



**CO L O R A D O**

**Department of  
Regulatory Agencies**

**2015 Sunset Review:  
Colorado Retail Marijuana Code**

*Office of Policy, Research and Regulatory Reform  
October 15, 2015*



**COLORADO**

**Department of  
Regulatory Agencies**

Executive Director's Office

October 15, 2015

Members of the Colorado General Assembly  
c/o the Office of Legislative Legal Services  
State Capitol Building  
Denver, Colorado 80203

Dear Members of the General Assembly:

The mission of the Department of Regulatory Agencies (DORA) is consumer protection. As a part of the Executive Director's Office within DORA, the Office of Policy, Research and Regulatory Reform seeks to fulfill its statutorily mandated responsibility to conduct sunset reviews with a focus on protecting the health, safety and welfare of all Coloradans.

Programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review via DORA's website at: [www.dora.colorado.gov/opr](http://www.dora.colorado.gov/opr).

DORA has completed the evaluation of the Colorado Retail Marijuana Code. I am pleased to submit this written report, which will be the basis for my office's oral testimony before the 2016 legislative committee of reference. The report is submitted pursuant to section 24-34-104(8)(a), of the Colorado Revised Statutes (C.R.S.), which states in part:

The department of regulatory agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section...

The department of regulatory agencies shall submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination....

The report discusses the question of whether there is a need for the regulation provided under Article 43.4 of Title 12, C.R.S. The report also discusses the effectiveness of the Executive Director of the Colorado Department of Revenue and the staff of the Marijuana Enforcement Division in carrying out the intent of the statutes and makes recommendations for statutory and administrative changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Joe Neguse  
Executive Director





# COLORADO

## Department of Regulatory Agencies

### 2015 Sunset Review Colorado Retail Marijuana Code

#### SUMMARY

##### *What Is Regulated?*

The Colorado Retail Marijuana Code (Retail Code) creates the framework for the regulation of the retail marijuana industry. It provides for the licensing of retail marijuana stores, retail marijuana cultivation facilities, retail marijuana product manufacturing facilities and retail marijuana testing facilities, as well as the individuals who own and work for such establishments. The Retail Code also provides for the regulation of other aspects of the industry, such as labeling and packaging requirements and diversion prevention. The Retail Code does not address the medical use of marijuana.

##### *Why Is It Regulated?*

Although Amendment 64 to the state's constitution legalized the possession and use of marijuana by individuals who are age 21 and older, marijuana remains illegal under federal law. The Retail Code helps to ensure that the state does not run afoul of the federal government's stated enforcement priorities of preventing diversion to children, other states and criminal organizations.

##### *Who Is Regulated?*

As of the end of fiscal year 14-15, the Executive Director of the Colorado Department of Revenue (Executive Director) had licensed 372 retail stores, 471 retail cultivation facilities, 132 retail product manufacturing facilities, 19 retail testing facilities and 22,518 marijuana industry owners and employees.

##### *How Is It Regulated?*

All individuals who own or work for a licensed retail marijuana establishment must pass a fingerprint-based criminal history background check, demonstrate Colorado residency and demonstrate financial responsibility. Retail establishments must also document their funding sources, ownership structures and right to possess the premises where they operate.

##### *What Does It Cost?*

In fiscal year 14-15, the Executive Director employed 51 full-time equivalent employees and spent approximately \$6.8 million to administer and enforce both the Retail Code and the Colorado Medical Marijuana Code (Medical Code).

##### *What Disciplinary Activity Is There?*

In fiscal year 14-15, the Executive Director denied 109 individual license applications, entered into 9 stipulated agreements, issued 4 summary suspensions, revoked 5 licenses and issued 7 fines totaling \$164,000.

## KEY RECOMMENDATIONS

### *Continue the Retail Code for three years, until 2019.*

Amendment 64 legalized the recreational use of marijuana by those 21 and older, even though marijuana remains illegal under federal law. The Retail Code represents Colorado's effort to implement a strong and effective regulatory and enforcement system that addresses the federal government's enforcement priorities.

### *Align the mandatory testing provisions in the Retail Code to those in the Medical Code.*

Since its creation, the Retail Code has contained provisions addressing the mandatory testing of retail marijuana and retail marijuana products. The Medical Code now mandates testing, too, but its approach to public health and safety is broader, meaning that as science advances, so too can the testing protocols. Therefore, the Retail Code should be aligned to the Medical Code with regards to testing.

### *Clarify that only the Retail Code and the Executive Director can prescribe standards pertaining to packaging and labeling.*

The Retail Code grants clear authority to the Executive Director to promulgate standards pertaining to packaging and labeling. Some local jurisdictions may have implemented their own standards, adding cost and creating confusion for those in the retail marijuana industry, and confusion among consumers. Packaging and labeling are matters of statewide concern and the promulgation of standards relating to them should rest solely with the state.

## METHODOLOGY

As part of this review, Department of Regulatory Agencies staff performed a literature review; interviewed staff at the Marijuana Enforcement Division, officials with state and national industry associations, retail marijuana licensees and representatives of consumer groups, industry associations, law enforcement agencies and local governments; and reviewed federal laws and Colorado statutes and rules.

## MAJOR CONTACTS MADE DURING THIS REVIEW

Cannabis Business Alliance  
Children's Hospital Colorado  
Colorado Association of Chiefs of Police  
Colorado Cannabis Chamber of Commerce  
Colorado Counties, Inc.  
Colorado Department of Agriculture  
Colorado Department of Law  
Colorado Department of Public Health and Environment  
Colorado Department of Public Safety  
Colorado Department of Regulatory Agencies

Colorado Department of Revenue  
Colorado Department of Transportation  
Colorado Municipal League  
Colorado NORML Women's Alliance  
County Sheriffs of Colorado  
Marijuana Industry Group  
National Organization to Reform Marijuana Laws, Colorado  
Southern Colorado Cannabis Council  
Southern Colorado Growers Association  
Smart Colorado

### What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are prepared by:  
Colorado Department of Regulatory Agencies  
Office of Policy, Research and Regulatory Reform  
1560 Broadway, Suite 1550, Denver, CO 80202  
[www.dora.state.co.us/opr](http://www.dora.state.co.us/opr)



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# Background

## Introduction

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria<sup>1</sup> and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are based on the following statutory criteria:

- Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;

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<sup>1</sup> Criteria may be found at § 24-34-104, C.R.S.

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- Whether the agency through its licensing or certification process imposes any disqualifications on applicants based on past criminal history and, if so, whether the disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subparagraph (i) of paragraph (a) of subsection (8) of this section shall include data on the number of licenses or certifications that were denied, revoked, or suspended based on a disqualification and the basis for the disqualification; and
  - Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

## Types of Regulation

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

### Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection - only those individuals who are properly licensed may use a particular title(s) - and practice exclusivity - only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.



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## Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

## Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements - typically non-practice related items, such as insurance or the use of a disclosure form - and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

## Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency - depending upon the prescribed preconditions for use of the protected title(s) - and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

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## Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

## **Sunset Process**

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review via DORA's website at: [www.dora.colorado.gov/opr](http://www.dora.colorado.gov/opr).

The regulatory functions of the Executive Director of the Colorado Department of Revenue (Executive Director) as enumerated in Article 43.4 of Title 12, Colorado Revised Statutes (C.R.S.), shall terminate on July 1, 2016, unless continued by the General Assembly. During the year prior to this date, it is the duty of DORA to conduct an analysis and evaluation of the administration of the Colorado Retail Marijuana Code by the Executive Director pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed regulation of retail marijuana should be continued for the protection of the public and to evaluate the performance of the Executive Director and staff of the Department of Revenue's Marijuana Enforcement Division (MED). During this review, the Executive Director must demonstrate that the regulation serves to protect the public health, safety and welfare, and that the regulation is the least restrictive regulation consistent with protecting the public. This review does not include an analysis of the Medical Marijuana Program at the Colorado Department of Public Health and Environment,<sup>2</sup> the Colorado Medical Board,<sup>3</sup> the Colorado Medical Marijuana Code<sup>4</sup> or the regulation of industrial hemp.<sup>5</sup>

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<sup>2</sup> The Medical Marijuana Program is tasked with maintaining the Medical Marijuana Registry, issuing Registry Identification Cards to medical marijuana patients and registering Primary Caregivers. It is scheduled to sunset in 2019.

<sup>3</sup> The Colorado Medical Board regulates physicians, who recommend medical marijuana to their patients, and in so doing, certify the number of plants to which such patients are entitled. It is scheduled to sunset in 2019.

<sup>4</sup> The Medical Marijuana Code is the statute under which the medical marijuana industry is regulated. It is scheduled to sunset in 2019.

<sup>5</sup> The Colorado Department of Agriculture regulates industrial hemp and its statutory authority to do so is not subject to sunset review.

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DORA's findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

## Methodology

As part of this review, DORA staff performed a literature review; interviewed MED staff, officials with state and national industry associations, retail marijuana licensees and representatives of consumer groups, industry associations, law enforcement agencies and local governments; and reviewed federal laws and Colorado statutes and rules.

## Profile of the Retail Marijuana Industry

The term "marijuana" refers to the plant species *Cannabis sativa L.*, and typically refers to the dried leaves, flowers, stems and seeds of that plant.<sup>6</sup> *Cannabis sativa L.*, has two main subspecies, *Cannabis sativa* and *Cannabis indica*. Hybrids of these main subspecies produce what are often referred to as "strains" of marijuana.<sup>7</sup>

The marijuana plant contains over 100 chemicals called cannabinoids.<sup>8</sup> When cannabinoids are ingested, they act on specific molecular targets on brain cells, called cannabinoid receptors, which can over-activate the endocannabinoid system, resulting in the "high" and other effects users often experience.<sup>9</sup>

However, only two cannabinoids are of primary interest—cannabidiol (CBD) and delta-9-tetrahydrocannabinol (THC). These two cannabinoids are found in varying ratios in the marijuana plant. THC, the more widely known of the two because of its mind-altering effects, not only stimulates appetite and reduces nausea, but it may also decrease pain, inflammation and spasticity. CBD is non-psychoactive and may be useful in reducing pain and inflammation, controlling epileptic seizures and possibly even treating psychosis and addictions.<sup>10</sup>

As a result of these characteristics, retail marijuana (commonly referred to as "recreational marijuana" or "adult-use marijuana") most typically contains higher ratios of THC than CBD.

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<sup>6</sup> See National Institute on Drug Abuse. *DrugFacts: Marijuana*. Retrieved April 21, 2014, from [www.drugabuse.gov/publications/drugfacts/marijuana](http://www.drugabuse.gov/publications/drugfacts/marijuana) and ProCon.org. *Medical Marijuana: What Are the Differences between Cannabis Indica and Cannabis Sativa, and How Do They Vary in Their Potential Medical Utility?* Retrieved on May 1, 2014, from [www.medicalmarijuana.procon.org/view.answers.php?questionID=000638](http://www.medicalmarijuana.procon.org/view.answers.php?questionID=000638)

<sup>7</sup> ProCon.org. *Medical Marijuana: What Are the Differences between Cannabis Indica and Cannabis Sativa, and How Do They Vary in Their Potential Medical Utility?* Retrieved on May 1, 2014, from [www.medicalmarijuana.procon.org/view.answers.php?questionID=000638](http://www.medicalmarijuana.procon.org/view.answers.php?questionID=000638)

<sup>8</sup> National Institute on Drug Abuse. *DrugFacts: Is Marijuana Medicine?* Retrieved on April 21, 2014, from [www.drugabuse.gov/publications/drugfacts/marijuana-medicine](http://www.drugabuse.gov/publications/drugfacts/marijuana-medicine)

<sup>9</sup> National Institute on Drug Abuse. *DrugFacts: Marijuana*. Retrieved on April 21, 2014, from [www.drugabuse.gov/publications/drugfacts/marijuana](http://www.drugabuse.gov/publications/drugfacts/marijuana)

<sup>10</sup> National Institute on Drug Abuse. *DrugFacts: Is Marijuana Medicine?* Retrieved on April 21, 2014, from [www.drugabuse.gov/publications/drugfacts/marijuana-medicine](http://www.drugabuse.gov/publications/drugfacts/marijuana-medicine)

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Although human use of marijuana is not new, the legal use of marijuana is a relatively recent phenomenon. Colorado's experience with medical marijuana began in earnest on December 28, 2000, when Amendment 20 took effect. That amendment to Colorado's constitution authorized those with certain debilitating medical conditions to grow, possess and use limited amounts of marijuana.<sup>11</sup>

Colorado's medical marijuana environment evolved dramatically in the years after Amendment 20's passage, and the public's acceptance of marijuana culminated in the passage of Amendment 64 in 2012. In short, Amendment 64 legalized the use and possession of marijuana for those 21 and older, and stipulated that marijuana should be taxed and regulated in a manner similar to alcohol.<sup>12</sup> Additionally, Amendment 64 provided the general outlines for:

- The regulation of industrial hemp;<sup>13</sup>
- The personal use of marijuana;<sup>14</sup> and
- The regulation of marijuana business establishments, including retail stores, cultivation facilities, manufacturing facilities and testing facilities.<sup>15</sup>

While the focus of this sunset review is on the regulation of retail marijuana business establishments, it is important to remember that the state's constitution authorizes anyone who is 21 and older to possess, grow, process or transport up to six marijuana plants and to possess the yield from those plants on the premises upon which it was grown,<sup>16</sup> and to possess, use, display, purchase or transport up to one ounce of marijuana.<sup>17</sup>

The overall annual demand for marijuana by adults in Colorado is estimated at between 104.2 and 157.9 metric tons. This is a combined total for both medical and retail marijuana, and, for retail marijuana, includes demand by out-of-state visitors.<sup>18</sup> In 2014, Colorado's licensed retail marijuana establishments sold to consumers approximately 38,700 pounds of marijuana flower,<sup>19</sup> 2.9 million units of marijuana-infused edible products<sup>20</sup> and 359,000 units of marijuana-infused non-edible products.<sup>21</sup>

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<sup>11</sup> Colo. Const. Art. XVIII, § 14.

<sup>12</sup> Colo. Const. Art. XVIII, §§ 16(1)(a) and (1)(b).

<sup>13</sup> Colo. Const. Art. XVIII, § 16(1)(c).

<sup>14</sup> Colo. Const. Art. XVIII, § 16(3).

<sup>15</sup> Colo. Const. Art. XVIII, § 16(4).

<sup>16</sup> Colo. Const. Art. XVIII, § 16(3)(b).

<sup>17</sup> Colo. Const. Art. XVIII, § 16(3)(a).

<sup>18</sup> Miles Light, et al, "Market Size and Demand for Marijuana in Colorado." Prepared for the Colorado Department of Revenue by the Marijuana Policy Group, July 2014, p. 2.

<sup>19</sup> *Annual Update*, Colorado Department of Revenue, Marijuana Enforcement Division, February 27, 2015, p. 19.

<sup>20</sup> *Annual Update*, Colorado Department of Revenue, Marijuana Enforcement Division, February 27, 2015, p. 25.

<sup>21</sup> *Annual Update*, Colorado Department of Revenue, Marijuana Enforcement Division, February 27, 2015, p. 28.

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To date, 23 states, including Colorado, and the District of Columbia have legalized medical marijuana, and another 15 have legalized the use of CBD only.<sup>22</sup> Furthermore, four states, including Colorado, and the District of Columbia, have legalized the recreational use of marijuana.

Although both medical marijuana and retail marijuana are widely available in Colorado and a growing number of other states, all forms of marijuana remain illegal under federal law.

