



NEW YORK STATE  
BAR ASSOCIATION

# Initial Report of the New York State Bar Association Committee on Cannabis Law **Regarding Legalized Cannabis Legislation in New York State**

2019



**REPORT AND RECOMMENDATION**

**OF THE**

**NEW YORK STATE BAR ASSOCIATION'S**

**COMMITTEE ON CANNABIS LAW**

**REGARDING LEGALIZED CANNABIS**

**LEGISLATION IN NEW YORK STATE**

## **INTRODUCTION**

In late 2017, the New York Bar Association (NYSBA) formed a [Committee on Cannabis Law](#) with the following mission:

The Committee on Cannabis Law is charged with serving as the New York State Bar Association's focal point for the evolving legal status of Cannabis at both the state and federal level. Cannabis law is perhaps one of the fastest growing yet complex areas of the law that poses a broad spectrum of challenges. This Committee seeks to help NYSBA lawyers give their clients better advice through sharing educational resources, and otherwise helping New York set the highest possible legal and business (including advice to medical professionals) standards for legalized Cannabis products.

The Committee is composed of subject matter experts in the key legal disciplines relevant to the developing area of cannabis law and includes an academic advisor, Professor Robert Mikos, Vanderbilt Law School, who wrote the first law school text book on cannabis law, *Marijuana Law, Policy, and Authority* in 2017.<sup>1</sup>

Through its ongoing meetings and legal programs, the Committee has developed in a short amount of time deep legal expertise in the regulated area of cannabis law both nationally and in New York State. We aim to be one of the key legal resources on cannabis law in the country and for lawyers conducting business with companies involved in the cannabis industry. With these comments and recommendations, the Committee wishes to provide its thoughts on legalized cannabis legislation in New York State by first discussing some necessary background and then specific topics of legal interest, focusing on the social equity aspects that we understand stalled previous legislation, as well as certain other aspects. We are available to discuss these and other specific aspects of any proposed legislation in writing or in person, when so requested.

### **I. CANNABIS REGULATION IN NEW YORK STATE AND FEDERALLY**

Like many states, New York has had a history regulating cannabis, at times unregulated or partially regulated as a medical product, available only by prescription, with varying degrees of tolerance for adult use or possession. In July 2014, New York first permitted marijuana use for medical purposes. The next year, New York launched its Industrial Hemp Agricultural Research Pilot Program, which permitted a limited number of educational institutions to grow and research industrial hemp. By 2017, the State eliminated the cap on the number of sites authorized to grow and research hemp and expanded the program to include farmers and businesses, and later legislation was passed to establish industrial hemp as an agricultural commodity under the State's Agricultural and Markets Law. In August 2018, New York Governor Andrew Cuomo created a panel charged with reviewing whether adult-use marijuana should be legalized in New York, along with revising parts of its prior medical marijuana program. As a result of that

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<sup>1</sup> The Committee is Co-Chaired by Aleece Burgio and Brian Malkin and is composed of members from the following NYSBA Sections, as well as other legal disciplines: Business Law; Commercial and Federal Litigation; Corporate Counsel; Criminal Justice; Elder Law and Special Needs; Entertainment, Arts and Sports Law Section; Food, Drug and Cosmetic Law, General Practice; Health Law; Intellectual Property Law; International Law; Labor and Employment Law; Real Property Law; Tax Law; Trusts and Estates Law; and Young Lawyers.

research, Governor Cuomo proposed in the State's budget in January 2019 a comprehensive program to regulate cannabis called the Cannabis Regulation and Taxation Act (CRTA). The CRTA would have created a central Office of Cannabis Management as a subsidiary of the Division of Alcoholic Beverage Control, which would be responsible for regulating the licensure, cultivation, production, distribution, sale, and taxation of all forms of legalized cannabis in New York.

On the federal level, on December 20, 2018, Congress passed a new Agricultural Improvement Act (commonly called "the 2018 Farm Bill"). The 2018 Farm Bill created a system of shared state and federal regulatory oversight over domestic hemp production, requiring that hemp be produced in accordance with: a) a U.S. Department of Agriculture (USDA)-approved state or tribal plan governing the licensing and regulation of hemp production, or b) a federal plan administered by the USDA for hemp produced in a state or territory that does not have a USDA-approved plan and in which hemp production is legal. According to the USDA's State and Tribal Plan Review webpage, ten states and ten tribal governments had already submitted proposed hemp production plans to the USDA before the issuance of the final rule. As discussed in more detail later in this report, New York has not yet submitted its hemp plan to the USDA for review and approval.

The 2018 Farm Bill also changed the definition of "hemp" to cover any part of the cannabis plant as long as the delta-9-tetrahydrocannabinol (delta-9-THC) was below 0.3 percent on a dry weight basis, and removed hemp (but not marijuana, which is a form of cannabis) from the list of substances regulated under the Controlled Substances Act (CSA). The 2018 Farm Bill further empowered states to develop industrial hemp programs consistent with certain conditions in the Bill (or to make it illegal within the state), but each state program would need to be approved by the (USDA), which would also develop a federal hemp program.

At the same time, the 2018 Farm Bill stated that the U.S. Food and Drug Administration (FDA) would regulate hemp products that fell within its jurisdiction, i.e., food, dietary supplements, drugs, cosmetics, and medical devices that are sold in interstate commerce. FDA held a public meeting on May 30, 2019 and opened a public docket to consider how it would regulate hemp products and in particular an active drug component of hemp, cannabidiol (CBD). So far, FDA has stated that other than certain hemp seed products that do not contain CBD or THC and may be used as foods, when hemp contains CBD, it must be regulated as a drug and cannot be included in any food products, including dietary supplements. In addition to CBD and THC, hemp and marijuana also contain a significant number of other cannabinoids, including cannabigerolic acid (CBGA). CBGA is a precursor molecule in cannabis that produces delta-9-tetrahydrocannabinolic acid (THCA), which can be decarboxylated to delta-9-THC. CBGA also produces cannabidiolic acid (CBDA), which can be decarboxylated to CBD. Unless hemp extracts are processed to remove these other cannabinoids, most hemp extracts are considered "full spectrum" variety, with varying amounts of these other cannabinoids.

While several bordering states, e.g., Vermont<sup>2</sup> and Massachusetts, and New York's bordering country, Canada, have already legalized some adult-use of marijuana,<sup>3</sup> federal law still considers marijuana production, possession, and sales illegal, and marijuana is classified as a Schedule 1 controlled drug substance under the CSA, putting it in the same substance abuse category as LSD or heroin. After the 2018 Farm Bill, cannabis plants that exceed the 0.3 percent of delta-9-THC on a dry weight basis are still considered "marijuana" and as a Schedule I drug illegal to produce, possess, or sell under the CSA. This designation is for drugs perceived to show a high potential risk for abuse, contain minimal or no medical value, and cannot be safely prescribed. Therefore, the transporting of marijuana interstate is still illegal, as is the advertisement of marijuana products.

On October 31, 2019, the USDA published its Interim Final Rule governing the domestic production of hemp pursuant the 2018 Farm Bill. The USDA's Interim Final Rule codified some similar but distinct requirements for hemp production under the state and tribal plans and under the federal plan. All hemp producers, however, will be subject to similar requirements including: a) mandatory licensure, b) maintaining and reporting information about production locations and cultivated acreage, delta-9-THC testing requirements, procedures for disposing of non-compliant plants, and procedures for handling negligent and willful violations.

