



**Statement of the  
New York State Broadcasters Association, Inc.**

*Before the*

**Joint Public Hearing**

**Examining Issues in the New York State Market  
Relating to Consumer Accessibility and Retail Sale  
of Legal Adult-use Cannabis**

**October 30, 2023**

On behalf of local radio and television stations throughout the Empire State, the New York State Broadcasters Association, Inc (NYSBA) hereby submits the following comments regarding consumer accessibility and the retail sale of adult use cannabis.<sup>1</sup> NYSBA's primary concern is that the advertising regulations enacted by the New York Office of Cannabis Management (NYOCM) have been counterproductive with respect to the development of a viable, **legal** cannabis market in New York State.

**Our primary objection is that legal cannabis distributors are effectively precluded from advertising on local broadcast stations in New York State. Because of the regulations, legally licensed cannabis businesses are unable to reach most of the adults to inform them that a legal distributor is operating in their community.**

Consumers are currently unsure which cannabis stores are legal and which are illegal. NYOCM has tried to educate consumers through public service campaigns. However, the number of illegal stores now operating demonstrates that NYOCM's public service announcements are insufficient to educate adults to purchase cannabis only from legal businesses and not from illegal operations.

New York can help drive consumers away from illegal operations by allowing licensed cannabis businesses to use local advertising to educate consumers. Local cannabis businesses have a strong incentive and are in the best position to attract consumers to legal stores and away from illegal operations.

NYSBA raised these issues with NYOCM and filed extensive comments outlining the problem. These filings are attached as Exhibits A and B. Our concerns about the overly restrictive advertising regulations were echoed in comments filed with NYOCM by the Cannabis Association of New York (CANY).<sup>2</sup> The Diversity, Equity and Inclusion Committee of the National Cannabis Industry Association also filed a letter that was supported by the Minorities for Medical Marijuana, JUSTUS Foundation, Unified Legacy Operators Council (UNLOC Inc.), and the Social Equity Empowerment Network (S.E.E.N).<sup>3</sup>

Broadcasters understand that those under 21 must be protected. Local stations have long recognized this obligation in the context of alcohol advertising, which has been in place for decades. Under the standards employed for alcohol, stations do not place such ads where approximately percent of the audience is under 21 years of age.<sup>4</sup> We take extra care and do not run any alcohol advertisements during children's shows.

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<sup>1</sup> The New York State Broadcasters Association, Inc. (NYSBA) is a not for profit 501(c)6 trade association representing more than 400 radio and television stations licensed to communities throughout New York State. Since 1955, NYSBA has been committed to ensuring that regulatory policies will enhance a local station's ability to fulfill its public interest obligations.

<sup>2</sup> Cannabis Association of New York, comments submitted to NYOCM, Jan. 29, 2023, at page 5,6.

<sup>3</sup> Statement of National Cannabis Industry Association, Hed of Diversity Equity and Inclusion for itself and other organization, letter submitted to NYOCM, August 14, 2022, at page 5.

<sup>4</sup> The Beer Institute's recommended standard for ad placement requires that ad will not be placed in programs unless 73.6 percent of the audience is comprised of legally drinking age adults. The audience standard for distilled spirits is 71.6 percent. See Beer Institute website at <https://www.beerinstitute.org/press-releases/beer-institute-and-brewers-association-reviseadvertising-standards-based-on-updated-u-s-census-data/> (visited August 3, 2022); The Distilled Spirits Council, 2021Code of Responsible Practices for Beverage Alcohol Advertising and Marketing <https://www.distilledspirits.org/wp-content/uploads/2021/03/2021-DISCUS-Code-of-Responsible-Practices-forBeverage-Alcohol-Advertising-and-Marketing.pdf#page=16> (visited August 15,2022 at 10:30 AM)

## **The 90% Audience Composition Standard Must be Amended and Changed to the 75% Standard Similar to that used for Alcohol Advertising**

NYOCM's rules require that a licensee can only advertise in programs where 90% of the audience is comprised of people 21 years of age or older. This 90% audience placement standard relegates all cannabis advertising to programs and time periods where there is effectively no audience. As documented extensively in our comments before NYOCM, the rule precludes millions of adults from watching or listening to advertisements from a licensed cannabis business.

The need to protect children while at the same time developing an adult use market has been addressed by a number of states that have approved the adult use of cannabis. We believe laws in these states should serve as a template for New York State. For example, Alaska, Arizona, Illinois, and Washington have no audience composition standard. **California, Colorado, Oregon, Nevada, and Michigan** have adopted an audience standard similar to that used for alcohol.

We believe that New York State Should adopt a 75% audience composition standard. In other words, cannabis advertisements should not be placed in advertisements where more than 25% of the audience is under 21 years of age. In this regard, the 75% standard is stricter than that used by the distilled spirits and beer industry.<sup>5</sup>

There is another data related issue. Many upstate markets may not be able to meet any standard because of the lack of third-party audience data. The same is true for many small TV and radio stations who cannot afford data services. Providing data regarding specific programs places an impossible burden on newly licensed cannabis businesses to purchase custom programming data reports. To resolve this problem, legal cannabis businesses should be allowed to rely on national audience data or data from other markets in New York to demonstrate they have met the audience composition standard. The age of people watching or listening to various programs remains similar across most markets.

### **The Length of Warning Labels Effectively Precludes Advertising on Local Radio Stations**

NYOCM's labeling requirements effectively preclude legal cannabis businesses from advertising on local radio stations. The labels contained in the initial regulations would take about 70 seconds to read. This makes it impossible for a licensed cannabis business to purchase a typical 15, 30 or 60 second radio spots, which are the most cost-effective advertising platform in many markets.

NYOCM's revised regulations created an "audio-only" warning label. Unfortunately, the revised NYOCM rule § 129(c)2 did not solve the problem. The "audio only" label takes between 11-13 seconds to read. This prevents a new cannabis business from using the popular 15-second spot. It renders the thirty-second spot ineffective, as the warning label takes up nearly 50% of the advertisement. Nascent cannabis businesses may not even use a 60-second spot as nearly one-third of the spot will be taken up by the warning label.

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<sup>5</sup> This 75% standard is stricter than the 70% audience composition standard contained in our initial comments and adopted by several states.

While the “audio-only” rule is described in NYOCM’s Guidance Document, the actual language of NYOCM’s regulations still require audio ads to contain a basic label, rotating warning labels in § 129(d) and reference to the HOPE Line in §129(f)]. Thus, the regulations themselves do not match the guidance contained in the NYOCM’s Guidance Document. Based on the precise language of the regulations, the time needed to read all the labels still exceeds 60 seconds. The requirements for radio and audio remain unclear.

Broadcasters do not object to using warning labels. Stations broadcast labels all the time to comply with a variety of federal and state laws. To be effective and reach consumers on radio, the labels must be short and succinct. For example, simply require a shortened version of the rotating labels in §129(d). Alternatively, have a warning label that references the NYOCM website, which can then list the potential dangers. Another approach would be to require that a label may only occupy 15 percent of the time of the advertisement.

Without short and concise warning labels, cannabis businesses will not be able to use local radio as an advertising platform. This drives up advertising costs. A newly licensed cannabis business should be able to use local radio stations to educate consumers about its legal business and advise citizens not to purchase cannabis from illegal stores.

#### **Solution – Support S. 7572**

We strongly support legislation S. 7572, which was introduced last session by Senator Jeremy Cooney. This legislation would enact a 75% audience composition standard. This strikes the appropriate balance between protecting minors and allowing the market to move forward. Also, the legislation would allow flexibility in the types of audience data that a licensed cannabis business may use to meet this standard. Finally, the legislation would fix the problems with “audio only” advertisements by requiring that a label may not take up more than 15% of the advertisements total time.