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<sup>22</sup> ProCon.org. *23 Legal Medical Marijuana States and DC*. Retrieved on August 20, 2015, from <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>

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## Legal Framework

### History of Regulation

On November 7, 2000, the voters of Colorado passed Amendment 20 to the state's constitution, effectively decriminalizing the medical use of the drug. Amendment 20 became effective on December 28, 2000.

In the years that followed, local governments began licensing medical marijuana dispensaries.

On October 19, 2009, the U.S. Department of Justice issued what has come to be known as the "Ogden Memo," which, while recognizing the plenary authority of the various U.S. Attorneys, directed they,

should not focus federal resources in [their] states on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.<sup>23</sup>

Thus, Colorado's 2010 legislative session began within the context of the state's local governments having created a patchwork of regulations and the federal government having indicated that it might not enforce federal law with fervor.

House Bill 10-1284 created the Colorado Medical Marijuana Code (Medical Code), which, among other things, created the framework for the licensing of medical marijuana centers, their cultivation operations, medical marijuana-infused product manufacturers and the individuals who own and work in such facilities. The bill named the Executive Director of the Colorado Department of Revenue (Executive Director) as the state licensing authority to administer the Medical Code.

Several additional pieces of medical marijuana-related legislation passed in the ensuing years. In November 2012, the voters of Colorado legalized the recreational use of marijuana. The ballot initiative, known as Amendment 64, took effect on December 10, 2012, requiring the Executive Director to begin accepting license applications for retail marijuana stores, cultivation operations and product manufacturers on October 1, 2013. Though some of the terminology in this amendment differed from that used in HB 10-1284, such as "stores" rather than "centers," the basic licensing structure mirrored what was created in the Medical Code.

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<sup>23</sup> U.S. Department of Justice. *Memorandum for Selected United States Attorneys, from David W. Ogden, Deputy Attorney General, Regarding Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, October 19, 2009. Retrieved October 23, 2013, from <http://blogs.justice.gov/main/archives/192>

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House Bill 13-1317 (HB 1317) implemented Amendment 64 by creating the Colorado Retail Marijuana Code (Retail Code). In so doing, the General Assembly again named the Executive Director as the state licensing authority to administer the Retail Code, and provided for the licensing of retail marijuana stores, retail marijuana cultivation facilities, retail marijuana product manufacturers, retail marijuana testing facilities and the individuals who own and work in them. The regulatory structures created in the Retail and Medical Codes operate parallel to one another.

Additionally, the bill continued the Medical Code's concept of vertical integration in the retail marijuana industry, but only through September 30, 2014, at which time, vertical integration in the retail marijuana industry would no longer be required. It also stipulated that until October 1, 2014, only those establishments previously licensed and in good standing under the Medical Code could obtain licensure under the Retail Code. The bill also adopted the Medical Code's requirement that anyone holding an ownership interest in a marijuana license must have been a Colorado resident for at least two years.

In an attempt to keep legal marijuana out of the hands of underage individuals, the General Assembly passed House Bill 14-1122, which, among other things, authorized retail marijuana licensees and their employees to confiscate fraudulent identification cards and to detain those attempting to use such cards to unlawfully obtain retail marijuana. The bill also added definitions for the terms "opaque" and "resealable," both of which are critical to discussions of marijuana packaging, to the Retail and Medical Codes.

House Bill 14-1361 directed that by January 1, 2016, the Executive Director promulgate rules establishing the equivalent of one ounce of retail marijuana flower in various retail marijuana products.

House Bill 14-1366 directed that by January 1, 2016, the Executive Director promulgate rules requiring that edible retail marijuana products be clearly identifiable with a standard symbol indicating that they contain marijuana and are not for consumption by children.

In 2014, the Medical Code underwent its first sunset review. The resulting bill, Senate Bill 15-115, aligned, in many ways, the Medical Code to the Retail Code. In an attempt to coordinate future sunset reviews to provide a comprehensive review of the entire marijuana industry, the bill continued the Medical Code until 2019, which aligned it with the sunset reviews of the Colorado Medical Board and the Medical Marijuana Program administered by the Colorado Department of Public Health and Environment (CDPHE).

Senate Bill 15-196 provided that industrial hemp may be tested by a retail marijuana testing facility licensed under the Retail Code.

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House Bill 15-1283 directed CDPHE to develop, by December 31, 2015, and maintain a marijuana laboratory testing reference library. The bill also directed the Executive Director to promulgate rules creating a process validation testing system for retail marijuana products in serving sizes of 10 milligrams or less.

House Bill 15-1379 provided a pathway for natural persons who are not Colorado residents to invest in a licensed marijuana establishment with the opportunity to become owners when they meet the Retail Code's residency requirements.

Finally, House Bill 15-1387 (HB 1387) limited HB 1317's transferability of medical marijuana to a retail marijuana licensee. After the passage of HB 1387, the only time medical marijuana can be transferred to a retail marijuana licensee is when a medical marijuana cultivation facility converts its license as such into a retail cultivation facility. Transfers between medical marijuana centers and retail stores, and between medical marijuana-infused product manufacturers and retail product manufacturers are no longer permissible.

## Federal Laws and Guidance

The federal Controlled Substances Act classifies marijuana and the cannabinoid tetrahydrocannabinol (THC) in Schedule I,<sup>24</sup> which means that they have a high potential for abuse, they have no currently accepted medical use in treatment in the United States, and there is a lack of accepted safety for use of them under medical supervision.<sup>25</sup> As such, both substances are illegal under federal law.

Nevertheless, the U.S. Department of Justice (DOJ), recognizing the fact that nearly half the states had either decriminalized or legalized medical marijuana, issued a memorandum in 2013 to all U.S. Attorneys providing guidance regarding marijuana enforcement. That memorandum, often referred to as the "Cole Memo," delineated the DOJ's enforcement priorities as preventing:<sup>26</sup>

- The distribution of marijuana to minors;
- Revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- The diversion of marijuana from states where it is legal under state law in some form to other states;
- State-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Violence and the use of firearms in the cultivation and distribution of marijuana;
- Drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;

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<sup>24</sup> 21 U.S.C. §§ 812(c)(c)(10) and (17).

<sup>25</sup> 21 U.S.C. § 812(b)(1).

<sup>26</sup> U.S. Department of Justice. *Memorandum for All United States Attorneys, from James M. Cole, Deputy Attorney General, Regarding Guidance Regarding Marijuana Enforcement, August 29, 2013*, pp. 1-2. Retrieved on October 22, 2013, from [www.justice.gov/iso/opa/resources/3052013829132756857467.pdf](http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf)



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- Growing marijuana on public land and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
  - Marijuana possession or use on federal property.

While the Cole Memo's guidance reinforces the DOJ's position that U.S. Attorneys and federal law enforcement should continue to focus on the enumerated priorities, it also clarified the DOJ's expectation,

that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.<sup>27</sup>

In such circumstances,

enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.<sup>28</sup>

Taken together, these provisions are generally interpreted as meaning that so long as state law creates a robust regulatory environment that is strongly enforced, the federal government will not interfere except in those individual cases where the DOJ's enforcement priorities are at risk.

## Retail Marijuana under Colorado Law

The state's constitution defines marijuana as:

All parts of the plant of the genus cannabis whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including marijuana concentrate. "Marijuana" or "marihuana" does not include industrial hemp, nor does it include the fiber produced from the stalks, oil, or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other product.<sup>29</sup>

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<sup>27</sup> U.S. Department of Justice. *Memorandum for All United States Attorneys, from James M. Cole, Deputy Attorney General, Regarding Guidance Regarding Marijuana Enforcement*, August 29, 2013, p. 2. Retrieved on October 22, 2013, from [www.justice.gov/iso/opa/resources/3052013829132756857467.pdf](http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf)

<sup>28</sup> U.S. Department of Justice. *Memorandum for All United States Attorneys, from James M. Cole, Deputy Attorney General, Regarding Guidance Regarding Marijuana Enforcement*, August 29, 2013, p. 3. Retrieved on October 22, 2013, from [www.justice.gov/iso/opa/resources/3052013829132756857467.pdf](http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf)

<sup>29</sup> Colo. Const. Art. XVIII, § 16(2)(f).

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Industrial hemp is cannabis with a THC concentration that does not exceed 0.3 percent on a dry weight basis.<sup>30</sup>

Any individual who is at least 21 years old may:

- Possess, use, display, purchase or transport marijuana accessories or one ounce or less of marijuana;<sup>31</sup>
- Possess, grow, process or transport no more than six marijuana plants and possess the marijuana produced by those plants on the premises where the plants were grown, provided that the growing takes place in an enclosed, locked space, is not conducted openly or publicly and is not made available for sale;<sup>32</sup>
- Transfer one ounce or less of marijuana without remuneration to a person who is at least 21 years old;<sup>33</sup>
- Consume marijuana, provided that such consumption is not open and public or in a manner that endangers others;<sup>34</sup> and
- Assist another person who is at least 21 years old in any of the acts described above.<sup>35</sup>

Although individuals may possess and use marijuana, only those entities licensed pursuant to the Retail Code may grow, manufacture and sell retail marijuana.<sup>36</sup> Retail marijuana, in turn, is defined as marijuana that is cultivated, manufactured, distributed or sold by a licensed retail marijuana establishment.<sup>37</sup> Retail marijuana establishments include retail marijuana stores, retail marijuana cultivation facilities, retail marijuana product manufacturers and retail marijuana testing facilities.<sup>38</sup>

The Retail Code names the Executive Director as the state licensing authority and vests in that position all regulatory authority over retail marijuana.<sup>39</sup>

Towards this end, the Executive Director has developed and maintains a seed-to-sale tracking system that tracks retail marijuana from either seed or immature plant stage until the retail marijuana or retail marijuana product is sold to a customer at a retail store to ensure that no marijuana grown or processed by a retail establishment is sold or otherwise transferred except by a retail store.<sup>40</sup>

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<sup>30</sup> Colo. Const. Art. XVIII, § 16(2)(d).

<sup>31</sup> Colo. Const. Art. XVIII, § 16(3)(a).

<sup>32</sup> Colo. Const. Art. XVIII, § 16(3)(b).

<sup>33</sup> Colo. Const. Art. XVIII, § 16(3)(c).

<sup>34</sup> Colo. Const. Art. XVIII, § 16(3)(d).

<sup>35</sup> Colo. Const. Art. XVIII, § 16(3)(e).

<sup>36</sup> § 12-43.4-102, C.R.S.

<sup>37</sup> § 12-43.4.-103(15), C.R.S.

<sup>38</sup> § 12-43.4-103(17), C.R.S.

<sup>39</sup> §§ 12-43.4-201, 12-43.4-103(24) and 12-43.3-201, C.R.S.

<sup>40</sup> § 12-43.4-202(1), C.R.S. See 1 CCR § 212-2, R 309, Retail Marijuana Code Rules.

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Further, the Executive Director is authorized to, among other things:<sup>41</sup>

- Grant or refuse state licenses for the cultivation, manufacture, distribution, sale and testing of retail marijuana and retail marijuana products;
- Suspend, fine, restrict or revoke such licenses upon a violation of the Retail Code or any rule promulgated thereunder;
- Impose any penalty authorized by the Retail Code or rule promulgated thereunder;
- Hear and determine at a public hearing any contested state license denial and any complaints against a licensee; and
- Maintain the confidentiality of reports or other information obtained from a licensee showing the sales volume or quantity of retail marijuana or retail marijuana products sold.

The Executive Director is required to promulgate rules, and has mostly done so, on a variety of subjects, including:<sup>42</sup>

- Procedures for the issuance, renewal,<sup>43</sup> suspension and revocation of licenses;<sup>44</sup>
- A schedule of application, licensing and renewal fees;<sup>45</sup>
- Qualifications for licensure, including fingerprint-based criminal history record checks, for all owners, officers, managers, contractors, employees and other support staff of entities licensed under the Retail Code;<sup>46</sup>
- A marijuana and marijuana products testing and certification program that includes analysis for residual solvents, poisons or toxins, harmful chemicals, dangerous molds or mildew, filth, harmful microbials, pesticides and potency;<sup>47</sup>
- Security requirements for licensed premises;<sup>48</sup>
- Requirements to prevent the sale or diversion of retail marijuana and retail marijuana products to those under 21 years of age;<sup>49</sup>
- Health and safety regulations and standards for the manufacture of retail marijuana products and the cultivation of retail marijuana;<sup>50</sup>
- Limitations on the display of retail marijuana and retail marijuana products;<sup>51</sup>
- Storage of, warehouses for and transportation of retail marijuana and retail marijuana products;<sup>52</sup>
- Sanitary requirements for retail establishments;<sup>53</sup>
- Records to be kept by licensees;<sup>54</sup>

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<sup>41</sup> § 12-43.4-202(2), C.R.S.

<sup>42</sup> § 12-43.4-202(3), C.R.S.

<sup>43</sup> See 1 CCR § 212-2, R 200, *et seq.*, Retail Marijuana Code Rules.

<sup>44</sup> See 1 CCR § 212-2, R 1300, *et seq.*, Retail Marijuana Code Rules.

<sup>45</sup> See 1 CCR § 212-2, R 207, R 208 and R 209, Retail Marijuana Code Rules.

<sup>46</sup> See 1 CCR § 212-2, R 231, Retail Marijuana Code Rules.

<sup>47</sup> See 1 CCR § 212-2, R 700, *et seq.*, and R 1500, *et seq.*, Retail Marijuana Code Rules.

<sup>48</sup> See 1 CCR § 212-2, R 305 and R 306, Retail Marijuana Code Rules.

<sup>49</sup> See 1 CCR § 212-2, R 404(A), Retail Marijuana Code Rules.

<sup>50</sup> See 1 CCR § 212-2, R 504, R 604, Retail Marijuana Code Rules.

<sup>51</sup> See 1 CCR § 212-2, R 403(C), Retail Marijuana Code Rules.

<sup>52</sup> See 1 CCR § 212-2, R 800, *et seq.*, Retail Marijuana Code Rules.

<sup>53</sup> See 1 CCR § 212-2, R 406, R 504 and R 604, Retail Marijuana Code Rules.

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- The reporting and transmittal of monthly sales tax payments;<sup>55</sup>
  - A schedule of penalties and procedures for issuing and appealing citations for violations;<sup>56</sup>
  - By January 1, 2016, the equivalence of one ounce of retail marijuana flower in various retail marijuana products including retail marijuana concentrate;
  - Specifications of duties of officers and employees of the Executive Director;<sup>57</sup>
  - Instructions for local jurisdictions and law enforcement officers;<sup>58</sup>
  - Requirements for inspections, investigations, searches, seizures and forfeitures;<sup>59</sup>
  - Prohibition of misrepresentation and unfair practices;
  - Requirement that magazines, the primary focus of which is marijuana or marijuana businesses, are only sold in retail marijuana stores or behind the counter in establishments where those under 21 years old are present;
  - Prohibition or regulation of additives to retail marijuana products, including those that are toxic, designed to make the product more addictive, designed to make the product more appealing to children or misleading to consumers;<sup>60</sup>
  - Labeling guidelines concerning the total content of THC per unit of weight; and
  - By January 1, 2016, requirements that edible retail marijuana products be clearly identifiable with a standard symbol indicating that they contain marijuana and are not for consumption by children.

