

**Parts 128 and 129, Packaging, Labeling, Marketing and Advertising Proposed Regulations:
Assessment of Public Comment**

128.1 – Definitions

COMMENT: Commenters stated general frustration with restrictions on the packaging, labeling, marketing, and advertising of adult-use cannabis products. Commenters stated that the proposed regulations, generally, were overly strict and too greatly restricted brands. Commenters stated that cannabis brands, packages, advertisements, and marketing materials should not be “subjected to stricter regulations than that of tobacco products or alcohol.”

RESPONSE: Many provisions of the proposed rules are required by the Cannabis Law which prohibit certain packaging, labeling, marketing, and advertising of adult-use cannabis including, but not limited to, false, deceptive, or misleading advertising and packaging or labeling that is false, misleading, or appeals to individuals under twenty-one. No changes to the proposed regulation were made as a result of this comment.

COMMENT: Comments were received on the proposed definition of “attractive to individuals under twenty-one”. Commenters agreed with the intention of ensuring that cannabis products are not packaged, labeled, marketed, or advertised in a manner that is attractive to individuals under twenty-one, but expressed concern that the proposed definition may place too many restrictions on licensees.

RESPONSE: Section 86 of Cannabis Law requires explicit rules be promulgated which prevent packaging, labeling, marketing, and advertising from appealing to individuals under twenty-one which is in line with the legislative intent to protect the public health and safety of all New Yorkers. No changes to the proposed regulations were made as a result of this comment.

COMMENT: Commenters suggested changing the word “attractive” to “targeted.”

RESPONSE: While other areas in Cannabis Law require targeting, this suggestion would not be in-line with the intent of the regulations specific to packaging, labeling, marketing, and advertising that are prohibited to appeal to children or other minors. No changes to the proposed regulations were made as a result of this comment.

COMMENT: Commenters who sell adult-use cannabis products in other states expressed concern that they would be required to change the colors used on their products before they could sell them in New York. Commenters requested clarification on which colors would be considered “bright colors.” Commenters suggest removing “(2) bright colors that are neon in appearance” from the proposed definition or providing certain color palettes, specific color codes, or other additional information that clarifies “bright colors”. Commenters recommended prohibiting the use of more than three colors, stating the use of more colors makes a product more likely to increase attractiveness to youth.

RESPONSE: The Office of Cannabis Management (Office) acknowledges this comment and refers those to Guidance that has been issued on the Office’s website. No changes were made as a result of this comment.

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COMMENT: Commenters requested clarification on which fonts would be considered “bubble-like” or “cartoon-like.” Commenters suggested specific fonts that be prohibited.

RESPONSE: The Office acknowledges this comment and refers those to Guidance that has been issued on the Office’s website. No changes were made as a result of this comment.

COMMENT: Commenters suggested the word “candy” not be deemed attractive to individuals under twenty-one when used to describe a “hard candy”. Commenters state that certain cultivars (strains) have the words candy in them (i.e., bubble gum) and should not be changed as that is how the cultivar is known.

RESPONSE: The proposed regulations were revised as a result of this comment.

COMMENT: Commenters request allowing public figures on branding.

RESPONSE: In line with the legislative intent to protect the public health and safety of all New Yorkers, and to prohibit packaging, labeling, marketing, and advertising strategies with the potential to attract individuals under twenty-one, no changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters suggest adding animals, insects and fruits to images that are attractive to individuals under twenty-one.

RESPONSE: No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters stated that the proposed definition of “Brand or Branding” may be inconsistent with the current definition of “Trademark” in General Business Law and suggested the definition be changed to match the definition of “Trademark”.

RESPONSE: “Trademark” is within the definition of “brand” or “branding” and therefore is not inconsistent, but a part of the definition. No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters seek clarification on “date of expiration” stating that they believe this is not the most appropriate term for a cannabis product which do not “expire” or denote the date the item has perished or is no longer safe for consumption but rather denotes the date the item begins to lose potency and requires re-testing. Commenters expresses concern that the definition provided for “date of expiration” is unclear.

RESPONSE: The proposed definitions of “date of expiration” and “use by date” are similar because they are intended to reflect the information for unopened products (if “date of expiration”) or opened products (if “use by date”). Both dates refer to the date at which a cannabis product meets applicable standards of identity, potency, and quality at the time of use, as determined by appropriate stability testing, subject to any storage conditions stated on the labeling. The proposed regulations do not prohibit licensees from

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explaining the meaning of these dates on labels. The proposed regulations were updated to allow appropriate data on the same product forms to substitute for stability studies.

COMMENT: Commenters recommend acceptance of Out of State Stability Testing from licensed, accredited cannabis testing labs for cannabis infused beverages so long as the final product passes New York’s state testing requirements.

Commenters cite recurring costs for stability testing related to products that have met or exceeded regulatory testing standards by another state’s licensed cannabis testing lab with similar or more comprehensive stability testing standards is redundant and leads to long wait times in terms of both achieving stability and bringing the product to market.

Commenters request a “phase in” of the proposed stability testing requirement. Stability testing, by its nature, takes significant time to complete, and immediately requiring stability testing would inhibit the introduction of new products in the market, particularly for new operators that are coming online, or will soon begin operations, in the adult-use marketplace. Alternatively, the Office should phase in the requirement that the date of expiration and use by date be supported by stability testing. For similar reasons, to ensure an adequate supply of adult use products in market upon the launch of retail sales,

Commenters expressed concern about the requirement for “stability testing” being costly to comply with and requested additional clarification on what constituted “appropriate stability testing.” Commenters specifically requested clarification on whether beverages would be required to undergo stability testing and stated that this not required of beverages by some state. Commenters suggest terms “Tested for quality on” or “Passed Testing on”. Commenters recommend standardization of these dates and their meaning on all labels citing their importance for the health of the industry and the public.

Presently, cannabis products are labeled when the product passes testing, stability testing is only required after that date. Commenters recommend testing be initiated 45-60 days prior to “use by/package date”.

RESPONSE: The proposed regulations were revised as a result of this recommendation so that both the date of expiration and use by date are based on appropriate data for similar product forms as opposed to solely from stability testing initiated by licensees.

COMMENT: Commenters recommend information on terpenes be added to required packaging and labeling. Commenters stated terpenes have different effects, which are particularly important to understand while using cannabis medically and therefore terpene labeling can help patients and consumers choose a product that works for them based on terpenes as opposed to selecting from less insightful strain names. Commenters also suggest that by adding terpene labeling as a requirement, it would allow individuals to make purchases informed by scent, despite sealed child-resistant packaging.

Commenters stated all terpenes should be allowable due to the ability to further educate people buying cannabis for medical purposes. Commenters requested clarity on banning synthetic and non-cannabis derived botanical terpenes stating if synthetic or non-cannabis terpenes are proven safe, they should be allowed to be added into cannabis products if they are declared in the ingredients list.

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RESPONSE: The proposed regulations were amended as a result of these comments. Guidance has been issued on the Office's website to clarify terpenes as outlined in the Principal Packaging Display Minimum Standards.

COMMENT: Commenters recommend rules be revised to reflect the same standard for both Medical and Adult-use Packages, by way of adopting the existing packaging and labeling requirements in the medical program to the adult-use program.

RESPONSE: Regulatory language and Guidance will continue to be streamlined whenever relevant for the adult-use and medical program through revised regulations and future Guidance.

COMMENT: Commenters recommend definition of "Lot unique identifier or lot number or bar code" be revised replacing the "or" with an "and" to elevate the minimum standard for product identifiers by bolstering public safety and transparency and facilitating the sharing of information about cannabis products throughout the supply chain.

RESPONSE: The terms "lot unique identifier", "lot number", and "bar code" are synonymous in the proposed regulations; it is not feasible for all three to be required on packaging and labeling. No changes were made to the proposed regulations as a result of this comment.