New York has significant problems with the continued operation of illegal cannabis businesses. By allowing legally licensed cannabis businesses greater opportunities to advertise, New York can use the natural business incentives to attract consumers to legal stores and away from illegal operations. This will protect consumers, assist in tax collection, and assist in the enforcement process.

Thank you for your consideration. We look forward to working with you to correct the current situation.

Respectfully Submitted,



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# Exhibit A



# New York State Broadcasters Association, Inc.

**To: New York Office of Cannabis Management**

**From: David L. Donovan, President**

**Date: August 15, 2022**

**RE: New York Office of Cannabis Management  
Proposed Packaging, Labeling, Marketing and Advertising Regulations for Adult Use  
Cannabis: Part 128 - Adult-Use Packaging and Labeling &  
Part 129 - Adult-Use Marketing and Advertising**

On behalf of local radio and television stations across New York State, I am writing to suggest minor changes to the proposed advertising regulations for adult use cannabis businesses. The New York State Broadcasters Association, Inc. (*hereafter* NYSBA) is a not-for-profit trade association representing approximately 450 broadcast stations throughout the Empire State.

New York State is endeavoring to create a new, legal market for authorized cannabis products. The creation of this market requires numerous, newly licensed small businesses to succeed. As with any new business, there must be a significant consumer education campaign to inform customers about the availability of these products and services the business provides. In this instance, a further goal is to move adults 21 years of age and older from the current illegal market to an authorized licensed market. This is no easy task. Traditional public service announcements will not be enough to stimulate a new, legal cannabis marketplace. Rather, the advertising provided by legally authorized businesses will play an essential role in educating consumers and creating a successful legal market for cannabis products. Without a change in consumer behavior, the benefits that underpin the legalization of adult use cannabis may never be realized.

At the same time, we recognize the importance of protecting those under 21 years of age. Achieving this objective requires a delicate balancing of interests, but NYSBA believes this balance can be achieved. Broadcasters are licensed by the Federal government to operate in the public interest. Radio and television stations want to protect minors and at the same time help create a viable cannabis marketplace. It is in this spirit that we offer some suggestions to the advertising rules proposed by the New York Office of Cannabis Management (*hereafter* NYOCM).

## **I. NYOCM Should Adopt a 70% Audience Composition Placement Rule**

At the outset we note that the enabling statute does not require NYOCM to enact a specific audience placement standard. The statute reads that rules should require that "advertisements only be placed where the audience is reasonably expected to be twenty-one years of age or older."<sup>1</sup> The statute gives NYOCM the discretion to enact a standard that it believes is appropriate.

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<sup>1</sup> NY Cannabis Law §86 4(b)

We respectfully request the NYOCM revise its proposed rule concerning the audience composition placement requirement for advertisements. As currently drafted the proposed rule §129.2(g) states:

“A licensee shall only advertise cannabis products, cannabis paraphernalia, or goods or services related to cannabis or cannabis products by means of television, radio, print, internet, mobile applications, social media, other electronic communication, or print publication 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.”

It is worth noting that the alcohol industry and broadcasters have been protecting minors with voluntary restrictions on advertising for years. Alcohol business placed advertisements and broadcasters accepted advertisements only when more than 71.6% of the audience is 21 years of age or older. While there are no existing FCC or federal rules regarding this placement standard, it has been followed by the alcohol and broadcast industry for decades. This Beer Institute standard was increased recently to 73.6% in July 2022.<sup>2</sup> As of this writing the Distilled Spirits Council standard remains at 71.6%.<sup>3</sup> (For ease of reference we will refer to this as the 70% standard.)

While the audience composition placement standards used for alcohol advertising have always been voluntary, we recognize that NYOCM wants to include this standard as part of its specific regulations. Responsible cannabis businesses and broadcasters do not object to including an audience composition placement standard in the regulations. However, as the analysis below will indicate, we believe that the proposed 90% placement standard is overly restrictive and would harm the development of a nascent cannabis industry. We believe NYOCM should enact a 70% audience composition placement standard.<sup>4</sup> Most states legalizing adult use cannabis have adopted this standard.

#### **A. The 70% Audience Composition Placement Standard Has Been Enacted in Other States**

A number of states approving adult use cannabis have addressed this issue. Indeed, several states authorizing adult use cannabis have not enacted a placement rule. Most enacting an audience placement rule have adopted the 70% audience placement standard.<sup>5</sup> A quick survey of the states enacting these policies reveals:

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<sup>2</sup> It is worth noting that the Beer Institute recently increased its standard for ad placement. Ads will not be placed in programs unless 73.6 percent of the audience is comprised of legally drinking age adults. See Beer Institute website at <https://www.beerinstitute.org/press-releases/beer-institute-and-brewers-association-revise-advertising-standards-based-on-updated-u-s-census-data/> (visited August 3, 2022)

<sup>3</sup> Distilled Spirits Council, 2021 Code of Responsible Practices for Beverage Alcohol Advertising and Marketing <https://www.distilledspirits.org/wp-content/uploads/2021/03/2021-DISCUS-Code-of-Responsible-Practices-for-Beverage-Alcohol-Advertising-and-Marketing.pdf#page=16> (visited August 15, 2022 at 10:30 AM).

<sup>4</sup> Throughout the cannabis legalization process, advocates argued that alcohol was more harmful than safe legalized cannabis. Given this position, it would be ironic for the NY Office of Cannabis management to impose an advertising placement restriction that was significantly stricter than the one used for alcohol advertising.

<sup>5</sup> In several states this is expressed as the audience under 21 may not exceed 30% of the total audience. For ease of reference, we will refer to this as the 70% placement standard.

### States with no audience composition placement standard

- **Alaska** – No audience composition placement rule for broadcasting but adopted 70% standard for live events. (See 3 AAC 306.770 (j))
- **Arizona** – No audience composition placement rule. See Arizona Revised Statute ARS Ariz. Rev. Stat. § 36-2859
- **Illinois** – No audience composition placement rule. (See Title 68 § 1290.455 DISPENSARY ADVERTISEMENTS)
- **Washington State** – No audience composition placement rule. WAC 314-55-155: Advertising

### States using a 70% audience composition standard

- **Colorado** - Enacted the 70% placement standard. (See R1104 R1105)
- **Oregon** – Adopted the 70% standard for all media. (See Oregon Liquor and Cannabis Commission Chapter 845-025-8060 (2))
- **California** - Adopted the 70% standard (71.6%) See Article 4 Section 5040 (a)(1)
- **Nevada** - Enacted the 70% standard (See NCCR § 6.120 (1) (b))
- **Michigan**: Enacted the 70% standard for all media (See MRA Administrative Rule R. 420.507(4))
- **New Jersey** – Enacted the 70% standard (71.6%) N.J. Admin. Code § 17:30-14.2 (a)<sup>6</sup>.

