

Professional Perspective

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Cannabis Marketing Proposed Regulations in New York & Neighboring States

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Marketing of cannabis products, supplies, and stores is tricky. States that are eager to embrace a thriving and lucrative cannabis market are still often hesitant to permit the type of advertising common for other products, such as alcohol. How strict states are with regulations also varies, with some states possessing billboards on major highways and other states effectively banning most forms of marketing.

The state of New York has the potential to be one of the largest adult-use cannabis markets in the US. On June 1, 2022, the New York Office of Cannabis Management (OCM) promulgated its [proposed regulations](#) for a public comment period which ended on Aug. 15, 2022. On November 21, 2022, the OCM published [revised regulations](#), which are now undergoing a second public comment period. These proposed regulations allow us to compare New York to other regimes.

This article will discuss New York's proposed restrictions on marketing cannabis are and how they compare to those in neighboring states, how those restrictions will shape cannabis marketing and advertising, and how they might be challenged in court.

Comparison to Massachusetts, New Jersey & Connecticut

New York OCM's proposed marketing regulations make clear that any marketing and advertising should “not jeopardize public health or safety, promote youth use, or be attractive to individuals under twenty-one” § 129.2(b). In leading off its regulations with such a narrow purpose, New York has made clear that its regulations will be restrictive. However, this is not out of the ordinary in the Northeast, a region which generally has restrictive cannabis marketing laws, let alone the US as a whole.

Age-Specific Restrictions

In fact, New York's proposed marketing regulations are in-line with the neighboring states of Massachusetts, New Jersey, and Connecticut. While New York's proposal is slightly more restrictive than some of its neighbors, for example, requiring that a license holder have “reliable evidence” that 90% of the audience of any advertisement is reasonably expected to be 21 years old or older, that number is only slightly higher than Massachusetts' 85% and matches Connecticut's 90%. [Mass. Gen. Laws Ch. 94G, § 4\(a\)\(xxix\)](#); [C.G.S. § 21a-421bb](#).

Neighboring New Jersey, however, only requires that 71.6% of the expected audience of a cannabis advertisement be over 21. [N.J.A.C. § 17:30-14.2\(a\)](#). This places New Jersey more in-line with less restrictive Western states like California, Colorado, and Washington, none of which require more than 71.6% of the expected audience to be over 21 years old.

Additionally, New York's proposed regulations require that digital advertisements utilize mechanisms to keep those under 21 from viewing the marketing materials. §129.2(l). However, this is not unique, and surrounding states have similar regulations.

Billboard Advertisements

New York's proposed regulations on signage are generally in-line with its neighbors as well. First, New York has an outright ban on cannabis billboards for all cannabis businesses except those that conduct retail sales or delivery. These signs may only be used to alert consumers of the location of the cannabis business, and may only contain: the company's name, address, phone number, e-mail address, telephone number, and the nature of the business.

Further, signage must be affixed to a building or permanent structure, and only two such signs are permitted per location of the cannabis business. Thus, like Massachusetts, drivers will likely be able to easily find the nearest dispensary by following the billboards along the highway. Massachusetts dispensaries have grown quite bold with their billboards and have gotten in trouble in unexpected places. For example, one dispensary in Massachusetts posted a billboard depicting the fictional character Borat, portrayed by actor Sacha Baron Cohen. This ultimately led to Sacha Baron Cohen suing the dispensary. See, e.g., *Cohen v. Solar Therapeutics Inc.*, No. 1:21cv11139 (D. Mass. 2021). New York dispensaries will not be permitted to make billboards such as those at issue in *Solar Therapeutics Inc.* due to the clearly established limits on billboard content.

Connecticut, while banning billboards for out-of-state dispensaries, does not forbid in-state dispensaries from advertising via billboards. [C.G.S. § 21a-421bb\(a\)](#). New Jersey has the most stringent requirements for billboards, forbidding the use of billboards outside the property of the cannabis business. [N.J.A.C. § 17:30-14.2\(d\)\(7\)](#).