The Executive Director is required to promulgate rules, and has done so, addressing signage, marketing and advertising, including packaging and accessory branding, and prohibitions on:<sup>61</sup>

- Mass-market campaigns that have a high likelihood of reaching those under 21;
- Health or physical benefit claims in advertising, merchandising and packaging;
- Unsolicited pop-up advertising on the internet;
- Banner ads on mass-market web sites;
- Opt-in marketing that does not permit an easy and permanent opt-out feature; and
- Marketing directed towards location-based devices, including cell phones, unless the marketing is a mobile device application installed on the device by the owner of the device who is at least 21 and includes a permanent and easy opt-out feature.

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<sup>54</sup> See 1 CCR § 212-2, R 900, *et seq.*, Retail Marijuana Code Rules.

<sup>55</sup> See 1 CCR § 212-2, R 902, Retail Marijuana Code Rules.

<sup>56</sup> See 1 CCR § 212-2, R 1300, *et seq.*, Retail Marijuana Code Rules.

<sup>57</sup> See 1 CCR § 212-2, R 1201, Retail Marijuana Code Rules.

<sup>58</sup> See 1 CCR § 212-2, R 1401, Retail Marijuana Code Rules.

<sup>59</sup> See 1 CCR § 212-2, R 1202, Retail Marijuana Code Rules.

<sup>60</sup> See 1 CCR § 212-2, R 504(F) and R 604(F), Retail Marijuana Code Rules.

<sup>61</sup> § 12-43.4-202(3)(c)(i), C.R.S. See 1 CCR § 212-2, R1100, *et seq.*, Retail Marijuana Code Rules.

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The Executive Director is required to promulgate rules, and has done so, addressing labeling requirements that include:<sup>62</sup>

- The license number of the retail cultivation facility that grew the retail marijuana;
- The license number of the retail store;
- An identity statement and standardized graphic symbol;
- The batch number;
- A net weight statement;
- THC and cannabidiol (CBD) potency;
- A list of any nonorganic pesticides, fungicides, herbicides and solvents used during cultivation or production;
- A statement to the effect of: "This product contains marijuana and was cultivated or produced without regulatory oversight for health, safety, or efficacy, and there may be health risks associated with the consumption of the product";
- Warning labels;
- Solvents used in the extraction process;
- Amount of THC per serving and the number of servings per package for retail marijuana products;
- A list of ingredients and possible allergens for retail marijuana products;
- A recommended "use by" or expiration date for retail marijuana products;
- A nutritional fact panel for edible retail marijuana products; and
- A universal symbol indicating the package contains marijuana.

The Executive Director is required to promulgate rules, and has done so, prohibiting the sale of retail marijuana or retail marijuana products unless:<sup>63</sup>

- The product is packaged by the retail store or the retail product manufacturer in packaging that complies with the federal Poison Prevention Packaging Act of 1970, or
- The product is placed in an opaque and resealable exit package or container at the point of sale prior to exiting the store.

The Executive Director is required to promulgate rules, and has done so, pertaining to serving sizes for edible retail marijuana products. Such servings must not contain more than 10 milligrams (mg) of active THC and the total amount of active THC must not exceed 100 mg in a sealed internal package.<sup>64</sup>

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<sup>62</sup> § 12-43.4-202(3)(a)(VII), C.R.S. See 1 CCR § 212-2, R 1000, *et seq.*, Retail Marijuana Code Rules.

<sup>63</sup> § 12-43.4-202(3)(c)(III), C.R.S. See 1 CCR § 212-2, R 1006.5, Retail Marijuana Code Rules.

<sup>64</sup> § 12-43.4-202(3)(c)(V), C.R.S. See 1 CCR §§ 212-2, R 1004(B)(2)(c) and R 1004.5(B)(2)(b), Retail Marijuana Code Rules.

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In order to manage production of retail marijuana in the state, the Executive Director may limit the number of licenses issued, or the amount of production permitted by individual licensees or all licensees collectively.<sup>65</sup>

The Executive Director is authorized to issue four distinct types of licenses to retail establishments:<sup>66</sup>

- Stores,
- Cultivation facilities,
- Product manufacturing facilities, and
- Testing facilities.

A retail cultivation facility is an entity licensed to cultivate, prepare and package retail marijuana and sell retail marijuana to retail stores, to retail product manufacturing facilities and to other retail cultivation facilities, but not to consumers.<sup>67</sup>

The Executive Director is required to develop a classification system for retail cultivation facilities based upon any combination of square footage of the facility; lights, lumens or wattage; lit canopy; the number of plants or other reasonable metrics.<sup>68</sup>

To this end, the Executive Director has determined that new retail cultivation facility licensees are permitted to grow up to 3,600 plants at any one time, and after two quarters of sales, may seek a waiver to grow more plants, at progressive increments of up to 6,000 plants and then up to 10,200 plants.<sup>69</sup> As of this writing, the Executive Director is engaged in rulemaking proceedings to amend these production management rules. As a result, they are likely to change by the end of calendar year 2015.

Retail cultivation facilities must remit any applicable excise tax to the Department of Revenue, based on the average wholesale price of marijuana as determined by the Executive Director.<sup>70</sup>

A retail product manufacturing facility is an entity licensed to purchase retail marijuana; manufacture, prepare and package retail marijuana products and sell them to other retail product manufacturing facilities and to retail stores, but not to consumers.<sup>71</sup>

Retail marijuana products are concentrated marijuana products and marijuana products that comprise marijuana and other ingredients and are intended for use or consumption, such as edible products, ointments and tinctures.<sup>72</sup>

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<sup>65</sup> § 12-43.4-202(4)(b)(i), C.R.S.

<sup>66</sup> Colo. Const. Art. XVIII, §§ 16(4)(b), 16(4)(c), 16(4)(d) and 16(5)(e), and § 12-43.4-401(1), C.R.S.

<sup>67</sup> Colo. Const. Art. XVIII, § 16(2)(h) and § 12-43.4-103(16), C.R.S.

<sup>68</sup> § 12-43.4-202(4)(a), C.R.S.

<sup>69</sup> 1 CCR § 212-2, R 212, Retail Marijuana Code Rules.

<sup>70</sup> § 12-43.4-403(3), C.R.S.

<sup>71</sup> Colo. Const. Art. XVIII, § 16(2)(j) and § 12-43.4-103(19), C.R.S.

<sup>72</sup> Colo. Const. Art. XVIII, § 16(2)(k) and § 12-43.4-103(18), C.R.S.

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Retail product manufacturers are generally prohibited from:

- Adding marijuana to any trademarked food product, except that such products may be used as component ingredients in a retail marijuana product;<sup>73</sup>
- Intentionally or knowingly labeling or packaging a retail marijuana product in a manner that would cause a reasonable consumer confusion as to whether the product contains marijuana;<sup>74</sup>
- Labeling or packaging a product in violation of any federal trademark law or regulation;<sup>75</sup> and
- Preparing retail marijuana products at a facility that is used to produce products other than retail marijuana products.<sup>76</sup>

All retail marijuana products that require refrigeration to prevent spoilage must be stored and transported in a refrigerated environment.<sup>77</sup>

Any licensed retail establishment must submit samples of retail marijuana and retail marijuana products to a licensed retail testing facility so that those samples may be tested for, among other things, potency, homogeneity, residual solvents, harmful chemicals and microbials.<sup>78</sup> A retail testing facility is an entity licensed to analyze and certify the safety and potency of retail marijuana.<sup>79</sup> No person who has an interest in a retail testing facility license may have an interest in any other marijuana license, either retail or medical.<sup>80</sup>

A retail store is an entity licensed to purchase retail marijuana from retail cultivation facilities and retail marijuana products from retail product manufacturing facilities and to sell such products to consumers.<sup>81</sup>

A retail store must purchase retail marijuana from a licensed retail cultivation facility.<sup>82</sup> A retail store may purchase retail marijuana products from a licensed retail product manufacturer, but the retail marijuana products can only be sold to consumers if they are prepackaged and labeled as required by the Executive Director.<sup>83</sup>

The amount of retail marijuana that a consumer may purchase from a retail store in a single transaction depends entirely upon whether that consumer is a resident of Colorado. Colorado residents may purchase no more than one ounce of retail marijuana or its equivalent in retail marijuana products, while non-residents are limited to no more than a quarter ounce.<sup>84</sup>

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<sup>73</sup> § 12-43.4-404(1)(e)(I), C.R.S.

<sup>74</sup> § 12-43.4-404(1)(e)(II), C.R.S.

<sup>75</sup> § 12-43.4-404(1)(e)(III), C.R.S.

<sup>76</sup> § 12-43.4-404(2), C.R.S.

<sup>77</sup> § 12-43.4-404(9), C.R.S.

<sup>78</sup> §§ 12-43.4-202(3)(a)(IV), 12-43.4-402(4), 12-43.4-403(5) and 12-43.4-404(6), C.R.S.

<sup>79</sup> Colo. Const. Art. XVIII, § 16(2)(I) and § 12-43.4-103(21), C.R.S.

<sup>80</sup> § 12-43.4-405(3), C.R.S.

<sup>81</sup> Colo. Const. Art. XVIII, § 16(2)(n) and § 12-43.4-103(20), C.R.S.

<sup>82</sup> § 12-43.4-402(1)(b), C.R.S.

<sup>83</sup> § 12-43.4-402(2), C.R.S.

<sup>84</sup> § 12-43.4-402(3)(a), C.R.S.

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A retail store that sells more than a quarter ounce to an individual who is not a Colorado resident commits a Class 2 misdemeanor, which is punishable by between 3 and 12 months imprisonment, a fine of between \$250 and \$1,000, or both.<sup>85</sup>

Prior to making any sale, an employee of a retail store must verify that the purchaser has valid identification showing that he or she is at least 21. If fraudulent identification is presented, the employee may confiscate the identification, detain the purchaser or both.<sup>86</sup>

A retail store that sells retail marijuana or retail marijuana products to someone under 21 commits a Class 1 misdemeanor, which is punishable by between 6 and 18 months imprisonment, a fine of between \$500 and \$5,000, or both.<sup>87</sup>

Retail marijuana stores are prohibited from selling consumable products that do not contain marijuana<sup>88</sup> or any retail marijuana or retail marijuana products that contain alcohol or nicotine.<sup>89</sup>

No retail marijuana or retail marijuana products may be consumed on the premises of any licensed retail marijuana establishment.<sup>90</sup> Anyone who consumes marijuana on a licensed premises, and any licensee that allows the consumption of retail marijuana on a licensed premises, commits a Class 2 misdemeanor,<sup>91</sup> which is punishable by between 3 and 12 months imprisonment, a fine of between \$250 and \$1,000, or both.<sup>92</sup>

The license of any retail establishment must be held by an owner or owners. In determining ownership, the Executive Director considers, among other things, who:<sup>93</sup>

- Bears risk of loss and opportunity for profit;
- Is entitled to possession of the licensed premises or the premises to be licensed;
- Has final decision-making authority over the operation of the licensed retail establishment;
- Guarantees the retail establishment's debts or production levels;
- Is a beneficiary of the retail establishment's insurance policies;
- Acknowledges liability for the retail establishment's federal, state and local taxes; and
- Is an officer or director in the retail establishment.

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<sup>85</sup> §§ 12-43.4-901(4)(f), 12-43.4-901(6) and 18-1.3-501(1)(a), C.R.S.

<sup>86</sup> § 12-43.4-402(3)(b), C.R.S.

<sup>87</sup> §§ 12-43.4-901(4)(e), 12-43.4-901(6) and 18-1.3-501(1)(a), C.R.S.

<sup>88</sup> § 12-43.4-402(7)(a), C.R.S.

<sup>89</sup> § 12-43.4-402(7)(b), C.R.S.

<sup>90</sup> §§ 12-43.4-402(9), 12-43.4-403(6) and 12-43.4-404(5), C.R.S.

<sup>91</sup> §§ 12-43.4-901(1) and 12-43.4-901(6), C.R.S.

<sup>92</sup> § 18-1.3-501(1)(a), C.R.S.

<sup>93</sup> 1 CCR § 212-2, R 204(A), Retail Marijuana Code Rules.



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All license applicants must provide the Executive Director with evidence of having a bond in the amount of \$5,000.<sup>94</sup> No retail establishment may operate without first obtaining both a state license and local jurisdiction approval. As a result, any state license is conditioned upon local jurisdiction approval. If the local jurisdiction does not approve an application within one year, the state license expires and may not be renewed. If the local jurisdiction denies the application, the Executive Director must revoke the state license.<sup>95</sup>

Applicants apply to the Executive Director, who then forwards a copy of the state application to the relevant local jurisdiction.<sup>96</sup>

To apply for a license with the Executive Director, an applicant must submit:<sup>97</sup>

- Evidence of lawful presence, residence and good moral character;
- All information concerning financial and management associations and interests, including any organizational documents of the entity;
- Department of Revenue tax payment information;
- Floor plans for the premises to be licensed; and
- Evidence that the applicant has or will have a right to possess the premises to be licensed.

Similarly, the Executive Director is required to forward to the local jurisdiction, half of the application fee,<sup>98</sup> which for new applicants is \$5,000 and for current medical marijuana licensees seeking to operate a retail establishment is \$500.<sup>99</sup>

The Executive Director must issue a retail license to an applicant no sooner than 45 days and no later than 90 days after receipt of the application, unless the Executive Director or the relevant local jurisdiction denies the application.<sup>100</sup> If the Executive Director fails to issue the license within this time frame and fails to notify the applicant as to the reason, the applicant may resubmit its application directly to the local jurisdiction and, if approved, operate with only local jurisdiction approval.<sup>101</sup>

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<sup>94</sup> § 12-43.4-303(1), C.R.S.

<sup>95</sup> § 12-43.4-304(1), C.R.S.

<sup>96</sup> § 12-43.4-301(1), C.R.S.

<sup>97</sup> 1 CCR § 212-2, R 202(A)(3), Retail Marijuana Code Rules.

<sup>98</sup> Colo. Const. Art. XVIII, § 16(5)(g)(II) and §§ 12-43.4-501(1) and 12-43.4-501(2), C.R.S.

<sup>99</sup> Colo. Const. Art. XVIII, § 16(5)(a)(II) and §§ 12-43.4-501(1) and 12-43.4-501(2), C.R.S.

<sup>100</sup> Colo. Const. Art. XVIII, § 16(5)(g)(III).

<sup>101</sup> Colo. Const. Art. XVIII, § 16(5)(h).

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The Executive Director must deny a state license when:

- The premises upon which the applicant proposes to conduct business do not satisfy the requirements of the Retail Code;<sup>102</sup>
- The premises upon which the applicant proposes to conduct business are the same as or within 1,000 feet of a location that, within the previous two years, the Executive Director denied an application for the same class of license due to the nature of the use or other concern related to the location;<sup>103</sup>
- The applicant is not, or will not be, entitled to possession of the premises upon which the applicant proposes to conduct business;<sup>104</sup> or
- The applicant fails to satisfy the statutory requirements to own and operate a retail marijuana establishment.<sup>105</sup>

The Executive Director may deny or refuse to renew a retail establishment license when:<sup>106</sup>

- The licensee or applicant has violated, does not meet, or has failed to comply with the Retail Code, the Executive Director's rules, or any local jurisdiction requirements;<sup>107</sup>
- The licensee or applicant has failed to comply with any special terms or conditions that were placed on its license by the Executive Director or local jurisdiction;<sup>108</sup> or
- The licensed premises have been operated in a manner that adversely affects the public health or the safety of the immediate neighborhood.<sup>109</sup>

Each license issued under the Retail Code is separate and distinct and a separate license is required for each specific business and each geographical location.<sup>110</sup>

In order to prevent the control of retail establishments by anyone other than the licensee, each applicant and licensee must disclose all persons having a direct or indirect financial interest, and the extent of such interest, in the applicant or licensee.<sup>111</sup>

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<sup>102</sup> § 12-43.4-305(1), C.R.S.