Other states have adopted different approaches. Maine did not adopt a specific audience composition placement standard but does not allow advertising if there is a high likelihood it will reach person under the age of 21. (See 18-691 CMR Chapter 1 § 5.2(C) (3). See 18-691 CMR Chapter 1 § 5.2(C) (3). Massachusetts adopted an 85% audience composition standard (See 935 CMR Sec. 502.105(4)(b)(2) along with Vermont (See VT Code R. 25-000-002.212(b). Connecticut is the only state that has proposed a 90% standard in its most recent legislation. (See Public Act No. 22-103 Sec. 8(b)(3)).<sup>7</sup>

### B. Proposed Federal Legislation Includes a 70% Audience Placement Standard

Newly introduced federal legislation relies on the 70% audience composition standard for cannabis advertising on broadcast stations. Sen. Ben Ray Lujan (D NM) has introduced the “Secure and Fair Enforcement (SAFE) Advertising Act” (S.4622), which will permit radio and television stations to accept advertising for legal cannabis products if the station is licensed in states that permit the advertising of medical or adult-use cannabis.<sup>8</sup> The legislation adopted an audience composition placement standard similar to that used for alcohol advertising. Section 3(b) (2) allows cannabis advertisements where:

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<sup>6</sup> Note: While adopting the 70% audience placement rule, New Jersey does not allow cannabis advertisement to be broadcast between the hours of 6AM to 10 PM. N.J. Admin. Code § 17:30-14.2(d)

<sup>7</sup> Montana has banned all advertising on radio and television broadcasting, newspapers, flyers, magazines and mailers. (See ARM 42.39.123 (9)) Interestingly, New Mexico adopted the 70% audience composition standard with respect to digital but banned advertising on broadcasting. It allows advertising on subscription services. (See N.M. Code R. § 16.8.3.8 A (2))

<sup>8</sup> Because cannabis remains illegal at the federal level, broadcast stations accepting cannabis advertisements in New York run the risk of being penalized by the Federal Communications Commission. This legislation corrects this



[T]he advertiser has reliable evidence that not less than 70 percent of the audience for the advertisement is reasonably expected to be not less than 21 years of age, with the burden of proof regarding the expected audience composition lying with the advertiser.

Thus, a majority of the states that have legalized adult use cannabis and proposed federal legislation have embraced the 70% audience composition placement standard. Federal legislation has also employed this standard. NYOCM should follow their lead and adopt a 70% audience composition standard.

**C. The 90% Audience Composition Standard Hinders the Development of Legal Cannabis Businesses by Preventing them from Reaching Many Adult Consumers**

The overly restrictive 90% program placement standard will impose significant costs on nascent cannabis businesses that are trying to transition customers from an illegal cannabis marketplace to a legal one. It may also preclude these businesses from reaching consumers through an important advertising platform: local broadcasting.

**1. The 90% Standard Will Limit Access to Television Viewers that are Over 21 Years of Age**

NYOCM should recognize the preclusive impact of the 90% audience composition standard. This standard would preclude nascent cannabis businesses from a significant portion of the adult population, i.e., anyone over 21 years of age. Under the regulation, a new cannabis business cannot place an advertisement on a program even though 89% of that program's audience is 21 years of age or older. This means that a significant number of adults 21 years or older will not be able to receive information from a legally licensed cannabis business. As a result, cannabis businesses will be unable to reach a significant portion of the adult audience on many popular programs.

The preclusive impact of the 90% standard will make it exceedingly difficult for a cannabis distributor to reach the adult audience and launch a successful business. An analysis by Nielsen of all television stations throughout New York for the first quarter of 2022 shows that the 90% audience composition standard would prevent cannabis operators from placing advertisements in broadcasting and cable programs that received 211,732,169 impressions from viewers 21 years of age or older.<sup>9</sup> The preclusive impact is especially significant for Spanish language programs. The 90% audience composition standard would prevent cannabis retailers from placing advertisements in Spanish Language television programs in the New York City Market that received more than 67 million impressions from viewers 21 years of age or older. This amounts to 40% of all impressions to Spanish language programming during the first quarter.<sup>10</sup>

Importantly, these programs are not "children's shows." They are primarily general audience programs designed and intended for adults, but nonetheless have at least 11% of their audience under

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problem. Assuming a change in federal law, nascent cannabis businesses should not be subject to state laws that effectively prevent achievement of the intended result for broadcast stations.

<sup>9</sup> Nielsen: *New York State Television Audience Analysis First Quarter 2022* (analyzed viewing impressions for all television programs broadcast on all television stations in all New York State TV markets.)

<sup>10</sup> *Id.* Data are for Spanish Language stations located in New York City.

21 years of age. The effect is that local cannabis businesses will be unable to advertise on many popular shows. Therefore, many cannabis advertisements on traditional television and cable programs will be relegated to early morning programs or types of shows that have an exceedingly small audience. There is no question that the preclusive effect of the 90% audience composition standard will make it difficult for licensed cannabis businesses to gain a foothold in the marketplace.

**2. The 90% Standard Will Foreclose Access to Many Radio Stations**

A newly licensed cannabis business may find it even more difficult to place advertisements on local radio stations. Similar to television, the 90% audience composition placement rule will result in placing cannabis advertisements in programs and during time periods that have an exceedingly small audience.

Radio is more complex. Unlike television that provides general format programs, each radio station selects a specific format. These programming formats are targeted to a specific audience. For example, some radio stations broadcast only a news/talk format. Other stations focus exclusively on sports. With respect to music, there are a variety of different formats such as adult/contemporary, country, urban contemporary and many others. Thus, the issue is not simply finding a specific program that meets the 90% audience composition test. It is entirely possible that a newly licensed cannabis business may be unable to purchase time on a significant number of radio stations because the format has more than 10% of its audience over 21 years of age.

Nielsen surveyed the audience composition of the 26 most popular radio formats broadcasted on stations across New York State. Aggregating the average results revealed that 10 (38%) popular radio formats will not pass the 90% audience composition test proposed by NYOCM.

**Radio Formats Not Meeting the 90% Placement Standard in New York<sup>11</sup>**

Hot Adult Contemporary
Country
POP CHR (Top 40)
Urban Adult Contemporary
Urban Contemporary
Rhythmic CHR
New Country
Active Rock
Mainstream Rock
Album Oriented Rock

In addition, another six radio formats including Adult Contemporary, Classic Hits, Spanish Language, Contemporary Christian, Alternative and Talk Personality were right on the edge. These

<sup>11</sup> Source: Nielsen National Regional Database; FALL/Winter 2021 & 2022; Stations licensed to New York state; Format Comparison of Cume Persons 12+/21+ M-SU 6A-12M. "Cume" is a common audience measurement. Nielsen defines "cume persons" as the total number of different persons who tune to a radio station during the course of a daypart for at least five minutes.

formats had an adult audience composition of 90% or 91%. Importantly, these formats are broadcast by hundreds of radio stations in markets throughout New York. They are the most popular stations in every market. The inability to obtain access to programs on these stations will make it difficult for a cannabis licensee to establish a profitable business.

Of course, this does not mean that every radio station broadcasting these formats cannot find a specific time of day or a specific program that could meet the 90% placement standard. For example, a cannabis advertiser may be able to broadcast on an early Sunday morning show with a limited audience. Nonetheless, as a general matter a legal cannabis business may be precluded from advertising on the most popular radio programs and on many radio stations across New York that broadcast these formats.

In addition, there are formats that could meet the 90% standard. For example, the news/talk format has an audience in which 96% of the listeners are 21 years of age or older. For “classical music” and “oldies” formats, 97% of the audience is 21 years or older. Of course, these formats attract a much older audience. It is far from clear whether a new cannabis business could survive based on an advertising plan reaching only the “older” audiences that listen to this format. Limiting advertising to these audiences will not achieve the fundamental goal of shifting over 21 consumers from an illegal market a legal market.

