

DEPARTMENT OF REVENUE

Taxpayer Service Division - Tax Group

RETAIL MARIJUANA TAX

1 CCR 201-18

[Editor's Notes follow the text of the rules at the end of this CCR Document.]

Rule 39-28.8-101. Definitions.

Basis and Purpose

The basis for this rule is §§ 39-21-112(1), 39-28.8-101, 205, and 308, C.R.S. The purpose of this rule is to establish definitions for terms used in 1 CCR 201-18 regarding retail marijuana sales tax and retail marijuana excise tax.

With respect to rules promulgated under Article 28.8 of Title 39, the following terms have the following meanings:

- (1) Unless the context clearly requires otherwise, terms defined by section 39-28.8-101, C.R.S. section 44-12-103, C.R.S., or in Rule R 103 of 1 CCR 212-2, the Marijuana Enforcement Division's rules related to the Colorado Retail Marijuana Code, shall have the same meanings in these rules as therein defined.
- (2) "Affiliated Marijuana Business Licensees" shall have the same meaning as defined in subsection 39-28.8-101(1), C.R.S.
- (3) "Average Market Rate" shall have the same meaning as defined in subsection 39-28.8-101(1.5), C.R.S., and shall be calculated pursuant to Department Rule 39-28.8-302(5) in the following categories:
 - (a) Bud
 - (b) Trim
 - (c) Bud Allocated for Extraction
 - (d) Trim Allocated for Extraction
 - (e) Immature Plant
 - (f) Wet Whole Plant
 - (g) Seed
- (4) "Bud" shall have the same meaning as the product of the "Flowering" stage as set forth by Rule R 103 of 1 CCR 212-2 including the actual flower.
- (5) "Bud Allocated for Extraction" means Bud that is designated for the extraction of Retail Marijuana Concentrate and not for direct sale to consumers.

- (6) "Immature Plant" shall have the same meaning as set forth by Rule R 103 of 1 CCR 212-2.
- (7) "Inventory Tracking System" shall have the same meaning as set forth by Rule R 103 of 1 CCR 212-2.
- (8) "Marijuana" means Medical Marijuana or Retail Marijuana.
- (9) "Retail Marijuana" shall have the same meaning as defined in subsection 39-28.8-101(7), C.R.S..
- (10) "Retail Marijuana Concentrate" shall have the same meaning as "Retail Marijuana Concentrate" as set forth by Rule R 103 of 1 CCR 212-2.
- (11) "Retail Marijuana Cultivation Facility" shall have the same meaning as defined in subsection 39-28.8-101(8), C.R.S..
- (12) "Retail Marijuana Excise Tax" or "Excise Tax" means excise tax imposed by Part 3 of Article 28.8 of Title 39, C.R.S.
- (13) "Retail Marijuana Excise Tax Return" means the excise tax return upon which all sales or Transfers of Retail Marijuana subject to Retail Marijuana Excise Tax and the amount of Retail Marijuana Excise Tax are reported.
- (14) "Retail Marijuana Plant" means a plant of the genus cannabis, other than an Immature Plant, whether growing or harvested, that is cultivated by a licensed Retail Marijuana Cultivation Facility.
- (15) "Retail Marijuana Product Manufacturing Facility" shall have the same meaning as defined in subsection 39-28.8-101(10), C.R.S.
- (16) "Retail Marijuana Sales Tax" means sales tax imposed by Part 2 of Article 28.8 of Title 39, C.R.S.
- (17) "Retail Marijuana Sales Tax Return" means the sales tax return upon which all sales of Retail Marijuana and Retail Marijuana Products and the amount of state and local Retail Marijuana Sales Tax are reported.
- (18) "Retail Sales Tax" means the sales tax imposed by Part 1 of Article 26 of Title 39, C.R.S.
- (19) "Test Period" means the period of time used to calculate the Average Market Rate. The Test Period shall be each November 1st to the subsequent January 31st, each February 1st to the subsequent April 30th, each May 1st to the subsequent July 31st, and each August 1st to the subsequent October 31st.
- (20) "Transfer(s)(ed)(ing)" means to grant, convey, hand over, assign, sell, exchange, or barter, in any manner or by any means, with or without consideration, any Retail Marijuana or Retail Marijuana Product from one licensee to another licensee or to a consumer. A Transfer includes the movement of Retail Marijuana or Retail Marijuana Product from one licensed premises to another, even if both premises are contiguous, and even if both premises are owned by a single entity or individual or group of individuals and also includes a virtual transfer that is reflected on the Inventory Tracking System, even if no physical movement of the Retail Marijuana or Retail Marijuana Product occurs.
- (21) "Trim" means any part of a Retail Marijuana Plant other than Bud or Wet Whole Plant. Trim includes "sweet leaf" or "sugar leaf".
- (22) "Trim Allocated for Extraction" means Trim that is designated for the extraction of Retail Marijuana Concentrate and not for direct sale to consumers.