Branding & Merchandising

New York's proposed regulations also control the fonts and colors used in advertisements. While it is common in the Northeast for states to ban the use of designs that are intended to appeal to someone under 21 years old, New York has gone even further by explicitly banning the use of bubble letters and neon colors. New Jersey has no restrictions on the font or colors of advertisements, while Massachusetts merely bans the use of neon lights. [Mass. Gen. Laws Ch. 94G § 4\(a½\)\(xxix\)](#); [935 CMR 500.105\(4\)\(b\)](#). However, New York, New Jersey, Massachusetts, and Connecticut have all banned the use of cartoons, toys, and other items meant to appeal to those under 21. [§ 128.1](#), [§129.3](#); [N.J.A.C. 17:30-14.2\(d\)\(1\)](#); [Mass. Gen. Laws Ch. 94G § 4\(a½\)\(xxix\)](#); [935 MA ADC 500.105\(4\)\(b\)](#); [C.G.S. § 21a-421bb\(b\)\(1\)\(A\)](#).

Like other states, New York also seeks to restrict the branded merchandise that cannabis businesses may sell. In New York, dispensaries will only be able to sell merchandise in adult sizes, on licensed premises, and they must not contain any cannabis symbols or references. [§ 129.2\(j\)](#); [§ 129.3\(a\)\(24\)](#). This regulation nearly perfectly matches New Jersey's own regulations. [N.J.A.C. 17:30-14.2\(e\)\(5\)](#). Massachusetts does not allow for branded goods solely for the promotion of cannabis and cannabis products. [935 CMR 500.105\(4\)\(b\)\(15\)](#).

Sponsorships

New York differs from the rest of the Northeast with regard to sponsorship of events. New York's proposed regulations allow cannabis companies to sponsor events, and allow the cannabis companies to include the company's logo, name, website, e-mail address, telephone number, retail dispensary location, and the nature of their business. [§ 129.2\(i\)](#).

In contrast, Connecticut law requires that 90% of the audience of a sports, charitable, or other similar event be over 21 years old for a cannabis company to be permitted to sponsor said event, and New Jersey requires 80% of the audience to be over 21. [C.G.S. § 21a-421bb\(b\)\(5\)](#); [N.J.A.C. 17:30-14.2\(d\)\(5\)](#). Massachusetts differs from Connecticut and New Jersey on this issue, permitting brand name sponsorship of charitable, sporting, and other similar events. [935 CMR 500.105\(4\)\(a\)\(2\)](#). However, the sponsorship must be limited to the cannabis company's brand name, and any form of advertising in connection with that event is prohibited unless the audience is expected to be over 21. Thus, New York's proposed regulations concerning event sponsorship are the most permissive in the region.

Finally, New York will require certain language and disclaimers be present on all advertisements. These regulations are fairly standard in the cannabis industry, and while the exact language required may vary from state to state, nothing adopted by New York is noticeably different from its neighbors.

Thus, while New York's proposed advertising and marketing regulations appear to be quite restrictive at first glance, they are largely in-line with the rest of the region.

First Amendment Considerations

It's an open question whether New York's proposed regulations would be vulnerable to First Amendment free speech challenges, but likely most of the rules would survive constitutional scrutiny.

The Central Hudson Test

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), in which a New York state rule banning “promotional advertising” by utility companies was challenged, the US Supreme Court held that commercial speech is protected by the First Amendment only if the speech concerns lawful activity and is not misleading.

Because cannabis is illegal at the federal level, one may think that the First Amendment does not provide protection against restrictive state legislation. However, even if cannabis was federally legal, the Supreme Court's analysis allows restrictions on commercial speech in certain circumstances.

For a restriction of commercial speech to be constitutional, the Supreme Court determined the government must possess a substantial interest, the regulation must directly advance that interest, and should be “narrowly tailored”—i.e., no more extensive than necessary—to advance that substantial need. If a substantial interest is present, the regulations advance that interest, but the regulations are not narrowly tailored, the regulations will not be permitted.

