

# STATE OF COLORADO

DEPARTMENT OF REVENUE  
Marijuana Enforcement Division  
455 Sherman Street Suite 390  
Denver CO 80203



July 17, 2014

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Dear Mr. McAllister:

John W.  
Hickenlooper  
Governor

Barbara J. Brohl  
Executive Director

Ron Kammerzell  
Deputy Senior  
Director of  
Enforcement

Lewis Koski  
Division Director

This letter is in response to your request for numerous position statements pursuant to Rules M 104(A), 1 CCR 212-1 (214) and R 104(a), 1-CCR 212-2, (2014) received in our office on June 17, 2014. As you know, the Marijuana Enforcement Division ("Division") cannot provide you with legal advice or provide a position statement based upon speculative scenarios or unclear questions. The Division finds that many of your questions involve such scenarios and questions. In the spirit of transparency, however, the Division provides the following position statement to the best of its ability based on the form of the questions presented in your letter.

## 1. Clarification of Rules M1307 and R1307, Penalties.

a. What are the criteria the MED uses to determine whether a violation by a licensee or applicant rises to the level of mandating a revocation or denial of the license? In other words, what distinguishes licensees that are allowed to sell their license to third parties as a resolution of the case compared to those that are not offered any resolution of the administrative complaint?

*Cases are analyzed on a case by case basis and the resolution of a specific case is based on multiple factors. The analysis will include a review of the factors detailed in Rules M 1307 and R 1307.*

b. What is the schedule of penalties for various violations? The old version of the rules contained specific potential penalties, but the new version does not.

*Cases are analyzed on a case by case basis and the resolution of a specific case is based on multiple factors. The analysis will include a review of the factors detailed in Rules M 1307 and R 1307.*

**2. Further clarification of C.R.S. §§ 12-43-3-601, 12-43.4-601, 24-4-104 and Rules M1307 and R1307, Penalties.**

- a. What is the statutory authority for the MED to withhold investigatory reports until after filing formal charges?

*On-going investigative files are not open to inspection per the Colorado Open Records Act. § 24-72-204(2)(a)(IX)(A), C.R.S.*

- b. What is the MED's power to deny or revoke a license even after a licensee has fixed all alleged problems and is complying with all lawful requirements in light of C.R.S. § 24-4-104(3)?

*Where a statutory scheme contains specific licensing or disciplinary provisions independent of the Administrative Procedure Act, an administrative agency may revoke or discipline a license without complying with 24-4-104(3) C.R.S. See, e.g., Davis v. State Bd. of Psychologist Examiners, 791 P.2d 1198, 1201-1202 (Colo. App. 1989); Colorado State Bd. of Medical Examiners v. Reiner, 786 P.2d 499, 501 (Colo. App. 1989); § 24-4-107, C.R.S. See also Colo. Motor Vehicle Dealer Bd. v. Brinker, 39 P.3d 1269, 1270 (Colo. App. 2001); Dixon v. State Board of Optometric Examiners, 39 Colo. App. 200, 565 P.2d 960 (1977) (Neither 24-4-104(3), C.R.S. nor due process considerations require that the licensee receive two notices).*

**3. Clarification of Rules M1202(B) and R1202(B), Administrative Holds.**

Where is there statutory or regulatory authority for the MED to shut down dispensaries by freezing current and future inventory without a hearing based on the administrative hold rule?

*The Division does not "shut down" dispensaries by freezing inventory. The Division has the authority pursuant to the Medical Marijuana Code ("Medical Code") subsection 12-43.3-202(a)(IV), C.R.S. and pursuant to the Retail Marijuana Code ("Retail Code") subsection 12-43.4-202(3)(b)(II), C.R.S. to, among other things, promulgate rules detailing the requirements for searches, seizures, and forfeitures. Rules M 1202(B) and R 1202(B) provide such details. The rules permit a licensee to retain and maintain its inventory pending further investigation.*

**4. Clarification of C.R.S. § 12-43.307(1)(m), C.R.S. § 12-43.4-306(1)(K) and Rules M204 and R204, Ownership.**

Can dispensaries pay properly badged employees a price per pound or price per unit, or a percentage of ultimate sales price, to produce marijuana product (either flower, edible, or concentrated marijuana) without making those employees owners of the company?

*No, typically, these types of arrangements indicate an ownership interest. Please see Rules M 204 and R 204. The rules do provide an exception for managers, who may be*

*compensated on the basis of profits made, gross or net. See Rules M 204(C) and R 204(C).*

**5. Clarification of C.R.S. § 12-43.307(1)(m), C.R.S. § 12-43.4-306(1)(K) and Rules M204 and R204, Ownership.**

a. Are promissory notes that contain a convertible equity interest, meaning the loan transforms into ownership in the future, lawful under the statutes and rules?