COMMENT: Commenters express concern that the use of the term "lot unique identifier or lot number or bar code" in the adult-use cannabis market is inappropriate and suggests that each term be replaced with "cannabis product batch", stating this term as the standard in the industry, defined as follows: "*product batch* means a uniquely defined quantity of medical cannabis or cannabis product; including pre-roll, that is uniform in processing, manufacture, and packaging within a concurrent time frame". Commenters state that the proposed cannabis laboratory regulations (Part 130) use the term "cannabis product batch", rather than "lot unique identifier or lot number or barcode", and that term is standard in the adult-use cannabis industry across the country, it is appropriate for usage here.

RESPONSE: The current definition includes multiple terms, as synonyms, due to inconsistent industry standards as well as the nature of each term serving the same function. Including the information relevant to the term under other guidelines outlined in proposed regulations would be allowable.

COMMENT: Commenters express concern that including websites and social media in the definition for advertising would inhibit licensees' ability to advertise pricing or promotion through these avenues. Commenters request the removal of websites and social media from the advertising definition stating patients and consumers rely on these avenues to check pricing and menus.

RESPONSE: The proposed regulation does not prohibit pricing and menus from being included on an age-verifiable website or social media but prohibits the act of promotion through these avenues. The inclusion of websites and social media in the proposed definition of "advertising" is necessary to ensure that all forms of communication that could be reasonably seen by individuals under twenty-one are subject to the proposed regulations. No changes were made to the regulations as a result of this comment.

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COMMENT: Commenters suggest including merchandise such as hats, shirts, etc. with cannabis businesses and brand names on them in the definition of advertising.

RESPONSE: The proposed regulations were amended and are reflected in the revised regulation as a result of these comments.

COMMENT: Commenters proposed a separate and distinct definition of marketing requirements applicable to a licensee such as, “Advertising Through Owned Marketing Channels,” to include websites, email, blogs, apps, or any other marketing channel where the licensee has complete ownership and control of the content. Commenters state marketing channels are controlled by the licensee and suggest this would (a) require a higher bar for burden of proof of audience composition being twenty-one and older and therefore (2) be exempt from certain restrictions related to pricing and loyalty programs. Commenters state that this would allow brand loyalty programs to promote environmental sustainability programs by having consumers return packaging.

RESPONSE: The inclusion of websites and social media in the proposed definition of “advertising” is necessary to ensure that all forms of communication that could be reasonably seen by individuals under twenty-one are subject to the proposed regulations. No changes were made to the regulation as a result of this comment.

COMMENT: Commenters suggest that flower products (e.g., rolls) be exempted from the child-resistant packaging requirements due to the nature of the psychoactive compounds in cannabis flower remaining are dormant until combusted.

RESPONSE: No changes to the proposed regulation were made as a result of this comment in an effort to continue ensuring public health safeguards are present in all product types to better prevent adverse consequences.

COMMENT: Commenters cite experience in advocating for cannabis regulations in other states who have experienced legal challenges due to regulations that reference federal law. Commenters recommend language be copied and inserted into the relevant section of the regulation.

RESPONSE: References to federal law are necessary to accurately capture regulatory requirements in proposed rules. No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters state Part 128 provides for four potential layers of packaging, which may ultimately be counterproductive to the State’s efforts to focus on sustainability.

RESPONSE: Changes have been made to address these concerns and Guidance has been issued on the Office’s website to clarify what materials are required to be included in the retail package and what materials are optional.

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COMMENT: Commenters suggest that the *reusable packaging* definition be amended to limit the materials that reusable packaging is made from, as follows: (u) Reusable packaging is packaging made from durable material that is designed to be used repeatedly for a number of use cycles, is safe for washing and sanitizing, made from plastics #2, #4, #5, glass, ceramic, and metal, and to the extent possible, is capable of being recycled at the end of use.

RESPONSE: Current Guidance on the Retail Packaging Sustainability Program has been issued on the Office's website. No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters recommend adding 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."

RESPONSE: Due to existing packaging and labeling prohibitions to safeguard against packaging designs that are not attractive to individuals under twenty-one but still allow for flexibility and brand differentiation, no changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters recommend clarifying the definition of "marketing". Commenters suggest the definition be amended to read as "Marketing means activity, process, or product for creating, communicating, delivering, and exchanging cannabis products. Marketing in any form and through any existing or new media platforms must comply with the definitions in 128.1 (b) 1-7." Another recommendation, to address comments that the definition was too broad was to replace it with the American Marketing Association (AMA) definition as follows: "Marketing means the activity, set of institutions, and processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large". Other commenters recommend that the definition of marketing be adjusted to ensure that only marketing activities are covered under the definition and broader language such as the "process for creating . . . cannabis products" is not included or that the definition be removed from regulation entirely.

Commenters recommend clarification of marketing definition stating "marketing" and "advertising" are often used synonymously, or advertising is considered a component of marketing. Commenters requests clarification of "communicating" used in the definition. Commenters would like to know if communicating about cannabis also falls within advertising based on the definition.

Lastly, some commenters state the definition should not include materials that are developed outside of marketing activities. Commenters offered examples of such materials could be wholesale sales between licensees or materials used to provide information regarding products to employees of licensees.

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RESPONSE: The definition of “marketing” has been amended as a result of these comments. A new definition for advertisements was also added. Guidance has been issued on the Office’s website to further clarify marketing activities.

COMMENT: Commenters stated that the current definition of cultivation could be considered marketing. Commenters suggested limiting the language to "activities specifically designed to reach and motivate adults twenty-one years old or older to purchase cannabis products."

RESPONSE: Section 85 of Cannabis Law requires retail dispensaries to clearly designate the price of each item. The proposed regulations do not prevent licensees from doing that or from changing the price of items they sell at any time, but rather, the proposed regulations limit the ability of licensees to use price changes to incentivize the purchase or use of cannabis products. The inclusion of websites and social media in the proposed definition of “advertising” is necessary to ensure that all forms of communication that could be reasonably seen by individuals under twenty-one are subject to the proposed regulations.

COMMENT: Commenters recommend clarifying the definition of marketing layer. Commenters suggest 128.1(m) be amended 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."

RESPONSE: The proposed rules have been revised to address these concerns. Guidance has been issued on the Office’s website to further clarify “marketing layer”.

COMMENT: Commenters recommend changing definition of retail package 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 used to transfer cannabis from one licensee to another."

Commenters suggest the following amendment “(t) Retail package means primary, consumer facing packaging that is a sealed, hard, or soft-bodied, child-resistant receptacle in which cannabis product is for sale directly to a consumer. Does not mean: (1) secondary packaging, inner wrapping, or lining; (2) an exit package; or (3) a non-consumer package used to transfer cannabis from one licensee to another” to allow more consistency with the existing cannabis industry.

Commenters suggest using more standard industry language and offers the following amendment:(t) Retail package means primary, consumer facing packaging that is a sealed, hard, or soft-bodied, child-resistant receptacle in which cannabis product is for sale directly to a consumer. Does not mean: (1) secondary packaging, inner wrapping, or lining; (2) an exit package; or (3) a non-consumer package used to transfer cannabis from one licensee to another.

RESPONSE: The proposed rules have been revised to address these concerns and Guidance has been issued on the Office’s website to further clarify “retail package”.

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COMMENT: Commenters state preference to refer to the retail marketplace as the “adult-use” marketplace.

RESPONSE: “Adult-use” will continue to be used as the preferred term when referencing the New York retail cannabis market.

