

August 14, 2022

RE: Comments on NYCRR 9, Parts 128 Adult-Use Packaging and Labeling and Part 129 Adult-Use Marketing and Advertising.

To Whom It May Concern:

The New York State Public Health Association (NYSPHA) is the New York affiliate of the American Public Health Association (APHA) and serves as the statewide organization for members from all disciplines across the spectrum of public health professionals, organizations, academia, and students pursuing careers in public health. NYSPHA's mission is to improve the public's health through advocacy, education, networking, and professional development. NYSPHA is pleased to submit the following public comments and recommendations to the proposed NYCRR 9, Parts 128 Adult-Use Packaging and Labeling and Part 129 Adult-Use Marketing and Advertising.

NYSPHA takes a public health approach to recreational cannabis, which means that health concerns should always take precedence over commercial ones. Despite the availability of medical prescriptions for cannabis, there are significant known health risks associated with recreational use for adults, adolescents and children. There is a long history of health education and civil enforcement related to the sale of alcohol and tobacco. The lessons learned from the decades of policy work to reduce the harm caused of alcohol and tobacco products have contributed to the strong evidence base regarding packaging and marketing to include direct, clear, health warnings to protect children, those legally under the age of purchase, and pregnant women.¹⁻⁵ Research findings suggest a need to apply similar strategies to recreational cannabis.⁶ The public health community has identified a set of best practice standards for regulation of adult-use cannabis, which NYSPHA has used to analyze the current draft regulations.⁷

Cannabis creates particular risks for children, adolescents and young adults under the age of 25 years whose brains are still developing. The risks posed by cannabis use on the developing brain include:

- Difficulty thinking and problem-solving
- Problems with memory and learning
- Reduced coordination
- Difficulty maintaining attention
- Problems with school and social life

Additional risks include:

- Higher risk of mental health issues
- Impaired driving
- Potential for addiction

While other states have legalized adult use recreational cannabis, New York State must be a national leader by establishing the highest protective public health standards regarding packaging, advertising and marketing. NYSPHA believes that while the current regulations are a strong start in providing these regulatory protections, New York State should utilize the existing U.S. public health standards⁷ and the Canadian cannabis neutral packaging regulatory model⁸ to offer the most protective environment for youth in terms of exposure to cannabis products.

Two fundamental principles for cannabis regulation are the importance of health risk warnings and the importance of plain neutral packaging. NYSPHA also believes that health risk warnings regarding at-risk populations or behaviors should be clear and explicit and that any language or images should not: 1) appeal to children/youth or pregnant women, or 2) be able to be reasonably recognizable as endorsing medical or health benefits of cannabis. In terms of neutral packaging, the evidence suggests that neutral or “plain” packaging reduces the appeal of harmful products to minors, makes health warnings more effective, and assures that no misleading health information is transmitted by the packaging.

In March 2010, the Food and Drug Administration, under authority of the 2009 Family Smoking Prevention and Tobacco Control Act, prohibited tobacco brand sponsorship of regulated tobacco products in sports and entertainment events or other social or cultural events. NYSPHA recommends that the proposed regulations apply the same restriction to manufacturers or sellers of adult-use cannabis products in New York State.

To these ends, NYSPHA offers the following recommendations on the proposed regulations (new or edited text is underlined and in red font):

128.1 Definitions

Amend the language proposed in section 128.1 (b) regarding *Attractive to individuals under twenty-one* to be defined as “advertising and marketing that is pleasing or appealing to persons under the age of twenty-one.” This definition does not apply to labeling and packaging which must comply with the neutral packaging definition and requirements set forth in this regulation.

Amend the language proposed in section 128.1 (l) to read as “Marketing means an activity, process, or product for creating, communicating, delivering and exchanging cannabis products and the utilization of internet tracking information to inform marketing strategies or to directly advertise to/solicit those who visit cannabis related sites.” Marketing in any form and through any existing or new media platforms must comply with the definitions in 128.1 (b) 1-7.

Amend the language proposed in section 128.1 (m) to read “Marketing layer means packaging in addition to the retail packaging that is the outermost layer visible to the consumer at the point of sale and shall include inner wrappings or linings. The Marketing Layer is optional, but if used it must be in compliance with all definitions and labeling requirements in this Part.”

Add after section 128.1 (m) a new definition of “neutral packaging”.

