

# PATTISHALL

*insights*

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“ NACB MEMBERSHIP ...  
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IS “CERTIFIED” AS RESPONSIBLE,  
TRUSTWORTHY, AND  
COMPLIANT. ”

## The Future of Cannabis Advertising

By Kristine A. Bergman

Recreational use of cannabis is now legal in 10 states, and medical use is permitted in 33. While all cannabis use remains illegal under federal law, it will be some time before cannabis businesses, distributors, and investors can expect national regulations for selling, labeling, and advertising cannabis products. Enter the NACB.



### What is the NACB?

The nation's first self-regulatory body for the cannabis industry—the National Association of Cannabis Businesses (“NACB”)—was formed in 2017. The NACB aspires to create a successful self-regulatory body for the emerging cannabis market. It is influenced by the success of other private regulatory groups like the Financial Industry Regulatory Authority (“FINRA”) and Motion Picture Association of America (“MPAA”).

Membership in the organization is open to business owners, investors, suppliers, and even individuals involved in the cannabis industry. Potential members must apply to join the NACB, and members pay an annual or monthly fee.

The NACB boasts of several benefits to membership. For one, membership means that the NACB has approved the applicant after a vetting process. NACB membership therefore may communicate to customers and investors that the cannabis business is “certified” as responsible, trustworthy, and compliant. Members also gain access to symposiums and updated news on innovation in the cannabis industry and can participate in NACB boards to help establish national standards.

### New Advertising Standards Under the NACB

On November 5, 2018, the NACB released its voluntary national advertising standards. These regulations are designed to further the NACB's mission of establishing a trustworthy association of cannabis business members. As Eugene Morgulis, the NACB's Director of Legal & Strategic Initiatives, explained, the standards were developed to establish “a robust set of business-approved guidelines to build trust amongst market participants and local state and national regulators.” The regulations also are an attempt to allow the industry to “control its own destiny” and avoid “heavy-handed government-driven rules that may hinder business's ability to market to and educate consumers.”

1. See <https://www.nacb.com/mission-and-vision>.
2. See <https://www.nacb.com/benefits>.
3. See <https://info.nacb.com/news/advertising-and-cannabis-0>.
4. See *id.*

Among other things, the NACB advertising standards provide the following:

**False or Misleading Advertising Prohibited:** The standards prohibit cannabis businesses from making false or misleading advertising statements.

**Health Claims Prohibited:** The advertising standards incorporate the NACB labeling standards for health claims. Under these standards, cannabis advertisers cannot make health, medical, or disease claims. Specifically, businesses cannot advertise that cannabis products diagnose, mitigate, treat, cure, or prevent a disease or that there is a relationship between the cannabis product and any health-related conditions. Cannabis advertisers also cannot mimic over-the-counter or prescription drugs or use any words, symbols, or images commonly used by medical or pharmaceutical professions (e.g., the word “prescription” or “RX,” or the depiction of a mortar and pestle). Advertisers can, however, describe the intended physical or psychological effects of the cannabis products if the description is substantiated by tests based on expertise of professionals in the relevant area that were conducted in an objective manner by persons qualified to do so and the description includes a disclaimer that results may vary by consumer.

**No Advertising to Underage Persons:** Cannabis advertisers cannot market to minors, or create advertising that would encourage an underage person to use cannabis products. This includes advertisements that include “a cartoon character, toy, mascot, brand sponsorship, logo, animal, celebrity endorsement, or any other depiction that targets an underage person or is commonly used to market products to underage persons.”

**Limitations on Depictions of Use of Products:** Cannabis advertising cannot depict “any person inhaling, exhaling, or ingesting Cannabis or Cannabis Products.” An exception is made, however, for topical products like lotions, salves, and transdermal products. Advertisements also should not depict excessive consumption of cannabis products. Further, advertisers in states where only medical (i.e., not recreational) use has been legalized cannot promote or encourage cannabis use for non-medical purposes. Finally, advertising of cannabis cannot portray, encourage, or condone driving any motor vehicle while impaired.