COMMENT: Commenters request clarification on sections 128.1(i), 128.6(a)(2), and 129.3(a)(6) whether the intent is to prohibit any Health claim, or only those Health claims that are false or misleading. Commenters state if the intention is to ban “any Health Claims,” that this regulation would deprive consumers of essential information related to the benefits of cannabis. Commenters suggest if cannabinoids are formulated in appropriate ratios, manufacturers should be able to make justified non-disease, structure/function and general well-being claims that relate to the added cannabinoid(s). Commenters state the act of prohibiting manufacturers from informing consumers of these benefits (if substantiated) is counter to the intent of the NYS legislature and the Office and Board should consider the California Department of Cannabis Control’s approach that considers the need to protect consumers from false and misleading claims and balances it with the manufacturers’ right to promote substantiated benefits of cannabis.

RESPONSE: The proposed rules have been revised to address these concerns and Guidance has been issued on the Office’s website to further clarify “health claims”.

COMMENT: Commenters seek clarification on definition of “use by date” stating this is not the most appropriate term for a cannabis product as most items not actually “expire”; but rather lose potency and require re-testing. The expiration date does not denote the date the item has perished or is no longer safe for consumption. Presently, cannabis products are labeled when the product passes testing, and it cannot be sent for stability testing until after that date. Commenters recommend testing be initiated 45-60 days prior to “use by/package date”. Commenters suggest terms “Tested for quality on” or “Passed Testing on”. Commenters recommend standardization of these dates and their meaning on all labels citing their importance for the health of the industry and the public.

RESPONSE: To maintain consistent industry standards, no changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters suggest that (p) be worded more consistently by not allowing or obscuring the presence of cannabinoids that may be naturally present in small quantities but are increased through synthesis from other cannabinoids, such as Delta 8, Delta 10, or THC-0.

RESPONSE: These compounds in larger amounts would be considered a synthetic cannabinoid as defined in subdivision (g) of schedule I of section thirty-three hundred six of the public health law. Due to this language being included in the current definition, no changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters recommend including a definition of cannabis products and an explanation of how it relates to the definition of phytocannabinoids in section 128.1(p) to clarify whether the packaging

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and labeling requirements apply to cannabinoid hemp and hemp extract products that contain psychoactive ingredients.

RESPONSE: Synthesized cannabinoid hemp or hemp extract products are considered a synthetic cannabinoid as defined in subdivision (g) of schedule I of section thirty-three hundred six of the public health law. Due to this language being included in the current definition, no changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenter states terms “audience”, “audience composition”, “reasonably expected”, “rapid consumption” and “deterministic data” should be defined.

RESPONSE: No changes were made as a result of these comments.

128.2 – Cannabis Product Retail Packaging Minimum Standards.

COMMENT: Commenters suggest the Office pre-approve packaging, labeling, marketing, and advertising for licensees to ensure their compliance with the regulations.

RESPONSE: No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters stated that the requirement that a retail package “prevent the contamination and/or degradation” of the product is misleading, because a cannabis product will inevitably degrade over time due to oxygen present in the container.

RESPONSE: The proposed regulations do not require that a retail package be completely vacuum sealed but do require that a retail package be “fully enclosed” to “minimize oxygen exposure.” No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters state support for the requirement that cannabis products be encased in child-resistant packaging. Commenters requested clarification on whether a retail package is required to be resealable and whether it is required to be child resistant for the life of the package. Commenters suggested the regulations be altered to require edible product packages containing more than one serving be “resealable.”

RESPONSE: As defined in the proposed regulations, any “resealable” package must maintain its child-resistant effectiveness for multiple servings. The proposed regulations have been amended to clarify that a retail package is required to be resealable if it contains more than one serving.

COMMENT: Commenters suggested changes to the proposed requirement that all retail packages be child-resistant that would allow for certain products to be placed in retail packages that are not child-resistant. Commenters stated that this would allow smaller and less wasteful packages to be used.

RESPONSE: Section 81 of Cannabis Law requires these regulations to include a requirement that cannabis products be placed in a child-resistant package before delivery or sale at a retailer. No changes to the proposed regulation were made as a result of this comment.

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COMMENT: Comments were received on the proposed standards for an exit package. Some commenters expressed concern that including standards that pertain to exit packages would encourage retailers to use unnecessary packaging. Commenters suggested the regulations ban exit packages, 129.3 Adult-Use Marketing and Advertising Prohibitions. (a)(23) strongly encourages their use as the only allowably free promotional item.

Commenters seeks clarity on the exit package and suggest following amendment: (c) The exit package is optional and is not required to be labeled, is optional but may include the retail dispensary's name or logo, providing such that name or logo complies with the provision of section 128.6 of this Part.

RESPONSE: Guidance has been issued on the Office's website to further clarify requirements for an "exit package".

COMMENT: Commenters state the limit on exit packaging to include only the retail dispensary name or logo as long as it complies with § 128.6 is overly restrictive and will result in very few retailers taking advantage of the exit packaging. Commenters state the Board should eliminate the restrictions on exit packaging.

Commenters state there should be more opportunity to be creative with design for the exit packaging.

Commenters state licensees should be allowed to meet the child-resistant requirements at the point of sale by using child-resistant exit packages.

RESPONSE: Guidance has been issued on the Office's website to further clarify "exit package".

COMMENT: Commenters ask the Office and Board to consider the following topics related to edible marijuana products and packaging that were notably absent from the proposed regulations and vital to children and adolescent safety when considering accidental ingestions of cannabis products or toxicities:

1. Package limits - a defined maximum amount of THC in milligrams allowed in each package, particularly for edibles.
2. Scoring of individual doses - ensuring that marijuana edibles are "scored" such that intended individual doses are clearly demarcated on the cannabis product and can be easily separated by hand or knife.
3. Prohibiting edible products that are known to be appealing to children and adolescents.

RESPONSE: Guidance has been issued on the Office's website to further clarify these requirements.

COMMENT: Commenters request clarification on whether record keeping, or "records and documentation" is required to prove compliant marketing and advertising.

RESPONSE: Guidance will continue to be issued on the Office's website to further clarify specific "records and documentation" as necessary for a licensee to be compliant in their marketing and advertising activities.

128.3 – Cannabis Product Packaging Prohibitions.

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COMMENT: Commenters requested clarification on whether prohibitions in proposed Part 128.3(a) would apply to packaging elements other than the retail package, such as the exit package or marketing layer.

RESPONSE: The proposed regulations have been amended to clarify that packaging prohibitions apply to all cannabis product packaging components, including exit packages.

COMMENT: Commenters suggested additional retail package prohibitions that would prevent certain text or labeling strategies from being used on a retail package, such as prohibiting false or misleading information, including health claims.

RESPONSE: The proposed regulations have been amended to clarify that provisions which prohibit misleading labeling apply to all cannabis product packaging components, including the retail package.

COMMENT: Commenters suggested additional prohibitions that would further mandate “plain” packaging, such as requiring that the retail package have a plain texture, have no features that would change the packages surface area, and only use the colors white, black, or brown.

RESPONSE: There is insufficient evidence at this time to determine if factors such as package texture, surface area, or colors that are not bright make a retail package attractive to individuals under twenty-one. No changes were made to the proposed regulations as a result of this comment.

COMMENT: Commenters remarked on restrictions in Part 128.3(a)(1) and (2) of the proposed rule which would prevent a retail package from containing any brand elements beyond one logo and brand name or any images, pictures, or graphics other than those that are required. Commenters requested clarification on what precisely constitutes a “picture, image, or graphic.” Commenters stated that these prohibitions are too strict and suggested they be removed or changed. Commenters expressed a belief that regulations should allow for colorful packaging and branding that contains images in order to differentiate between brands, allow brands to co-brand, provide consumers a broader range of choices, and allow consumers to readily recognize and access their preferred products.

RESPONSE: The proposed rules have been revised to address these concerns by removing these prohibitions. The regulations have been changed to allow licensees greater flexibility in the use of images and logos in packaging and labeling, and Guidance has been issued on the Office’s website to further clarify allowable imagery.