<sup>103</sup> § 12-43.4-307(1)(a), C.R.S.

<sup>104</sup> § 12-43.4-307(1)(b), C.R.S.

<sup>105</sup> § 12-43.4-306(1), C.R.S.

<sup>106</sup> § 12-43.4-305(1), C.R.S.

<sup>107</sup> § 12-43.4-305(1)(a), C.R.S.

<sup>108</sup> § 12-43.4-305(1)(b), C.R.S.

<sup>109</sup> § 12-43.4-305(1)(c), C.R.S.

<sup>110</sup> § 12-43.4-309(7)(a), C.R.S.

<sup>111</sup> § 12-43.4-312, C.R.S.

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Licensees must obtain the Executive Director's permission to affect any change in:

- Ownership,<sup>112</sup>
- Financial interest in the licensee,<sup>113</sup> or
- Location.<sup>114</sup>

Failure to notify the Executive Director of a change in financial interest constitutes a Class 2 misdemeanor, which is punishable by between 3 and 12 months imprisonment, a fine of between \$250 and \$1,000, or both.<sup>115</sup>

Licensees must notify the Executive Director of the name of any manager of a licensee, if other than the licensee itself, and any change in manager within seven days of such a change.<sup>116</sup> Failure to comply with this requirement constitutes a Class 2 misdemeanor.<sup>117</sup>

Dual medical marijuana centers and retail marijuana stores must maintain separate licensed premises, including entrances and exits, inventory, point of sale operations and record keeping. However, if the medical marijuana center sells only to patients who are at least 21, single entrances and exits and a virtual separation of inventory is permitted.<sup>118</sup>

In addition to licensing retail establishments, the Executive Director also licenses individuals by issuing occupational licenses to the owners, managers, operators, employees, contractors and other support staff employed by, working in, or having access to restricted areas of a retail establishment's licensed premises.<sup>119</sup>

No license may be issued to:<sup>120</sup>

- A person until the annual license fee is paid;
- An individual whose criminal history indicates that he or she is not of good moral character;
- An entity if the criminal history of any of its officers, directors, stockholders or owners indicates that such individuals are not of good moral character;
- A person financed in whole or in part by any other person whose criminal history indicates that he or she is not of good moral character;
- A person under the age of 21;
- A person who has failed to provide a surety bond, file any tax return and pay any taxes, interest or penalties due to the Department of Revenue relating to a retail establishment;

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<sup>112</sup> § 12-43.4-308, C.R.S.

<sup>113</sup> § 12-43.4-309(10), C.R.S.

<sup>114</sup> § 12-43.4-309(12), C.R.S.

<sup>115</sup> §§ 12-43.4-901(3)(c), 12-43.4-901(6) and 18-1.3-501(1)(a), C.R.S.

<sup>116</sup> § 12-43.4-309(11), C.R.S.

<sup>117</sup> §§ 12-43.4-901(3)(d) and 12-43.4-901(6), C.R.S.

<sup>118</sup> § 12-43.4-401(2)(b), C.R.S., and 1 CCR § 212-2, R 304(B), Retail Marijuana Code Rules.

<sup>119</sup> § 12-43.4-401(1)(e), C.R.S.

<sup>120</sup> § 12-43.4-306(1), C.R.S.

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- A person who has discharged a sentence for a felony conviction in the five years immediately preceding the application;
  - A person who has discharged a sentence for a felony conviction relating to a controlled substance in the 10 years immediately preceding the application, except that the Executive Director may grant a license if the conviction is related to marijuana and the offense does not rise to the level of a felony on the date of application;
  - A person who employs another person at a retail establishment who has not submitted fingerprints for a criminal history record check or whose criminal history record check reveals that the person is ineligible for licensure;
  - A sheriff, deputy sheriff, police officer, prosecuting officer or an employee of the Executive Director or a local jurisdiction's licensing authority; or
  - A person applying for a license for a location that is currently licensed as a retail food establishment or wholesale food registrant.

All officers, managers and employees of a licensed retail establishment must be Colorado residents as of the date of their respective license applications.<sup>121</sup> All owners must have been Colorado residents for at least two years.<sup>122</sup>

All licenses issued under the Retail Code are valid for one year from the date of issuance.<sup>123</sup> Licensees are notified of the need to renew 90 days prior to the expiration of the license,<sup>124</sup> and licensees who fail to renew their licenses within 90 days after the expiration date must apply for a new license.<sup>125</sup> The Executive Director may, at his or her discretion, administratively continue a license and accept a later application for renewal.<sup>126</sup>

Each licensee's physical premises, as well as any books and records (which must be retained for three years), are subject to inspection and examination by the Executive Director.<sup>127</sup>

The Executive Director may fine a licensee or suspend or revoke any license issued under the Retail Code.<sup>128</sup> If a licensee faces a suspension period of 14 days or less, the licensee may petition the Executive Director for a fine in lieu of suspension,<sup>129</sup> which fine may not be less than \$500 and may not exceed \$100,000.<sup>130</sup>

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<sup>121</sup> § 12-43.4-309(5), C.R.S.

<sup>122</sup> § 12-43.4-306(1)(k), C.R.S.

<sup>123</sup> § 12-43.4-309(5), C.R.S.

<sup>124</sup> § 12-43.4-310(1), C.R.S.

<sup>125</sup> 1 CCR § 212-2, R 203(C)(3), Retail Marijuana Code Rules.

<sup>126</sup> § 12-43.4-310(2)(b), C.R.S.

<sup>127</sup> § 12-43.4-701, C.R.S.

<sup>128</sup> § 12-43.4-601(1), C.R.S.

<sup>129</sup> § 12-43.4-601(3)(a), C.R.S.

<sup>130</sup> § 12-43.4-601(3)(b), C.R.S.

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If the Executive Director has objective and reasonable grounds to believe that a licensee has deliberately and willfully violated the Retail Code or the Executive Director's rules, or that the public health, safety or welfare requires emergency action, the Executive Director may summarily suspend a license.<sup>131</sup>

Any disciplinary action imposed by the Executive Director may include an order to destroy some or all of the licensee's retail marijuana or retail marijuana products.<sup>132</sup> In such a case, the licensee has 15 days within which to petition the state district court in the City and County of Denver for a stay of the order.<sup>133</sup>

All decisions made by the Executive Director are subject to review by the state's district courts.<sup>134</sup>

It is a Class 2 misdemeanor, punishable by between 3 and 12 months imprisonment, a fine of between \$250 and \$1,000, or both, for any person to:<sup>135</sup>

- Buy, sell, transfer, give away or acquire retail marijuana or retail marijuana products except as allowed by the Retail Code or the state's constitution; or
- Have an unreported financial or direct interest in a license issued pursuant to the Retail Code.

It is also a Class 2 misdemeanor, for any licensee to:<sup>136</sup>

- Be within a limited-access area unless the person's license badge is displayed, or
- Fail to designate areas of ingress and egress for limited-access areas and post signs in conspicuous locations.

Finally, it is a Class 2 misdemeanor for any licensee that sells retail marijuana or retail marijuana products to:<sup>137</sup>

- Display any signs that are inconsistent with local laws or regulations;
- Use advertising that is misleading, deceptive or false or that is designed to appeal to minors;
- Provide public premises for the purpose of consuming retail marijuana or retail marijuana products;
- Have in possession or upon the licensed premises any marijuana, the sale of which is not permitted by the license;
- Have on the licensed premises any retail marijuana, retail marijuana products or retail marijuana paraphernalia that shows evidence of the retail marijuana having been consumed or partially consumed;

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<sup>131</sup> §§ 12-43.4-601(2) and 24-4-104(4)(a), C.R.S.

<sup>132</sup> § 12-43.4-602(4), C.R.S.

<sup>133</sup> § 12-43.4-602(5), C.R.S.

<sup>134</sup> §§ 12-43.4-801 and 24-4-106(4), C.R.S.

<sup>135</sup> §§ 12-43.4-901(2), 12-43.4-901(6) and 18-1.3-501(1)(a), C.R.S.

<sup>136</sup> §§ 12-43.4-901(3) and 12-43.4-901(6), C.R.S.

<sup>137</sup> §§ 12-43.4-901(4) and 12-43.4-901(6), C.R.S.

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- Distribute retail marijuana or retail marijuana products, with or without remuneration, directly to another person using a mobile distribution center;
  - Violate certain provisions of the state’s Unfair Practices Act as they relate to discriminatory sales or sales below cost; or
  - Abandon a licensed premises or otherwise cease operations without notifying the Executive Director and the relevant local jurisdiction at least 48 hours in advance and without accounting for and forfeiting all retail marijuana and retail marijuana products.

## Local Regulation of Retail Marijuana

Local jurisdictions may prohibit the operation of retail establishments through the enactment of an ordinance or through an initiated or referred measure. Local jurisdictions that permit retail establishments may enact ordinances or regulations governing the time, place, manner and number of such establishments, as well as the issuance, suspension and revocation of a license issued by the local jurisdiction. No such ordinances or regulations may conflict with the state’s constitution or the Retail Code.<sup>138</sup>

If a particular jurisdiction has not banned retail establishments, such establishments must obtain a state license and local jurisdiction approval before operating.<sup>139</sup> Importantly, local jurisdictions need not issue licenses to retail establishments; they can simply “approve” them.

Regardless of whether the local jurisdiction licenses or approves retail establishments, applicants apply to the Executive Director first, who then forwards a copy of the state application to the relevant local jurisdiction.<sup>140</sup>

Similarly, the Executive Director is required to forward to the local jurisdiction, half of the application fee,<sup>141</sup> which for new applicants is \$5,000 and for current medical marijuana licensees seeking to operate a retail marijuana establishment is \$500.<sup>142</sup>

As of July 9, 2015, at least 45 municipalities, including the City and County of Denver, and at least 19 counties had enacted laws permitting retail marijuana establishments. Notably, one of those counties permits only retail marijuana cultivation.

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<sup>138</sup> Colo. Const. Art. XVIII, § 16(5)(f).

<sup>139</sup> § 12-43.4-304(1), C.R.S.

<sup>140</sup> § 12-43.4-301(1), C.R.S.

<sup>141</sup> Colo. Const. Art. XVIII, § 16(5)(g)(II).

<sup>142</sup> Colo. Const. Art. XVIII, § 16(5)(a)(II) and §§ 12-43.4-501(1) and 12-43.4-501(2), C.R.S.

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## Program Description and Administration

The Colorado Retail Marijuana Code (Retail Code) designates the Executive Director of the Department of Revenue (Executive Director) as the state licensing authority. As such, the Executive Director has all rulemaking, licensing and enforcement authority. As a practical matter, the Director of the Marijuana Enforcement Division (Director and MED, respectively) is responsible for the overall implementation of the Retail Code and the rules promulgated thereunder.

The MED is also tasked with the implementation of the Colorado Medical Marijuana Code (Medical Code). As a result, many of the tables and data in this sunset report pertain to the MED's enforcement of both codes. Where possible, Retail Code-specific data are presented.

Table 1 illustrates, for the fiscal years indicated and for both codes, the MED's program expenditures and full-time equivalent (FTE) employees.

**Table 1  
Agency Fiscal Information**

Fiscal Year	Total Program Expenditure	FTE
10-11	\$4,729,520	22
11-12	\$4,859,446	13
12-13	\$1,805,230	17
13-14	\$4,725,400	35
14-15	\$6,790,577	51

The MED commenced operations in fiscal year 10-11. Both the level of expenditures and the number of FTE have fluctuated considerably over the MED's lifespan. This can be attributed to the various forces at play when regulating new markets.

Expenditures and staffing increased appreciably in fiscal years 13-14 and 14-15. This can be attributed to the assumption of regulatory responsibility for retail marijuana and a more stable funding methodology. Beginning in fiscal year 13-14, the MED has been funded by a combination of license fees and marijuana taxes.

With respect to FTE, it should be noted that the figures in Table 1 represent the staff employed at MED as of the end of each fiscal year. Fiscal year 12-13 is particularly noteworthy since, at one point during that year, the MED employed 35 FTE. Due to significant budget shortfalls, much of that staff had been reassigned by the end of the fiscal year.

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The 51 FTE employed by the MED as of the end of fiscal year 14-15 comprised:

- 1.0 FTE Management—The Director is responsible for management of the MED, budget, rulemaking, public speaking and outreach, responding to executive management and legislative requests/mandates and strategic planning and implementation.
- 1.0 FTE Criminal Investigator IV—The Chief of Investigations is responsible for the day-to-day operation of the MED, facilitates Director requests and mandates, and develops and implements policies and processes.
- 4.0 FTE Criminal Investigator III—The Agents-in-Charge are responsible for the operation of the MED’s licensing operations, including background investigations, as well as for field enforcement operations.
- 6.0 FTE Criminal Investigator II—These investigators supervise field enforcement operations and investigations in the MED’s Denver and regional offices, and they supervise business license application processing and background investigations at the MED’s headquarters in Denver.
- 14.0 FTE Criminal Investigator I—These investigators conduct in-depth background, compliance and criminal investigations, perform site compliance inspections and engage in enforcement actions.
- 9.0 FTE Compliance Investigator I—These investigators assist and support background investigations and field enforcement actions.
- 1.0 FTE General Professional IV—The Communications Specialist manages the MED’s website, develops and maintains data reports, facilitates special projects and is responsible for processing all Colorado Open Records Act and subpoena requests.
- 1.0 FTE Legal Assistant II—This position facilitates the MED’s administrative disciplinary action process, working in conjunction with the Attorney General’s Office.
- 1.0 FTE Office Manager—This position manages administrative business and occupational licensing activities.
- 1.0 FTE Program Assistant II—This position provides administrative support to the Chief of Investigations and other staff.
- 1.0 FTE Program Assistant I—This position provides administrative support to the Director.
- 1.0 FTE Administrative Assistant III—This position is line staff engaged in business and occupational licensing activities.
- 10.0 FTE Administrative Assistant II—These positions provide administrative support to business and occupational licensing activities.

As of the end of fiscal year 14-15, the MED had been appropriated 73.2 FTE. Most of these positions are on track to be filled by the end of calendar year 2015. These FTE are divided into three primary program areas: the Director’s office, licensing and enforcement. While most of this staff works out of the MED’s headquarters in Denver, the MED also has field offices in Colorado Springs, Grand Junction and Longmont.



In addition to license fees, retail marijuana licensees also remit to the state, taxes based on two types of transactions. Retail cultivation facilities pay a 15 percent excise tax on the average wholesale price of retail marijuana, as determined by the Executive Director,<sup>143</sup> upon the first transfer of retail marijuana. When retail marijuana is ultimately sold to a consumer, sales tax is assessed at a rate of 12.9 percent, comprising the standard state sales tax of 2.9 percent, plus a 10 percent retail marijuana sales tax. Importantly, local jurisdictions may impose their own excise and sales taxes.

The average wholesale price (also referred to as the average market rate) upon which the excise tax is paid is not necessarily the price paid in any given transaction. Rather, the Executive Director determines this figure by examining the wholesale transactions recorded in the MED’s Marijuana Enforcement, Tracking, Reporting and Compliance computerized inventory tracking system (METRC)<sup>144</sup> and then excluding certain types of data, such as:

- Confirmed transfers between licensees within a vertically integrated business structure;
- Data entered with obvious incorrect unit measurements (i.e., reporting immature plants by the pound, rather than by plant); and
- Medical marijuana transfers.