The Interim Final Rule became effective upon publication on October 31, 2019 and will sunset on November 1, 2021, when the USDA plans to have issued final regulations. At that point, all of the provisions of the 2018 Farm Bill will be in effect. The USDA accepted comments until December 30, 2019. The Interim Final Rule does not preempt state or tribal law, and such laws may be more stringent than federal law. State and tribal laws, however, may not prohibit or restrict interstate transportation of hemp across their borders. The USDA will have sixty days to review state and tribal hemp production plans submitted to the USDA for approval. And thirty days after the effective date of the Interim Final Rule, if a producer's State or Tribe does not have a hemp production plan or intends to have such a plan, producers may begin applying for licenses to produce hemp under the federal plan for the 2020 growing season. For the first year of the program, applications may be submitted any time, and for subsequent years, applications and renewals must be submitted between August 1 and October 31. Such licenses are not transferrable. A producer, however, cannot receive a hemp production license from a State, Tribe, or the USDA, if convicted of a felony related to a controlled substance in the last ten years.

On December 9, 2019, Governor Andrew M. Cuomo signed legislation (S.6184/A.7680) (amended and substituted as S.06968/A.08977, January 7, 2020) establishing a regulatory framework for producing and selling hemp, cannabinoid hemp, and hemp extract in New York State including a process for laboratory testing of such hemp extract products, including CBD, and product labeling. New York's framework requires "industrial hemp" of any part of the cannabis plant to have no more than 0.3 percent delta-9-THC on a dry weight basis with the testing procedure to use post decarboxylated method authorized by the U.S. Department of Agriculture or similarly reliable methods. New York will approve independent laboratories to test

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<sup>2</sup> See *Marijuana Policy Project*, available at; <https://www.mpp.org/issues/legislation/key-marijuana-policy-reform/> (noting Vermont, allows adults to possess and cultivate marijuana, but does not yet allow regulated sales).

<sup>3</sup> See *Legality of cannabis by U.S. jurisdiction*, available at : [https://en.wikipedia.org/wiki/Legality\\_of\\_cannabis\\_by\\_U.S.\\_jurisdiction](https://en.wikipedia.org/wiki/Legality_of_cannabis_by_U.S._jurisdiction) (last edited Nov. 28, 2019).

the hemp extract products produced by the manufacturer including the required tests and services. All hemp extracts must be extracted and manufactured in accordance with good manufacturing practices. New York will also promulgate rules and regulations regarding the advertising of hemp extract and any other related products. All hemp extract for human or animal consumption must be licensed by New York under these provisions and promulgated rules and regulations. The new law also includes a revised definition for “marihuana”, which excludes hemp and cannabinoid hemp. NYSBA’s COMMITTEE ON CANNABIS LAW ENDORSES THE AMERICAN BAR ASSOCIATION’S AUGUST 12-13, 2019 RESOLUTIONS REGARDING CANNABIS

The American Bar Association’s (ABA’s) Resolution regarding resolving issues between federal laws and state laws regarding cannabis and drug scheduling are as follows:

RESOLVED, That the American Bar Association urges Congress to enact legislation to exempt from the Controlled Substances Act any production, distribution, possession, or use of marijuana carried out in compliance with state laws;

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation to remove marijuana from Schedule I of the Controlled Substances Act, 21 U.S.C. §§ 801 et seq.; and

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation to encourage scientific research into the efficacy, dose, routes of administration, or side effects of commonly used and commercially available cannabis products in the United States.

NYSBA’s Committee on Cannabis Law supports the ABA’s Resolution for the reasons discussed in their proposal.<sup>4</sup> In particular, the Committee supports exempting cannabis from the CSA for production, distribution, possession, or use of marijuana carried out in compliance with state laws. The other two provisions necessarily go hand-in-hand with this first provision, because descheduling marijuana to another schedule to further study medical uses for cannabis and to better understand its benefit/risk for those medical uses may create more barriers to research with additional federal oversight. In general, however, we support continuing cannabis research, both at the federal and state level to help guide regulators.

**II. NEW YORK’S CANNABIS REGULATION AND LEGALIZED USE LEGISLATION SHOULD INCLUDE USDA MANDATED CANNABIS TESTING, A COMPREHENSIVE OFFICE OF CANNABIS MANAGEMENT, PROVISIONS FOR LOCAL MUNICIPALITY “OPT-OUT”, SOCIAL EQUITY, STATE TAX, ADVERTISING/MARKETING, and STATE ENVIRONMENTAL PROTECTIONS.**

As a general comment, we recommend that New York adopt cannabis regulation and legalized use legislation that is based on reasoned decision making and analysis of successful

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<sup>4</sup> See American Bar Association House of Delegates Resolution 104 (adopted Aug. 12-13, 2019), available at: <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/104-annual-2019.pdf>.

aspects of legislation passed in other states that have legalized cannabis use either for medical or adult-use. As an initial step, in January 2018, New York commissioned a multi-agency study, led by the Department of Health, to assess the impact of a regulated marijuana program in New York State. The impact assessment examined the health, economic, public safety and criminal justice impact of a regulated marijuana program in New York State and the consequences to New York State of legalization in surrounding states. The study found that the positive impacts of a regulated marijuana market in New York State outweigh the potential negative impacts, and that areas that may be a cause for concern can be mitigated with regulation and proper use of public education that is tailored to address key populations.<sup>5</sup> Based on the findings of the study, Governor Cuomo announced the creation of a Regulated Marijuana Workgroup to provide advice to the State on legislative and regulatory approaches needed to protect public health, provide consumer protection, ensure public safety, address social justice issues, and capture and invest tax revenue.

We are not aware of a single jurisdiction that has passed model cannabis regulation and legalized adult-use that would necessarily be appropriate for New York to adopt in total. However, we note that the RAND Corporation (“RAND”) has been commissioned by several state legislatures for comprehensive advice and analysis prior to developing their legalized cannabis use legislation. For example, RAND published *Considering Marijuana Legalization: Insights for Vermont and Other Jurisdictions*.<sup>6</sup> RAND is a research organization that develops solutions to public policy challenges. RAND is nonprofit, nonpartisan, and committed to the public interest. RAND We believe New York would similarly benefit by commissioning RAND or a similar organization to conduct such a study or analysis.

### **A. Cannabis Testing**

Because the delta-9-THC concentration of a cannabis plant determines whether it is regulated as an agricultural commodity or a Schedule I drug, the methods and testing requirements for delta-9-THC testing are critical. Prior to the USDA’s Interim Final Rule, there were no national standards for testing, which led to inconsistent regulatory requirements, industry confusion, and criminal prosecution. The Interim Final Rule now specifies when sampling must be conducted, who conducts the testing, and what methodology must be used. In terms of timing, sampling must occur prior to and within fifteen days of harvesting, i.e., harvesting may not precede sampling. If the producer fails to complete a harvest within fifteen days of sampling, a secondary pre-harvesting sample must be taken and submitted for testing. Sampling must be performed, at the producer’s expense, by an approved sampling agent or authorized government enforcement agent, accompanied by the licensee or designated employee.

The USDA’s Final Interim Rule further provided details about the sampling procedure. Samples must be collected from the flowering material (flower or bud) located at the top one-third of the cannabis plants. The sampling procedure must ensure collection of a representative sample, i.e., one that represents a homogeneous composition of a lot of hemp crop acreage. The Rule further defines “lot” to mean a contiguous area in a field, greenhouse, or indoor growing

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<sup>5</sup> *Assessing Regulated Marijuana in New York*, available at: <https://www.ny.gov/programs/assessing-regulated-marijuana-new-york>.

<sup>6</sup> Available at: [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR800/RR864/RAND\\_RR864.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR864/RAND_RR864.pdf).

structure containing the same variety or strain of cannabis throughout the area. On the USDA's website are supplemental guidelines regarding the sampling procedure, e.g., the number of plant specimens to be composited (about one per acre) to provide a representative sample for laboratory analyses.

The USDA's Interim Final Rule also imposes a number of requirements on laboratories that conduct delta-9-THC testing for the purpose of determining compliance with the 2018 Farm Bill. First, all testing laboratories will need to register with the DEA, because there is the potential that a hemp sample could have delta-9-THC levels that exceed 0.3 percent on a dry weight basis, thereby making the product "marijuana" and requiring Schedule I controls. In addition, the USDA is also considering requiring laboratories to obtain an International Organization for Standardization (ISO) 17025 accreditation ("General Requirements for the Competence of Testing and Calibration Laboratories") or a process for accrediting hemp testing laboratories, which would require the laboratories to comply with the USDA's Laboratory Approval Program requirements.