Central Hudson & Cannabis Regulation

While it is unlikely all of New York's proposed regulations would be deemed as violating the First Amendment, it is certainly possible that some may be successfully challenged. In fact, this has happened in other states, notably in Washington. In *Plausible Products, LLC d/b/a Hashtag Cannabis v. Washington State Liquor and Cannabis Board*, Case No. 19-2-03293-6 SEA, Washington State King County Superior Court (2019), cannabis retailers challenged restrictions on advertising, arguing that the *Central Hudson* ruling protected their commercial speech.

Specifically, the retailers challenged restrictions on on-site advertising, which were more restrictive than those on billboards. The court agreed with the retailers, finding that since cannabis was legal in the state of Washington, the retailers had overcome the initial hurdle that they must be engaged in lawful activity.

While the court did agree that Washington had a substantial interest in keeping cannabis out of the hands of individuals under 21, the court did not feel the restrictions being challenged advanced the state's interest, nor were they narrowly tailored. The court agreed with the retailers that the more lenient regulations on cannabis billboards showed that the on-site advertising regulations were more restrictive than necessary.

This is only a single case from a lower court and does not hold precedential value, but it does demonstrate that courts may not shy away from peeling back these regulations if cannabis businesses challenge them. Still, as with restrictions on alcohol and tobacco advertising, courts are likely to hold that regulating the advertising of cannabis is a substantial government interest, and so long as the regulations are deemed to advance that interest and are narrowly tailored, they will survive.

Cannabis Marketing & Advertising in Practice

The proposed regulations in New York appear restrictive, but that does not mean innovative marketers will not find a way to promote their brands. As the most developed cannabis market in the Northeast, Massachusetts serves as a prime example.

As discussed above, Massachusetts requires 85% of the expected audience of an advertisement to be over the age of 21 years old. Yet in Worcester, Mass., 60 banners [line the streets](#) outside the stadium of the Worcester Red Sox—a.k.a., the “WooSox”—bearing the logos of a local cannabis company and the minor league affiliate of the Boston Red Sox. How was this possible given Massachusetts strict regulations? The solution was surprisingly simple—housing data demonstrated that over 85% of the residents in the area were over the age of 21.

Cannabis companies have performed extensive studies to determine locations that will meet the necessary audience threshold to permit advertising. For example, while it may be difficult to determine the age of audiences to radio shows over-the-air, it is much easier to ascertain the audience make-up for radio that is streamed over the internet. It is not uncommon to hear cannabis advertisements on internet streams of sports radio, whereas those same advertisements are missing if you listen on your car radio during your morning commute. Podcasts are another area where cannabis advertisements have thrived. Many forms of online advertisements already let you target your ads to users of a specific age, making those arenas ripe for cannabis advertising.

In New York, expect cannabis companies to seek to advertise wherever they legally can. Studies regarding the audience demographics for television shows, radio shows, and print media will be especially valuable. The advertising market for forms of media with an audience of over 90% people 21 years old or older will be competitive. We can expect such ads will run wherever a cannabis company can demonstrate that the expected audience is compliant.

Further, we can expect cannabis companies to seek out creative new ways to market themselves—whether through on-site events or through mobile applications. With all forms of advertisements, documentation will be key to the success of cannabis businesses. New York will likely audit businesses to determine their compliance with the new regulations, and business will have to support any assertion that 90% of the expected audience of an advertisement was over 21 years old to avoid fines and other penalties.

Conclusion

New York's proposed regulations are largely in line with its neighbors, as well as with other states that have legalized adult-use cannabis. These regulations may be challenged in court, and some may be overturned, but it is likely that most will survive. While these regulations may appear restrictive, they will likely only encourage more innovation in the marketing industry, forcing marketing and advertising professionals to find creative solutions to reach the maximum number of consumers. Thus, while we may not see flashing lights for cannabis in Times Square, New York's regulations will most likely be speed bumps for the creative minds in New York's marketing firms, rather than roadblocks.