“Neutral packaging shall mean packaging that complies with regulatory restrictions or prohibitions regarding color, shape, size, texture, hidden features, features that change surface area, scent, sound elements, cut-out features, additional inserts or leaflets containing any of the above, and shall include no branding or marketing text or images beyond product name and single brand logo, as well as

required warnings and symbols. Neutral packaging shall include retail packaging, exit packaging and inner wrapping or linings.”

Re-letter the current 128.1 (n) through (y) to “(o) through (z).

Amend the language proposed in section 128.1 (t) to read as “*Retail package* means a sealed, hard or soft-bodied, child-resistant receptacle in which cannabis product is for sale. Retail packaging shall include the inner wrapper or lining. Does not mean: (1) an exit package; or (2) a non-consumer package to used to transfer cannabis from one licensee to another.”

128.2 Cannabis Product Retail Packaging Minimum Standards

NYSPPHA recommends that 128.2 (a) be amended and renumbered as follows:

- (a) A retail package shall:
 - (1) Meet all neutral packaging requirements.
 - (2) Be child-resistant.
 - (3) Be tamper-evident.
 - (4) Fully enclose the product, minimize oxygen exposure and prevent the contamination and/or degradation of the cannabis product; and
 - (5) Not impart any toxic or deleterious substance onto the cannabis product.

NYSPPHA recommends that 128.2 (c) be amended as follows:

- (c) The exit package is optional and is not required to be labeled, but any text or images included must comply with the neutral packaging definitions/requirements.

128.3 Cannabis Product Retail Packaging Prohibitions

NYSPPHA recommends that 128.3 (a) be amended and renumbered to include the following:

§ 128.3 Cannabis Product Retail Packaging Prohibitions.

- (a) A retail package must not:
 - (1) 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);
 - (2) contain any pictures, images, or graphics, other than what is required by the Office;
 - (3) contain any features that emit scent or sound;
 - (4) contain any features that change or alter a package’s appearance through technology, including heat-activated ink or features only visible through technological means other than for anti-counterfeiting purposes;
 - (5) have any texture other than a smooth texture. A texture will be considered other than smooth texture if it includes raised features for containers and coverings, embossing or decorative ridges for wrappers, other irregularities (e.g., engravings, etchings) for containers and coverings, except that these restrictions shall not apply to features necessary to facilitate opening and closing of the container and those to assist persons who are visually impaired;

- (6) include any features that can change surface area including tags or fold-out panels except in the case of a peel back or accordion panel for a small immediate container;
- (7) contain medical or health care symbols, such as a plus (+) sign in any color or a caduceus or other symbol that could reasonably be interpreted to imply medical or health benefits;
- (8) include cut-out windows;
- (9) include any background package color or shading other than white, black or brown;
- (10) be made attractive to individuals under twenty-one;
- (11) be made of single-use plastic, unless containing a minimum 25% post-consumer recycled content; and
- (12) violate any additional requirements as set out by the Office.

128.5 Cannabis Product Labeling Minimum Standards

Cannabis use warnings must be as strong as, and consistent with, required warnings for alcohol products, in regard to impaired driving. States where adult-use recreational cannabis has been legalized showed a consistent increase in motor vehicle related crashes and injuries following legalization. Other studies indicate that combined alcohol and cannabis use are a factor in increased motor vehicle injuries.

NYSPHA recommends that a new (4) be added to 128.5 Cannabis product Labeling Minimum Standards subsection (f), stating “Warning: Do not use if driving or operating machinery”.

NYSPHA recommends amending 128.5 (b) (1) to read as follows:

(1) a list of all ingredients in descending order of predominance by weight in the cannabis product – both active and inactive. The ingredient list must include and separately list, in bold, any major allergens set forth in the Food Allergen Labeling and Consumer Protection Act of 2004, Title 21, as it relates to Food and Drugs, of the U.S. Code § 343, for misbranded food, as amended from time to time; and:

NYSPHA recommends amending 128.5 (g) (3) as follows:

(3) in text no smaller than size 8 font;

NYSPHA recommends further that the following requirements be added to the regulation in accord with the national public health best practice standards:⁷

1. That the New York State Department of Health approve the packaging and health warning labels.
2. That prohibit labeling content that is false, misleading, deceptive, or the use of descriptors to indicate a brand is less harmful or safer than others.