The Executive Director has calculated the average wholesale price four times since retail marijuana became legal. Table 2 illustrates the average wholesale price for the type of marijuana indicated, plus the actual excise tax imposed on that unit.

**Table 2**  
**Average Wholesale Price of Retail Marijuana and Amount of Excise Tax**

Form of Marijuana	Average Wholesale Price as of January 1, 2014 <sup>145</sup>	Amount of Tax Due	Average Wholesale Price as of July 1, 2014	Amount of Tax Due	Average Wholesale Price as of January 1, 2015	Amount of Tax Due	Average Wholesale Price as of July 1, 2015	Amount of Tax Due
Flower Rate (\$/pound)	\$1,876.00	\$281.40	\$1,876.00	\$281.40	\$2,007.00	\$301.05	\$1,868.00	\$280.20
Trim Rate (\$/pound)	\$296.00	\$44.40	\$296.00	\$44.40	\$364.00	\$54.60	\$370.00	\$55.50
Immature Plant Rate (\$/plant)	\$9.00	\$1.35	\$9.00	\$1.35	\$9.00	\$1.35	\$8.00	\$1.20

<sup>143</sup> Although the Executive Director establishes the average wholesale price of retail marijuana for the purposes of levying the excise tax, the process by which this is conducted lies outside the scope of this sunset review.

<sup>144</sup> METRC is the computer program through which the MED tracks medical and retail marijuana inventory. Marijuana plants are identified as either medical or retail, tagged with radio frequency identification tags (RFID tags) when they are planted in growing media. The plants are then tracked throughout their growth cycles, through harvesting and ultimately sale to a consumer. This is often referred to as “seed-to-sale tracking.”

<sup>145</sup> Retail marijuana sales began on January 1, 2014.

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Flower, sometimes called “bud,” refers to the flower of the marijuana plant, and is mostly sought for smoking.

Trim refers to the leaves and parts of the cannabis plant that contain tetrahydrocannabinol, and are therefore valuable, but in lower concentrations than what is typically found in flower. Trim is often purchased by retail product manufacturing facilities to make marijuana concentrate, which, in turn, can be used to infuse marijuana into both edible and non-edible products.

Although the retail marijuana industry is still relatively young, Table 2 illustrates that the average wholesale price has not fluctuated too much. As METRC captures more data relating to wholesale transactions, the average wholesale price can be expected to more closely approximate the prices actually being paid in various transactions.

Table 3 illustrates, for the fiscal years in which retail marijuana transactions have occurred, the revenue generated by the various taxes.

**Table 3  
Retail Marijuana Tax Receipts**

<b>Fiscal Year</b>	<b>State Sales Tax Receipts (2.9%)</b>	<b>State Marijuana Sales Tax Receipts (10%)</b>	<b>State Excise Tax Receipts (15%)</b>	<b>Total State Tax Receipts</b>
13-14	\$2,706,299	\$9,023,352	\$3,014,839	\$14,744,490
14-15	\$11,816,410	\$42,017,797	\$23,995,775	\$77,829,982
<b>Total</b>	<b>\$14,522,709</b>	<b>\$51,041,149</b>	<b>\$27,010,614</b>	<b>\$92,574,472</b>

The data in Table 3 pertain to state taxes only. Most local jurisdictions impose their own sales and excise taxes.

Tax receipts increased substantially in fiscal year 14-15 because retail marijuana became legal on January 1, 2014, halfway through fiscal year 13-14. An additional factor impacting excise tax receipts is the fact that licensees were allowed a one-time, excise-tax free transfer of plants and marijuana when those plants and marijuana converted from medical marijuana into retail marijuana. Due to legislation passed in 2015, such tax-exempt transfers no longer occur and the types of transfers that can be made have been limited.

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## Licensing

The Executive Director issues five basic types of licenses: retail marijuana store, retail marijuana cultivation facility, retail marijuana product manufacturing facility, retail marijuana testing facility and occupational. The first four types are issued to businesses and the last is issued to individuals. The Executive Director also registers vendors who work with both licensed retail and medical marijuana businesses.

All initial license applications must be submitted in person at a MED office. In general, occupational licenses can be submitted at any MED office, but business licenses must be submitted at the MED's headquarters in Denver.

All retail marijuana licenses issued by the MED are valid for one year from the date of issue.

### Occupational Licensing

The Executive Director issues four types of occupational licenses:

- **Support** licenses are issued to individuals who perform duties that support the marijuana business' operations, such as sales clerks, cultivation staff, trimmers and cooks;
- **Key** licenses are issued to individuals who perform duties that are key to the marijuana business' operations and have the highest level of responsibility;
- **Associated Key** licenses are issued to individuals who are owners of a marijuana business and who also act as a key executive, employee or agent while physically working in a licensed marijuana business; and
- **Associated Person** licenses are issued to individuals who are owners of a marijuana business but who do not act as a key executive, employee or agent.

Table 4 illustrates, for the four fiscal years indicated, the number of active support and key licenses. Table 4 does not include data pertaining to associated key or associated person licenses. Such data may be found in Table 5.

**Table 4**  
**Occupational Licensing**

Fiscal Year	Key	Support	Total
10-11	157	503	660
11-12	1,083	3,628	4,711
12-13	1,372	4,529	5,901
13-14	2,397	8,892	11,289
14-15	5,003	16,333	21,336

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Importantly, the data in Table 4 represent occupational licenses issued under the Medical Code. As of this writing, the Executive Director had issued a total of 12 occupational licenses under the Retail Code. No distinction is made between key and support licenses issued under the Retail Code.

Until very recently, the licensing qualifications were more rigorous under the Medical Code than under the Retail Code.<sup>146</sup> As a result, an individual with an occupational license issued under the Medical Code has been able to work in either a retail or medical marijuana establishment. Since all retail licensees, except testing facilities, were required to have first held medical marijuana licenses, it made more sense for employees to hold occupational licenses that permitted them to work in either or both sides of the marijuana establishment's business.

An additional benefit to holding an occupational license under the Medical Code is the fact that such licenses are valid for two years, while those issued under the Retail Code are statutorily valid for only one year.

Regardless, as the marijuana industry has grown, so too has the overall number of licensed individuals working within it. This is particularly true with the arrival of retail marijuana in fiscal year 13-14. Since then, the number of occupational licensees has nearly doubled each year.

To obtain a support license, the applicant must complete the appropriate application and appear in person at a MED office. Walk-ins are accepted at the MED headquarters in Denver, but appointments must be made at the MED's offices in Colorado Springs, Grand Junction and Longmont. The length of time an applicant must wait for an appointment depends on which office the applicant wishes to use. Appointments are typically available at the Grand Junction office within two days, and it takes between two and five days to obtain an appointment in Longmont. In Colorado Springs, applicants may have to wait for up to two and a half weeks.

The license application requires the applicant to provide proof of age and residency, as well as attest that none of several disqualifiers (e.g., status as a law enforcement officer or employee of a local licensing authority) are applicable. The application further requires the applicant to disclose several matters related to the applicant's criminal history.

When the applicant arrives at the MED office, the application and the applicable fees are collected, along with any supporting documentation (e.g., documents indicating final dispositions of any arrests or criminal convictions, evidence of Colorado residency and photographic identification). Applicants can pay the license fee of \$150 with cash, check or money order. If any element of the application, including court documents evidencing disposition, is missing, the application is not accepted until the missing documents can be supplied.

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<sup>146</sup> Following the 2014 sunset review of the Medical Code and the subsequent passage of Senate Bill 15-115, these licensing qualifications are now the same.

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MED staff runs preliminary criminal history background checks based on the applicant's name and social security number through a Colorado Bureau of Investigation database and the National Crime Information Center database.

If there are problems, the applicant is immediately notified and given an opportunity to take appropriate steps. If there are no problems, the applicant is informed of such and is also informed that his or her photographic license badge will be mailed to him or her as soon as a fingerprint-based criminal history background check is completed by the Federal Bureau of Investigation (usually within 7 to 10 days). The applicant cannot begin working in the marijuana industry until he or she receives the badge.

The process for obtaining a key license is essentially the same as that for a support license, except that the applicant must surrender his or her support license. Additionally, key license applicants must disclose some of their financial history, particularly with regard to any other professional licenses, bankruptcies and judgments. The fee for a key license is \$300.

Occupational licenses may now be renewed by mail. The fee to renew a support license is \$75 and the fee to renew a key license is \$200.

The process for obtaining an associated key or an associated person license is substantially similar to that of obtaining a support or key license. The individuals are photographed and fingerprinted at the time they appear at the MED to submit the underlying business license application, and their license badges are not sent to them until the underlying business license is issued.

The application for an associated key and associated person license delves deeper into the applicant's financial history and relationship to the business license applicant. It also requires the applicant to disclose his or her employment history, income and character references.

The initial fee for either of these license types is \$1,300, and the fee to renew is \$200.

Table 5 illustrates, for the fiscal years indicated, the number of associated key and associated person licenses that have been approved, denied and withdrawn, but not the total number of active licenses. The data in Table 5 reflect associated key and associated person licenses issued to owners of businesses licensed under both codes.

Importantly, new associated person licenses are no longer issued. This license type was discontinued in fiscal year 12-13. Any such licenses approved after that time have been, in practice, renewals of previously issued associated person licenses.

**Table 5**  
**Associated Key and Associated Person Licensing Activity**

	Type	Pending	Approved	Denied	Withdrawn	Totals
FY 10-11	Associated Key	46	520	97	860	1,523
	Associated Person	8	76	8	119	211
	<b>Total</b>					<b>1,734</b>
FY 11-12	Associated Key	1	31	3	6	41
	Associated Person	0	11	0	2	13
	<b>Total</b>					<b>54</b>
FY 12-13	Associated Key	0	42	2	1	45
	Associated Person	0	2	0	0	2
	<b>Total</b>					<b>47</b>
FY 13-14	Associated Key	58	151	1	8	218
	Associated Person	8	89	8	121	226
	<b>Total</b>					<b>444</b>
FY 14-15	Associated Key	4	1,096	101	124	1,325
	Associated Person	0	74	8	14	96
	<b>Total</b>					<b>1,421</b>

The relatively higher totals in fiscal year 10-11 can be attributed to the initial wave of license applications as the MED was created and Medical Code implementation began. Similarly, the dramatic increases beginning in fiscal year 13-14 can be attributed to implementation of the Retail Code.

Figures in the “Approved” column indicate the number of license applications approved, but not necessarily issued. Associated key and associated person licenses are not issued until and unless the underlying business license is ultimately issued. Thus, in fiscal year 10-11, for example, 596 associated key and associated person licenses were approved, but none were issued because none of the underlying business license applications were approved until fiscal year 11-12.

Figures in the “Pending” column reflect applications that were still pending as of the last day of the indicated fiscal year.

Increases in fiscal year 13-14 can be attributed to an increase in the number of changes in ownership of currently licensed marijuana businesses. These could include the addition of new owners or the sale of the entire business to a new group of owners, thus necessitating new associated key licenses.

The high number of withdrawals in fiscal year 10-11 can be attributed to the fact that many people initially misunderstood the qualifications for licensure under the Medical Code. For example, they may not have been Colorado residents for two years, they had disqualifying criminal convictions or they had issues with a taxing authority. The MED allowed these individuals to withdraw their applications, rather than deny them, so as to preserve the applicants’ ability to reapply later and so as to conserve the Executive Director’s own resources by avoiding the need for administrative hearings.

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## Business Licensing

Just as each owner of a retail marijuana business needs to be licensed, so too does the business itself.

As with occupational licenses, new business license applications must be submitted to the MED in person. All of the owners of the business must be physically present so that they can be fingerprinted and photographed as part of the processing of their associated key or associated person license applications. Appointments are generally available within six to eight weeks of requesting one.

To address these waiting times, MED staff recently collaborated with stakeholders to conduct a comprehensive evaluation of the license processing unit. As a result, MED staff has, as recently as September 2015:

- Eliminated, or substantially reduced, the need for in-person appointments for renewals where no information has changed; and
- Enabled relatively minor issues to be addressed by the regional offices. Examples of these include changes in trade names, premises modifications and changes in location within the same jurisdiction.

Additionally, MED staff is in the process of filling vacant staff positions.

During the licensing appointment, MED staff reviews the application package to ensure that it is complete. Each application package must include, at a minimum:

- An application for each license being sought;
- Payment for each license being sought;
- An associated person or associated key license application for each owner;
- A copy of the operating agreement if the applicant is a limited liability company;
- A copy of the articles of incorporation and any bylaws if the applicant is a corporation;
- Copies of any financing documents, such as promissory notes, security interests or other loan documents;
- A copy of a current certificate of good standing issued by the Colorado Secretary of State if the applicant is a business entity;
- A copy of a Trade Name Registration from the Colorado Secretary of State, if applicable;
- A copy of the lease for the property where the business is to be located or other documentation evidencing a right to possess that property;
- A copy of the floor plans for each facility to be licensed;
- Evidence of having a retail marijuana sales tax bond; and
- A copy of a current state sales tax license.

Additionally, the applicant for any of these types of businesses must submit to the MED a license application and supporting documents for the local jurisdiction in which the applicant intends to operate. MED then forwards this package, along with the applicable application fees, to the local licensing jurisdiction.

The fees that must be paid vary depending on the type of license sought. The application fee for a retail store, retail cultivation facility and a retail product manufacturing facility is \$5,000, and the fee for a retail testing facility is \$1,000. Half of the application fee is forwarded to the local jurisdiction along with the license application.

In addition to the application fee, each applicant must pay a license fee at the time of application. The license fee for a retail store is \$3,000 and it is \$2,200 for a retail product manufacturing facility and a retail testing facility.

The license fee for a retail cultivation facility, however, is based on the number of plants the facility seeks to grow. The Executive Director has implemented a system of tiers to organize this process, and the license fee for a cultivation facility is based on its tier. Table 6 illustrates the tiers, the number of plants allowed under each tier and the license fee for each.

**Table 6  
Retail Marijuana Cultivation Facility License Fees by Tier**

Tier Number	Maximum Number of Plants	License Fee
1	3,600	\$2,000
2	6,000	\$4,000
3	10,200	\$8,000

Business licenses are valid for one year. To renew a license, the licensee must pay the license fee for each license held, plus a single \$300-renewal fee.

Table 7 illustrates, for the fiscal years indicated, the number of active retail business licenses.

**Table 7  
Retail Marijuana Business Licensing Activity**

License Type	FY 13-14	FY 14-15
Retail Marijuana Stores	212	372
Retail Marijuana Cultivation Facilities	279	471
Retail Marijuana Product Manufacturing Facilities	63	132
Retail Marijuana Testing Facilities	8	19



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Initially, all retail business license applicants had to already hold medical marijuana business licenses. It was not until July 1, 2014 that businesses could apply directly for a retail license, and those licenses could take effect no earlier than October 1, 2014. This staggering of dates helps to explain the increase in licenses during the last two fiscal years. This trend is likely to continue, at least in the short term.

Table 8 illustrates, for the fiscal year indicated, the number of retail cultivation facilities in each licensing tier.

**Table 8**  
**Retail Marijuana Cultivation Facility Licenses by Tier**

Tier	FY 14-15
1	415
2	18
3	38
<b>Total</b>	<b>471</b>

Data regarding licensing tiers are not available for fiscal year 13-14 because the production management rules that created this system were not yet in place. When the first group of medical marijuana cultivation facilities converted to retail cultivation facilities in the spring of 2014, they simply converted as cultivation facilities. There were no tiers. Once the production management rules creating the tier system became effective, these licensees were placed into their respective tiers based on the number of plants they were growing at that time.