- (23) “Unaffiliated Marijuana Business Licensees” shall mean Retail Marijuana business licensees that are not owned or controlled by the same or related interests, where “related interests” includes individuals who are related by blood or marriage or entities that are directly or indirectly controlled by an entity or individual or related individuals.
- (24) “Unprocessed Retail Marijuana” means all Retail Marijuana that is first Transferred by a Retail Marijuana Cultivation Facility to a Retail Marijuana Store or a Retail Marijuana Products Manufacturing Facility, even though it may have gone through some processing, and even though it may be subject to further processing by another licensee.
- (25) “Wet Whole Plant” means a Retail Marijuana Plant that is cut off just above the roots and is not trimmed, dried, or cured. The weight of the Wet Whole Plant includes all bud, leaves, stems, and stalk. The Wet Whole Plant must be weighed within 2 hours of the plant being harvested. The plant must not undergo any further processing prior to being weighed, and tax must be paid on the weight of the entire unprocessed plant.

RETAIL MARIJUANA SALES TAX PROCEDURES

39-28.8-201

- (1) The Department’s procedures governing Retail Sales Tax described in the rules promulgated under Articles 21 and 26 of Title 39, C.R.S. shall, to the extent not inconsistent with the provisions of Article 28.8 of Title 39, C.R.S. and the rules promulgated pursuant thereto, likewise govern the procedures with respect to the collection, reporting, and remittance of Retail Marijuana Sales Tax.
- (2) Any vendor making sales of Retail Marijuana at a Retail Marijuana Store shall file a Retail Marijuana Sales Tax Return for Retail Marijuana Sales Tax collected.
- (a) The Retail Marijuana Sales Tax Return shall be filed electronically by all such vendors. The remittance of the Retail Marijuana Sales Tax shall be made in accordance with procedures prescribed on the Department’s website or on forms published by the Department.
- (b) If any vendor making sales of Retail Marijuana is unable to file Retail Marijuana Sales Tax Returns electronically, such vendor may apply to the Department for a waiver of electronic filing requirements. The Department may grant such a waiver upon a showing of good cause.

SALES TAX ON RETAIL MARIJUANA AND RETAIL MARIJUANA PRODUCT

39-28.8-202

Retail Marijuana Sales Tax is imposed on the full purchase price of all Retail Marijuana and Retail Marijuana Product. The sale of any product that contains any amount of Retail Marijuana or any derivative thereof is subject to the Retail Marijuana Sales Tax on the full purchase price of such product.

Rule 39-28.8-302. Retail Marijuana Excise Tax.

Basis and Purpose

The basis for this rule is §§ 39-21-112(1), 39-28.8-101, 301, 302, and 308, C.R.S. The purpose of this rule is to provide guidance regarding the imposition and calculation of retail marijuana excise tax and the record keeping requirements therefor.