3. That warnings are large, clear, and visible, cover more than 50% of the principal display areas, and are at a reading level appropriate for children and low literacy adults.
4. Requires that warnings use images in addition to text

128.6 Cannabis Product Labeling Prohibitions

NYSPHA recommends that 128.6 be amended to read as follows:

(a) No retail package or marketing shall display any content or be labeled in any manner other than those required elements set forth in regulation and a single display of the product name and logo. Labels must not include:

- (1) any color, text, brand, logo, or image other than those allowed by this regulation;
- (2) any false or misleading statements including, but not limited to, any health claims, including the use of plus (+) symbols in any color, or caduceus;
- (3) includes the term “organic”;
- (4) the term “craft” unless the processor meets the term as defined in Part 118 of this Chapter;
- (5) any packaging or logo 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;
- (6) any illustration or content that falsely portrays cannabis or cannabis products as being authorized under or part of Article 3 or Article 5 of the Cannabis Law;
- (7) depicts cannabis, excluding the universal symbol as required by section 128.4 of this Part, cannabis products, or paraphernalia;
- (8) promotes ~~over~~consumption beyond a single serving;
- (9) promotes price, price reductions, or any other discount or coupon;
- (10) depicts a child or other person reasonably appearing to be under the age of twenty-one;
- (11) depict a pregnant or nursing person; and
- (12) violates additional prohibitions as set out by the Office.

129.2 Adult-Use Marketing and Advertising General Restrictions

NYSPHA believes that marketing and advertising must contain strong, clear language regarding the use of products by pregnant or nursing persons. We recommend the following language replace the proposed 129.2 subsection (d):

(d) Cannabis should not be used by persons who are pregnant or nursing.

NYSPHA recommends the following amendments to 129.2 (E) (3)

(3) in text no smaller than size 8 font.

NYSPHA recommends the following amendments to 129.2 (i)

(i) A licensee may **not** sponsor a charitable, sports, entertainment, 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 Adult Use Marketing and Advertising Prohibitions.

NYSPHA recommends that the subsection (a), after item (12), add a (13) and renumber the current (13) through (24) to (14) through (25).

(13) shall not depict a pregnant or nursing person.

While NYSPHA recognizes that the legalization of adult-use recreational cannabis requires the establishment of a market, as public health professionals, we must also urge the Office of Cannabis Management to start with the most comprehensive, protective regulations allowed under the statute. New York must assure that lessons learned over decades of tobacco and alcohol marketing immediately benefit both consumers and children by avoiding misleading, predatory and otherwise enticing to minors in packaging, labeling, and marketing practices, as well as prohibiting practices that encourage overconsumption, misuse or false health claims. We believe the amendments offered here further strengthen the proposed regulations and will protect public health to the greatest extent allowed in a legalized cannabis market.

Sincerely,



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Policy and Advocacy Committee Chair
New York State Public Health Association.

References:

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- 2) Bansal-Travers M, Hammond D, Smith P, and Cummings KM. The Impact of Cigarette Pack Design, Descriptors, and Warning Labels on Risk Perception in the U.S. *Am J Prev Med* 2011;40(6):674–682.
- 3) Mays D, Niaura RS, Evans WD, Hammond D, Luta G, and Tercyak KP, Tob. Cigarette packaging and health warnings: the impact of plain packaging and message framing on young smokers. *Tob Control*. 2015;24(0): e87–e92.

- 4) Dimova ED and Mitchell D. Rapid literature review on the impact of health messaging and product information on alcohol labeling. *Drugs: Education, Prevention and Policy*. 2021; <https://doi.org/10.1080/09687637.2021.1932754>
- 5) Packaging colour research by tobacco companies: The pack as a product characteristic. Lempert LK, Glantz S. *Tob Control* 2017;26:307–315.
- 6) Goodman S, Leos-Toro C, Hammond D. The impact of plain packaging and health warnings on consumer appeal of cannabis products. *Drug and Alcohol Dependence* 2019;205:107633.
- 7) Marijuana Regulatory Frameworks in Four US States: An Analysis Against a Public Health Standard. Barry RA and Glantz SA. *Am J Public Health*. 2018;108(7):914-923.
- 8) Packaging and labelling guide for cannabis products. Requirements under the Cannabis Act and the Cannabis Regulations. Health Canada (2019). Available at: https://www.canada.ca/content/dam/hc-sc/documents/services/cannabis-regulations-licensed-producers/packaging-labelling-guide-cannabis-products/Packaging_and_labelling_guide_for_cannabis_products_rev.pdf. Accessed 8/13/22.