COMMENT: Commenters suggested the proposed regulations be changed to prohibit any plastic from being used in packaging.

RESPONSE: Section 81 of Cannabis Law requires that each cannabis product be placed in a resealable, child-resistant package. To allow licensees flexibility in identifying a package that meets this statutory requirement, the proposed regulations allow licensees to use certain plastics in a retail package. The proposed regulations have been amended to clarify that this restriction on use of certain plastics applies to all cannabis product packaging components, and not just retail packages.

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COMMENT: Commenters stated that the prohibition on single-use plastic that does not contain 25% post-consumer recycled content may contaminate recycling streams. Commenters suggested the proposed regulations be changed to require 25% of all packages to be made of “reusable, plastic-free, and 100% recyclable materials.”

RESPONSE: Section 81 of Cannabis Law requires that each cannabis product be placed in a resealable, child-resistant package. To allow licensees flexibility in identifying a package that meets this statutory requirement, the proposed regulations allow licensees to use plastics containing more than 25% post-consumer recycled material in a retail package. The proposed regulations have been amended to clarify that this restriction on use of plastics containing under 25% post-consumer recycled material applies to all cannabis product packaging components, and not just retail packages.

COMMENT: Commenters expressed concern about the proposed rule prohibiting the use of single-use plastic that contains less than 25% post-consumer recycled content in a retail package. Commenters requested more flexibility, particularly for licensees which also package products for other states, and suggested this prohibition not go into effect immediately upon adoption. Commenters stated a phase-in period would minimize cost and would account for existing supply-chain delays because many packaging materials will be manufactured overseas and require advanced notice. Commenters stated that they believe it will be costly to find child-resistant retail packages which are not made of single-use plastic and urged the Board to conduct an analysis of the cost of compliant packaging. Some commenters suggested, instead of removing the prohibition, that it be changed to allow limited use of single-use plastic that contains less than 25% post-consumer recycled content or other plastics, such as hemp-based plastics.

RESPONSE: The limitation on using plastic containing less than 25% post-consumer recycled material in cannabis product packaging is intended to minimize the impact that cannabis product packaging has on the environment. The proposed regulations allow a wide range of materials to be used in cannabis product packaging, including, but not limited to, paper, metal, glass, and ceramic. No changes have been made to the proposed regulations as a result of this comment.

COMMENT: One commenter suggested removing the prohibition on the use of single-use plastic that contains less than 25% post-consumer recycled content in a retail package. The commenter stated that removing this prohibition would allow for cannabis to be sold in “small, pre-sealed, resealable plastic bags” which would have a minimal environmental impact “if they are recycled.” This commenter also stated that it would not be feasible to reuse plastic bags and, thus, suggested that provisions be removed which would allow a licensee to choose to sanitize and re-use packages as their sustainability program.

RESPONSE: Many of the bags that this commenter may be referring to cannot be recycled easily, or at all, by many municipal recycling facilities in New York State. Sections of the proposed regulations which allow licensees to sanitize and re-use packages are not mandatory and do not need to be removed because some packages cannot feasibly be sanitized or re-used. No changes to the proposed regulations were made as a result of this comment.

128.4 – Retail Packaging Sustainability Program.

COMMENT: Commenters requested clarification on whether a licensee would be permitted to incentivize a consumer to re-use or return packaging.

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RESPONSE: To allow for robust environmental sustainability programs, the proposed regulations have been amended to allow a licensee to promote customer loyalty programs and other discounts or advertise through free promotional items if the promotion or item is part of an environmental sustainability program.

COMMENT: Commenters expressed concern that the proposed regulations would allow for packaging refill and re-use as a permissible environmental sustainability program. Commenters stated that package reuse was unfeasible and that reused packages may contain pests, pathogens, or be otherwise unsuitable for reuse. Commenters requested clarification on what constitutes “appropriate sanitation” for a package to be reused.

RESPONSE: As explained in the proposed regulations, to be reused, a retail package shall be visually inspected and sanitized and disinfected to ensure that it is in good working order and does not contain any harmful residue or contaminants. A retail package that contains harmful residue or contamination or is not in good working order after sanitization would not be reusable pursuant to the proposed regulation. No changes have been made to the proposed regulations as a result of this comment.

COMMENT: Commenters noted that vaporizer batteries and other components of cannabis products were not referenced in the proposed regulations and requested clarification on whether a redemption or deposit programs for vaporization pens, cartridges, and batteries would be an acceptable sustainability program, as it is unclear whether these programs would satisfy the requirement of the sustainability plan. Commenters noted that lithium-ion batteries, which are used in many vaporization devices, are “the leading cause of fires” and “leach into soil and waterways.”

RESPONSE: The Board and Office acknowledge this comment and understand the potential environmental impact of the improper disposal of lithium-ion batteries. Because vaporizer batteries and other components of cannabis products are not part of cannabis product packaging, this comment is outside of the scope of the proposed regulations. No changes have been made to the proposed regulations as a result of this comment.

COMMENT: Commenters suggest the requirement that a licensee required to submit an environmental sustainability program must submit a revised environmental sustainability product packaging plan only be required if the licensee’s program has changed since its initial submission.

RESPONSE: The form of the revised environmental sustainability product packaging plan and the manner in which it shall be submitted will be clarified for licensees who are required to submit this plan before such time that submission of the plan is due. No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters suggested assistance in creating a packaging sustainability plan be provided to social and economic equity licensees and other licensees who may have lower amounts of capital. Commenters stated that facilitating package reuse would be costly for businesses to engage in.

RESPONSE: The proposed regulations do not prohibit a licensee from charging consumers a deposit fee for certain packages or otherwise utilizing a revenue-generating mechanism as part of their submitted

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environmental sustainability program. The Office intends to issue Guidance to clarify permissible forms of an environmental sustainability program. No changes were made to the proposed regulation as a result of this comment.

COMMENT: One commenter expressed concern that the proposed requirement that certain licensees submit an environmental sustainability program is too vague and too focused on “end-of-life management.” The commenter noted that the requirement would negatively impact licensees which “lack the resources to implement a robust sanitation system.” The commenter the sustainability program be removed and that, instead, the regulations require packages “be made of either non-plastic, compostable, or recyclable materials, or contain a minimum of 25% post-consumer recycled content.”

RESPONSE: The environmental impact of cannabis product packaging is not solely attributable to what material(s) a package is made of. The proposed regulations already prohibit certain materials from being used in retail package, and the proposed sustainability plan is necessary to address all factors which contribute to the impact of cannabis product packaging, such as improper disposal. It is unclear from this comment if the commenter noted that a package reuse program is one example of a permissible sustainability program, and not a required program for all licensees. Grammatical corrections have been made to the proposed regulations to clarify that package reuse is one example of a permissible program and not a requirement of licensees.

COMMENT: Commenters suggested that the environmental sustainability program not be required at application. Commenters stated that this later submission period would allow for licensees to build stronger plans and build stronger sustainability programs. Commenters suggested the regulations allow this plan to be submitted in the licensee’s first few years of licensure. Commenters noted that many sustainability strategies may impart additional costs on licensees and stated that this change would allow these licensees an opportunity to better fund their sustainability programs. Commenters suggested programs be funded by the Board or Office, such as through tax credits, and that standards be established for success and funding be allocated to incentivize behavior “beyond the bare minimum.”

RESPONSE: Guidance has been issued on the Office’s website to further clarify the environmental sustainability program requirements for the Office’s current conditional licensees. The Board and Office understand that implementing a sustainability program will incur costs, and current Guidance does not require these conditional licensees submit a sustainability program until their transition to a non-conditional license. No changes have been made to the proposed regulations as a result of this comment.

COMMENT: Commenters requested clarification on who would be allowed to inspect packages in a package reuse program and certify that they remained child-resistant upon reuse.