The Final Rule also clarified that when the 2018 Farm Bill defined "hemp" with regard to "delta-9-tetrahydrocannabinol concentration," this meant "total THC". As a result, the Final Rule described a process where all hemp cannabis would be tested for "total THC" including both delta-9-THC plus its precursor molecule, delta-9-tetrahydrocannabinolic acid (THCA), calculated or measured as its decarboxylated form on a dry weight basis. The analysis must be performed by a sufficiently-sensitive, validated, and reliable analytic method using, for example, gas chromatography (GC) or high performance liquid chromatography (HPLC) in combination with a suitable detector. The GC method involves heating the sample, which automatically decarboxylates any THCA present to form delta-9-THC. When delta-9-THC is subsequently detected and measured by the detection device, it is actually a combination of the delta-9-THC originally present in the sample and decarboxylated THCA, i.e., "total THC". The HPLC method detects and measures delta-9-THC and THCA separately. Total THC is then calculated by adding 87.7% of the THCA concentration to that of the delta-9-THC (since only 87.7% by weight of the THCA molecule is delta-9-THC). In addition, the USDA will allow state plans to specify different testing methods, provided that they are "similarly reliable" as compared to GC and HPLC.

An important consideration regarding compliance with the delta-9-THC testing will be a testing laboratory's calculated "measurement of uncertainty", i.e., similar to a margin of error, which will be represented by a range of values. If the concentration range represented by the measurement of uncertainty includes or falls below the statutory limit of 0.3% total THC, the cannabis will be considered "hemp" and compliant with the 2018 Farm Bill. Laboratories must share results with both the licensed producer and the USDA. Licensed producers may request retesting if, for example, they believe the original testing results are erroneous.

Cannabis plants grown under an USDA-approved industrial hemp program that exceed the "acceptable hemp THC level" are considered "marijuana" and must be disposed of in accordance with the CSA and applicable DEA regulations. Producers who use reasonable efforts to produce hemp that complies with the 2018 Farm Bill but inadvertently produce cannabis that exceeds the "acceptable hemp THC level" will not have committed a "negligent violation", if the total THC concentration is 0.5% or less.



Finally, hemp seeds can be imported into the U.S. from Canada and other countries if accompanied by a phytosanitary certificate from the exporting country's national plant protection organization to verify the origin of the seed and confirm that no plant pests are detected. In addition, Canadian seed also requires a Federal Seed Analysis Certificate (SAC, PPQ Form 925). The USDA noted, however, that the same hemp seeds can produce different total THC concentrations depending on where they are grown and under what conditions.

### **Committee Recommendations on Cannabis Testing**

The Committee on Cannabis Law recommends that New York develop industrial hemp provisions that are feasible and mirror, to the extent possible the requirements for state programs as discussed in USDA's Interim Final Rule. Further, New York State should submit its program for approval to the USDA to comply with the federal rules as soon as possible to be in position to expand hemp production in line with the 2018 Farm Bill and any subsequent related legislation when effective.

Based on our research and discussions with our members who have connections to hemp producers, however, we are concerned that one or more of the requirements discussed in USDA's Interim Final Rule will be difficult if not impossible for many hemp producers in any state to meet in the short term. First, until there is a well-established list of DEA-licensed laboratories with THC testing as required by the Interim Final Rule, the required 15-day pre-harvest testing requirement may be difficult, or impossible for some localities. If a laboratory cannot turn around testing fast enough, hemp producers may be required to undergo additional testing prior to harvest, potentially resulting in more mature, noncompliant crops that exceed the delta-9-THC levels. While a hemp producer may request retesting, it is unclear how the timing of the retesting may impact the ability to harvest a compliant hemp crop. As a result, we think that it is imperative that New York help facilitate the development of a network of DEA-compliant testing laboratories for THC as described in the Interim Final Rule to meet the needs of its hemp producers.

The USDA appears to have assumed that since THCA can be converted to delta-9-THC, usually following heating, the statutory limit for "hemp" with regard to delta-9-THC should include THCA. In some regards, the USDA's interpretation in the Interim Final Rule has been viewed as a broadening of the definition of delta-9-THC. THCA, however, can be completely converted to delta-9-THC with only a 7.94 percent loss in total molar concentration and no side reactions.<sup>7</sup> Similar to marijuana, hemp may be made into a flour and used for baking, which likely yields a less complete conversion.<sup>8</sup> Therefore, to the extent hemp flour is not derived

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<sup>7</sup> See Mei Wang et al., *Decarboxylation Study of Acidic Cannabinoids: A Novel Approach Using Ultra-High-Performance Supercritical Fluid Chromatography/Photodiode Array-Mass Spectrometry*, *Cannabis and Cannabinoid Research*, 1:1, 2016, available at: <https://www.ncbi.nlm.nih.gov/pubmed/28861498> (Table 1).

<sup>8</sup> See Kerstin Iffland et al., *European Industrial Hemp Association (EIHA) paper on: Decarboxylation of Tetrahydrocannabinolic acid (THCA) to active THC*, available at: <https://www.hanfanalytik.at/hanf/Iffland-2016-Decarboxylation-of-THCA-to-active-THC-European-Industrial.pdf> (noting that real-life scenarios with baking hemp flour may yield less conversion of THCA to delta-9-THC, because the temperature on the inside of the cake is lower at 100 Celsius versus the outside at 180 Celsius, where delta-9-THC may also evaporate).

completely from hemp seed, which contains no CBD or THC, there is also the potential for THCA to delta-9-THC conversion.

On the other hand, our members have heard from their hemp-farming clients that the 0.3 percent delta-9-THC limit, as well as hemp sampling/testing, as interpreted by the USDA's Interim Final Rule, may be too stringent for producing commercially-viable hemp crops for CBD extraction. In addition, some hemp producers have suggested that the USDA's requirement to test the top one-third of a hemp plant, including primarily the hemp flower and not the entire hemp plant, would not be consistent with current practice, which involves processing the entire plant, and that some hemp plants may be devoid of flowers or buds when harvested. In particular, the 2018 Farm Bill's definition of "hemp" does not require the delta-9-THC testing to be confined to the top one-third of the plant or the hemp flower. As noted in New York's new industrial hemp legislation (S.6184/A.7680), New York does not specifically require testing the top one-third of mature plants, but this definition is not inconsistent with requiring "any part of the plant" to have not more than 0.3 percent delta-9-THC.

Our review of the legislative history of the definition of "hemp", however, finds some support for the USDA's interpretation for testing with regard to the historical taxonomy of hemp versus marijuana varieties of cannabis now set by federal and a majority, if not all, state regulators. As explained in the reference, the limit was set based on observing the "young, vigorous leaves of relatively mature plants," which could arguable include the leaves and flowers in the top third of the cannabis plant.<sup>9</sup> In both varieties, plant taxonomists observed that CBD and THC comprised a majority of the total 2% cannabinoids by dry weight in the same sample, either in a high CBD/low THC (and high fiber and oil content) or low CBD/high THC (low fiber / higher terpene content) variety, which so formed the definition later for differentiating hemp from marijuana. Our research further supports this differentiation, because the biosynthetic pathway of generating CBD and delta-9-THC both come from the same precursor molecule, CBGA.<sup>10</sup> As a result, we would recommend that New York's industrial hemp regulations adopt the cannabis testing suggested by the USDA's Interim Final Rule.

