

STATE OF COLORADO

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



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Governor

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George Thomson
Senior Enforcement
Director

Laura K. Harris
Division Director

September 20, 2012

Sean McAllister
McAllister, Darnell & Associates, P.C.
36 Steele Street, Suite #200
Denver, CO 80206

Re: Request for Position Statement – “Brokering Wholesale Transactions”

Dear Mr. McAllister:

This is in response to the June 19, 2012 order from the medical marijuana state licensing authority remanding the matters addressed in your correspondence, dated April 25, 2012, to the Medical Marijuana Division (MMED) for response. This is the second of two responses from the MMED in accordance with that order.

On behalf of your law firm, McAllister, Darnell & Associates, P.C., (“Petitioner”) and pursuant to Regulation 1.310, 1 CCR 212-1, you’ve presented legal analysis and four follow-up questions for MMED’s consideration in seeking a statement of position regarding the permissibility of “brokering wholesale transactions” of medical marijuana.

Background

The Petitioner observes the following points, as a precursor to the presentation of questions for position statement:

1. Pursuant to section 12-43.3-402(4), C.R.S., and further clarified by Rule 1.210, 1 CCR 212-1, a medical marijuana licensee may purchase not more than 30% of its total on-hand inventory of medical marijuana from another licensed medical marijuana center in Colorado. (The Petitioner will later describe such transactions as “wholesale transactions” in the remainder of his analysis).
2. There are no promulgated rules that govern whether a medical marijuana center owner is permitted to take a commission on wholesale transactions.

3. There are no promulgated rules that govern whether a medical marijuana center owner is permitted to “arrange” a wholesale transaction between two other centers, in which that person does not have ownership and subsequently for that center owner to receive a commission on the transaction. (The Petitioner will also use the term “brokering” when describing the arranging of a wholesale transaction between two other entities).
4. Pursuant to section 12-43.3-313(1), C.R.S., a complete disclosure of all persons having a direct or indirect financial interest, and the extent of such interest, in each license issued under article 43.3 is required. However, it is unclear whether brokering a wholesale transaction would constitute financial assistance.
5. If a medical marijuana center owner were permitted, pursuant to article 43.3 of title 12, to broker a wholesale transaction, it is unclear whether that owner is required to have “hands on dealings” with the medical marijuana as contemplated in Rule 1.205 and Rule 11.200, 1 CCR 212-1.

The Petitioner then seeks a response and position statement on the following points: 1) whether a center owner can take a commission [on] wholesale transactions; 2) whether a center owner could arrange a wholesale transaction between two other centers and take a commission; 3) whether such “brokering” would constitute unlawful financial assistance pursuant to C.R.S. 12-43.3-313; and 4) assuming that the activity described in point #3 was authorized, whether a broker would be required to handle the product or check the product in and out of the center pursuant to Rule 1.205 and 11.200.

Division Response

The Division’s position is that pursuant to section 12-43.3-402, C.R.S., the holder of a medical marijuana center license is authorized to receive pecuniary gain from transactions related to his or her licensed operation, *only*. Said owner is not authorized to receive any pecuniary gain, such as a monetary commission, from transactions related to operations in which he or she does not hold an ownership interest, the disclosure of which is otherwise required pursuant to article 43.3 of title 12. Therefore, the owner of a medical marijuana center could not arrange or “broker” a wholesale transaction between two other centers, in which he or she does not hold an ownership interest, and receive a commission.

Division Analysis:

The Code states “[article 43.3 of title 12 of the C.R.S.] sets forth the exclusive means by which manufacture, sale, distribution, and dispensing of medical marijuana may occur in the state of Colorado.” C.R.S. § 12-43.3-104(2)(e). Therefore, any activity not explicitly allowed by the Code is not authorized.

Neither “wholesale transaction” nor “commission” is defined in article 43.3 of title 12 (the “Code”) or rules promulgated pursuant to it. For purposes of this position statement, the Division considers a “wholesale transaction” as a sales transaction that is not a retail sale to a registered patient but, rather, any sale between two licensed medical marijuana centers or between a licensed medical marijuana center and a licensed medical marijuana-infused products manufacturer that meets the quantity restrictions as authorized by section 12-43.3-402(4), C.R.S. The Division considers “commission”, as used in the context of the petition, to mean a fee paid to an agent as compensation for executing a transaction, which is calculated either as a percentage of the transaction value or as a flat fee.

Wholesale Transactions

The Code only authorizes wholesale transactions that are in strict compliance with the terms of section 12-43.3-402(4), C.R.S. and Rule 1.210, 1 CCR 212-1. Consequently, there is no legal means by which an individual, even a licensee, could broker a wholesale transaction between two other parties/licensees because such a transaction is not contemplated by section 12-43.3-402(4), C.R.S.; *See also* C.R.S. § 12-43.3-104(2)(e). This analysis directly addresses Petitioner’s first two questions, which relate to wholesale transactions.

Commissions

Although the Division’s determination that wholesale transactions are outside the scope of section 12-43.3-404(4), C.R.S., thereby making analysis of whether commissions are allowed moot, such analysis nonetheless follows.

The Code clarifies that a licensee is granted license privileges to sell, manufacture, or cultivate medical marijuana on its licensed premises. *See* C.R.S. § 12-43.3-310(8)(a). Privileges are specific to the licensed location and entity holding the license, and it is specifically prohibited that any other person not holding the license exercise those privileges. *Id.*

The Code not only mandates that the State Licensing Authority require a “complete disclosure of all persons having a direct or indirect financial interest” in each licensed issued, but it also prohibits individuals from having an unreported financial interest in a license. C.R.S. § 12-43.3-313. Assuming, for the sake of this analysis, a licensee could broker a wholesale transaction outside the confines of section 12-43.3-402(4), C.R.S., the Code does not explicitly allow said licensee to receive a commission for brokering such a transaction. The Division believes a commission in this instance would constitute an indirect financial interest in another licensee’s license, and such activity is not allowed.

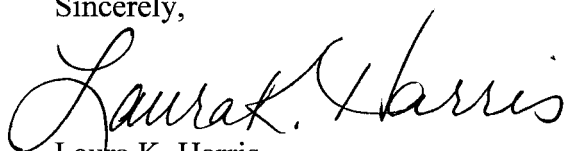
Thus, even a licensed medical marijuana center owner is prohibited from receiving a commission, *i.e.*, holding an unreported financial interest, in another licensee’s license. This analysis directly addresses Petitioner’s third question.

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With regard to Petitioner's fourth question, the Division believes no analysis is necessary because neither wholesale transactions nor commissions from brokering activity between two other licensees is authorized pursuant to the Code.

If you should disagree with the position statements provided herein, you may have the right to appeal by seeking a Declaratory Order from the state licensing authority. An appeal is governed by the provisions of Rule 1.310, and must be made within thirty (30) days from the date of this position statement.

Sincerely,

A handwritten signature in cursive script that reads "Laura K. Harris". The signature is written in black ink and is positioned above the printed name and title.

Laura K. Harris
Director
Medical Marijuana Enforcement Division