*All direct or indirect financial interests must be disclosed and are required to go through the application and vetting process.*

b. Can investors place limitations on the way in which the company is operated, such as requiring all income to be reinvested into the company during the two year period when the investor is obtaining residency, in order to protect their investment without triggering ownership?

*See response to question 4. It appears these investors may hold a beneficial ownership interest by making significant decisions concerning the management of the business. Please refer to Rules M 204 and R 204 Factors Considered When Evaluating Ownership of a License.*

**6. Clarification of C.R.S. § 12-43.307(1)(m), C.R.S. § 12-43.4-306(1)(K) and Rules M204 and R204, Ownership.**

a. Can lenders receive more than 20% interest from licensees without triggering an ownership interest if the lender can show the increases interest rate is reasonable and customary in analogous situations?

*This question cannot be answered based on the information provided. Each application is evaluated on a case-by-case basis according to the facts and circumstances presented. See also responses to 5a and b above.*

b. Can lenders receive payment for fees above the interest rate that when taken together with the interest rate result in greater than 20% return for the lender?

*This question cannot be answered based on the information provided. Each application is evaluated on a case-by-case basis according to the facts and circumstances presented. See also responses to 5a and b above.*

c. Can in-state investors receive more than 20% return on their investment? Does it make a difference if they are 2-year residents?

*This question cannot be answered based on the information provided. Each application is evaluated on a case-by-case basis according to the facts and circumstances presented. See also responses to 5a and b above.*

**7. Clarification of C.R.S. § 12-43.307(1)(m) '(sic)', C.R.S. § 12-43.4-306(1)(K) and Rules M204 and R204, Ownership.**

a. Can an individual or company which does not meet the ownership criteria under the Colorado Marijuana Code receive a royalty or licensing fee from a licensee?

*This question cannot be answered based on the information provided. Each application is evaluated on a case-by-case basis according to the facts and circumstances presented. A royalty or licensing fee tied to a percentage of sales or profits would likely constitute an ownership interest. Please refer to Rules M 204 and R 204 Factors Considered When Evaluating Ownership of a License. See also response to question 4.*

b. Can this royalty or licensing fee be a percentage of profits from the sale or is a flat fee not tied to sales a preferable solution?

*See response to question 7a. A flat fee arrangement would be less likely to represent an ownership interest.*

**8. Clarification of C.R.S. § 12-43.4-403 and the Rule R500 series, Stand alone grows.**

a. Does the 70/30 rule apply to dispensaries that remain vertically integrated after September 30, 2014 or do those dispensaries need to create separate legal entities for the grow facilities if they want to be able to wholesale more than 30% of their inventory? If they do not need to create a new entity, is the relief from the 70/30 limitation self-executing or does a dispensary need to take some action?

*This question cannot be answered based on the information and terminology contained therein. Any change to the ownership structure must be accomplished by filing of an application for change of ownership and/or change of corporate structure with the Division.*

b. Will the MED allow a pre-existing retail marijuana cultivation license in the city of the Denver to be separated off from the original retail marijuana store company and operated by a new owner as a stand-alone grow allowed to wholesale 100% of its product? In other words, can someone buy a currently valid recreational grow license from a Denver dispensary and create a new company to operate a stand-alone grow?

*Any applicant must comply with any and all City of Denver regulations and requirements, and any change to the ownership structure must be accomplished by filing of an application for change of ownership and/or change of corporate structure with the Division.*

**9. Clarification of Rule R 211(E)(3), Plant and Quantity limitations in recreational.**

a. Can a licensee go directly from the 3,750 plant level to the 10,200 level by merely paying the fee or can they only step up one production level to 6,000 plants?

*Please see emergency rule R 211, adopted June 30, 2014, in response to this question. Attached as Exhibit A.*

b. Is there any quantity limitation of loose finished marijuana (saleable bud) that licensees can possess?

*Please see response to question 9a.*

c. Can a MIP or RMPMF acquire two grow licenses to double the 1,000 plant limit or is each company limited to 1,000 total plants?

*Please see response to question 9a.*

d. What will the production caps for plants be after July 1, 2014? Will they remain the same or be amended?

*Please see Response to question 9a.*

**10. Clarification of Rules M103 and R103, Definition of a Plant (Clones/immature plants).**

a. What makes something a plant for purposes of calculating a dispensary's plant count?

*Plants larger than eight inches tall or eight inches wide, or growing in a container larger than two inches tall and two inches wide are no longer considered immature plants, and therefore require a unique METRC RFID tag and must be counted toward the allowed number of plants that a center may possess. (M 103, R 103)*

b. Are plants in clone machines that do not have rooting mediums, but instead rely on misting the clone, considered a plant?

*This question cannot be answered based on the information and terminology contained therein. Please see response to question 10a.*

Sincerely,



Lewis Koski  
Director