



## Compliance Tip

January 7, 2020

### **Topic: Advertising and Branding - Regulated Marijuana Businesses**

**Applicable Statutory Sections/Rule Series: 44-10-103(7) and (10), 44-10-203, and 44-10-701(3)(c), C.R.S.; Rule 1-115 and the 3-700 Series, Colorado Marijuana Rules, 1 CCR 212-3**

#### **Defined Terms<sup>1</sup>**

“**Advertising**” means the act of providing consideration for the publication, dissemination, solicitation, or circulation of visual, oral, or written communication to directly induce any person to patronize a particular medical marijuana business or retail marijuana business or purchase particular regulated marijuana. “Advertising” does not include packaging and labeling, consumer education materials, or branding.

“**Branding**” means promotion of a Regulated Marijuana Business’s brand through publicizing the Regulated Marijuana Business’s name, logo, or distinct design feature of the brand.<sup>2</sup>

#### **Rulemaking Authority**

The Colorado Marijuana Code, 44-10-101, *et seq.*, C.R.S., establishes rulemaking authority regarding advertising. Pursuant to section 44-10-203(3)(a), the State Licensing Authority shall promulgate rules addressing “*signage, marketing, and advertising, including but not limited to a prohibition on mass-market campaigns that have a high likelihood of reaching persons under eighteen years of age for medical marijuana and have a high*

*likelihood of reaching persons under twenty-one years of age for retail marijuana.*” The Marijuana Code further identifies the following areas for rulemaking:

- (I) Allowing packaging and accessory branding;*
- (II) Prohibiting health or physical benefit claims in advertising, merchandising, and packaging;*
- (III) Prohibiting unsolicited pop-up advertising on the internet;*
- (IV) Prohibiting banner ads on mass-market websites;*
- (V) Prohibiting opt-in marketing that does not permit an easy and permanent opt-out feature; and*
- (VI) Prohibiting marketing directed toward location-based devices, including but not limited to cellular phones, unless the marketing is a mobile device application installed on the device by the owner of the device who is eighteen years of age or older for medical marijuana and twenty-one years of age or older for retail marijuana and includes a permanent and easy opt-out feature.*

<sup>1</sup> Senate Bill 19-224 established statutory definitions for “Advertising” and “Branding”. State regulations were subsequently amended to incorporate these definitions in the Colorado Marijuana Rules, effective January 1, 2020.

<sup>2</sup> Pursuant to Rule 3-715, “Branding” includes taglines, which may or may not be trademarked.

## Amended Rules Effective Jan. 1, 2020

The Colorado Constitution calls for the regulation of marijuana “in a manner similar to alcohol” in certain key respects.<sup>3</sup> As part of its 2019 rulemaking session, the Marijuana Enforcement Division reviewed all advertising rules, where amendments to rules were informed by the constitutionally mandated regulatory scheme governing Regulated Marijuana Businesses. Amended rules regarding Advertising and Branding reflected in the Colorado Marijuana Rules, 1 CCR 212-3, are summarized below.

### **Restrictions Established Under Prior Rules Which Remain Effective:**

- **No Deceptive, False, or Misleading Statements**
- **No Advertising or Branding Designed to Appeal to Minors**
- **No Unsolicited Internet Pop-up Advertising**
- **No Safety Claims.** Regulated Marijuana Businesses are prohibited from engaging in Advertising or using signage that asserts products are safe because they are regulated or tested.
- **Restrictions on Advertising Directed Towards Location-Based Devices.** Regulated Marijuana Businesses are prohibited from engaging in Advertising via marketing directed towards location-based devices, including but not limited to cellular phones, unless (a) the marketing is a mobile device application installed by the owner of the device; (b) the owner is of legal age to purchase marijuana; and (c) the marketing includes an easy opt-out feature.

### **New Advertising Restrictions - All Media:**

- **No Television, Radio, Print, or Internet Advertising Where More than 28.4% of the Audience is Reasonably Expected to be Under the Legal Age of Purchase.**<sup>4</sup> Such Advertising is permitted only where at least 71.6% of the audience is reasonably expected to be at least the age of 18 (Medical Marijuana) and age 21 (Retail Marijuana).

### **New Advertising Restrictions - Event Sponsorship:**

- **No Event Sponsorship Where More than 28.4% of the Attending or Viewing Audience is Reasonably Expected to be Under the Legal Age of Purchase.**<sup>5</sup> Such sponsorship at a charitable, sports, or similar event is permitted only where at least 71.6% of the audience at the event and/or viewing Advertising in connection with the event is reasonably expected to be at least the age of 18 (Medical Marijuana) and age 21 (Retail Marijuana).

### **New Advertising Restrictions - Outdoor Advertising:**

- **Outdoor Advertising is Subject to the Outdoor Advertising Act and Applicable Local Ordinances.** Outdoor Advertising must comply with all applicable local and state laws, including the Outdoor Advertising Act at sections 43-1-401 through 43-10420, C.R.S.
- **No Outdoor Advertising within 500 ft. of Elementary or Secondary Schools, Places of Worship, and Public Playgrounds**<sup>6</sup>

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<sup>4</sup> Standards adopted by the alcohol industry direct the industry to refrain from advertising where more than 28.4% of the audience is reasonably expected to be under the legal age of purchase.

<sup>5</sup> This event sponsorship restriction aligns with standards adopted by the alcohol industry. See [Distilled Spirits Council Code of Responsible Practices](#), the [Beer Advertising/Marketing Code](#), and the [Wine Institute’s Code of Advertising Standards](#).

<sup>6</sup> This outdoor advertising restriction aligns with standards adopted by the alcohol industry See [Distilled Spirits Council Code of Responsible Practices](#), the [Beer Advertising/Marketing Code](#), and the [Wine Institute’s Code of Advertising Standards](#).

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<sup>3</sup> Colo. Const. Art. XVIII, §16(1)(b)