At the same time, given that the THC limit for hemp is a statutory provision of the 2018 Farm Bill, we would recommend that New York's Department of Agriculture and Markets aggregate comments from its farmers to address the potential concerns regarding whether the 0.3 percent concern. As support for why the 0.3 percent delta-9-THC limit should be revisited, it would appear from the article that cannabis crops sampled in 1976 in Canada were either grown for THC or fiber/oil production, not CBD. We would therefore recommend that the research be updated by Dr. Small or another reputable researcher to include hemp crops cultivated for CBD extraction to determine a more appropriate hemp v. marijuana delineation based on percent of delta-9-THC, as interpreted for testing by the USDA in the Interim Final Rule.

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<sup>9</sup> See Ernest Small et al., *A Practical and Natural Taxonomy for Cannabis*, Taxon 25(4): 405-35 (Aug. 1976), Exhibit 1..

<sup>10</sup> Hanuš LO, Meyer SM, Muñoz E, Tagliabatella-Scafati O, Appendino G. Phytocannabinoids: a unified critical inventory. Nat Prod Rep. 2016 Nov 23; 33(12): 1357-1392. <https://pubs.rsc.org/en/content/articlelanding/2016/NP/C6NP00074F#!divAbstract>.

## **B. Office of Cannabis Management**

We agree that New York should set up one regulating body to oversee each program of cannabis: adult-use marijuana, medical use marijuana, and hemp product regulations. States<sup>11</sup> have found that a single body governing cannabis is required due to the complex regulations and little federal oversight that comes with legalization. The mission should be to safely, equitably, and effectively implement and administer the laws for access to adult-use and medical-use marijuana, as well as hemp products.

### **Committee Recommendations on the Office of Cannabis Management**

We recommend that New York proceed with establishing a single Office of Cannabis Management. We believe, however, that given the complex nature of this space, that cannabis be managed as a separate, standalone office including relevant regulatory expertise, rather than part of another established entity that regulates health or alcohol/tobacco products. To the extent that the Office of Cannabis Management requires expertise from other governmental authorities, such as Agriculture and Markets or the Division of Alcoholic Beverage Control, then it can seek such advice on a consult basis.

## **C. Opt-Out Provisions**

Past New York legislative proposals to legalize adult-use marijuana have included so-called “opt out” provisions, where municipality (i.e., county or city) with 100,000 or more residents could prohibit production and sales of marijuana in their county or city. If a municipality opts-out of allowing marijuana production and sales, however, such municipality also opts-out of receiving any tax revenue generated by sales of the drug statewide. Also, municipalities with less than 100,000 residents, as well as all towns and villages regardless of population, cannot opt-out of allowing marijuana sales. However, all municipalities, regardless of size, can adopt laws relating to the time, place, and manner in which adult-use dispensaries can be operated. Many localities in California and Michigan have opted out, and more than 40 towns in New Jersey have done so before the State has even passed its legislation.<sup>12</sup>

As written, the opt-out provisions could potentially harm local governments more than it protects them. There are many towns in New York with more than 100,000 residents that will not be able to opt-out under the current proposal, since it only applies to counties and cities. This could be an issue in population dense areas like, Nassau, Suffolk, and Westchester Counties,

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<sup>11</sup> See, e.g., Oregon’s Cannabis Commission, which was established in 2017 after originally being under the Oregon Liquor Control Commission, available at:

<https://www.oregon.gov/oha/PH/DISEASES/CONDITIONS/CHRONICDISEASE/MEDICALMARIJUANAPROGRAM/Pages/Cannabis-Commission.aspx>; see also Massachusetts Cannabis Control Commission, available at: <https://mass-cannabis-control.com/>.

<sup>12</sup> See [https://www.michigan.gov/documents/lara/MRTMA\\_Municipality\\_Opt-Out\\_Update\\_1-25-2019\\_644664\\_7.pdf](https://www.michigan.gov/documents/lara/MRTMA_Municipality_Opt-Out_Update_1-25-2019_644664_7.pdf) (stating that as of 12/6/2019 approximately 80% of municipalities in the State of Michigan have opted of allowing recreational sales in their communities).

See also, <https://mjbizdaily.com/chart-most-of-california-municipalities-ban-commercial-cannabis-activity/> (noting that Only 161 of California’s 482 municipalities and 24 of the 58 counties have opted to allow commercial cannabis activity).

See also, <https://www.nytimes.com/2019/05/13/nyregion/marijuana-legalization-ny-nj.html>

where many towns have over 100,000 people. Also, if a town of over 100,000 people wants to prohibit adult-use cannabis business from operating within its boundaries, it will not be able to do so. Thus, a foreseeable result of the opt-out could be that some counties may end up prohibiting adult-use marijuana to appease one or more large or more influential towns within the counties' boundaries, even if the majority of towns or residents within the county in favor of adult-use marijuana businesses and the tax revenue and jobs that could be realized therefrom.

By way of example, in Nassau County, the Town of North Hempstead enacted a local law on January 8, 2019 prohibiting the retail sale of adult-use marijuana.<sup>13</sup> If the proposed opt-out provisions are enacted, however, this local law would be preempted. One reasonably foreseeable result of preemption, therefore, would be that the Town of North Hempstead would lobby the Nassau County legislature to exercise the county-wide opt-out, thereby prohibiting marijuana businesses from operating in one of the largest counties in the state.

### **Committee Recommendations on Opt-Out Provisions**

We recognize that opt-out provisions are helpful to allow local cities and towns to not allow adult-use marijuana in their local areas. Given the possibility for disparities with municipalities that do not meet the proposed definition, we would recommend that towns and cities larger than 100,000 or larger be given the opportunity to opt out to allow adult-use marijuana, as well as adopt laws relating to the time, place, and manner in which adult-use dispensaries can be operated, if not opted out. Because of the potential for county governments to opt-out because one or more influential cities or towns lobbies for it to the potential detriment of a majority of other cities or towns in that county, we recommend that counties not be given the option to opt-out.

#### **D. Social Equity**

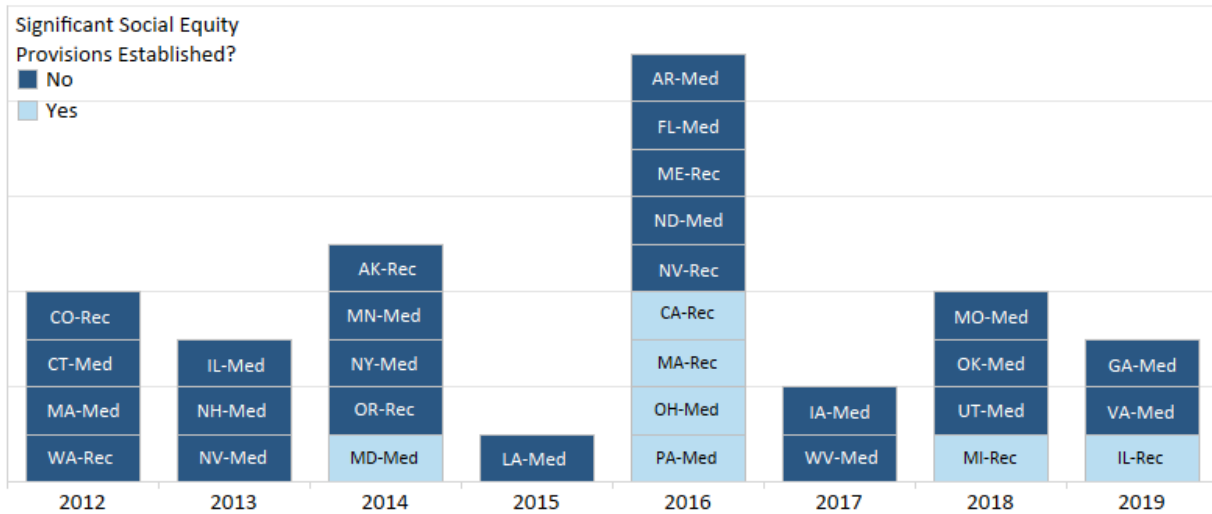
Social equity has been both a sticking and selling point among New York legislators when weighing whether to implement adult-use legislation. Of the eighteen states that have legalized medicinal or recreational marijuana since 2016, six have taken measures to increase diversity in their marijuana programs. Most of the first states to legalize marijuana, such as Colorado and the State of Washington in 2012, did not include provisions that state licenses to grow, process, or dispense marijuana would be distributed equitably or would positively impact less prosperous communities. More recent states to enact adult-use marijuana legislation, such as Massachusetts, however, have included social equity provisions.<sup>14</sup>

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<sup>13</sup> See Town of North Hempstead Local Law 1 of 2019.