A cannabis business will want to advertise on the most popular radio stations in a market. Nielsen looked at the audience composition for the top 5 radio stations in every market in New York State that the company surveys.<sup>12</sup> The audience composition was examined on 70 stations from the hours of 6 AM to midnight. Based on the survey, 31 stations (44%) had an average audience composition that would not meet the 90% audience composition test.<sup>13</sup> However, these are the top stations that new licensed cannabis businesses would use to reach consumers in each market. Nascent cannabis business could find less popular radio stations that might meet the 90% standard. The potential exclusion from nearly half the top stations in markets across the state would place these new businesses at a considerable disadvantage and prevent cannabis users from learning about legal alternatives to their current illegal suppliers.

## **II. NYOCM Should be Flexible Regarding “Reliable” Audience Data**

Pursuant to the proposed rule, a cannabis licensee is required to have “*reliable evidence that at least 90% 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.

At the outset, obtaining audience data is extremely expensive, costing tens of thousands and even hundreds of thousands of dollars. The cost will depend on market size. Data is a significant expense for any advertising agency or station and such an expense may be well beyond the reach of many new cannabis businesses. Also, it is entirely possible that specific ratings data may not be available for smaller family owned or minority owned radio stations that do not subscribe to expensive national ratings services.

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<sup>12</sup> With respect to radio, Nielsen surveys may not include detailed data for stations in small radio markets.

<sup>13</sup> *Nielson Comparison Cume Persons 12+/21+ Fall 2021 /Winter 2022 (M-Sun 6 AM to Midnight)*

There may be a lack of data for specific programs in specific markets depending on the medium and market size. This can be a significant problem for radio broadcasters, especially in small markets. A number of radio stations may no longer subscribe to independent data services such as Nielsen. Moreover, there are a number of radio stations and radio markets in upstate New York that are not served by data services. Even small markets that have broadcast data services may not have daily ratings reports for their programs. These markets may only have data published every six months.

The net result is that licensed cannabis businesses, especially those operating in small towns upstate, may not be able to provide specific daily ratings data for a specific program that is being broadcast at a specific date and time. In some instances, the station may be operating off a ratings survey or “book” taken every six months. In other instances, a station may be relying on aggregate data relating to overall performance of the radio format.

We believe the NYOCM should adopt a flexible approach regarding what constitutes “reliable evidence.” It is reasonable for NYOCM to accept national or regional data regarding audience composition. Stations relying on the latest survey or “book” should be sufficient and aggregate data should be acceptable. For example, as noted above, based on aggregate data for New York, 98% of the audience listening to the news/talk radio format is 21 years of age or older. If a cannabis business places an advertisement on a radio station in a small market, it should be able to rely on such aggregate data, even if it cannot obtain specific audience data about the radio station. It is reasonable to assume that aggregate data regarding national or regional listenership data will ensure the advertisement is meeting the appropriate placement standard. Also, broadcasters, even those without specific data, have a keen sense of their audience. Accordingly, a letter by local broadcasters indicating that they reasonably believe the advertising will appear in a program that meets the placement standard should be sufficient and reliable evidence to comply with the NYOCM placement standards.

The lack of flexibility with respect to “reliable” data could have significant negative consequences for newly established cannabis businesses. A rule requiring independent data regarding a specific program could preclude cannabis businesses from advertising on an extremely effective low-cost medium: radio. Radio plays a vital role in communities throughout New York because of its overwhelming reach. On average, 93% of the population tunes into a radio station at least once a week. The reliable data requirement should not effectively preclude nascent cannabis businesses from using this effective and important advertising platform.

### **III. Modifying the Labeling Requirements Will Make Labels More Effective**

Broadcasters support the use of warning labels in cannabis advertisements. Radio and television stations are accustomed to including warning labels in advertising for a number of products. Under New York State Law, advertising for casinos and online gaming must include a reference to the problem gambling hotline. Federal law requires specifically warning labels on a variety of smokeless tobacco products. Nonetheless, extremely long labels are counterproductive. NYSBA would suggest some changes to the proposed cannabis labeling rules for advertisements.

#### **A. The Proposed Regulations Require Lengthy Warning Labels**

The proposed regulations state that any marketing or advertisement of cannabis or cannabis products shall include the following statements, in a conspicuous manner, on the face of the marketing

material or advertisement or be read aloud clearly at the same volume and pace as the rest of the advertisement. Section 129.2(c) requires:

**“For use only by adults 21 years of age and older. Keep out of reach of children and pets. In case of accidental ingestion or overconsumption, contact the National Poison Control Center hotline 1-800-222-1222 or call 9-1-1. Please consume responsibly.”**

In addition to this basic label above, which must appear on all advertisements, §129.2(d) requires an additional “rotating label.” Any marketing or advertising of cannabis or cannabis products shall include one of the following warnings in a rotating manner, as directed by the Office, in their entirety and in a conspicuous manner on the face of the marketing material or advertisement:

- (1) "Cannabis may cause impairment and may be habit forming."**
- (2) "Cannabis can impair concentration, coordination and judgment. Do not operate a vehicle or machinery under the influence of cannabis."**
- (3) "There may be health risks associated with consumption of this product."**
- (4) "Cannabis is not recommended for use by persons who are pregnant or nursing."**

Finally, it appears that under §129.2(f) a cannabis licensee must include the New York State HOPEline phone number, text number, and website or QR code on any advertising or marketing materials, by displaying the information on visual media or by reading the information in audio media. The typical reference would likely state:

**“For help and hope 24/7, call 1-877-8-HOPENY (467369) or text HOPENY (467369).”**

It appears that a typical advertisement on both radio and television would have to include a reference to the NY HOPEline.

When combined, all of the above requirements create a warning label that is unreasonably long. A typical warning could read as follows:

**For use only by adults 21 years of age and older. Keep out of reach of children and pets. In case of accidental ingestion or overconsumption, contact the National Poison Control Center hotline 1-800-222-1222 or call 9-1-1. Please consume responsibly. Cannabis can impair concentration, coordination and judgment. Do not operate a vehicle or machinery under the influence of cannabis. For help and hope 24/7, call 1-877-8-HOPENY (467369) or text HOPENY (467369)**

Assuming you count the phone numbers as one word, this label is about 70 words<sup>14</sup>. It could be a bit shorter depending on the rotating advertisement that was selected. Requiring this type of label could effectively preclude a nascent cannabis advertising business from advertising its products or television or radio. While such a label could work on packaging or in a print ad, it simply will not work on broadcasting.

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<sup>14</sup>If you count each number as a separate word the number of words would be much higher.

The fundamental issue is the length of the labels that must be used to comply with state and federal regulations. Today, advertising spots on radio and television are generally 10 seconds, 15 seconds, 30 seconds and 60 seconds. The 15 and 30-second spots are by far the most popular. Spots lasting 60 seconds are declining in popularity. Not only are 60 second spots more expensive, but they also sometimes lack the direct and immediate impact of a 15 or 30-second spot.

### 1. Lengthy Labeling May Preclude Most Radio Advertising

Radio is problematic because the warning labels must be “read aloud clearly at the same volume and pace as the rest of the advertisement.” It is worth noting that the total number of words that can be read in an average radio spot is as follows:

- 15 Second Spot – 30 to 40 words
- 30 Second Spot – 70 to 80 words
- 60 Second Spot – 120 to 150 words<sup>15</sup>

Using the above guide, it would be impossible for a nascent licensed cannabis distributor to obtain a 15 second or 30 second radio spot.<sup>16</sup> The label simply cannot be read in that time frame. As a result, the most popular and least costly advertising radio option in a local market would be lost due to the labeling requirements.

At a minimum, a local cannabis business would be forced to purchase a more expensive 60 second spot. Even in this context, 50% or more of the time would be dedicated to reading the warning label. To provide the necessary information a cannabis advertiser may be forced to “speed read” the warning label. However, under the regulations the warning labels must be “read aloud clearly at the same volume and pace as the rest of the advertisement.”