For current conversions, the tier system is roughly based on the medical marijuana center tier system. Under the Medical Code, medical marijuana centers are grouped into tiers based upon the number of registered patients at each. The Medical Code's vertically integrated structure dictates that the cultivation facility attached to each center grows plants for that center. When these cultivation facilities convert to retail marijuana, their tier status transfers over as well. For example, a medical cultivation facility tied to a Tier 2 medical center becomes a Tier 2 retail cultivation facility upon conversion.

To move up in the retail tier system, the retail cultivation facility must obtain a waiver from the MED.

Each new facility (i.e., one that was not already licensed under the Medical Code) begins in Tier 1. If, after two quarters, the facility demonstrates that it has cultivated an amount of plants at or near its maximum allowed and transferred at least 85 percent of the inventory produced over three consecutive months, it may apply for a waiver to move to Tier 2. If it can repeat these performance measures, another waiver may be sought to move to Tier 3. Since implementation, only two such waivers have been granted and both involved movement from Tier 1 to Tier 2.

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This tiered system represents the Executive Director's attempt to manage retail marijuana production. As such, although a license may be characterized as belonging in a certain tier, the aggregate number of plants that a particular ownership group may grow is limited by that tier. In other words, the tier is tied more directly to the owners of the licensed facility than to the license itself. No owner can grow more than the 10,200 plants allowed under Tier 3, regardless of how many retail licenses he, she or it may possess.

This system is expected to evolve substantially as the result of rulemaking in autumn 2015.

In addition to the background checks performed on the owners of a retail marijuana business, in connection with their individual applications for associated key and associated person licenses, MED staff conducts a more comprehensive investigation of the business itself.

For example, MED staff ensures that all owners are identified and have submitted the appropriate occupational license applications. Staff also ensures that all owners have been Colorado residents for at least two years, and staff investigates any financing that might be in place. MED staff seeks to ensure that anyone who shares in the profits of a licensee has been properly disclosed and vetted.

MED investigators also conduct other types of routine investigations that are not the result of a complaint or an indication that anything is amiss. For example, a pre-license inspection is routine, as are investigations resulting from a change in ownership or a change in location.

Table 9 illustrates for the fiscal years indicated, the number and types of investigations performed by MED staff.

**Table 9  
Investigations Summary**

Type	FY 11-12	FY 12-13	FY 13-14	FY 14-15
Corporate Background Investigation	2,378	72	612	45
Licensing Field Inspection	148	696	1,669	416
Change of Ownership	30	166	379	31
Assist Other Agency	5	39	85	2
Investigator Initiated Field Visit	486	132	240	23
Individual Background Investigation	1,734	64	240	34
Mandatory Reporting	2	17	76	1
Voluntary Withdrawal	57	248	391	1
Voluntary Surrender of Product	8	30	44	0
Voluntary Surrender of License	0	41	180	8
Change of Location	8	117	259	12
Modification of Premises	2	89	245	18
Change of Trade Name	1	16	61	3
Renewal Investigation	0	0	299	123
Non-Qualified Sales Check	Not Applicable	Not Applicable	Not Applicable	119
Government Outreach	Not Applicable	Not Applicable	Not Applicable	2
Industry Outreach	Not Applicable	Not Applicable	Not Applicable	1
Waiver Request	Not Applicable	Not Applicable	Not Applicable	2
<b>Total</b>	<b>4,859</b>	<b>1,727</b>	<b>4,780</b>	<b>841</b>

Table 9 includes data for investigations conducted pursuant to both the Retail Code and the Medical Code.

Figures in fiscal year 11-12 for the categories “Corporate Background Investigations” and “Individual Background Investigations” were derived by manually tracking license applications. Since these types of investigations were not tracked in the MED’s licensing system during this fiscal year, figures pertaining to them can be considered approximations.

The MED began tracking the types of investigations reported in the last four rows of Table 9 in this manner beginning in fiscal year 14-15. As a result, these activities may have occurred prior to this time, but they would be included in the other types of investigations.

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Overall fluctuations in numbers can be attributed to the initial round of medical marijuana license applications in fiscal year 11-12, the implementation of the Retail Code in fiscal year 13-14 and the continued evolution of the MED's enforcement efforts. During the early phases of implementation of the Medical Code, for example, MED staff attempted to conduct pre-license inspections of all facilities. As an application processing backlog developed, this emphasis shifted to conducting inspections as soon after license issuance as was practicable. Today, such inspections, and indeed, most routine inspections, are conducted on more of a risk-based basis. This approach helps to explain, at least in part, the relatively low number of investigations in fiscal year 14-15. Investigations have become more targeted.

While many of the investigations identified in Table 9 are self-explanatory, several are not:

- "Mandatory Reporting" includes investigations resulting from a licensee's failure to report to the MED any felony criminal charges or convictions that occurred after the person was licensed.
- "Voluntary Withdrawal" includes those individuals who voluntarily withdrew their applications for licensure.
- "Voluntary Surrender of Product" includes those instances in which a licensee relinquished custody of marijuana without being ordered to do so by the Executive Director. Most often this occurs because the applicant is withdrawing an application, closing the business or the cultivation operation has overproduced marijuana.
- "Voluntary Surrender of License" includes those instances in which a licensee relinquishes an occupational or business license.
- "Non-Qualified Sales Check" includes undercover operations conducted to identify retail stores that might be selling to individuals under 21. MED staff selects a number of stores to target and each is assigned an investigation number. If no improper sale occurs, the investigation is closed. If an improper sale occurs, however, a complaint is opened. Of the 119 such checks reported in Table 9, 107 were conducted at retail stores, resulting in six violations.
- "Waiver Request" includes requests for extended plant counts under the Medical Code, and requests to move from one cultivation tier to another under the Retail Code.

Several of these categories are not investigations (e.g., government and industry outreach), within the ordinary meaning of that word, yet this is the manner in which the MED tracks such activity within its licensing database.

By law, business licenses cannot be issued sooner than 45 days after the date of application, nor later than 90 days after the date of application.

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The Executive Director began accepting applications for retail marijuana licenses from medical marijuana licensees on October 1, 2013, and the first such licenses were issued on December 23, 2013. Provided these licensees also had all the necessary approvals from their local jurisdictions, the earliest any could open for business as retail marijuana establishments was January 1, 2014.

### Vendor Registrations

All businesses that work within the marijuana industry providing services to industry members and the employees of which commonly work within restricted areas of the licensed marijuana business or take custody of retail or medical marijuana product must register with the MED as vendors.

These types of businesses include those that employ trim crews that travel from facility to facility to harvest marijuana crops and couriers that transport marijuana from facility to facility.

To register as a vendor, the business must complete the vendor registration application, which solicits much of the same information as is solicited from a marijuana business license application. However, rather than licensing each owner of a vendor, the Executive Director issues a key occupational license to the individual who takes responsibility for the registered business. Additionally, each of the vendor's employees who will be working in the marijuana industry must obtain an occupational support license.

The fee for a vendor registration is \$300, which includes the fee for the key license as well. Vendor registrations are valid for two years.

Table 10 illustrates, for the fiscal years indicated, the number of total active vendor registrations as of the end of the indicated fiscal year.

**Table 10  
Vendor Registration Activity**

<b>Fiscal Year</b>	<b>Total Active</b>
10-11	4
11-12	45
12-13	63
13-14	99
14-15	127

The number of registered vendors has grown steadily from one year to the next, in tandem with the marijuana industry itself.

The MED does not track the nature of the services provided by each registered vendor, so it is not possible to provide any breakdown of this nature.

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## Complaints/Disciplinary Actions

The Executive Director receives complaints from a variety of sources, including members of the public, licensees and the MED staff. Staff may initiate a complaint when a routine investigation, for example a background investigation or a field investigation, reveals possible violations.

Table 11 illustrates the nature of complaints received in fiscal year 14-15.

**Table 11  
Complaint Information**

Nature of Complaint	FY 14-15
Crime Against a Licensee	23
Sale of Retail Marijuana to Underage Individuals	9
Assist Public Safety Agencies	35
Report of Violations	103
Sale of Marijuana - Other	24
Regulatory Violation	330
Criminal Violation	40
<b>Totals</b>	<b>564</b>

The data in Table 11 apply to both medical and retail marijuana industries. Data for fiscal years prior to fiscal year 14-15 are not available because MED staff did not begin tracking these data in this manner until fiscal year 14-15.

While many of the types of complaints described in Table 11 are self-explanatory, some are not:

- “Crime Against a Licensee” most typically involves marijuana being stolen from a licensed facility.
- “Assist Public Safety Agencies” includes those instances where MED personnel have assisted local law enforcement, public health, local licensing authority or other governmental agencies with an investigation.
- “Report of Violations” refers to a licensee self-reporting that it has committed a violation. This could include items as innocuous as an erroneous entry in METRC.
- “Sale of Marijuana - Other” includes a broad range of violations including selling an excess quantity of marijuana to a purchaser, selling an expired product and selling medical marijuana to a patient with an expired medical marijuana registration.
- “Regulatory Violations” refers to allegations that a licensee has violated a provision of one of the codes or of the rules promulgated thereunder. The MED does not track such allegations in any greater detail. So, for example, the MED cannot report on how many “Regulatory Violations” pertained to incorrect labeling or employees working without their license badges.

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- “Criminal Violations” are similar to “Regulatory Violations” in that they refer to allegations that a licensee has engaged in conduct that is criminal in nature. Again, the MED does not track such allegations in any greater detail.

When a complaint is received, it is assigned to an investigator based on geographic region.<sup>147</sup> If the complaint appears to be non-jurisdictional (e.g., home grows), the investigator may forward the information to local law enforcement and/or dismiss.

If the case is jurisdictional, the investigator begins the investigation. Depending on the issue, the investigator may conduct a site visit and he or she may contact local law enforcement to determine if that agency has any interest in joining the investigation.

If the complaint is unfounded, it is closed. However, if a violation is found, the MED’s progressive disciplinary process is implemented.

The level of discipline taken is determined, in part, by the severity and type of violation, and whether there are any mitigating or aggravating circumstances. In short, the Executive Director classifies all violations as license infractions, license violations or license violations affecting public safety.

License infractions tend to be the least severe and may include failure to display required badges, unauthorized modifications of the premises of a minor nature, or failure to notify the Executive Director of a minor change in ownership. Possible penalties include a verbal or written warning, license suspension, license restriction, a fine per individual violation or a fine in lieu of suspension of up to \$10,000.<sup>148</sup>

License violations tend to be more severe, but generally do not have an immediate impact on the health, safety and welfare of the public. These may include advertising or marketing violations, packaging or labeling violations that do not directly impact consumer safety, failure to maintain minimum security requirements, failure to keep and maintain adequate business books and records and minor clerical errors in METRC. Possible penalties include written warnings, license suspension, a fine per individual violation, a fine in lieu of suspension of up to \$50,000, license restrictions and license revocation.<sup>149</sup>

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<sup>147</sup> Although the MED has offices in Denver, Colorado Springs, Grand Junction and Longmont, the MED has actually divided the state into four geographic regions: Denver, South, North and Western Slope. The investigators assigned to the South region work out of the Colorado Springs office and those assigned to the Western Slope work out of the Grand Junction office. Those assigned to Denver and the North region work out of the Denver and Longmont offices.

<sup>148</sup> 1 CCR §§ 212-1, M 1307(A)(3) and R 1307(A)(3).

<sup>149</sup> 1 CCR §§ 212-1, M 1307(A)(2) and R 1307 (A)(2).

License violations affecting public safety are the most severe types of violation and include consuming marijuana on a licensed premises, marijuana sales in excess of the relevant transaction limit, permitting the diversion of marijuana outside the regulated distribution system, possessing marijuana from outside the regulated distribution system, misstatements or omissions in METRC, and packaging and labeling violations that directly impact consumer safety. Possible penalties include license suspension, a fine per individual violation, a fine in lieu of suspension of up to \$100,000 and license revocation.<sup>150</sup>

Mitigating and aggravating factors may include:<sup>151</sup>

- Whether the licensee took any actions to prevent the violation;
- The licensee’s past history of success or failure with compliance inspections;
- Whether the licensee has taken any actions to correct the violation;
- Whether the licensee has previously committed any violation;
- The willfulness and deliberateness of the violation;
- The circumstances surrounding the violation;
- Whether an owner or manager committed the violation, or directed an employee to commit the violation; and
- Whether the licensee has participated in a marijuana responsible vendor training program.

The Executive Director does not track violations in a way that lends itself to reporting such data. Rather, emphasis has been placed on tracking outcomes. Table 12 illustrates, for the fiscal years indicated, the number and types of agency actions taken against retail marijuana business licensees.

**Table 12**  
**Agency Actions**

Action	FY 13-14		FY 14-15	
	Actions	Licenses Affected	Actions	Licenses Affected
Assurances of Voluntary Compliance	Not Applicable	0	5	7
Denials	10	10	11	11
License Revocations	0	0	2	5
Orders to Show Cause	0	0	14	27
Stipulated Agreements	1	2	7	18
Summary Suspensions	1	3	4	13

<sup>150</sup> 1 CCR §§ 212-1, M 1307(A)(1) and R 1307(A)(1).

<sup>151</sup> *iComply Training Manual: Responsible Vendor Training*, iComply (2014), p. 14.



Recall that initially, only businesses holding medical marijuana licenses could apply for and obtain retail business licenses. As a result, all final agency actions taken in fiscal year 13-14 were actually based upon disciplinary actions taken against those businesses' related medical marijuana licenses.

In fiscal year 14-15, the Executive Director began accepting Assurances of Voluntary Compliance (AVCs). An AVC may include a stipulation for a payment commensurate with the acts or practices involved and an amount necessary to restore money or property which may have been acquired by the alleged violator because of the acts or practices. An AVC does not constitute an admission of a violation, but failure to comply with the terms of an AVC constitutes *prima facie* evidence of a violation of the Retail Code.<sup>152</sup>

Since many owners hold multiple licenses and violations may involve multiple licenses, Table 12 provides detail as to the number of actions taken and the number of licenses affected.

Table 13 illustrates, for fiscal year 14-15, the number and value of fines imposed on retail marijuana licensees.

**Table 13  
Retail Marijuana Fines  
Fiscal Year 14-15**

Number	Reason for Fines Imposed	Total Value of Fines Imposed
3	Inspection Failures - Multiple Compliance Violations	\$135,000
1	Inspection Failure - Labeling Violations	\$10,500
1	Lack of Local License	\$3,500
1	Commenced Retail Sales Prior to One-Time Transfer	\$7,500
1	Under 21 Sales Operative	\$7,500
<b>Total</b>		<b>\$164,000</b>

No fines were assessed in fiscal year 13-14. Retail marijuana sales began on January 1, 2014, halfway through fiscal year 13-14. The lack of fines can be attributed to a combination of factors. First, the MED placed greater emphasis on bringing licensees into compliance with the new set of rules and statutory requirements, rather than strict enforcement. Second, it takes longer than six months for MED staff to identify a potential violation, begin an investigation, close the case and then complete the necessary processes at the Attorney General's Office.

The fine of \$135,000 related to multiple violations by a single ownership group at multiple locations.

<sup>152</sup> 1 CCR § 212-2, R 1204, Retail Marijuana Code Rules.

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## Collateral Consequences – Criminal Convictions

Section 24-34-104(9)(b)(VIII.5), Colorado Revised Statutes, requires the Department of Regulatory Agencies (DORA) to determine whether the agency under review, through its licensing processes, imposes any disqualifications on applicants or licensees based on past criminal history, and if so, whether the disqualifications serve public safety or commercial or consumer protection interests.