- (1) **Incidence of Tax.** The Excise Tax is imposed upon the Retail Marijuana Cultivation Facility, which shall pay the Excise Tax to the Department on the first Transfer of Retail Marijuana to a Retail Marijuana Store or a Retail Marijuana Product Manufacturing Facility. No Colorado Retail Marijuana Excise Tax is imposed on the Transfer of Retail Marijuana from one Retail Marijuana Cultivation Facility to another Retail Marijuana Cultivation Facility. In the case of such Transfer, the Colorado Retail Marijuana Excise Tax will be imposed on the subsequent Transfer of the Retail Marijuana to a Retail Marijuana Store or a Retail Marijuana Product Manufacturing Facility.
- (a) *Virtual Transfers.* Except as provided in this paragraph (1)(a), Transfers subject to the Excise Tax include virtual Transfers of Retail Marijuana or Retail Marijuana Product between Unaffiliated Marijuana Licensees if such Transfers are accurately reflected in the Inventory Tracking System, even if the physical movement of the Retail Marijuana or Retail Marijuana Product does not follow the virtual Transfer. No Excise Tax is imposed on the Transfer or virtual Transfer of seeds or Immature Plants for subsequent cultivation in a Retail Marijuana Cultivation Facility, in which case the Excise Tax is imposed on the subsequent Transfer of Retail Marijuana cultivated from such seeds and Immature Plants. Any Retail Marijuana Cultivation Facility utilizing a virtual Transfer shall maintain documentation required by paragraph (6)(a) of this rule regarding the virtual Transfer and any subsequent Transfer of the Retail Marijuana. The Inventory Tracking System will not determine whether any Transfer from a Retail Marijuana Cultivation Facility is subject to Retail Marijuana Excise Tax. If any Transfer does not accurately represent legitimate business activity or is in any way designed to avoid or defeat the proper imposition and calculation of the Excise Tax, the Executive Directory may determine the Transfer of the Retail Marijuana upon which the Excise Tax is properly imposed.
- (i) *Examples*
- (A) Virtual Transfer would be recognized. A Retail Marijuana Store owned by Company A purchases Retail Marijuana from a Retail Marijuana Cultivation Facility owned by Company B through a documented point-of-sale transaction in the Inventory Tracking System reflecting the actual contract price paid. A second Transfer is then documented in the Inventory Tracking System Transferring the Retail Marijuana from the Retail Marijuana Store owned by Company A to a Retail Marijuana Cultivation Facility owned by Company A. The physical movement of Retail Marijuana need not follow all virtual Transfers. In this scenario, the Retail Marijuana Excise Tax would be imposed at the time of the first Transfer from the Retail Marijuana Cultivation Facility owned by Company B to the Retail Marijuana Store owned by Company A, even though that Transfer is virtual. No additional Excise Tax is imposed on the subsequent Transfer of that Retail Marijuana from the Retail Marijuana Cultivation Facility owned by Company A to the Retail Marijuana Store owned by Company A.

- (B) Virtual Transfer would not be recognized. A Retail Marijuana Store owned by Company A purchases seeds and Immature Plants from a Retail Marijuana Cultivation Facility owned by Company B through a documented point-of-sale transaction in the Inventory Tracking System. A second Transfer is then documented in the Inventory Tracking System Transferring the seeds and Immature Plants from the Retail Marijuana Store owned by Company A to a Retail Marijuana Cultivation Facility owned by Company A. The seeds and Immature Plants are cultivated and harvested at the Retail Marijuana Cultivation Facility owned by Company A. After cultivation and harvest, the Retail Marijuana Cultivation Facility owned by Company A Transfers the resulting Retail Marijuana to the Retail Marijuana Store owned by Company A. In this scenario, payment of Excise Tax on the Transfer from Company B to Company A would defeat the proper imposition and calculation of the Excise Tax. Instead, the Executive Director would impose the Excise Tax on the Transfer of the Retail Marijuana from the Retail Marijuana Cultivation Facility owned by Company A to the Retail Marijuana Store owned by Company A, using the applicable Average Market Rate(s).
- (2) **Local Incidence of Tax.** See §§ 29-2-114 and 32-1-1004, C.R.S. and the applicable local ordinance or resolution for information about the application of any local excise taxes to Retail Marijuana Transfers.
- (3) **Exempt Transfers.** The Transfer of Retail Marijuana to a Retail Marijuana Testing Facility for testing purposes is exempt from Retail Marijuana Excise Tax so long as the marijuana is destroyed by the Retail Marijuana Testing Facility during or following the testing.
- (4) **Inventory Tracking System.** When a Transfer is entered into the Inventory Tracking System, all Transfers between Unaffiliated Marijuana Business Licensees, whether virtual or physical, must be entered in a manner that allows the price to be recorded in such Inventory Tracking System. When entering the price, the actual price charged, exclusive of tax, must be recorded in such Inventory Tracking System.
- (5) **Calculation and Payment of Tax.**
- (a) The method for calculating Retail Marijuana Excise Tax depends upon whether the first Transfer of Retail Marijuana from a Retail Marijuana Cultivation Facility to a Retail Marijuana Store or a Retail Marijuana Product Manufacturing Facility is between Unaffiliated Marijuana Business Licensees or Affiliated Marijuana Business Licensees.
- (i) Unaffiliated Marijuana Business Licensees –
- (A) If the first Transfer is between Unaffiliated Marijuana Business Licensees, the Excise Tax is calculated based on the actual contract price of the Retail Marijuana Transferred.
- (B) If no contract price is established at the time of the first Transfer the Excise Tax is calculated based on the Average Market Rate of the Retail Marijuana Transferred. Examples of such Transfers include:

