicle or machinery under the influence of cannabis” “There may be health risks associated with consumption of this product”).
10. See Id. at 20
11. See Id. at 24
12. Kristi L. Wolff, Shea O’Meara, “New York’s Cannabis Market Sees New Advertising Rules (Apr. 18, 2023), <https://www.kelleydrye.com/viewpoints/blogs/ad-law-access/new-yorks-cannabis-market-sees-new-advertising-rules>
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