The issue gets more complex due to potential labeling requirements under federal law. For example, the Secure and Fair Enforcement (SAFE) Advertising Act (S.4622), has a specific labeling requirement.<sup>17</sup> To accept an advertisement, a station must broadcast the following disclosure label:

**“This product has not been evaluated by the Food and Drug Administration. There may be health risks associated with consumption of this product”<sup>18</sup>**

As an alternative, the legislation gives broadcasters the option to comply with any future labeling requirements adopted by the Surgeon General or the Food and Drug Administration for

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<sup>15</sup> *Voice Talks*, The Most Effective Length for Audio Commercials, <https://voice123.com/blog/voice123/the-most-effective-length-for-an-audio-commercial/> (Visited August 8, 2022 at 3:22 PM)

<sup>16</sup> Thirty second spots tend to be the most effective. See *Inside Radio* [https://www.insideradio.com/free/best-ad-length-study-shows-its-30-seconds/article\\_c94fdda6-78f6-11ec-adea-2b35f07d7749.html](https://www.insideradio.com/free/best-ad-length-study-shows-its-30-seconds/article_c94fdda6-78f6-11ec-adea-2b35f07d7749.html) January 26, 2022 (visited August 9, 2022 at 12:39PM)

<sup>17</sup> Secure and Fair Enforcement (SAFE) Advertising Act (S.4622) at <https://www.congress.gov/bill/117th-congress/senate-bill/4622?q=%7B%22search%22%3A%5B%22S4622%22%2C%22S4622%22%5D%7D&s=1&r=1>

<sup>18</sup> SAFE Advertising Act, S.4622 §3(b)

advertising of cannabis or cannabis products. In either instance, the labeling required by this legislation would be added to the state labeling requirement.<sup>19</sup>

The likely result of NYOCM's proposed lengthy label requirement is that newly licensed cannabis businesses will simply not advertise on local radio stations at all. Even with a 60 second spot, lengthy labels will undermine the effectiveness of the advertisement. New cannabis business will have to shift to more expensive and perhaps less effective advertising platforms. Local radio stations have addressed this issue before. For example, because of the "regulation Z truth in lending disclosure requirements under federal law," a number of automobile dealers and lending institutions have forgone advertising on radio, due to the fact that the length of the disclosures renders the ad ineffective.

## **2. Lengthy Labels May Render TV Ads Ineffective**

For television, this would mean a rather large graphic would have to appear on the screen. While the proposed regulations do not spell out the font size for television, they do exist for print and digital advertisements. These rules require the print to be 1) no less than a size 6 font; 2) bolded; 3) legible, unobscured, and visible to the consumer, and 4) be placed in a bright yellow box or offset with a distinctive border.<sup>20</sup>

It is entirely possible that NYOCM's proposed labels would take up the entire screen. The issue is how long the label must appear. Assuming the label would have to appear long enough for someone to read it, the label would essentially eliminate the effective use of a 15 or 30-second television spot. Depending on the length of time that must be devoted to the label, the same may be true for the 60-second spot and perhaps would leave the ad completely ineffective in convincing users to turn to a legal alternative.

## **B. NYOCM Should Reduce the Length of the Proposed Labels**

As noted above, we do not oppose placing warning labels on cannabis advertisements. To be effective, however, such warning labels should be short and concise. This approach has the advantage of allowing newly licensed cannabis businesses to use local television and radio stations to reach their adult customers with less costly 15 and 30 second spots. It is simply contradictory to try to stimulate a new legal cannabis business and at the same time enact labeling rules that effectively preclude these businesses from using a key advertising platform in their local market.

Consistent with this approach we would recommend a series of short and concise rotating warning labels that include all the messages mentioned in the proposed rules. We would simply break them up into shorter and more effective rotating messages:

- **For use only by adults 21 years of age and older.**
- **Keep out of reach of children and pets.**
- **In case of accidental ingestion or overconsumption, contact the National Poison Control Center hotline 1-800-222-1222 or call 9-1-1.**

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<sup>19</sup> Accordingly, we suggest that NYOCM should consider the impact of labeling requirements that may be enacted by the Federal government as it moves forward with federal cannabis legislation.

<sup>20</sup> See §129.2(e)

- Please consume responsibly.
- Cannabis may cause impairment and may be habit forming.
- Cannabis can impair concentration, coordination and judgment.
- Do not operate a vehicle or machinery under the influence of cannabis.
- There may be health risks associated with consumption of this product.
- Cannabis is not recommended for use by persons who are pregnant or nursing.
- For help and hope 24/7, call 1-877-8-HOPENY (467369) or text HOPENY (467369).

Another approach to the warning label is to include a reference to a specific web page on the NYOCCM web portal. For example:

There are health risks with cannabis use. Go to <https://cannabis.ny.gov/> for more details.

The reference could be made to a specific web page that would not only list but fully explain all of the risks associated with cannabis consumption. This webpage could then reference specific medical locations, such as the Nation Poison control Center or local hospitals where those using cannabis can obtain help.

There are added benefits to this approach. For instance, this type of label drives cannabis users to the NYOCCM website thereby increasing the reach of this platform. This will give the NYOCCM a more effective way to reach consumers about other cannabis related issues.

#### IV. Summary

NYSBA applauds the efforts of the NYOCCM to establish a new and safe cannabis marketplace. We understand the complexity of this task and our objective is to work with the NYOCCM to make this effort a success. We share the same goal. To achieve this objective, we believe the proposed advertising rules should be modified.

The audience composition placement rule requiring that 90% of the audience be 21 years of age or older should be revised. NYSBA urges the NYOCCM to follow the lead of most other states and adopt the 70% (73.6%) audience composition standard. This standard has been successfully used for alcohol advertising. It strikes the appropriate balance between protecting minors and allowing nascent cannabis businesses to succeed.

We also respectfully request that the NYOCCM adopt a flexible approach to providing proof regarding audience composition. Obtaining data from traditional ratings companies can be prohibitively expensive for a new cannabis business. In addition, there are a number of stations and small markets that simply may not have access to ratings data for specific programs on a daily basis. In these instances, we believe aggregate audience composition data from the most recent survey of a market should meet the requirement. In addition, aggregate national or regional data for programming should be sufficient. Finally, a statement from the broadcaster providing a reasonable analysis of its audience composition should be sufficient to meet these requirements.

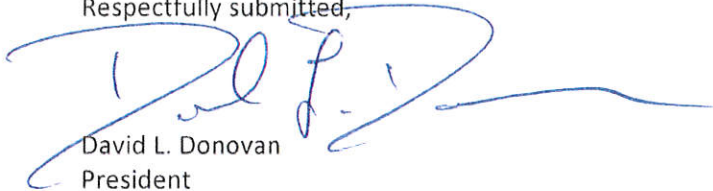
We support the use of labels for cannabis advertisements. Nonetheless, the proposed labeling requirement could effectively prevent new cannabis businesses from advertising on local broadcast stations, especially radio. We believe the labeling regulation should be modified to require short,



concise labels that would be aired on a rotating basis. Alternatively, we believe a short warning label that drives consumers to the NYOCM website may be the best way to help consumers learn about all the potential risks associated with cannabis use.

We look forward to working the NYOCM to address these complex issues. Thank you for your consideration.