- (I) a temporary Transfer, that does not constitute a sale, of Retail Marijuana from a Retail Marijuana Cultivation Facility to an unaffiliated Retail Marijuana Product Manufacturing Facility that will process or manufacture the Retail Marijuana before returning it to the Retail Marijuana Cultivation Facility or to a Retail Marijuana Store affiliated with the Retail Marijuana Cultivation Facility; or
 - (II) a Transfer of Retail Marijuana from a Retail Marijuana Cultivation Facility to an unaffiliated Retail Marijuana Store for which a price is not established at the time of Transfer, but instead depends upon the revenue generated from the subsequent sale of the Retail Marijuana to the end consumer.
- (ii) Affiliated Marijuana Business Licensees - If the first Transfer is between Affiliated Marijuana Business Licensees, the Excise Tax is calculated based on the Average Market Rate of the Retail Marijuana Transferred.
- (b) *Contract Price*
- (i) The contract price is the invoice price charged by a Retail Marijuana Cultivation Facility to each licensed purchaser for each Transfer of Unprocessed Retail Marijuana, exclusive of any tax that is included in the written invoice price, and exclusive of any discount or other reduction. In the case of multiple invoices reflecting multiple prices for the same transaction, the contract price used to calculate the tax is the highest such price. For the purpose of this paragraph (5)(b)(i), the invoice price charged includes all consideration the seller receives from the buyer in whatever form and regardless of the time of receipt.
- (c) *Calculation of Average Market Rate.*
- (i) The Department will calculate the Average Market Rate using reported sales of each category during the Test Period. The Department will determine the best methodology to arrive at the Average Market Rate. The Department may, from time to time, change its method of calculating the Average Market Rate if, in the judgment of the Department, such change is necessary to arrive at the most accurate Average Market Rate given the market conditions.
- (d) In the case of Retail Marijuana Excise Tax calculated using Average Market Rate, the Excise Tax shall be calculated based on the category of Retail Marijuana (i.e., Bud, Trim, Immature Plant, Wet Whole Plant, Seed, Bud Allocated for Extraction, or Trim Allocated for Extraction) being Transferred. The provisions of this paragraph (5)(d) apply only to Excise Tax calculated using Average Market Rate.
- (i) For the categories of Bud, Trim, Bud Allocated for Extraction, and Trim Allocated for Extraction, the Excise Tax is computed on the total weight of the Retail Marijuana Transferred. If multiple categories of Retail Marijuana are included in the Transfer, the Excise Tax shall be calculated separately for each category of Retail Marijuana included in the Transfer by separately calculating the total weight of the Retail Marijuana included in each category and multiplying the weight by the Average Market Rate of each category and the applicable Excise Tax rate. Notwithstanding this rule, inconsequential amounts of Bud inadvertently included in a Transfer that is otherwise Trim shall be treated as Trim and not as Bud.

- (A) Retail Marijuana categorized for the purpose of Excise Tax calculation as Bud Allocated for Extraction or Trim Allocated for Extraction may not be subsequently Transferred for direct sale to consumers unless it has first been subject to extraction as allocated.
 - (B) If Bud Allocated for Extraction or Trim Allocated for Extraction is subsequently Transferred for direct sale to consumers and has not been subjected to extraction, the Retail Marijuana Cultivation Facility shall amend the Retail Marijuana Excise Tax Return upon which the Excise Tax was initially paid in order to recalculate the Excise Tax, and any applicable penalty and interest, using the Average Market Rates for the category of Bud or Trim, respectively.
 - (C) The Retail Marijuana Product Manufacturing Facility shall notify, in writing, the Retail Marijuana Cultivation Facility of any subsequent Transfer of Bud Allocated for Extraction or Trim Allocated for Extraction that has not first been subjected to extraction within seven (7) days of the Transfer by the Retail Marijuana Production Manufacturing Facility. Any failure by a Retail Marijuana Production Manufacturing Facility to notify a Retail Marijuana Cultivation Facility in accordance with this paragraph (5)(d)(i)(C) shall not relieve the Retail Marijuana Cultivation Facility of liability for any additional tax, penalty, and interest due pursuant to paragraph (5)(d)(i)(B) of this rule.
- (ii) The Retail Marijuana Excise Tax for Immature Plants is calculated on the total number of Immature Plants being sold or Transferred.
 - (iii) The Retail Marijuana Excise Tax for Wet Whole Plants is calculated on the total weight of the entire Retail Marijuana Wet Whole Plant. The weight of the entire Retail Marijuana Wet Whole Plant is subject to the Excise Tax because the Average Market Rate for Wet Whole Plant already reflects an allowance for water weight and waste. The Wet Whole Plant may not undergo any further processing (i.e., drying the plant and subsequently selling separately the Bud and Trim) prior to being weighed when using the Wet Whole Plant basis. The Wet Whole Plant must be harvested and packaged in the same day.
 - (A) The Retail Marijuana Wet Whole Plant must be weighed within 2 hours of the plant being harvested and without any further processing, including any artificial drying such as increasing the ambient temperature of the room or any other form of drying, curing, or trimming. The Retail Marijuana Excise Tax must be calculated and paid on the total Wet Whole Plant weight. If the Wet Whole Plant is not weighed within 2 hours of being harvested or is subjected to further processing before being weighed, the Excise Tax on such plant cannot be calculated and paid on the Wet Whole Plant basis and must instead be calculated and paid at the Bud and Trim rates.
 - (B) A Retail Marijuana Cultivation Facility that calculates and pays the Excise Tax using the Wet Whole Plant rate must maintain records of the time each Wet Whole Plant (identified by its RFID tag) was harvested and weighed and the weight of each Wet Whole Plant. The records must be in writing and created contemporaneously with the harvesting and weighing.
 - (iv) The Retail Marijuana Excise Tax for seeds is calculated on the total number of seeds being Transferred.