<sup>14</sup> Under Massachusetts Law, Part I Title XV, Chapter 94G, Section 4.

## Status Of Social Equity Provisions By State & Market: 2012-2019



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In Massachusetts, for example, a Social Equity Program was created where applicants must either have lived for five of the last ten years in an “area of disproportionate impact” and have an income under 400 percent of the federal poverty level, or they must have a past drug conviction or be a spouse or child of someone who does and have lived in Massachusetts for the past year. In addition, Massachusetts has an Economic Empowerment Priority Review Program, which prioritizes review and licensing decisions for applicants seeking retail, manufacturing, or cultivation licenses who are able to demonstrate business practices that promote economic empowerment in communities disproportionately impacted by high rates of arrest and incarceration for marijuana possession offenses under state and federal laws.

Under Michigan’s adult-use legislation, Michigan has adopted social equity provisions that promotes and encourages participation in the cannabis industry by people from communities that have been disproportionately impacted by cannabis prohibition and enforcement.<sup>15</sup> In addition, Michigan’s marijuana regulatory agency established a Social Equity Team, which provides: one on one assistance with the social equity application, assistance preparing and completing the adult-use application, education on marijuana rules and regulations, and connecting participants with resources regarding the program.<sup>16</sup>

The most notable and controversial social equity program, however, was enacted by Illinois. Illinois’ social equity program includes: technical assistance and support through the Illinois Department of Commerce and Economic Opportunity, applicants automatically receive

<sup>15</sup> Michigan Regulation and Taxation of Marihuana Act., 333.27958 Rules; limitations., Sec. 8. 1.

<sup>16</sup> Michigan.gov, Department of Licensing and Regulatory Affairs, Social Equity (Adult-Use Marijuana), available at: [https://www.michigan.gov/lara/0,4601,7-154-89334\\_79571\\_93535---,00.html](https://www.michigan.gov/lara/0,4601,7-154-89334_79571_93535---,00.html).

50 points out of a possible total of 250 on the application score, extra points are provided for having a diversity plan or having a plan to engage the community (e.g., establishing an incubator program or contributing to local treatment centers), and diversity applicants have reduced application and license fees as well as options for low interest loans.<sup>17</sup>

### **Committee Recommendations on Social Equity**

We recommend that New York should look in particular to the six more recent states to adopt social equity provisions to see which provisions have been effective to encourage full participation in the regulated marijuana industry by people from communities that have previously been disproportionately harmed by marijuana prohibition and enforcement and how to best use the tax proceeds from legalized cannabis in New York to positively impact those communities. As part of that process, we recommend that New York commission an outside research entity like RAND to take a critical look at states with social equity programs for legalized marijuana to guide public policy decisions for what provisions to institute.

We recommend that New York not adopt any specific social equity provisions until this analysis is complete, but that such efforts should not prevent comprehensive regulation of legalized adult-use cannabis. However, to ensure that social equity measures be promptly considered and enacted, we recommend that the comprehensive regulation expressly provide for a two-year sunset and that a plan for social equity programs be part of a recertification bill within one or two years of enacting the comprehensive cannabis regulations.

Specific provisions that the Committee recommends New York consider in its initial social equity programs and commissioned state analysis include:<sup>18</sup>

- Develop incubator programs to provide direct support to small-scale operators who are marijuana license holders in the form of legal counseling services, education, small business coaching and funding in the form of grants.
- Require licensees to use good-faith efforts in hiring employees who meet the equity eligibility criteria, and certify annually that 25% of their employees meet the criteria or that they have use a good faith effort to achieve that 25% threshold.
- Dedicate a percentage of local cannabis tax and non-licensing fee revenue to support a Community Reinvestment Fund to, at a minimum, provide reentry services, job training, and criminal-record-change assistance to residents of disproportionately impacted areas.
- Ban local or state government from discriminating against licensing applicants on the basis of their substance-use treatment history, or convictions unrelated to honesty, and background checks can only be used to check for those convictions.

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<sup>17</sup> Illinois Cannabis Regulation and Tax Act, Article 7.

<sup>18</sup> See Minority Cannabis Business Association's Ten Model Municipal Social Equity Ordinances available at <https://cannabis.ca.gov/wp-content/uploads/sites/13/2019/07/MCBAs-Ten-Model-Municipal-Social-Equity-Ordinances.pdf>

- Create a basic framework for permitting cannabis-consumption lounges, while leaving zoning to local governments. Local governments are authorized to regulate consumption lounges where cannabis may be used on site.
- Authorizing local government to facilitate resentencing and expungement to restore the civil rights of prior cannabis arrestees and to fund these efforts through cannabis taxes. This can include automation, fee waivers, and funding legal fairs and lawyers to publicize and execute.

## **E. Marijuana Taxes**

### **1. Adult-Use Marijuana**

States that have legalized adult-use marijuana have experimented with various taxation regimes, including flat and weight-based taxes. A pattern appears to be emerging, however, indicating that a lower rate of tax returns higher per capita tax revenues and fosters a robust and thriving market while simultaneously discouraging growth of the gray and illicit market. Both the type and amount of marijuana taxes, therefore, should be designed to prevent business and consumers from operating in the gray and illicit markets.

Cultivation taxes, for example, are imposed by some states and should be carefully considered: What the cultivation tax does not consider is the potency, and, therefore, value of the crop. Some consumers, or medical users, may prefer less potent versions of the product. Therefore, pure product weight may not be the best metric for a cultivation tax. Cannabis is a plant that can vary widely in its composition among species. Using weight to determine the tax rate may limit growers to certain biochemical makeups and limit production potential. Examples of some state cultivation taxes: Maine - \$ 335/lb., Alaska - \$50/oz., and California - \$9.25/oz.

A marijuana sales tax that is more in the form of a traditional sales tax may make the most sense, because it does not differentiate between products and is instead a function of price. New Jersey is reportedly considering the nation's lowest tax of 10% on marijuana. Colorado has a 15% sales tax on adult-use marijuana that started as a combined 12.9% sales tax that increased to 15% on July 1, 2017.<sup>19</sup> The current 15% marijuana sales tax is in addition to a 15% state retail excise tax on marijuana sales. The combined 30% marijuana tax rate generated over \$266 million for Colorado in 2018.<sup>20</sup>

Though, as shown below, Colorado is generating the most tax revenue per capita of those 21 and over, the illicit market continues to grow due, at least in part, to a combined 30% sales tax rate. Unlicensed growers are growing cannabis for sale in other non-legal states, in search of higher profits.<sup>21</sup> A 30% sales tax may lead consumers to seek illicit market products as those products are not taxed. This hurts both the state as well as legitimate businesses.

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<sup>19</sup> Colorado Department of Revenue, Marijuana Tax Data (updated Dec. 2019), available at: <https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data> .

<sup>20</sup> *Id.*

<sup>21</sup> CBC, *Why Colorado's black market for marijuana is booming 4 years after legalization* (May 28, 2018), available at: <https://www.cbc.ca/news/world/colorado-marijuana-black-market-1.4647198> .

California’s cannabis taxes can amount to nearly 40%, including wholesale taxes, which has caused nearly 20% of consumers to purchase cannabis from the illicit market. Studies have shown that a reduction of 5% in taxes could move nearly a quarter of purchases made on the illicit market to legal purchases.<sup>22</sup>

New York may be in a rare position to attempt to insulate itself from the continued growth of the illicit market. New York can impose a tax rate no more than 30% in total, keeping it in line with other states or even lowering the tax rate below other states to attempt to create a market that effectively prices the illicit market out of competition.