RESPONSE: The licensee engaging in a package reuse program would be required to determine the person facilitating the package reuse, and the regulations do not require that person be the licensee. As explained in the proposed regulations, to be reused, a retail package shall be visually inspected and sanitized and disinfected to ensure that it is in good working order and does not contain any harmful residue or contaminants. No changes were made to the proposed regulations as a result of this comment.

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COMMENT: Commenters requested clarification on the annual reporting described in proposed section 128.4(d). Commenters requested clarification on the form this report would take and what the information collected in this report would be used for. One commenter remarked that the report would provide a “window into the scale of the packaging waste problem,” but would not measure the “effectiveness of their sustainability program.” Some commenters suggested that additional data points, such as the weight of materials recycled, the number of containers re-used, or the amount of packaging manufactured overseas, be added to this report.

RESPONSE: Information about key packaging metrics submitted in this report will be used, alongside other information, to inform future decisions related to cannabis product packaging and labeling. The proposed rules have been amended as a result of these comments to clarify that the number of cannabis products sold in reusable packages, the number of reusable packages that the licensee re-used, and other information as set out by the Office are key metrics which shall be included in this report.

128.5 – Cannabis Product Labeling Minimum Standards.

COMMENT: Commenters stated that the proposed minimum standards required too much information to be put on product labels and would result in packages that were too large and wasteful. Commenters expressed discomfort with the amount of information required on the principal package display panel and suggested some information that the proposed rules require to be on the principal package display panel be allowed elsewhere. Some commenters suggested that licensees be permitted to display required labeling text through an alternative method, such as a QR code. Other commenters suggested certain labeling requirements, such as certain warnings, be removed in order to reduce the amount of labeling text.

RESPONSE: The warnings required to be placed on each package are intended to be clearly seen by any individual who picks up the package, including children. Making these warnings less visible would endanger public health and safety and would mean that these warnings would not be seen by individuals who did not have a cellphone or other device capable of viewing the associated QR code. The proposed regulations allow for labeling on small retail packages; labeling information may be displayed using accordion, expandable, extendable, or layered labeling with the exception of the labeling components that are required to be on the principal packaging display panel. To allow greater flexibility for labeling small products, the proposed regulations have been amended to clarify the use of layered labeling and to remove the requirement that the product’s lot number appear on the principal packaging display panel.

COMMENT: Commenters recommended adding “packaging date” and “expiration date” to the principal packaging display panel.

RESPONSE: The proposed regulations limit the amount of information that is required to appear on the principal packaging display panel in order to allow for labeling of small products. The proposed regulations already require that the date of expiration of the unopened cannabis product and the use by date be contained on the retail package or marketing layer. No changes to the proposed regulation were made as a result of this comment.

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COMMENT: Commenters requested clarification on whether the labeling text pertaining to the product weight should be listed on the principal packaging display panel in the Metric or US standard and what unit of measurement should be used for this information.

RESPONSE: The proposed rules do not specify a unit of measurement in which the cannabis product's weight should be listed. This unit may vary based on the product type. No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters suggested the proposed size and placement requirements for the universal symbol be altered to clarify where the universal symbol should be placed, particularly on smaller packages. Commenters expressed concern that the universal symbol, if printed on the "upper left 25% of the marketing layer" as required by the proposed rules, would result in significant added costs, would create logistical problems for small or cylindrical packages, and would require a large amount of dedicated space on an already crowded marketing layer.

RESPONSE: The proposed rules have been amended to address these concerns by removing the proposed requirement that the universal symbol be placed on the upper left 25% of the marketing layer.

COMMENT: Commenters requested clarification on whether both active and inactive ingredients must appear in the same ingredients list or whether a licensee could list active and inactive ingredients separately on a product's labeling.

RESPONSE: The proposed regulations require both active and inactive ingredients appear in the same ingredient list. No changes were made to the proposed regulations as a result of this comment.

COMMENT: Commenters recommend the universal symbol be changed by altering the colors, replacing proposed universal symbol with the International Intoxicating Cannabinoid Product Symbol (IICPS) symbol, or adding warning text to the symbol such as "Not for Kids".

RESPONSE: The universal symbol is intended to demark the product clearly and visibly as one that contains THC and is intended for individuals twenty-one years of age and older. Alterations to the symbol which make it less visible, add English text, or otherwise change its meaning would impact the ability of some individuals, such as those that do not speak English, to recognize or understand the symbol. The proposed rules have been revised to address these concerns by altering the symbol; shades of teal have been removed from the symbol to reduce the cost of printing the symbol.

COMMENT: Commenters expressed concern about rotating warnings. Commenters stated that changing warnings would increase the cost of packaging and labeling products and expressed concern that licensees would be required to relabel products to comply with seasonal changing warnings. Commenters request Guidance on when to include each required rotating warning on packaging.

RESPONSE: Guidance has been issued on the Office's website to further clarify the requirements for rotating warnings. Licensees which label cannabis products are intended to rotate these warnings equally between all their products and are not required to change warnings throughout the year.

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COMMENT: Commenters request clarification on how to assure required labeling text is “unobscured, and visible to the consumer” if printed on allowable “accordion style” or other layered labeling.

RESPONSE: To allow greater flexibility for labeling small products, the proposed regulations have been amended to clarify the manner in which layered labeling may be used and the information that may not be printed on a layered label and, thus, must be immediately visible to the consumer without peeling or unfolding a layered label.

COMMENT: Commenters stated that the requirement that the required warnings appear in a bright yellow text box was overly prescriptive and would impact packaging design. Commenters suggested the requirement be changed to allow the warnings to appear in another manner.

RESPONSE: The required warnings are intended to be clearly visible to a consumer. The proposed rules have been amended to remove the requirement that required warnings appear in a bright yellow text box and permit licensees to display warnings in an aggregate panel labeled “Warnings.”

COMMENT: Comments were received about the minimum font size in which required warnings must be presented. Some commenters suggested the minimum font size be increased beyond the 6-point font required by the proposed regulations. Other commenters suggested the warnings must always be presented in a font larger than the font size used for other certain product information.

RESPONSE: The required warnings are intended to be clearly visible to a consumer while still allowing flexibility for labeling of small products. No changes to the proposed regulations were made as a result of these comments.

COMMENT: Commenters recommend certain required labeling text be removed from the proposed regulations. Commenters stated that removing warning text from the labels would allow licensees greater space for “value-added content” and would reduce the possibility of confusion between adult-use and medical-use products. Commenters requested removal of the Poison Control Center phone number, text that “Cannabis may be habit forming,” and text that “There may be health risks associated with consumption of this product.” Commenters stated that these labeling requirements perpetuated stigma, were unnecessary, and were inaccurate.

RESPONSE: The required warnings in the proposed rules are in alignment with other jurisdictions that have adult-use cannabis markets. The content of warnings is based on current scientific evidence related to the topic of the warning text and the feasibility of labeling products with such text. No changes were made to the proposed regulations as a result of this comment.

COMMENT: Commenters recommended certain required labeling text be added to the proposed regulations. Commenters stated that additional labeling text is necessary to ensure that consumers do not view cannabis as “benign.” Additional labeling recommended by commenters included:

- “Consuming too much cannabis can result in acute psychosis and/or paranoia. Frequently using cannabis (daily or near daily) and/or using cannabis with high concentrations of THC (the active ingredient in cannabis) can increase the risk of mental health issues, including depression, social anxiety, acute psychosis, and schizophrenia.”;

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- “Cannabis can be addictive. The risk of developing “cannabis use disorder” can increase for people who start using cannabis at a young age and consume cannabis frequently.”;
- “Cannabis can negatively affect the developing brain. Brain development is not complete until age 25. Negative cognitive effects after consistent consumption can include difficulty thinking and solving problems, difficulty making decisions, problems with memory and learning, reduced coordination, difficulty maintaining attention, and problems with school and social life.”;
- “Warning: Do not use if driving or operating machinery”;
- “In case of accidental ingestion or overconsumption, contact the National Poison Control Center 1-800-222-1222 or call 9-1-1”;
- “Products ingested orally may take up to two hours to take effect
- “Keep out of reach of children and pets”
- “Please consume responsibly.”; and
- the required inclusion of images in proposed required warnings.