Respectfully submitted,



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## Exhibit B



# New York State Broadcasters Association, Inc.

**To:** New York Office of Cannabis Management

**From:** David L. Donovan, President New York State Broadcasters Association, Inc.

**Date:** January 29, 2023

**RE:** Comments on Packaging and Labeling & Marketing and Advertising Regulations for Adult Use Cannabis Part 129

## **I. Introduction**

The New York State Broadcasters Association, Inc. (NYSBA) submits the following comments in response to the New York Office of Cannabis Management's (NYOCM) proposed advertising regulations for adult use cannabis.<sup>1</sup> In addition, on December 19, 2022, NYOCM published a Guidance for the Marketing and Advertising rules of Adult Use Licensees, which these comments also address.<sup>2</sup>

In response to NYOCM's initial publication of Part 129, NYSBA submitted an extensive statement regarding the proposed rules.<sup>3</sup> In that statement we observed that the proposed rules were overly restrictive and would harm nascent, legal cannabis businesses. We noted that, as proposed, the rules were counterproductive and undermined the objective of shifting New Yorkers from an unregulated to a regulated cannabis market. We referenced the advertising laws in numerous states that have approved adult use cannabis which permit more advertising than the proposed New York rules. In sum, New York's proposed rules would amount to an effective ban on local radio and television advertising, thereby harming nascent cannabis licensees trying to start a business by preventing them from using the most efficient and cost-effective means of informing potential consumers of their services.

Unfortunately, the revised proposal does not address these concerns. Accordingly, NYSBA restates the concerns outlined in our initial comments. The following outlines additional reasons why NYOCM should adopt a more flexible approach to cannabis advertising rules.

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<sup>1</sup> NYS Register, NY Office of Cannabis Management, Adult-Use Packaging, Labeling, Marketing and Advertising Rules, Vol. XLIV, Issue 50, December 14, 2022, at page 5.

<sup>2</sup> New York Office of Cannabis Management, *Packaging and Labeling & Marketing and Advertising Guidance for Adult-Use Licensees*, December 19, 2022, at 9. (hereinafter "Guidance Document")

<sup>3</sup> Statement of the New York State Broadcasters Association, Inc, *Proposed Packaging Labeling Marketing and Advertising Regulations for Adult Use Cannabis Part 128 & 129*, submitted to NYOCM August 15, 2022. (hereinafter *NYSBA Statement*).

## II. Licensees Must be Able to Advertise to Promote the Legal Market Place

For New York's adult cannabis laws to work, cannabis sales must shift to regulated, state sanctioned businesses. With little doubt that the continuing proliferation of unregulated sales harms new cannabis licensees, advertising by cannabis entities becomes incredibly valuable, particularly in local communities. Using local media, New York licensees can distinguish themselves from unregulated operations. This means they must be allowed to access low-cost local advertising platforms, such as local broadcast radio and television.

The importance of accessing local broadcast advertising was recognized by the Diversity, Equity and Inclusion Committee of the National Cannabis Industry Association in its August 2022 comments:

“Under section 129.2 the percentage of demographic information providing consumers are over 21 years of age is the most restrictive in the industry. At 90% this becomes a very difficult standard to meet. We recommend that OCM adopt a 75% standard in alignment with alcohol self-governance and industry standards nationally....

Overall, this issue of the disparate treatment of cannabis business operators who want to package, label and advertise in a manner consistent with alcohol is at hand here. Rather than treating cannabis as a more restrictive substance, New York should err on the side of practicality, balance and sensibility....

We are confident that by adopting more equitable language, the candidate pool of eligible applicants will create more diverse, inclusive and equitable products for the New York cannabis industry.”<sup>4</sup>

These insights are correct, and NYSBA wholeheartedly agrees. New York has provided a preference in licensing to those who have been incarcerated previously or otherwise justice involved. If these licensees are to be successful in helping the state achieve its goals, part of their work will require shifting public attitudes toward cannabis businesses and this can only happen if they are able to access advertising opportunities in a way that is equal to the alcohol industry.

Shifting public attitudes cannot be accomplished by generic state-wide public service announcements. On the contrary, this is straightforward, hard-nosed, “local main street” competition. New cannabis licensees must convince customers in their neighborhood to come to their specific store, as opposed to an unregulated operation down the street. This type of competition confronts every new retail business: “Shop at my store, not my competitors.”

However, the task of convincing the public is more difficult for newly licensed cannabis businesses as opposed to other new businesses. Unlike their unregulated counterparts, licensed cannabis businesses are confronted with a complex set of rules, quality controls and taxes. Reaching, educating and enticing customers to shop in regulated cannabis dispensaries should not, then, be made more challenging by limiting advertising opportunities. The advertising

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<sup>4</sup> Statement of National Cannabis Industry Association, Head of Diversity Equity and Inclusion, letter submitted to NYOCM, August 15, 2022, at page 5

platforms on local radio and television provide local businesses with the most extensive audience reach of any media platform. The entire success of the cannabis program, and its public policy benefits, depends on getting customers into the newly licensed stores, keeping them as long-term customers and making sure they do not revert to buying cannabis in the unregulated market.

Given the enormous challenges facing newly licensed cannabis businesses, the proposed advertising regulations automatically place these businesses at a significant disadvantage. The proposed advertising regulations amount to an effective ban on local radio stations and most TV advertising, thereby jeopardizing the ability of these nascent businesses to survive. While we agree that public protection is paramount, the regulations cannot be so strict as to deny new cannabis businesses access to the effective local advertising platforms provided by local radio and television stations. Such a restrictive approach is a recipe for business failure and will not benefit newly licensed cannabis entities as they compete with unregulated entities.

As noted in our initial comments, we are not opposed to advertising regulations. The proposed advertising regulations, however, strike the wrong balance between protecting minors and allowing nascent cannabis businesses to succeed. The following outlines the significant problems with the overly restrictive advertising regulations proposed by NYOCM.

### **III. The 90% Audience Placement Standard is not Justified - A 75% Audience Placement Standard Strikes a More Appropriate Balance**

NYOCM proposes that advertising may not be placed in programs unless it can be shown that 90% of the audience is over 21. Nearly every state that has legalized adult use cannabis has rejected this standard and adopted an audience placement standard similar to alcohol advertising. These include *Colorado, Oregon, California, Nevada, Michigan and New Jersey*. Several states including *Alaska, Arizona, Illinois and Washington* do not have an audience standard.

Our initial comments demonstrated that a 90% audience placement standard would preclude a significant number of New Yorkers from seeing cannabis advertising on television. Had these rules been in place during the first quarter of 2022, licensed cannabis entities would have been precluded from placing advertising in programs that are watched by adults that received more than 200 million TV impressions. In other words, the 90% standard will force cannabis advertising from programs that are highly popular with adult audiences.

The overly strict standard would essentially prevent cannabis businesses from placing advertisements in popular radio formats. Moreover, as we documented in our initial filing, the 90% rule would prevent cannabis operators from placing cannabis advertisements on the top 5 radio stations in every market in New York. In its initial decision to keep the proposed 90% standard, NYOCM stated:

“Comments were received on the requirement that licensees have reliable evidence that 90% of an advertisement’s audience would be reasonably expected to be at least twenty-one years of age. Commenters requested the regulations be changed to allow licensees to place advertisements that would be more easily seen by individuals under twenty-one.

No changes to the proposed regulations were made. The proposed audience composition requirement 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.”<sup>5</sup>

The decision by NYOCM not to make changes to the proposed 90% threshold in Part 129 ignores the impact of denying cannabis licensees access to an essential advertising platform. This is especially true for radio, which offers low-cost advertising and is essential for new businesses to establish a brand and educate new customers in their local communities. The success of these new businesses is essential to obtaining the public health, safety, and tax benefits of legalizing adult use cannabis that underpinned the statute. If nascent cannabis operators are unable to reach local customers, the entire system will be undermined and the public benefits that are associated with the legalization of adult use cannabis will never be realized.