**Digital Advertising:** Cannabis products can be advertised via websites, but the advertiser must ensure the persons visiting the website are not underage. The standards require websites include data-entry access points that allows users to enter their age accurately, and permitting users to merely check a box to verify age is not enough. Cannabis advertisers cannot engage in unsolicited pop-up advertising or advertising directed towards

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location-based services. The standards do, however, permit marketing through a downloadable mobile application so long as users have an easy and permanent opt-out feature.

**Limitations on Placement of Advertising:** Cannabis establishments cannot advertise on any public transit vehicle or “shelter.” The term “shelter” is not defined.

**Event Sponsorship:** Cannabis businesses may sponsor events (e.g., charitable, sports, or music event), but cannot advertise at events targeted to underage persons or at event where at least 30% of the targeted population is underage.

**Documentation of Advertising:** The standards require that cannabis advertisers document all marketing activities and keep records of past advertising for a period of no less than two years from the date of advertising.

Most of these advertising regulations mimic other advertising laws and regulations. For example, the prohibition on false and misleading advertising, and the strict scrutiny for health-related claims, are consistent with federal false advertising law. Likewise, the limitations on advertising to underage persons, including in digital marketing, echo regulations for the alcohol industry.

The NACB does not explain the repercussions for violating these standards. There is currently no mechanism or procedure for bringing complaints for violations of these guidelines. It is likely that, as the NACB remains in its infancy, the only recourse for violations of these regulations is a suspension of membership or expulsion from the NACB. There is also no neutral interpreting body, so to the extent the NACB’s standards may be construed as vague or ambiguous, a purported violation is likely to be resolved based upon the NACB’s sole judgment.

As states continue to expand legal use of cannabis, including for recreational purposes, it is likely that state regulators will adopt these or similar standards into law. Cannabis advertisers therefore would be well-advised to consider the NACB’s advertising standards, whether currently a member or not, in preparation for the inevitable state (and maybe even one day, federal) requirements to come.■

5. See <https://www.nacb.com/national-advertising-standards>.

# *firm*UPDATE

## PRESENTATIONS

### ■ Thad Chaloehtiarana



Thad will be speaking on an American Bar Association “Career Choice” webinar on Trademark Law on January 18.

### ■ Jonathan S. Jennings



As the opening speaker, Jonathan will provide an international case round-up at the Pharmaceutical Trade Marks Group’s (PTMG’s) Spring Conference in Rome, Italy, on March 11. He will also be a speaker in the February 9 Strafford webinar on “Rights of Publicity and Social Media: Navigating the Complexities Absent Clear Court Guidance.”

## PRESENTATIONS

### ■ Jason M. Koransky



Jason was a panelist on an American Bar Association Webinar entitled “Book Contracts 102” on November 28.

## PUBLICATIONS

### ■ Jonathan S. Jennings

In his *US Update* column in the December 2018 issue of Pharmaceutical Trade Marks Group’s *Law Lore & Practice* newsletter, Jonathan discussed the challenges in serving a complaint and summons in accordance with the Hague Convention and Due Process that were the focus of the *Celgene Corp. v. Distinct Pharma* federal district court case.

# *firm*NOTEWORTHY

## Chicago Bar Association

David C. Hilliard was honored in the Chicago Bar Association Blog in “Leading the Way: An Interview with David C. Hilliard” as founder of the 9,000 member Young Lawyers Section (YLS). As stated by Terry Murphy, Executive Director of the Chicago Bar Association: “Hilliard’s vision to form the YLS and extraordinary leadership has helped make the CBA the leading metropolitan bar association in the country. This is proven by the fact that, to this day, the YLS continues to be recognized year after year after year by the American Bar Association as the best young lawyers section in the country. David Hilliard is a universal donor and we are better because of him.”

## Martindale Hubbell AV® Preeminent Rating

Brett A. August, Ashly I. Boesche, Thad Chaloehtiarana, David C. Hilliard, Jonathan S. Jennings, Robert M. Newbury, Robert W. Sacoff and Joseph N. Welch II have each received an AV® Preeminent rating from the Martindale-Hubbell Bar Directory for 2019.

## U.S. News & World Report - Best Law Firms 2019

Pattishall McAuliffe has been designated a National Tier 1 Trademark Law Firm, and a Chicago Tier 1 Intellectual Property Litigation and Trademark Law Firm.



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