RESPONSE: Some of the additional warning text suggested by commenters, such as a warning to “Keep out of reach of children and pets” is already required by the proposed regulations. The required warnings in the proposed rules are in alignment with other jurisdictions that have adult-use cannabis markets. The content of warnings is based on current scientific evidence related to the topic of the warning text and the feasibility of labeling products with such text. No changes were made to the proposed regulations as a result of this comment.

COMMENT: Commenters recommend that the New York State Department of Health approve packaging and warnings.

RESPONSE: As a member of the Cannabis Advisory Board pursuant to section 14, the Department of Health already advises the Board and Office on issues such as the packaging of adult-use cannabis. A number of State agencies, including the Department of Health, provided the Board and Office with feedback on aspects of the proposed regulations. No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters recommend warnings are large, clear, and visible, cover more than 50% of the principal packaging display panel, and are presented at a reading level appropriate for children and low literacy adults.

RESPONSE: The required warnings in the proposed rules are in alignment with other jurisdictions that have adult-use cannabis markets. The content of warnings is based on current scientific evidence related to the topic of the warning text and the feasibility of labeling products with such text. No changes were made to the proposed regulations as a result of this comment.

COMMENT: Commenters requested clarification on what “clear usage instructions” would consist of and whether those instructions should pertain to the products storage, dosage, or handling.

RESPONSE: The proposed regulations require products be labeled with both the product’s “proper storage conditions” and “clear usage instructions.” Usage instructions should include clear instructions on how the processor intends the product to be consumed. No changes were made to the proposed regulation as a result of this comment.

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COMMENT: Commenters recommend the proposed requirement that product labels list all solvents used to produce the product be changed to only require labeling to list solvents that are detected on a certificate of analysis. Commenters stated that this requirement may require producers to disclose proprietary technology and that a list of solvents “would be confusing” for consumers.

RESPONSE: Just as the proposed regulations require products to list all ingredients, including inactive ingredients, the proposed requirement that product labels list all solvents ensures that customers are informed about the products they purchase. No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters recommend allocating space on the label for icons to indicate when a product is gluten-free, kosher, and/or vegan. Commenters recommended that the Office require uniform placement of those icons.

RESPONSE: The proposed regulations have been amended to clarify that products may only be labeled gluten-free, kosher, or vegan if it meets the requirements to be labeled as such.

COMMENT: Commenters recommend that all major and minor cannabinoids be required to be listed on product labeling. Commenters stated that it is misleading to focus labeling on the “intoxicating substances” in the product.

RESPONSE: The proposed regulations require, at a minimum, the milligrams per single serving of total THC, total CBD content and any other marketed phytocannabinoids be listed on the front of the package. The proposed regulations do not prohibit a licensee from listing phytocannabinoids beyond those required by the regulations. No changes were made to the proposed regulations as a result of this comment.

128.6 – Cannabis Product Labeling Prohibitions.

COMMENT: Commenters recommends allowing products to be labeled using the terms “craft” and “organic.” Commenters suggested that the regulations be amended to allow for products to be labeled as “organic” once a federal standard exists. Commenters requested clarification on whether they would be permitted to label edibles made with organic ingredients as “made with organic ingredients.”

RESPONSE: There is no organic standard established for cannabis that is federally recognized. This prohibition does not prohibit cannabis or cannabis products from being cultivated or processed using organic practices, being made using ingredients that are organic, otherwise being sustainably produced, or adding a statement to the label to indicate that the product is “made with organic ingredients” if applicable. The proposed regulations have been amended to clarify that licensees may use a “made with organic ingredients” statement if the product contains at least 70 percent certified organic ingredients (not including salt or water). These products may contain up to 30 percent of allowed non-organic ingredients. Additionally, the label must identify the USDA-accredited certifying agent on the retail package or marketing layer.

COMMENT: Commenter suggests clarifying if images of cannabis or paraphernalia are prohibited.

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RESPONSE: Guidance has been issued on the Office’s website to further clarify these requirements.

COMMENT: Commenter requests clarity on what is considered “overconsumption” as it relates to required warnings.

RESPONSE: The proposed regulations prohibit labeling, marketing, or advertising that promotes overconsumption. An example of this would be labeling, marketing, or advertising that encourages a consumer to consume more than the recommended serving of a product. No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenter requests that OCM consider implications of prohibiting rapid consumption in advertising and marketing when some edibles will be fast acting and typical warnings will not apply, which could potentially mislead consumers.

RESPONSE: This prohibition is intended to prohibit depictions of rapid consumption, not products that may have rapid onset of effects. No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters suggested changes to the proposed rule to allow for the depiction of cannabis leaves, flower, or plant in packaging and labeling. Some commenters also requested that changes to the proposed rules that would allow for the depiction of cannabis products or paraphernalia in packaging and labeling. Commenters stated that prohibiting depictions of the cannabis plant would result in more ambiguous labeling and perpetuate stigma. Commenters further stated that allowing depictions of cannabis products and paraphernalia will allow licensees to show images explaining the intended manner of consumption in their packaging and labeling.

RESPONSE: The proposed rules have been amended to allow for cannabis product packages to be labeled in a manner that depicts the cannabis plant.

COMMENT: Commenters recommend 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 cadeceus; (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 overconsumption 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.

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RESPONSE: The proposed rules have been revised to address these concerns and Guidance has been issued on the Office’s website to further clarify allowable imagery.

COMMENT: Commenters recommend prohibiting labeling content “that is false, misleading, deceptive, or the use of descriptors to indicate a brand is less harmful or safer than others.”

RESPONSE: The proposed regulations already prohibit labeling content that includes any false or misleading statements. No changes to the proposed regulation were made as a result of this comment.

128.7 – Retail Packaging and Labeling Violations and Penalties.

COMMENT: Commenters stated that all packaging occurs at the cultivation or processing level, (with the exception of microbusinesses) as opposed to at the retail dispensary level, to assure compliance and “seed to sale” control.

RESPONSE: As stated in Section 69 of Cannabis Law, processing includes the packaging and labeling of cannabis products. Only licensees authorized to process cannabis are permitted by the Cannabis Law to package and label cannabis products. The proposed regulations were amended to clarify that processors are responsible for ensuring cannabis products comply with packaging and labeling regulations.

COMMENT: Commenters recommend a phase-in period for any future packaging, labeling, marketing, and advertising required changes, allowing time for products to be sold and comply with any additional requirements to any of the sections of Part 128 and 129.

RESPONSE: The Office will provide advanced notice of any changes as they arise, allowing individuals time to have sell down periods of current inventory and phase-in newly implemented requirements. No change was made as a result of this comment.

COMMENT: Commenters recommend that the Office dedicate resources for manufacturer and distributor education, training, and updated Guidance across the state, to ensure compliance with these rules. Additionally, dedicated staff and resources will be needed to enforce these regulations.

RESPONSE: Once adopted, the Office will continue to clarify these regulations via Guidance documents, which may include illustrative examples of how to be compliant and additional technical assistance to licensees and education to the public. Enforcement and compliance staff at the Office will help ensure these rules are being followed, and identify failures in compliance where applicable, and seek penalties where necessary.

128.8 – Referenced Material

No comments were received on this section.

129.1 Definitions.

No comments were received on this section.

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129.2 Adult-Use Marketing and Advertising General Requirements.