**(a) Current Tax Rates**

As a comparison, states that have legalized marijuana for adult use have the following tax rates:<sup>23</sup>

State	Retail	Wholesale	Population (>=21)	Adult-Use Revenue (2018)	Per Capita Revenue (>= 21)
California	9.25% Sales Tax; 15% Excise Tax; Up to 10% Local Tax <b>Total: 34.25%</b>	\$9.25/oz. flowers \$2.75/oz. leaves	30,892,866 <sup>24</sup>	\$236,000,000 (estimate) <sup>25</sup>	\$7.63
Colorado	15% State Tax; Up to 10% Local Tax; <b>Total up to 25%</b>	15% Excise Tax	3,014,312 <sup>26</sup>	\$266,529,637 <sup>27</sup>	\$88

<sup>22</sup> Ease Insights, The High Cost of Illicit Cannabis (July 2018), available at: [https://mjbizdaily.com/wp-content/uploads/2018/08/High-Cost-of-Illegal-Cannabis\\_FINAL\\_.pdf](https://mjbizdaily.com/wp-content/uploads/2018/08/High-Cost-of-Illegal-Cannabis_FINAL_.pdf) .

<sup>23</sup> Cannabis Tax Rates: A State-By-State Guide (June 22, 2017), available at: <https://www.leafly.com/news/industry/marijuana-tax-rates-by-state> .

<sup>24</sup> Suburban Stats, Current Population and Demographics and Statistics for California by age, gender, and race (2019, 2020), available at: <https://suburbanstats.org/population/how-many-people-live-in-california> .

<sup>25</sup> California taxmakers are considering a tax cut – for cannabis, The Sacramento Bee (Jan. 28, 2019), available at: <https://www.sacbee.com/news/politics-government/capitol-alert/article225185310.html> .

<sup>26</sup> Infoplease, CO Demographic Statistics, available at: <https://www.infoplease.com/us/comprehensive-census-data-state/demographic-statistics-33> .

<sup>27</sup> Colorado Department of Revenue (through November 2019), available at: <https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data> .



State	Retail	Wholesale	Population (≥21)	Adult-Use Revenue (2018)	Per Capita Revenue (≥ 21)
Maine	10% Sales Tax <b>Total: 10%</b>	\$335/lb. flowers \$94/lb. leaves \$1.50/immature plant; \$0.30/seed	1,131,622 <sup>28</sup>	NA	NA
Massachusetts	6.25% State Tax; 10.75% Retail Tax; 3% Local Tax <b>Total: 20%</b>	NA	4,587,935 <sup>29</sup>	NA	NA
Nevada	10% Excise Tax; Up to 8% Local Tax; <b>Total: 18%</b>	15% Excise Tax	1,411,378 <sup>30</sup>	\$69,400,000 (estimate to June 2019) <sup>31</sup>	\$49
Oregon	17% State Tax; 3% Optional Local Tax; <b>Total up to 20%</b>	NA	2,429,348 <sup>32</sup>	\$82,203,729 (fiscal year 2018) <sup>33</sup>	\$34
Washington	6.5% State Tax; 37% Excise Tax;	NA	5,650,485 <sup>34</sup>	\$64,000,000	\$11

<sup>28</sup> Suburban Stats, Current Population Demographics and Statistics for Maine by age, gender and race (2019, 2020), available at: <https://suburbanstats.org/population/how-many-people-live-in-maine> .

<sup>29</sup> Infoplease MA Demographic Statistics, available at: <https://www.infoplease.com/us/comprehensive-census-data-state/demographic-statistics-149> .

<sup>30</sup> Infoplease Nevada Demographic Statistics, available at: <https://www.infoplease.com/us/comprehensive-census-data-state/demographic-statistics-217> .

<sup>31</sup> *Nevada marijuana tax revenues top \$31M from July to October*, Las Vegas Review-Journal (Dec. 31, 2018), available at: <https://www.reviewjournal.com/news/pot-news/nevada-marijuana-tax-revenues-top-31m-from-july-to-october-1562785/> .

<sup>32</sup> Infoplease Oregon Demographic Statistics, available at: <https://www.infoplease.com/us/comprehensive-census-data-state/demographic-statistics-245> .

<sup>33</sup> Oregon Marijuana Tax Statistics: Accounting Information (through November 2019), available at: <https://www.oregon.gov/DOR/programs/gov-research/Documents/Financial-reporting-receipts-public.pdf> .

<sup>34</sup> Suburban Stats, Current Population Demographics and Statistics for Washington by age, gender and race (2019, 2020), available at: <https://suburbanstats.org/population/how-many-people-live-in-washington> .

State	Retail	Wholesale	Population (≥21)	Adult-Use Revenue (2018)	Per Capita Revenue (≥ 21)
	<b>Total: 43.5%</b>			(annualized) <sup>35</sup>	

**(b) Taxation Analysis**

The above table shows a probable correlation between tax rate and revenue per capita of those 21 and older. Colorado’s 20% retail tax along with a flat 15% excise tax on the wholesale side resulted in the highest tax revenue out of any adult-use state. Colorado, however, also has one of the most mature adult-use markets. Conversely, California’s over 34% retail tax and weight-based excise tax and Washington’s over 40% retail tax resulted in significantly lower tax revenues per capita of those 21 and over. It is important to note that there are many factors that influence the revenue collected by a state, and the tax regime is merely one factor.

Cumulatively, the tax rate in California can be as high as 45% which has caused significant numbers of consumers to turn to the illicit market in order to avoid substantially-increased prices associated with legal purchases. The marijuana tax revenue shortfall of \$101 million in California has prompted the legislature to reduce the retail excise tax from 15% to 11% and suspend all cultivation taxes until 2022. The legislature’s rationale is that states with lower tax rates have seen continued tax revenue growth (e.g., Colorado over 7% tax revenue growth from 2017 to 2018.<sup>36</sup>). Democratic Assemblyman Rob Bonta, sponsor of California’s bill to reduce cannabis taxes, stated, “Lowering a tax rate to bring in more money might sound counterintuitive, but as they found in Washington state, if you drop the tax, more people will buy more legally so revenue will go up.”<sup>37</sup>

If New York were to follow California’s model of relatively high taxes out of the gate and then lower the taxes after tax revenues fail to meet expectations, New York runs the risk of small businesses being unable to withstand the initial high tax period. This will lead to a business environment where only the most well-funded businesses are able to absorb and offset the taxes with an eye towards lower taxes. The smaller businesses will not be able to absorb and offset some of the taxes and will not be able to push the ultimate cost to the end consumer in the form of higher retail prices as these small businesses would be undercut by larger businesses with bigger profit margins.

Additionally, Section 280E of U.S. Internal Revenue Code law increases the tax burden on businesses which will necessarily pass on the tax to consumers, resulting in higher pricing.

<sup>35</sup> *Recreational and medical marijuana taxes*, Department of Revenue Washington State, available at: <https://dor.wa.gov/about/statistics-reports/recreational-and-medical-marijuana-taxes>.

<sup>36</sup> *Marijuana Tax Data*, Colorado Department of Revenue (through November 2019), available at: <https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data>.

<sup>37</sup> *California craving more tax revenue from recreational cannabis sales*, San Francisco Chronicle (Feb. 3, 2019), available at: <https://www.sfchronicle.com/bayarea/philmatier/article/California-craving-more-tax-revenue-from-13582251.php>.