A key component of New York’s intentions to commence a regulated cannabis marketplace is to normalize public attitudes about legal cannabis in local communities. The most efficient and least costly way to achieve this result is to advertise on local radio and television stations. A narrowly targeted digital-only campaign will not be adequate because it would fail to reach sufficiently large adult audiences. It is also worth noting that local radio and TV stations are businesses operating in New York. As such they contribute to New York’s economy and tax base and their employees live and work in New York. This is not necessarily the case with advertising placed on “Big Tech” digital companies that are located primarily out of the state. Advertising regulations that force cannabis businesses to forego local stations and shift to “Big Tech” social media and Internet platforms will not help develop New York’s businesses.<sup>6</sup>

In explaining the proposed advertising regulations, NYOCM states that the “audience composition requirement is in line with the legislative intent to protect the public health and safety of all New Yorkers.” This position conflicts with the legislative intent of the statute. While the legislation proposed an audience composition standard, it did not require the 90% standard. Indeed, there is nothing in the language of the enabling statute or the legislative history to suggest that the 90% audience composition standard strikes the appropriate balance. Instead, the 90% threshold will prevent those over 21 from receiving cannabis advertising messages, and

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<sup>5</sup> NYS Register, NY Office of Cannabis Management, Adult-Use Packaging, Labeling, Marketing and Advertising Rules, Vol. XLIV, Issue 50, December 14, 2022, at page 5,8.

<sup>6</sup> Local broadcasters in New York make significant contributions to the Empire State’s Economy. For example, direct economic activity from local radio and TV stations amounts to \$3.42 billion. The industry directly accounts for 18,47 thousand jobs. When considering the stimulative impact of local stations on other businesses the total economic impact of local stations is more than \$75 billion and 143 thousand jobs. See Woods & Poole Economics, Inc., *Local Radio and TV: Helping to Drive the United States Economy*, 2019 at 40. <https://www.nab.org/saeportal/documents/2019-NAB-Woods-Pooles-Local-Broadcasting-Publication.pdf>

that does run counter to the legislative intent of the Marijuana Regulation and Taxation Act. They effectively ban all local radio and most TV advertisements, thereby denying those adults who are allowed to use cannabis, important information about a legal product.

From a public health standpoint, the legislation wants to drive cannabis sales into the regulated market and ensure adults in New York know where to obtain regulated cannabis. There is no quality control in the illegal market; in an unregulated marketplace, consumers are unable to obtain information about THC levels and cannabis products may be laced with deadly additives such as fentanyl. Therefore, it is essential for these new cannabis businesses to succeed so that consumers know where to find them in their local markets. Local radio and television advertising are essential to achieve this public health objective.

The statutory advertising provisions are designed to protect minors, not to deny adults access to information. This is best accomplished by preventing minors from purchasing cannabis at licensed outlets, which is assisted by making sure the content of cannabis advertising is not directed at minors or those under the age of 21. The statute never envisioned enacting an audience placement rule that would deny all New York citizens, especially those over 21, access to important messages from local cannabis businesses.

Finally, the NYOCM states that the rule is “based upon existing adult-use cannabis marketing and advertising regulations in other states.” This is simply correct. As noted above, the overwhelming majority of states that have approved adult use cannabis enacted an audience placement standard similar to that used for alcohol, requiring no more than 75% of the audience be over 21. These states have struck the appropriate balance between limiting messages to minors and at the same time allowing newly licensed cannabis operators to reach local consumers in their markets. The 90% audience composition standard is an aberration, and not based on the laws enacted by an overwhelming majority of other states.

NYSBA continues to believe that an audience composition standard similar to alcohol and adopted by most states that have approved adult use cannabis should be employed in New York. Accordingly, we believe NYOCM should enact a standard that requires an ad to be placed in programs where 75% of the audience is 21 years of age or older. As previously noted, this is the position taken by the Diversity, Inclusion and Equity Committee of the National Cannabis Industry Association. We believe this strikes the appropriate balance.

#### **IV. NYOCM Should Employ a Flexible Approach to Audience Composition Data**

In our initial comments, NYSBA observed that new, nascent cannabis businesses will be unable to afford expensive data services to demonstrate that they have met the audience share standard required. In many small upstate New York radio markets, data on specific programs may not be available. In larger markets smaller community-oriented radio stations may not have access to specific data relating to program ratings. The problem may also exist for print media such as newspapers and magazines.<sup>7</sup>

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<sup>7</sup> For example, on any given day it is not clear whether newspapers have specific data on the age of a person reading the headlines, sports pages or obituaries.

While the regulations are silent on the type of evidence that may be admissible, the *Guidance Document* issued by NYOCM suggests that a cannabis business must have data about the actual program and at the time it is broadcast. The *Guidance Document* stated:

“An example of unreliable evidence would be supplying information about the typical audience composition of a television channel at 11 AM and applying that evidence to suggest that 90% of the audience viewing an ad placed on that channel at 9:00 PM would reasonably be expected to be 21 years of age or older. Such information would be unreliable because it would not be information application to the situation in which the ad was placed; it is not reasonable to expect the audience of a channel at 11 AM is similar to the audience at 9 PM.”<sup>8</sup>

While we understand the NYOCM’s concerns, we respectfully request that the guidance be developed with a more flexible approach. The guidance requires a level of data that may not be available in all markets, especially small upstate markets. The costs of obtaining such data may be prohibitive for most cannabis licenses and small market radio stations. Moreover, broadcast data services may not provide program by program data in small markets on a daily basis. Many stations get data reported on only a quarterly or even annual basis. Additionally, audience composition may be inferred based on overall data of a particular radio format, even where that program is broadcast in an adjacent or different market.

The example above shows the need for flexibility. For example, you may find a larger “over 21 audience” at the 11 AM hour as opposed to 9 PM, as many younger viewers will be at school during the day. As a result, the overall audience can skew older in some markets. Moreover, depending on the program’s content, the audience composition may not necessarily vary considerably based on the time of day. For example, we would tend to doubt that the age of the audience watching financial news on CNBC or listening to an “all-news” radio station changes dramatically based on the time of day.

Local broadcast stations, even without specific data, are very knowledgeable about the composition of their audience. Indeed, their entire business depends on providing audiences to advertisers. There is no one set of uniform data that is used by all stations, especially in small radio markets. Cannabis licensees should be able to rely on the expertise of local stations regarding the composition of their own audience. Because each market and each medium are different, the policies addressing what constitutes “reliable” evidence can be developed over time to reflect the different characteristics of each medium and market size. In this regard cannabis businesses and stations should be able to rely on audience data from programs that were broadcast in adjacent markets where such evidence is available.

## **V. The Labeling Requirements for Audio Still Preclude Most Radio Advertising**

In our initial comments on Part 129, we noted that the extensive labels required on all advertising would effectively ban most advertising on radio. Reading the required labels would take longer than the average 15 or 30 second radio spot. Indeed, it would take up most of a 60

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<sup>8</sup> New York Office of Cannabis Management, Packaging and Labeling & Marketing and Advertising Guidance for Adult-Use Licensees, December 19, 2022, at 9.



second spot. As a result, nascent cannabis licensees would be denied access to an effective low-cost advertising platform: local radio. In its new rules, NYOCM indicates that it changed the proposed rules to provide more flexibility stating, “The proposed regulations have been amended as a result of these comments [received] to allow greater flexibility in audio-only advertisements.”<sup>9</sup>

Unfortunately, as drafted, the rules still require a basic label, a rotating label and a reference to HOPEline information. Providing all these labels will prevent local cannabis licensees from advertising on radio stations. Our reading of the actual regulations is as follows.