- (v) The Retail Marijuana Excise Tax for Retail Marijuana Concentrate produced by a Retail Marijuana Cultivation Facility shall be calculated either pursuant to paragraph (5)(d)(i) of this rule based on the weight of Bud Allocated for Extraction and/or Trim Allocated for Extraction used in the extraction or pursuant to paragraph (5)(d)(iii) of this rule based on the weight of Wet Whole Plant(s) used in the extraction.

(6) Evidence of Payment of Tax.

- (a) Both the Retail Marijuana Cultivation Facility and the first purchaser or transferee shall maintain documentation sufficient to determine the Excise Tax due for the Transfer. Such documentation must include:
 - (i) the name and license number of the Retail Marijuana Cultivation Facility,
 - (ii) the name and license number of first purchaser or transferee,
 - (iii) the category of Retail Marijuana Transferred,
 - (iv) the date of Transfer,
 - (v) the weight of the Retail Marijuana Transferred, and
 - (vi) the contract price for the Transfer, if applicable.

BOOKS AND RECORDS OF RETAIL MARIJUANA EXCISE TAX

39-28.8-303

Copies of all books and records required to be maintained pursuant to section 39-28.8-303, C.R.S., must be maintained at each Retail Marijuana Store, Retail Marijuana Products Manufacturing Facility, or Retail Marijuana Cultivation Facility for a period of at least four years.

RETAIL MARIJUANA EXCISE TAX LICENSES AND RETURNS

39-28.8-304

- (1) A Retail Marijuana Cultivation Facility shall file a Retail Marijuana Excise Tax Return monthly reporting the total amount of Retail Marijuana sold or Transferred and the excise tax due thereon.
 - (a) The Retail Marijuana Excise Tax Return shall be filed electronically by all such vendors. The remittance of the Retail Marijuana Excise Tax shall be made in accordance with procedures prescribed on the Department's website or on forms published by the Department.
 - (b) If any vendor is unable to file Retail Marijuana Excise Tax Returns electronically, such vendor may apply to the Department for a waiver of electronic filing requirements. The Department may grant such a waiver upon a showing of good cause.

RETAIL MARIJUANA EXCISE TAX PROCEDURES

39-28.8-308

The Department's procedures governing Retail Sales Tax described in the rules promulgated under Articles 21 and 26 of Title 39 shall, to the extent not inconsistent with the provisions of Article 28.8 of Title 39, C.R.S. and the rules promulgated pursuant thereto, likewise govern the procedures with respect to the collection, reporting, and remittance of excise tax on Retail Marijuana.

Editor's Notes

History

Entire rule emer. rule eff. 12/26/2013.

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Rules 39-28.8-101, 39-28.8-302, 39-28.8-304 eff. 06/30/2016.

Rules 39-28.8-101, 39-28.8-302 emer. rules eff. 08/08/2017.

Rule 39-28.8-201 eff. 11/01/2017.

Rules 39-28.8-101, 39-28.8-302 emer. rules eff. 11/09/2017.

Rules 39-28.8-101, 39-28.8-302 eff. 01/01/2018.