The Executive Director is required to deny or revoke the license of any individual who:<sup>153</sup>

- Has discharged a sentence for a felony conviction in the five years immediately preceding the application; and
- Has discharged a sentence for a felony conviction relating to a controlled substance in the 10 years immediately preceding the application, except that the Executive Director may grant a license if the conviction related to marijuana and the offense does not rise to the level of a felony on the date of application.

The Executive Director has not revoked any licenses due to criminal convictions since the Retail Code was first implemented in fiscal year 13-14. Typically, if a licensee is convicted of a crime, the licensee voluntarily surrenders the license. The MED does not track these surrenders.

The Executive Director has denied licenses based on criminal convictions. While the majority of applicants withdraw their applications upon learning that their criminal histories disqualify them, not all do. Some inform MED staff that they will obtain the documentation necessary to clarify the matter. In many instances, MED does not hear from the applicant again, forcing a denial in order to close the file. The MED does not track these types of denials.

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<sup>153</sup> § 12-43.4-306(1), C.R.S.

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## Analysis and Recommendations

### Recommendation 1 – Continue the Colorado Retail Marijuana Code for three years, until 2019.

On November 6, 2012, the voters of Colorado passed Amendment 64 to the state's constitution, effectively legalizing the use of marijuana by those age 21 and older. Amendment 64 became effective upon proclamation of the Governor on December 10, 2012, with the first retail sale occurring on January 1, 2014.

In short, this constitutional provision provided the general outlines for:

- The regulation of industrial hemp;
- The personal use of marijuana; and
- The regulation of marijuana business establishments, including retail stores, cultivation facilities, marijuana product manufacturing facilities and testing facilities.

These latter provisions were further implemented by the General Assembly through the Colorado Retail Marijuana Code (Retail Code), the subject of this sunset review.

The first sunset criterion asks:

Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation[.]<sup>154</sup>

The first two of these questions are highly relevant in this particular sunset review and will be addressed in order.

Regardless of marijuana's status under state law, federal law continues to ban its use. The federal Controlled Substances Act (CSA) classifies marijuana and the cannabinoid tetrahydrocannabinol (THC) in Schedule I.<sup>155</sup>

Although many contend that the CSA misclassifies marijuana, the fact remains that it is a Schedule I substance. This means that the federal government, particularly the federal Food and Drug Administration (FDA), lacks the same regulatory oversight over its production and distribution as it does for drugs in the other CSA schedules.

Thus, without the Retail Code, retail marijuana, a Schedule I substance under federal law, would be completely unregulated but legal, given its status in the state's constitution.

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<sup>154</sup> § 24-34-104(9)(b)(I), C.R.S.

<sup>155</sup> 21 U.S.C. §§ 812(c)(10) and (17).

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Further, it is now being grown on a commercial scale in Colorado. These commercial cultivations use various pesticides, herbicides, fungicides and fertilizers to protect their crops and to encourage more profitable growth. Many of these substances are themselves hazardous.

Therefore, regulation of retail marijuana is necessary to protect the public health, welfare and safety because without the Retail Code, there would be no governmental oversight of any aspect of retail marijuana.

Additionally, conditions that led to the initial enactment of the Retail Code have changed. Since the General Assembly enacted the Retail Code, the U.S. Department of Justice (DOJ) issued a memorandum delineating that department's enforcement priorities.

This memorandum, issued in August 2013 and addressed to all U.S. Attorneys, provides guidance regarding marijuana enforcement. Often referred to as the "Cole Memo," after the Deputy Attorney General who drafted it, it delineates the DOJ's enforcement priorities as preventing:<sup>156</sup>

- The distribution of marijuana to minors;
- Revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- The diversion of marijuana from states where it is legal under state law in some form to other states;
- State-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Violence and the use of firearms in the cultivation and distribution of marijuana;
- Drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Growing of marijuana on public land and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Marijuana possession or use on federal property.

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<sup>156</sup> U.S. Department of Justice. *Memorandum for All United States Attorneys, from James M. Cole, Deputy Attorney General, Regarding Guidance Regarding Marijuana Enforcement*, August 29, 2013, pp. 1-2. Retrieved on October 22, 2013, from [www.justice.gov/iso/opa/resources/3052013829132756857467.pdf](http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf)

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While the Cole Memo's guidance reinforces the DOJ's position that U.S. Attorneys and federal law enforcement should continue to focus on the enumerated priorities, it also clarified the DOJ's expectation,

that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.<sup>157</sup>

In such circumstances,

enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.<sup>158</sup>

Taken together, these provisions are generally interpreted as meaning that so long as state law creates a robust regulatory environment that is strongly enforced, the federal government will not interfere except in those individual cases where the DOJ's enforcement priorities are at risk. The Retail Code represents Colorado's efforts to address these enforcement priorities.

The state's constitution envisions state and local licensing of retail marijuana business establishments. It even goes so far as to identify the types of businesses that should be licensed and the license application process. For example, the constitution requires the state licensing authority, which the Retail Code defines as the Executive Director of the Colorado Department of Revenue (Executive Director), to accept applications and application fees on behalf of local jurisdictions. Additionally, the constitution establishes the application fee for both state and local licensing authorities.

The constitution, however, provides only a general framework for regulating the retail marijuana industry. Reliance on these provisions alone to address the DOJ's enforcement priorities is inherently risky.

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<sup>157</sup> U.S. Department of Justice. *Memorandum for All United States Attorneys, from James M. Cole, Deputy Attorney General, Regarding Guidance Regarding Marijuana Enforcement*, August 29, 2013, p. 2. Retrieved on October 22, 2013, from [www.justice.gov/iso/opa/resources/3052013829132756857467.pdf](http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf)

<sup>158</sup> U.S. Department of Justice. *Memorandum for All United States Attorneys, from James M. Cole, Deputy Attorney General, Regarding Guidance Regarding Marijuana Enforcement*, August 29, 2013, p. 3. Retrieved on October 22, 2013, from [www.justice.gov/iso/opa/resources/3052013829132756857467.pdf](http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf)

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Discussion of the constitutional provisions governing retail marijuana raises another, and final, argument in favor of continuing the Retail Code. The constitution affirmatively requires the state to adopt regulations to govern the retail marijuana industry.<sup>159</sup> If the Retail Code were to sunset, the General Assembly would be legally compelled to replace it with something else. Given the prescriptive nature of the constitution, that “something else” would very likely be remarkably similar to the Retail Code itself.

For all of these reasons, the General Assembly should continue the Retail Code. The length of that continuation, however, merits discussion.

The marijuana industry, as a whole, continues to evolve. Since enactment of the Medical Marijuana Code (Medical Code) and the Retail Code, the General Assembly has made substantive changes to both codes in each subsequent legislative session. The Executive Director continues to promulgate new and amend existing rules. New concerns continue to arise as the industry matures and the focus of regulators and stakeholders shifts from preventing diversion to other issues involved in regulating an entire industry (e.g., packaging, labeling and testing).

Complicating matters is the fact that this sunset report focuses exclusively on the Retail Code, merely one facet of Colorado’s marijuana industry. This sunset report does not address issues related to the Medical Code or to the Colorado Department of Public Health and Environment’s maintenance of the medical marijuana patient registry or the Colorado Medical Board’s regulation of the physicians who write recommendations for medical marijuana.

However, these other marijuana-related laws are all scheduled to sunset in 2019. Scheduling the Retail Code to also sunset in 2019 will enable the first comprehensive sunset review of Colorado’s entire marijuana industry. Doing so will enable a holistic approach to regulatory reform, as opposed to the current piecemeal approach.

Thus, a short continuation period for the review of the Retail Code is amply justified.

To ensure that the entire marijuana industry is reviewed on a coordinated basis sooner rather than later, the General Assembly should continue the Retail Code for three years, until 2019.

## **Recommendation 2 – Align the mandatory testing provisions in the Retail Code to those in the Medical Code.**

Since its creation, the Retail Code has contained provisions addressing the mandatory testing of retail marijuana and retail marijuana products, though implementation of those provisions continues to evolve.

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<sup>159</sup> Colo. Const. Art. XVIII, § 16(5)(a).

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The Retail Code requires retail marijuana and retail marijuana products be tested in licensed retail marijuana testing facilities for:<sup>160</sup>

- Residual solvents, poisons or toxins;
- Harmful chemicals;
- Dangerous molds or mildew;
- Filth;
- Harmful microbials such as E. Coli or salmonella;
- Pesticides; and
- THC potency.

The Medical Code, on the other hand, requires testing (once implemented) for:<sup>161</sup>

- Contaminants that are injurious to health,
- Microbial and residual solvents and chemical and biological contaminants deemed to be public health hazards by the Colorado Department of Public Health and Environment,
- THC potency, and
- Homogeneity.

Importantly, both codes grant to the Executive Director broad rulemaking authority.

One of the more obvious differences between the two codes is the level of detail. The Retail Code is far more prescriptive in terms of what testing must address (e.g., pesticides). The Medical Code, on the other hand takes a broader approach and places greater emphasis on health and safety. Since the goal of testing is to protect consumers, the Medical Code's approach seems more in line with this goal.

Additionally, the way in which the Medical Code approaches health and safety is broader, meaning that as science advances, so too can the testing protocols.

Finally, the Medical Code's testing provisions represent an evolution in thought when compared to the Retail Code. Although the Medical Code predates the Retail Code in total, the Medical Code's testing provisions were not enacted until 2015.

For all these reasons, the General Assembly should harmonize the Retail Code's testing provisions to those in the Medical Code.

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<sup>160</sup> §§ 12-43.4-202(3)(a)(IV)(B) and 12-43.4-202(3)(a)(IV)(D), C.R.S.

<sup>161</sup> § 12-43.3-202(2.5)(a)(I), C.R.S.

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### **Recommendation 3 – Clarify that only the Retail Code and the Executive Director can prescribe standards pertaining to packaging and labeling.**

Local jurisdictions are clearly authorized to enact ordinances and regulations governing the “time, place, manner and the number of marijuana businesses” they license.<sup>162</sup> In addition, the constitution specifically authorizes them to enact ordinances and regulations:<sup>163</sup>

- Establishing procedures for the issuance, suspension and revocation of a license issued by the locality;
- Establishing a schedule of annual operating, licensing and application fees; and
- Establishing civil penalties for violation of an ordinance or regulation governing the time, place and manner of a marijuana establishment that may operate in such locality.

Nowhere in the constitution or the Retail Code are local jurisdictions specifically authorized to prescribe the manner in which retail marijuana or retail marijuana products are packaged or labeled, yet some may have done so.

This proves particularly burdensome for licensees who sell their products statewide. It requires these licensees to evaluate the laws of each local jurisdiction in which they sell their products to ensure their particular packaging and labeling are in compliance. If one local jurisdiction has a requirement that is even slightly different from the Executive Director’s or those of other local jurisdictions, the licensee must decide whether to sell in that jurisdiction, and if so, whether to develop a label or package for use in that local jurisdiction alone or adjust all of its packaging and labeling to comply with the requirements of a single jurisdiction.

Packaging and labeling represent costs to marijuana businesses. Anecdotally, many purchase these items in bulk to take advantage of bulk-purchase discount pricing. This may saddle them with months’ worth of packages and labels. Constant changes to and variations in the requirements could render this inventory unusable.

Perhaps more importantly, though, are the problems caused for consumers. With different requirements in different jurisdictions, consumers are unsure of what to expect. It is easy to see how a consumer could become confused by a disclosure made in one jurisdiction that is not made in another.

Clearly then, matters of packaging and labeling are matters of statewide concern, necessitating consistent statewide standards. Therefore, the General Assembly should clarify that only the Retail Code and the Executive Director can prescribe standards pertaining to packaging and labeling.

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<sup>162</sup> Colo. Const. Art. XVIII, § 16(5)(f) and § 12-43.4-301(2), C.R.S.

<sup>163</sup> Colo. Const. Art. XVIII, § 16(5)(f).



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## **Recommendation 4 – Repeal the requirement that retail marijuana licensees post surety bonds as a condition of licensure.**

The state’s constitution prohibits any regulations that render the operation of retail marijuana establishments “unreasonably impracticable.”<sup>164</sup>

The Retail Code, like many statutes, requires licensees to post bonds. Specifically, the Retail Code mandates that,<sup>165</sup>

Before the [Executive Director] issues a state license to an applicant, the applicant shall procure and file with the [Executive Director] evidence of a good and sufficient bond in the amount of \$5,000 with corporate surety thereon duly licensed to do business in the state, approved as to form by the Attorney General of the state, and conditions that the applicant shall report and pay all sales and use taxes due the state, or for which the state is the collector or collecting agent, in a timely manner, as provided in law.

This requirement essentially provides assurance to the state that the licensee will pay all sales and use taxes due the state. It is necessitated by the fact that, under circumstances where marijuana is not involved, the state could seize a sales tax licensee’s inventory or other assets and sell them to cover the taxes owed. The Executive Director is not in a position to do this with retail marijuana licensees. Thus, the General Assembly enacted the bond requirement.

However, the continued availability of such bonds was cast into serious doubt in late summer 2015 as the result of a pair of civil suits filed in the U.S. District Court for the District of Colorado in February 2015 naming two bond-issuing insurance companies among the defendants.<sup>166</sup>

As of this writing, at least one of the insurance companies had settled. As a result of this settlement, multiple bond-issuing insurance companies began cancelling or refusing to renew bonds issued to Colorado marijuana establishments.

Ordinarily, the businesses that lost their bonds would be able to provide alternative evidence of financial responsibility. Section 11-35-101, Colorado Revised Statutes (C.R.S.), lists alternatives, such as savings accounts, deposits or certificates of deposit, which entities regulated under certain enumerated statutes can provide the state in lieu of a bond.

Unfortunately, neither the Medical Code nor the Retail Code is among the enumerated statutes. This is understandable given the difficulties marijuana businesses have historically had in securing even the most rudimentary of banking services.

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<sup>164</sup> Colo. Const. Art. XVIII, § 16(5)(a).

<sup>165</sup> § 12-43.4-303(1), C.R.S.

<sup>166</sup> See *Safe Streets Alliance v. Alternative Holistic Healing, LLC*, Civil Action No. 15-349, and *Safe Streets Alliance v. Medical Marijuana of the Rockies, LLC*, Civil Action No. 15-350.

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Since the federal government’s stance regarding marijuana could change at some point in the future, thereby granting licensees greater access to the banking system, the General Assembly could add the Retail Code to the list of statutes under which licensees can utilize alternatives to a bond. However, since marijuana is currently illegal under federal law, this alternative is impractical at present.

All of this, however, begs the question of whether the bonds are necessary. None of the bonds in question have been acted upon, meaning that the marijuana industry has complied with the requirements to report and remit sales taxes. Furthermore, the Executive Director would likely have to spend more than \$5,000 to even access a bond should the need arise. Since the taxes have been paid, to date, there is no evidence to suggest the bond amount may be insufficient. Thus, there is no justification to raise the dollar amount of the bond to make it economically feasible for the Executive Director to act.

Licensees, in the meantime, are in a predicament. The Retail Code requires that they post a bond as a condition of licensure. Since it seems at least possible that compliance may soon be impossible, an alternative must be implemented or the requirement should be repealed.

The most reasonable course is to repeal the mandate for the bond. A licensee’s failure to pay tax is a violation of the Retail Code.<sup>167</sup> Should a licensee commit such a violation, the Executive Director could take disciplinary action. Thus, the repeal of the bond requirement would not leave the state without recourse.

For all these reasons, the General Assembly should repeal the requirement that retail marijuana licensees post surety bonds as a condition of licensure.