COMMENT: Commenters suggested removing the proposed requirement that the primary purpose of advertising and marketing materials is to displace the illicit market or to inform consumers of dispensary locations. Commenters expressed that it is not the licensee’s responsibility to displace the illicit market. Commenters requested clarification on what types of advertising this provision would restrict and stated that the requirement was vague. Commenters stated that the requirement could dissuade legacy operators from joining the regulated market.

RESPONSE: The proposed rules have been amended as a result of these comments.

COMMENT: Commenters suggested shortening, or removing, the statements required to be on the face of, or read aloud before, all marketing materials and advertisements. Commenters stated that these required statements were too long to easily include in short audio advertisements without “speed read[ing].” Commenters stated that problems reading these statements aloud at the same pace as the rest of the advertisement are exacerbated when combined with rotating warnings and HOPEline information that would also be required by the proposed regulations.

RESPONSE: The proposed regulations were amended as a result of this comment to allow licensees flexibility in audio-only advertisements.

COMMENT: Commenters requested clarification as to what a “conspicuous manner” would be to satisfy the requirement in proposed section 129.2(c).

RESPONSE: The proposed rules require the statements be conspicuous, or easily visible, to an individual who views the face of the advertisement on which they are listed. Additionally, the proposed rules describe minimum standards for how these statements must be listed in proposed section 129.2(e). No changes were made to the proposed regulations as a result of this comment.

COMMENT: Commenters requested clarification on whether the required statements and rotating warnings were required to be displayed on apparel.

RESPONSE: The proposed regulations were amended as a result of this comment to allow flexibility for apparel.

COMMENT: Commenters recommend removing rotating warnings as a requirement of marketing and advertising. Commenters stated that rotating warnings were not feasible to implement and would be costly for licensees to comply with.

RESPONSE: The practice of rotating warnings is supported by scientific evidence to ensure consumers continue to notice and register warnings. The selected rotating warnings are in alignment with other jurisdictions with adult-use cannabis markets and are based on current evidence in terms of content. Amendments to the revised rules were made to make the rotating warnings plain language, but the revised rules continue to require rotating warnings on any advertisement, unless it is an outdoor sign pursuant to section 129.4(a) or an audio-only advertisement.

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COMMENT: Commenters recommend the rotating warning statement related to pregnant women be amended to read “Cannabis should not be used by persons who are pregnant or nursing.”

RESPONSE: No changes were made to the proposed regulations as a result of this comment.

COMMENT: Commenters recommend warning be amended to read “KEEP OUT OF SIGHT AND REACH OF CHILDREN AND PETS.”

RESPONSE: The required warnings in the proposed rules are in alignment with other jurisdictions that have adult-use cannabis markets. The content of warnings is based on current scientific evidence related to the topic of the warning text and the feasibility of labeling products with such text. Amendments to the revised rules were made, creating a truncated version of the required warning for use in audio-only advertisements. No changes to the revised rules were made regarding the required warnings for visual only or audio/visual advertisements.

COMMENT: Commenters request requirement for emotional support phone numbers to be included in advertisements be removed due to perpetuating stigma related to cannabis use.

RESPONSE: The New York State HOPEline phone number, text number, and website or QR code remains a requirement of any advertisement to best promote the public health and safety of all New Yorkers and is in alignment with the legislatively mandated collaboration with the Office of Addiction Services and Supports (OASAS). The revised rules continue to require the New York State HOPEline information on any advertisements, but the revised rules were amended to exclude this requirement from outdoor signs pursuant to section 129.4(a) and audio-only advertisements.

COMMENT: Commenters suggest adding a prohibition that marketing and advertising shall not depict a pregnant or nursing person.

RESPONSE: Due to existing required warnings and other safeguards intended to protect pregnant and nursing people, no changes to the revised rules have been made as a result of this comment.

COMMENT: Commenters recommend banning a charitable, sports, entertainment, or similar event.

RESPONSE: Due to the existing requirements and prohibited activities related to events, no changes to the revised rules have been made as a result of this comment.

COMMENT: Commenters suggest audience composition for advertisement and marketing efforts be amended to allow 70-75% of the audience for any advertisements to be twenty-one years of age or older.

Commenters suggest current 90% threshold for audience composition expected to be over the age of twenty-one is too onerous.

RESPONSE: Section 86 of Cannabis Law requires rules be promulgated which prevent packaging, labeling, marketing, and advertising from appealing to children or other minors. The proposed audience composition requirement is in line with the legislative intent to protect the public health and safety of all

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New Yorkers and is based upon existing adult-use cannabis marketing and advertising regulations in other states. No changes to the proposed regulations were made as a result of this comment.

COMMENT: Commenters recommend striking limits on the sale of branded or trademarked apparel by licensees. Commenters state the sale of branded or trademarked apparel is a common method for generating brand awareness across industries and is necessary for new businesses to thrive.

Commenters state the prohibition on the sale of branded or trademarked apparel by licensees to sales outside a licensed premises limited brand building capabilities essential for smaller operators and social equity brands to compete and thrive against such other well-capitalized operators. Commenters recommend that this prohibition be removed from the proposed regulations.

RESPONSE: Due to the intent of existing apparel prohibition to protect against potential marketing to individuals under twenty-one, no changes to the revised rules have been made as a result of this comment.

COMMENT: Commenters requested removal of the prohibition on advertising through the marketing of free promotional items including, but not limited to, gifts, giveaways, discounts, points-based reward systems, customer loyalty programs, coupons, and "free" or "donated" cannabis products, except for the provision of branded exit packages by a licensee for the benefit of customers after a retail purchase is completed.

Commenters state this prohibition strips licensees of another avenue by which they can build brand recognition and a customer base.

RESPONSE: Section 86 of Cannabis Law requires explicit rules be promulgated which prevent packaging, labeling, marketing, and advertising from appealing to children or other minors. The proposed prohibition is in line with the legislative intent to protect the public health and safety of all New Yorkers and is based upon existing adult-use cannabis marketing and advertising regulations in other states. No changes to the proposed regulations were made as a result of this comment.

COMMENT: Commenters encourage stronger age verification on websites.

RESPONSE: The current rules account for the existing safeguards in place to avoid marketing and advertising to individuals under twenty-one. No changes to the revised rules have been made as a result of this comment.

COMMENT: Commenters request striking the requirement that license numbers be included on all marketing and advertising.

RESPONSE: Aligned with transparency efforts that best protect the public health and safety of consumers, no changes to the revised rules have been made as a result of this comment.

COMMENT: Commenters suggested certain information, print media, or other communications that are only distributed inside of a retail dispensary be excluded from requirements in the proposed regulations which pertain to marketing and advertising.

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RESPONSE: The proposed rules have been amended to further clarify when requirements pertaining to marketing and advertising will apply. Requirements pertaining to marketing, advertising, and advertisements ensure, as is required by Section 86 of Cannabis Law, that consumers are not subject to false, deceptive, or misleading marketing and advertising. Because consumers should not be subject to false, deceptive, or misleading marketing and advertising while inside of a retail dispensary, the proposed rules have not been amended to exempt information distributed in this setting from these requirements.

COMMENT: Commenters recommend removing the phrase “or banner” from proposed prohibitions on unsolicited pop-up or banner advertising or removing the prohibition altogether. Commenters expressed concern that this prohibition will prevent a licensee from advertising online whatsoever. Commenters requested clarification on what a “mechanism designed to keep those under the age of twenty-one from visiting the website or digital application” would consist of.

RESPONSE: Section 86(2)(k) of the Cannabis Law explicitly prohibits any marketing or advertising in the forms of an unsolicited internet pop-up. The proposed rules do not prevent all advertising via a website or digital application and allow an entity to use age verification tools to restrict a website only to individuals twenty-one and over who consent to view cannabis-related material and, thus, allow advertising, including a pop-up or banner, to be used on that website. No changes to the proposed regulation were made as a result of this comment.