The amended rules require a basic label for audio only advertisements. Section 129 (c) 2 reads.

*“For use by adults 21 and older. Keep out of reach of children and pets. In case of accidental ingestion or overconsumption, contact the National Poison Control Center. Consume responsibly.”*

The difference between this label and video or print labels is that it does not require the inclusion of the actual phone numbers “hotline 1-800 -222-1222 or call 9-1-1.” While this is a step in the right direction, the amended label still requires about 11-13 seconds to read. This eliminates the popular 15 second radio spot as an option for cannabis licensees. It will likely make a 30 second spot ineffective, as approximately 50% the spot’s time will be devoted to the label as opposed to advertising information. Even in the context of a 60 second spot, nearly 33% of the time will be devoted to the label. This makes radio a very ineffective advertising vehicle for nascent cannabis businesses. As a result these businesses will be forced to shift to more costly and less effective advertising platforms.

In addition to the audio label mentioned above the actual language of the rules still require more labeling. Section 129(d) requires that all advertisements contain a rotating label. The language does not exclude audio advertisements from this requirement. Moreover, §129(f) requires that all advertising contain a reference to the HOPE Line (Section 129(f)). Again, this seems to include radio and audio advertising. Thus, as drafted, the proposed regulations still require audio advertisements to include all the labels outlined in Section 129(c)(2), (d), and (f). In other words there has been no significant change in the audio label requirements and the length of what needs to be read is still too long for radio station advertising.

In its recently published *Guidance Document*, NYOCM only mentions the 129(c)(2) basic label when describing the labeling obligation of audio only advertisement and does not mention the rotating label or the HOPEline label. Nonetheless, the actual underlying regulations appear to require all of the labels outlined in § 129 (c)2, (d) and (f). Clarification is needed to eliminate any conflict between the *Guidance Document* and the actual language of the proposed regulations, if it is in fact intended that §129 (d) and (f) **do not apply** to audio only advertisements.

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<sup>9</sup> NYS Register, New York Office of Cannabis Management, Adult-Use Packaging, Labeling, Marketing and Advertising Rules, Vol. XLIV, Issue 50, December 14, 2022, at page 5,8.

Once again we urge NYOCM to adopt short and concise labels for audio advertisement. Even the “audio only” rule in § 129 (c)(2) would preclude cannabis businesses from using 15 second spots as well as the most popular 30 second radio spot. Short concise rotating labels will work best and allow new businesses access to more economical radio advertising. In addition, a brief label telling listeners to go to the NYOCM website would be the most effective way for consumers to learn about all the health and safety concerns raised by NYOCM.

## **VI. The NYOCM Regulations Raise Significant First Amendment Issues**

As drafted, the proposed NYOCM Regulations raise significant First Amendment issues. Rules that effectively ban or significantly limit advertising for a legal product generally violate the First Amendment.<sup>10</sup> Adult use cannabis is a legal product, and advertising for this product is protected speech.

The operative First Amendment standards for analyzing commercial speech were set forth in *Central Hudson Gas & Elec. Corp. v. Public Servs. Comm'n*. Under *Central Hudson*, courts ask whether (1) the expression is protected by the First Amendment; (2) the asserted government interest is substantial; (3) the regulation directly advances the government interest asserted; and (4) the regulation is no more extensive than necessary to serve that interest.<sup>11</sup>

NYOCM’s proposed regulations conflict with a number of the elements raised in *Central Hudson*. In particular, the advertising restrictions do not appear to meet the standards contained in the fourth prong of the *Central Hudson* test. As noted above, the regulations amount to an effective ban on radio and television advertising. The 90% audience placement rules and labeling requirements render advertising on local radio and television completely ineffective. Confronted with overly strict regulations, cannabis businesses will forego advertising on these outlets.

The fundamental goal of the legislation is to legalize adult use cannabis and restrict sales to adults 21 years of age or older. From a First Amendment perspective, the best way to achieve this goal is to ban sales to people under the age of 21. Of course that is exactly what the statute does and it imposes significant sanctions on licensees who violate this ban. This ban, by itself, insures the New York State’s objectives. Given the ban at the point of sale, the overly restrictive advertising rules conflict with the *Central Hudson* standard that the “regulation is no more extensive than necessary to achieve the government’s interest.”

The regulations also have an extensive set of rules to ensure that the contents of the advertisements are not attractive to children. NYOCM provides no evidence that these rules will not be effective. On the contrary NYOCM presumably believes they will be effective in not attracting consumers under 21 years of age. Adopting an overly strict 90% audience placement

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<sup>10</sup> See *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 193-94 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503, 509-12 (1996); *Central Hudson Gas & Elec. v. Public Svc. Comm’n*, 447 U.S. 557 (1980)

<sup>11</sup> *Central Hudson Gas & Elec. Corp. v. Public Servs. Comm’n*, 447 U.S. 557, 566 (1980)

standard and a labeling requirement that effectively bans radio advertising is not necessary for the state to achieve its goals. Accordingly, given the extensive content regulation in the rules, this “belt and suspenders” approach to advertising regulations violates the fourth prong of the *Central Hudson* test.

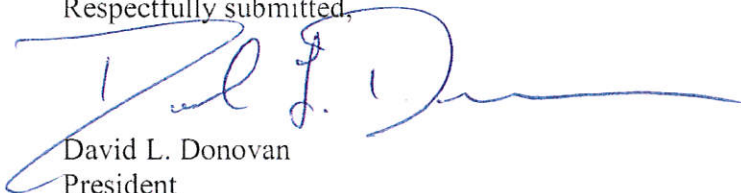
NYOCM cannot ignore the fact that, because it effectively bans advertising on broadcasters, its regulations will prevent adults that are over 21 from accessing cannabis advertisements on local radio and TV stations. There is no justification for such a result. As a result the regulations undermine an important legislative objective which is to inform adults about the regulated cannabis business and shift consumption away from the unregulated cannabis market. The negative impact on adults 21 years of age demonstrates that the rules are more extensive than necessary to achieve the governments interest. Indeed, restricting and preventing adults from accessing such advertisements conflicts with the government’s underlying policy with respect to authorizing adult use cannabis in New York.

Throughout the debate on cannabis, advocates noted that cannabis was not dangerous if used properly. Indeed many advocates suggested there were health benefits or that it was certainly no more harmful than alcohol, and sales of both are restricted to adults 21 years of age or older. Further, the cannabis licensing model draws heavily from the alcohol model in New York State and comparisons between the markets are drawn consistently. Despite these comparisons and similarities, NYOCM has adopted advertising rules for cannabis that are much stricter than those used for alcohol. In adopting these rules, NYOCM has ignored the overwhelming majority of states that employ an audience placement standard for cannabis that is similar to that employed by the voluntary industry agreement for alcohol. Such disparate treatment of similar products also raise serious first Amendment concerns.

## **VI. Summary**

We respectfully request that NYOCM reconsider its proposed adult use cannabis advertising rules contained in § 129 (c)2, (d) and (f). It is important to understand that new cannabis businesses will need to employ both broadcast and digital services to launch their nascent business. The answer should not be that cannabis businesses can use one medium over another or that they can purchase TV advertising if the lengthy labels make it impossible to use radio ads. Each medium has its own advantages. If newly created cannabis businesses are to succeed in New York, they need to use all the local advertising platforms that are available.

Respectfully submitted,



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