### **Recommendation 5 – Create a new license type for marijuana transport companies.**

Among other things, the first sunset criterion asks whether the conditions that led to the initial regulation have changed and whether other conditions have arisen that would warrant more, less or the same degree of regulation. Although Colorado’s commercial marijuana industry is young, it is dynamic. Many things have changed since the Medical Code was enacted in 2010 and the Retail Code in 2013. Among these changes is the nascent marijuana transport industry.

The focus of both codes has been on the production and sale of marijuana—activities that are entirely unique to the marijuana industry. Very little attention has been paid to ancillary services—such as transportation or the provision of security—that are not at all unique to the marijuana industry.

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<sup>167</sup> § 12-43.4-306(1)(f)(II), C.R.S.

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On the one hand, this is logical. Absent the codes, the marijuana industry would be entirely unregulated. On the other hand, both codes have created closed-loop systems where virtually every business that takes possession of marijuana and every employee who touches marijuana, or has access to it, is licensed. A notable exception to this occurs when marijuana is transported from one physical location to another.

When a licensee transports its own marijuana or marijuana products, there are no problems. However, not all cultivation facilities or marijuana product manufacturers maintain their own delivery fleets. In fact, very few do.

Given similar circumstances, non-marijuana industries can turn to paid delivery services, such as the U.S. Postal Service or commercial delivery services. However, given marijuana's status under federal law, these options are not available to Colorado's marijuana industry.

As a result, entrepreneurs have recognized a market potential and have sought to address the needs of the marijuana industry by providing marijuana transportation services. In general, the seller of the marijuana initiates a shipment within the MED's Marijuana Enforcement, Tracking, Reporting and Compliance computerized inventory tracking system (METRC). This process entails the creation of a manifest which includes the name and other identifying information of the individual who will be transporting the marijuana, as well as the route to be followed from the seller's facility to the purchaser's facility and the anticipated time of arrival.

While cumbersome, this system works relatively well so long as the individual driver assigned to the delivery proceeds directly from a single seller to a single purchaser and further provided that there are no traffic or weather delays or adjustments to the route.

This system becomes increasingly complicated, however, when the individual driver does not proceed directly from a single seller to a single purchaser. This could occur, for example, when the seller is a marijuana product manufacturer transporting products to multiple purchasers (perhaps scattered across the state). The manifests become increasingly difficult to produce as routes and delivery times are adjusted.

Out-of-town deliveries further complicate matters since it makes more sense for the transportation company to group shipments together when going to remote areas of the state. Again, this complicates the generation of an accurate manifest.

Further complications can include purchasers who refuse delivery of product, drivers stopping to eat or use a restroom (thereby leaving the marijuana unattended in their vehicles) and instances when a driver might have to retain possession of marijuana overnight (because of weather or traffic delays, or because a vehicle broke down or was involved in an accident).

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The current system also poses some challenges for law enforcement during traffic stops or traffic accidents. While the manifest should clarify that the individual driver is conducting lawful business in the event of a traffic stop, problems arise when the driver is, for example, incapacitated in a traffic accident. It can be difficult for law enforcement to discern the proper party to contact to retrieve the marijuana. Law enforcement has no particular desire to take possession of the marijuana in the vehicle, yet neither can law enforcement allow the marijuana to remain unattended in the vehicle in an unsecured tow lot.

The most obvious solution to all of these problems is to allow transportation companies to take lawful possession of the marijuana. This would necessitate the licensing of the transportation companies, which will require them to maintain licensed premises, but will also allow them access to METRC. By allowing them to warehouse or store marijuana for short periods of time (e.g., while in transit), they can more efficiently transport marijuana across the state. By further granting them access to METRC, they can develop their own manifests based upon the schedules and routes that make the most sense from a logistics perspective. Through all of this, the Executive Director will still be able to track the marijuana and will actually have a better picture of where marijuana is at any given time because the transport company will be able to update METRC as needed.

Retail marijuana licensees should be required to use a licensed transportation company only if they do not transport their products themselves. In other words, nothing should interfere with a licensee's ability to transport its own products, but when a licensee contracts with a third party, that third party should have to be a licensed transportation company.

For all these reasons, the General Assembly should create a new license type for marijuana transport companies.

### **Recommendation 6 – Create a new license type for marijuana business operators.**

Another area in which conditions have changed pertains to the rise in the use by marijuana business licensees of operators or management companies.

Put simply, many want to invest in the marijuana industry but not necessarily run a marijuana business. Such an owner can contract with an operator to run the business in return for a percentage of the profits.

However, the Retail Code defines an owner as "any person having a beneficial interest, as defined by the [Executive Director], in a retail marijuana establishment."<sup>168</sup>

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<sup>168</sup> § 12-43.4-103(12), C.R.S.

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In defining the term “owner,” the Executive Director has determined that a person holds a beneficial interest when he or she bears risk of loss (other than an insurer), has an opportunity to gain profit from the operation or sale of the establishment, or has a controlling interest in a marijuana establishment.<sup>169</sup>

Given these definitions, an operator satisfies the definition of an owner, even though the operator does not actually own the licensed establishment. As a result, the Executive Director has determined that in order to facilitate these types of arrangements, the operator must be disclosed as part of the licensee’s ownership structure, even though everyone acknowledges that the operator is not an owner, within the traditional meaning of that word.

Within this context, the operator, whether it is an individual or an entity, must submit to a criminal history background check, disclose those with financial interests in it and be properly vetted, just as would the owner of a licensee. The only difference is the legal charade that takes place in declaring the operator to be an owner.

While this system works, it is unnecessarily confusing and can become exponentially complicated when one operator serves as such for multiple licensees.

Therefore, to better distinguish who is and who is not the owner of a licensee and to call operators what they are, the General Assembly should create a new license type for operators.

**Recommendation 7 – Repeal the requirement that the Executive Director deny a license based on a previous denial for the same location.**

The Retail Code requires the Executive Director to deny a retail business license,

If the application for the license concerns a particular location that is the same as or within 1,000 feet of a location for which, within the two years immediately preceding the date of the application, the state licensing authority denied an application for the same class of license due to the nature of the use or other concern related to the location[.]<sup>170</sup>

This provision is problematic because given the 1,000-foot and two-year parameters, a series of denials based on this provision could create an ever-growing area of ineligibility. For example, if a license is denied for point A based on location, a 1,000-foot buffer is created around point A. If a license is then sought for point B, which is 999 feet from point A, it must be denied and a new buffer is created that is 1,000 feet around point B, but 1,999 feet around point A. This process could continue on.

Therefore, the General Assembly should repeal this provision.

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<sup>169</sup> 1 CCR § 212-2, R 103, Colorado Retail Marijuana Code Rules.

<sup>170</sup> § 12-43.4-307(1)(a), C.R.S.

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**Recommendation 8 – Clarify that certain proprietary and personal information in the possession of the Executive Director is confidential.**

Section 12-43.4-202(2)(d), C.R.S., provides that the Executive Director shall:

Maintain the confidentiality of reports or other information obtained from a licensee showing the sales volume or quantity of retail marijuana or retail marijuana products sold, or revealing any customer information, or any other records that are exempt from public inspection pursuant to state law.

Of particular concern in this provision is its focus on sales information. While this information should be protected and not disclosed to a licensee's competitors, the Executive Director collects and possesses a great deal more information that should be similarly protected.

METRC collects a considerable amount of information that is not sales-related and that could be used for nefarious purposes. For example, METRC captures data related to the number of plants in various stages of growth, when and how much retail marijuana is transferred from retail cultivation facilities to retail stores and retail product manufacturers, licensee inventory, and so on.

Since this data is not specifically protected as confidential, it could be subject to disclosure under the Colorado Open Records Act. This would allow, for example, criminals to request data relating to retail marijuana transfers so that they could properly time a theft of marijuana. Additionally, if a licensee could request data relating to the growth cycles of competitors, it could time price hikes and discounts accordingly, thereby providing a competitive advantage.

Additionally, as part of the licensing process, the Executive Director comes to possess a considerable amount of personal information, such as individual applicants' tax records and credit reports. The Executive Director also requires business license applicants to submit information related to security systems. All of this is necessary from a regulatory perspective, but should not be readily accessible by the public.

Finally, the Medical Code had a provision similar to this until it was amended in Senate Bill 15-115, the medical marijuana sunset bill. That bill protected medical and retail marijuana information in the possession of the Executive Director, but only amended the Medical Code. So today, this information is protected under the Medical Code, but not under the Retail Code. This is particularly problematic for those who hold only retail marijuana business licenses.

Therefore, the General Assembly should amend the Retail Code to protect as confidential all individualized data and records contained in METRC or in the possession of the Executive Director.

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**Recommendation 9 – Repeal the proscription on the placement of marijuana-themed magazines and publications.**

The Retail Code requires the Executive Director to promulgate rules on a variety of subjects, including rules:

Requiring that magazines whose primary focus is marijuana or marijuana businesses are only sold in retail marijuana stores or behind the counter in establishments where persons under 21 years of age are present[.]<sup>171</sup>

In June 2013, the U.S. District Court for the District of Colorado, with the state’s consent, permanently enjoined the state from promulgating such regulations, finding that the statutory requirement is void because it violates the First Amendment of the U.S. Constitution as well as Colorado’s constitutional protections regarding free speech.<sup>172</sup>

Therefore, the General Assembly should repeal this requirement.

**Recommendation 10 – Repeal the requirement that the Executive Director promulgate rules prohibiting misrepresentation and unfair practices.**

The Retail Code requires the Executive Director to promulgate rules on a variety of subjects, including rules prohibiting misrepresentation and unfair practices.<sup>173</sup> No such rules have been promulgated.

This is not to say that such practices are not prohibited. Section 12-43.4-901(4)(i), C.R.S., prohibits conduct that violates two separate provisions of the Unfair Practices Act. Specifically, it is a Class 2 misdemeanor for any licensee to engage in discriminatory sales practices or to sell below cost.<sup>174</sup>

Since the Retail Code prohibits unfair practices by declaring them to be unlawful, the General Assembly should repeal the requirement that the Executive Director promulgate rules prohibiting misrepresentation and unfair practices.

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<sup>171</sup> § 12-43.4-202(3)(c)(II), C.R.S.

<sup>172</sup> Order, Permanent Injunction and Final Judgment on Consent. *Trans-High Corp. v. State of Colorado*, Civil Action No. 13-cv-01389-RPM, and *Tattered Cover, Inc. v. Brohl*, Civil Action No. 13-cv-01431-RPM. U.S. District Court for the District of Colorado. Entered June 11, 2013.

<sup>173</sup> § 12-43.4-202(3)(b)(IV), C.R.S.

<sup>174</sup> See §§ 12-43.4-901(4)(i), 6-2-103 and 6-2-105, C.R.S.

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## **Recommendation 11 – Make technical changes to the Retail Code.**

The Retail Code contains several instances of obsolete, duplicative and confusing language, and it should be revised to reflect current terminology and administrative practices. These changes are technical in nature, meaning that they have no substantive impact.

The General Assembly should make the following technical changes:

- To make the Retail Code grammatically correct, amend section 12-43.4-103(14.5), C.R.S., as follows: “‘Resealable’ means that the package continues to function ~~with~~ WITHIN effectiveness specifications, which shall . . .”
- To be consistent with the Medical Code, amend the following provisions as indicated:
  - Section 12-43.4-105, C.R.S.: “Subject to the provisions of section 12-43.3-701, a limited access area shall be a building, room, or other contiguous area upon the licensed premises where retail marijuana is grown, cultivated, stored, weighed, displayed, packaged, sold, or possessed for sale, under control of the licensee, with ACCESS limited access to only those persons licensed by the state licensing authority AND THOSE VISITORS ESCORTED BY A PERSON LICENSED BY THE STATE LICENSING AUTHORITY. All areas of ingress or egress to limited access areas shall be clearly identified as such by a sign as designated by the state licensing authority.”
  - Section 12-43.4-306(1)(f)(I), C.R.S.: “Provide a surety bond or file any tax return related to a MEDICAL OR retail marijuana establishment;”
  - Section 12-43.4-306(1)(f)(II), C.R.S.: “Pay any taxes, interest, or penalties due ~~the department of revenue~~ relating to a MEDICAL or retail marijuana establishment.”

## **Administrative Recommendation 1 – The Executive Director should convene a task force to explore whether and to what extent the labeling requirements of the Retail Code and the Medical Code should be harmonized.**

Both the Retail and Medical codes require the Executive Director to promulgate rules prescribing the manner in which marijuana and marijuana products are labeled. However, the two codes delineate this requirement very differently.



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The Retail Code mandates that the Executive Director’s labeling requirements include:<sup>175</sup>

- The license number of the retail cultivation facility that grew the retail marijuana;
- The license number of the retail store;
- An identity statement and standardized graphic symbol;
- The batch number;
- A net weight statement;
- THC and cannabidiol potency;
- A list of any nonorganic pesticides, fungicides, herbicides and solvents used during cultivation or production;
- A statement to the effect of: “This product contains marijuana and was cultivated or produced without regulatory oversight for health, safety, or efficacy, and there may be health risks associated with the consumption of the product”;
- Warning labels;
- Solvents used in the extraction process;
- Amount of THC per serving and the number of servings per package for retail marijuana products;
- A list of ingredients and possible allergens for retail marijuana products;
- A recommended “use by” or expiration date for retail marijuana products;
- A nutritional fact panel for edible retail marijuana products; and
- A universal symbol indicating the package contains marijuana.

Additionally, the Executive Director’s labeling guidelines must include a statement concerning the total content of THC per unit of weight.<sup>176</sup>

The Medical Code, on the other hand, simply requires the Executive Director to promulgate rules on “labeling standards.”<sup>177</sup> Nothing more prescriptive is included.

Thus, the two codes enshrine very different approaches to labeling: the older Medical Code is more permissive whereas the younger Retail Code is more prescriptive. Several realities could explain these differences, but the time has come to determine the best course to follow under both codes.

While a sunset review would ordinarily wade into such a topic and make a recommendation to the General Assembly as to the course to pursue, the issue of what should be mandated on labels is highly technical and will be the subject of great debate. All voices should be heard and all perspectives should have a seat at the table.

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<sup>175</sup> § 12-43.4-202(3)(a)(VII), C.R.S. See 1 CCR § 212-2, R 1000, *et seq.*, Retail Marijuana Code Rules.

<sup>176</sup> § 12-43.4-202(3)(c)(VI), C.R.S.

<sup>177</sup> § 12-43.3-202(2)(a)(XIV), C.R.S.

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Therefore, the Executive Director should convene an inclusive task force to explore whether and to what extent the labeling requirements of the two codes should be harmonized. The work of the task force should be completed before the commencement of the next sunset review so that the recommendations of the task force can be considered at that time.

**Administrative Recommendation 2 – The Executive Director should track license disqualifications based on criminal history.**

In 2013, the General Assembly created a tenth sunset criterion, which requires the Department of Regulatory Agencies to evaluate whether the agency undergoing sunset:<sup>178</sup>

...through its licensing or certification process imposes any disqualifications on applicants based on past criminal history and, if so, whether the disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis...shall include data on the number of licenses or certifications that were denied, revoked, or suspended based on a disqualification and the basis for the disqualification.

Because it is a newer reporting requirement, some programs and organizations do not track this information. Because the General Assembly finds this information to be an important function of a sunset review, the Executive Director should be sure to track disqualifications for licenses based on past criminal history.

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<sup>178</sup> § 24-34-104(9)(a)(VIII.5), C.R.S.