Section 280E prohibits traffickers in controlled substances (all legal cannabis businesses) from deducting of all business expenses, except cost of goods sold (“COGS”). An excise tax paid by cultivators that would otherwise be a deductible business expense becomes non-deductible by virtue of Section 280E resulting in the need to increase sales price. Legal cannabis businesses can face effective tax rates in excess of 70% which results, to an extent, on taxation of revenue, not profits.<sup>38</sup> Tacking on an additional 45% tax, as we’ve seen in California (and higher rates proposed by the CRTA) will lead to an immediate increase in retail pricing that far exceeds the illicit market as cannabis companies seek to project what little profit margin exists.

Lastly, IRS Chief Counsel Advisory, IRS CCA 201631016, requires that excise taxes be capitalized which reduces gain on the sale of property. Therefore, an excise tax, according to the CCA, is not a deductible expense for businesses, and instead must be capitalized into the cost of goods. If a cultivator is required to pay an excise tax, the cost would be difficult for the cultivator to capitalize as they are not buying a product for resale, but instead creating the product. This could result in the situation wherein a cultivator is taxed on the money used to pay the excise tax.

### **Committee Recommendations on Marijuana Taxes**

New York would be advised to adopt a taxation regime similar to Colorado’s to avoid increasing illicit market sales. Section 280E is unlikely to change for the next two to four years and therefore, a lower New York State tax rate allows for the economic reality that the federal tax law denies deductions to all expenses except COGS.

If New York were to enact lower tax rates until the federal tax law is updated, it would act as an investment into the cannabis ecosystem in New York. Further, it would allow small businesses, who cannot afford sophisticated planning techniques, to compete with large cannabis companies who can engage expensive legal and taxation advice to reduce effective tax rates through exotic and complicated business structures.

The Committee proposes that New York adopt rates that have proven efficacy to facilitate legal sales, sustain increased tax revenue growth year-over-year and support a thriving market. Upon a change in federal tax law, New York would have the availability to increase its tax rates and maintain price equilibrium as companies will be allowed to deduct their ordinary and necessary business expenses, including excise taxes.

Lastly, it would be advisable that New York refrain from imposing an excise tax at the production and wholesale levels to avoid the penalties of Section 280E. Instead of imposing a weight based or flat tax on producers and processors, the excise tax should instead be borne by retailers or consumers. As explained above, an excise tax paid by retailers would allow the retailer to capitalize the excise tax into the basis of the property sold, and therefore it would reduce the gain upon the sale. For example, if a cultivator sells cannabis for \$100 to a retailer and the retailer pays \$100 plus a \$25 excise tax, the retailer’s basis in the cannabis would be, by virtue of § 164 of the Tax Code, \$125. If the retailer sells the cannabis for \$200, the retailer would only be taxed on \$75 of gain.

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<sup>38</sup> *Fed Slaps 70% Tax on Legal Marijuana Businesses*, Daily Beast (Apr. 13, 2017 updated), available at: <https://www.thedailybeast.com/feds-slap-70-tax-on-legal-marijuana-businesses>

The tax revenue to New York would be indistinguishable but this would allow businesses to escape a non-deductible tax. If businesses do not have to account for a non-deductible tax in determining the price of their product, it may result in lower prices to consumers, which will help avoid increasing activity into the illicit market. The placement of the excise tax, whether at production/wholesale or retail, could be reversed upon a change in federal law allowing for ordinary and necessary business deductions for cannabis companies. Moreover, the ability to allocate an excise tax between retail and wholesale gives the State a mechanism, similar to the federal government's ability to control interest rates through the Federal Reserve Bank, to encourage or discourage production capacity and pricing without the need to consistently adjust license numbers.

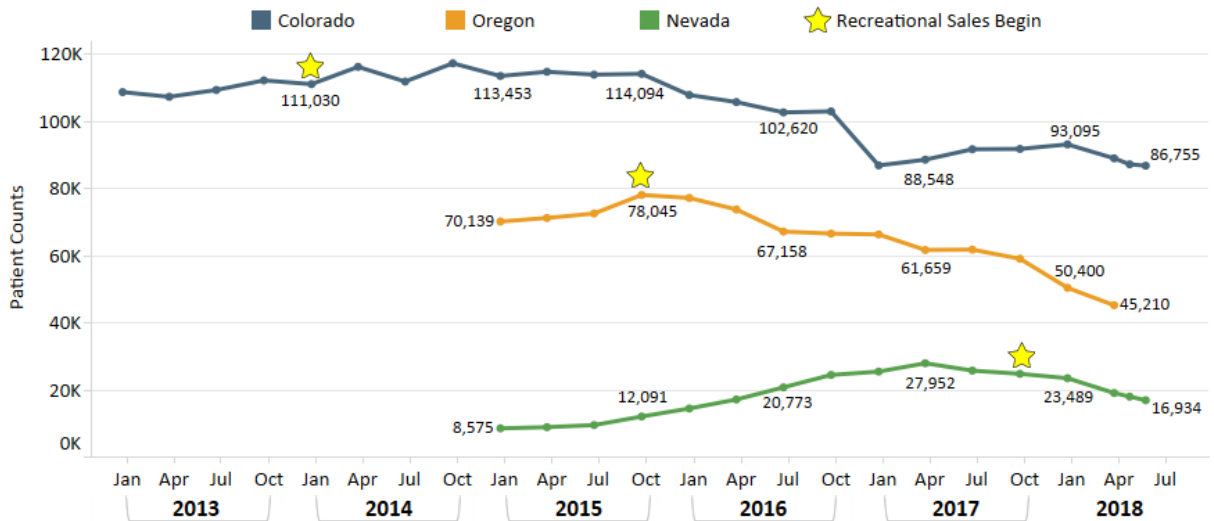
## **2. Tax Considerations Regarding Medical Marijuana**

Based on data published by other states, we can expect New York's medical marijuana program to experience some patient decreases if New York legalizes adult-use marijuana. One way that New York could stem this reduction would be by managing the taxation of medical cannabis to retain medical marijuana patients. As noted in the chart below,<sup>39</sup> states where there were tax advantages to staying in the medical marijuana program had the lowest attrition from the medical marijuana programs. For example, Oregon's medical marijuana observed the greatest reduction, with patient counts falling 42% since early adult-use sales began in October 2015. Nevada also observed significant reductions, with patient counts down 32% since its October 2017 adult-use launch, i.e., an average decline of 5% per month. In contrast, Colorado fared better, with patient counts down 22% since the state's adult-use market launched in January 2014. Based on a comparison between these three states, the smaller decline was thought to be likely driven by a combination of low-cost medical marijuana cards and significantly-reduced tax requirements on medical purchases.

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<sup>39</sup> Eli McVey, Marijuana Business Daily, *Chart: Can medical marijuana programs survive in states with recreational markets?* (July 16, 2018), available at: <https://mjbizdaily.com/chart-can-medical-marijuana-programs-survive-in-states-with-recreational-markets/>.

**Impact of Legalizing Recreational Marijuana on MMJ Patient Counts In Colorado, Oregon & Nevada**



Source: Oregon Medical Marijuana Program, Colorado Marijuana Enforcement Division, Nevada Division Of Public and Behavioral Health  
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So far New York has maintained a relatively conservative medical marijuana program to allow for better record-keeping of diseases treated and patient results, which should continue to be collected to help guide the program in coming years by following Colorado’s model. For patients navigating the certification process in New York’s medical program, the price of high-quality, medical-grade cannabis should be affordable enough to preserve the market and its tested products from recreational offerings. New York should also consider implementing procedures to simplify the procedure for patients to obtain certifications for medical marijuana, e.g., by permitting more physicians to prescribe and further removing restrictions on the types of indications where medical marijuana could be prescribed. Otherwise, patients who view the certification as too arduous or too expensive will turn to recreational products to self-medicate, effectively removing clinical oversight, product integrity, and targeted therapeutic relief from the use of cannabis.