129.3 Adult-Use Marketing and Advertising Prohibitions.

COMMENT: Commenters request prohibiting any sales of branded clothing, apparel, and merchandise.

RESPONSE: Due to apparel and merchandise being one element that allows brands to sell another profitable product and allows for brand differentiation, and with the intent of existing apparel prohibitions to protect against potential marketing to individuals under twenty-one, no changes to the revised rules have been made as a result of this comment.

COMMENT: Commenters recommended removing the requirement that talent portrayed in cannabis advertising be at least twenty-five years old. Commenters requested clarification on why individuals who can consume adult-use cannabis would not be permitted to advertise it.

RESPONSE: The proposed rules prohibit individuals under twenty-five from appearing in cannabis advertisements to better ensure advertisements are not attractive to individuals under twenty-one. Individuals between twenty-five and twenty-one years of age can easily be mistaken by an individual viewing the advertisement as being under twenty-one. No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters request removing the prohibition of cannabis advertisements on billboards. Commenters remark billboards are the only medium of communication specifically prohibited. Commenters state the adult-use program in NYS will need to leverage billboard advertising to become successful businesses. Commenters request that NYS maintain its current standard for other “adult-use” product advertisements.

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RESPONSE: Due to this prohibition being in alignment with Cannabis Law, which explicitly prohibits any marketing or advertising in the form of a billboard, no changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters state that they do not support prohibiting brands and businesses from sponsoring events. Commenters request clarification on whether sponsoring events is allowable.

RESPONSE: Due to the existing requirements and prohibited activities related to events, no changes to the revised rules have been made as a result of this comment.

COMMENT: Commenters state that they do not support prohibiting cannabis products from making health claims or curative claims. Commenters suggest they not be restricted from claims that are not false or misleading. Commenters add, such a restriction is not enforceable due to its allowable use in other wellness products.

RESPONSE: To protect public health and safety, health claims are not allowed on adult-use cannabis packaging and labeling. No changes to the revised rules have been made as a result of this comment.

COMMENT: Commenters request ability to market products as regulated and safe.

RESPONSE: Due to cannabis having documented health risks it would be inaccurate to market cannabis products as absolutely safe. It is allowable to market products as being part of the regulated adult-use market; however, it remains unallowable to assert that cannabis products are safe because they are regulated by the Board or Office. No changes to the revised rules have been made as a result of this comment.

COMMENT: Commenters do not support prohibition of advertising on signs and placards in arenas, stadiums, shopping malls, fairs that receive state allocations, and video game arcades.

RESPONSE: Due to the inability to limit audience composition for these types of advertisements to expecting at least 90% of individuals being twenty-one and over, no changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters request removal of proposed prohibition of the promotion of product potency or THC concentration in adult-use advertising and marketing stating information on potency could undermine public health education.

RESPONSE: Amounts of Total THC and Total CBD content are required elements on cannabis product labeling. No changes to the revised rules have been made as a result of this comment.

COMMENT: Commenters request removal of proposed prohibition of the use or display of colloquial references to cannabis stating the prohibition further stigmatizes common vernacular used by existing consumers and operators who may be transitioning over to the legal marketplace. Commenters state this prohibition could potentially prevent potential licensees from maintaining their existing brands or joining the legal market.

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RESPONSE: The proposed rules have been revised to address these concerns and include certain exemptions for brand names or doing business as (DBA) names.

COMMENT: Commenters suggest increasing allowable proximity to schools at a minimum of 1,500 ft distance to match standards in alcohol industry.

RESPONSE: Proximity requirements are aligned with the strongest evidence base and with other jurisdictions overseeing adult-use cannabis programs. Local ordinances may impose stricter proximity guidelines. No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters recommend that the Office prohibit advertisements of cannabis or cannabis use by any individual under the age of 35.

RESPONSE: Due to the existing proposed regulation that prohibits the depiction of a child, a person under the age of twenty-one, or a person reasonably appearing to be under the age of twenty-one in advertising, which is in alignment with the legal age to consume cannabis, no changes to the proposed regulation were made as a result of this comment.

129.4 Outdoor Signage.

COMMENT: Commenters request that retail store signage additionally require a means to verify the licensing and compliance of such retail store through the display of a verifiable code including: the name of the retailer; validity of the retailer’s active licensure; exact address of the retailer licensed to sell cannabis products as provided by a geolocation lookup on the computing device used to scan the code; and an indication if the license was issued under the Social Equity initiative.

RESPONSE: No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters request removal of proposed prohibition of the use or display neon lights for outdoor signage.

Commenters request clarification on what is considered “neon lights”.

RESPONSE: The proposed regulations have been amended to clarify that an outdoor sign is a type of advertisement and to clarify the way in which outdoor signs may be illuminated. These amendments clarify that licensees may illuminate an outdoor sign but may not use bright colors which are neon in appearance—or any other elements that are attractive to individuals under twenty-one—in an outdoor sign, including in the illumination of the sign. Guidance will be issued to clarify on the use of bright colors in marketing and advertising.

COMMENT: Commenters request clarification on what is considered a “mascot”.

RESPONSE: No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenter requests removal of prohibition of mascots.

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RESPONSE: Due to the potential of mascots being attractive to individuals under twenty-one, no changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters request removal of proposed prohibition of the use or display of more than (2) outdoor signs stating multiple entrances on large parcels may require signage.

RESPONSE: No changes to the proposed regulation were made as a result of this comment in an effort to ensure public health safeguards are present in all marketing, advertising, or advertisements to better prevent adverse consequences or passive marketing to individuals under twenty-one. Jurisdictions overseeing adult-use cannabis programs may impose stricter guidelines.

COMMENT: Commenters request “wallscapes” be added to prohibitions for outdoor signage based on their proximity to billboard like advertising.

RESPONSE: Changes to the proposed regulation were made as a result of this comment. The definition of “advertisement” has been revised to include murals and street art, therefore making any “wallscapes”, subject to all advertising minimum standards and provisions.

COMMENT: Commenters request vehicle signage be added to prohibitions.

RESPONSE: Outdoor signage prohibitions currently include vehicle signage. No changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenters request that vehicle signage be allowed.

RESPONSE: Due to the inability to limit audience composition for these types of advertisements to 90% of individuals being over 21, no changes to the proposed regulation were made as a result of this comment.

COMMENT: Commenter requests removal of 129.4(e) Outdoor retail store signage must comply with any additional requirements as set out by the Office.

RESPONSE: This requirement allows compliance measures to be revised to effectively respond to the future needs of the evolving cannabis market on ensuring the protection of public health and safety. Outdoor signs are exempt from certain provisions including the requirement of: warnings, rotating warnings, substance use and problem gambling resource hotlines, audience composition standards, and inclusion of the license number, No changes to the proposed regulation were made as a result of this comment.

COMMENT: Many commenters suggest audience composition for outdoor advertisements be amended to allow 70-71.6% of the audience for the advertisement is reasonably expected to be twenty-one years of age or older.

RESPONSE: The definition of “advertisements” in the proposed regulations has been amended to now include “out of home media”. All advertisements, including “out of home” advertisements are only

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allowable 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.

COMMENT: Commenter recommends allowing licensees to design signs that are in compliance with local codes.

RESPONSE: In addition to regulations set out by the Office, all licensees must follow local municipal standards and codes related to outdoor signs.

COMMENT: Commenter requests ample lead time or potential phase in for requirements of outdoor signage due to high cost of signage.

RESPONSE: Advance notification to licensees will be provided should changes affecting outdoor signage be made. No changes to the proposed regulation were made as a result of this comment

129.5 Adult-Use Marketing and Advertising Violations and Penalties.

COMMENT: Commenters requests fines collected from violations or penalties go to participating counties for local community engagement to improve the reach and effectiveness of ongoing public education.

RESPONSE: No changes were made to the regulations as a result of this comment.