In addition, we believe that given what happened in Oregon and Nevada, attrition from the medical program to recreational use will be driven primarily by the economic framework of the two programs. One of the most common complaints among patients certified through New York State’s medical cannabis program is that of cost. New York-certified patients pay average monthly expenditures ranging from \$100 to \$500 for physician-recommended doses. Financial incentives, including reduced tax requirements, low-cost medical cannabis cards, financial

hardship discounts, and exclusive access to higher-dose formulations have been proposed in other states to prevent erosion of medical programs.<sup>40</sup>

New York's organization of both medical and adult-use marijuana programs under a single regulatory body should act to shield its medical marijuana program. A robust medical marijuana program will be a driver for New York's leadership in marijuana legitimacy and clinical relevance and reliability. A broadening of opportunities for physician-led research on marijuana, its properties, and its various efficacy rates for the State's approved conditions will benefit the overall science as well as patient outcomes in the medical marijuana program.

The State program should lean on qualified medical professionals, New York's leading clinicians and pharmacists, to determine an appropriate measurement for impairment and to promote research-backed safety indications for all marijuana users. Coordination of both programs with the protection of the medical program in mind will benefit all marijuana users in New York State.

## **F. Advertising and Marketing**

The Committee recommends that New York's proposed comprehensive cannabis legislation work in congruence with the FDA as to avoid any confusion on which rules govern. For example, it is recommended that any proposed cannabis legislation refer to its own state labeling requirements for food products that are consistent with the Federal Food Drug & Cosmetics Act and the Fair Packing and Labeling Act. The reasoning behind this recommendation is that if the proposed legislation refers directly to application of FDA regulations to label it could potentially expose New York cannabis businesses to FDA enforcement on the basis that they are violating federal food labeling laws. For example, the FDA has stated that only products containing no CBD or THC, two of the most common drug components of cannabis, e.g., hemp seed products, can be used in FDA-regulated food products, i.e., sold in interstate commerce, including dietary supplements.<sup>41</sup> On the other hand, if New York or any state were to develop food product laws that governed products not subject to FDA's jurisdiction, i.e., manufactured from products exclusively grown, packaged, and sold in New York, then New York could develop its own laws to govern these products separate from food products sold in interstate commerce.

### **Committee Recommendations on Advertising and Marketing**

We recommend that New York develop cannabis marketing and labeling guidelines for products that would be grown, processed, and packaged for exclusive use in New York, separate from cannabis products that would be developed for interstate commerce and would be subject to

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<sup>40</sup> Shira Shoenburg, MassLive, *Will recreational marijuana stores help or hurt medical marijuana patients?* (May 29, 2018; updated Jan. 30, 2019), available at: [https://www.masslive.com/politics/index.ssf/2018/05/will\\_recreational\\_marijuana\\_st.html](https://www.masslive.com/politics/index.ssf/2018/05/will_recreational_marijuana_st.html).

<sup>41</sup> FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD) (updated Dec. 6, 2019), available at: <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd#legaltosell>.

concurrent jurisdiction by the FDA. Along those lines, we recommend some of the following labeling and packaging guidelines to be considered.

### Medical Marijuana Packaging Should Be Adopted

It is recommended that the proposed adult-use bill also adopt the regulations set forth in S. 1004.11(h), (i), (j), and (k) -- Manufacturing Requirements for Approved Medical Marijuana Product, which was made part of New York State's medical marijuana program.

More regulations need to be implemented, however, in light of adult use in New York State based on an analysis of other states' robust packaging and labeling regulations such as California's and Colorado's packaging and labeling laws.

### All Packaging Should Be *Certified* Child-Resistant Packaging

Prior to delivery or sale at a retailer, cannabis and cannabis products shall be labeled and placed in a resealable, child-resistant package, and it is recommended that such cannabis products, prior to delivery or sale at a retailer, be placed in a resealable package that has been tested by companies similar to the ones recommended by the Consumer Product Safety Commission.

### Add Allergen Warnings

The proposed legislation should require cannabis-infused products to list a nutritional fact panel. It is recommended that a requirement also be made that cannabis labeling for cannabis-infused products include allergen warnings which, at a minimum, warn the consumer whether the cannabis-infused product contains nuts and dairy products.

### Additional Labeling Requirements

The proposed law should also mandate that all labeling of cannabis include:

- A. **Exit Packaging:** Opaque Containers for Exit Packaging with Child-Resistant Locks.
- B. **Font Size:** That lettering be of a minimum font size of a Primary Panel be no less than 6-point font and in relation to size of panel and container; and the Informational Panel be no less than 6-point font and in relation to size of primary panel. If the font cannot fit all required info, the product may be accompanied by a supplemental labeling with no less than 8-point font. In addition, warning statements must be on non-supplemental labels and in no less than 6-point font and should only be in black lettering with a white background.
- C. **Add Universal Symbol Requirement:** New York State was to create a universal symbol for single serving edibles as of January 1, 2019. It is uncertain whether New York's universal symbol has been implemented into its Medical Marijuana Program as of the date of this recommendation. If such a universal symbol has been implemented for single serving edibles for the Medical Program, then it is

recommended that it be carried forward in the proposed adult-use legislation. In addition, it is recommended that there be an educational program developed to be taught in the public schools and in public service announcements to children and the public about what the cannabis universal symbol means akin to the skull and cross bones on dangerous substances.

- D. Prohibit untruthful or misleading statements
- E. Prohibit packaging that resembles packaging of certain commercially available products
- F. Include liquid unit measurements.
- G. Packaging must protect contents from contamination.
- H. **Labeling Cannabis or Cannabis Products as “Organic”:** It is recommended that the proposed adult-use legislation add a section on explicitly prohibiting adult-use cannabis processors from using the term “Organic” in labeling of cannabis products to refer to cannabis or cannabis products/edibles, unless the cannabis is produced, processed and certified in a manner that is similar to the Organic Foods Production Act of 1990.

#### **G. Committee Recommendations on Environmental Issues**

Experience has shown that cannabis cultivation does have the potential to cause adverse environmental impacts. Any state legislation that will result in increased cannabis cultivation should consider environmental issues.

The issues which should be addressed include the use of pesticides, energy management, air quality, including odor control, and wastewater and waste disposal considerations. Most of these issues are too technically complex for specific mandates to be included in federal legislation. Evolving technology and concerns can be more efficiently addressed through regulation without the need to amend the federal legislation. Any legislation should require that the administrative body which regulates state cannabis growing, cultivating, processing, and use should develop regulations embodying environmental standards to which permitted cultivators and manufacturers are required to adhere.

The issue of pesticide use likely to be a particularly sensitive issue. Some industry participants and advocates urge that no pesticides be allowed, or that only those pesticides that qualify for use with the U.S.D.A. National Organic Program (“NOP”) be allowed. However, while some cultivators strive to grow organically,<sup>42</sup> even under the most sophisticated Integrated Pest Management (“IPM”) programs, some use of pesticides, particularly fungicides, is likely to

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<sup>42</sup> Qualification under the NOP is not currently legally possible, given the Schedule 1 listing of cannabis. Thus, while some cultivators may describe their product as “organically produced,” use of the term “organic” and use of the USDA NOP seal are not allowed.



be necessary. The statute should mandate that rules require that IPM programs be part of any cultivation program, but should not otherwise specify the prohibition of specific products.

With respect to pesticide use the rules shall require the development and implementation of integrated pest management plans incorporating to the extent practicable sanitation and the use of cultural controls including beneficial pests as well as the appropriate use of pesticides. Cultivators of adult-use cannabis should be permitted to only use pesticides that are registered by the department of environmental conservation or that meet the United States environmental protection agency registration exemption criteria for minimum risk pesticides, and only in compliance with regulations and guidance issued by the Department of Environmental Conservation. Such regulations and guidance shall require the use of integrated pest management principles, including where required the appropriate use of pesticides.

Recycling of excess waste from manufacturing and consumption of cannabis product and packaging have become a major environmental issue across the country. Vaporizing cannabis has become one of the most popular ways to consume cannabis just behind traditional smoking of the cannabis flower. Spent plastic tubes used to hold cannabis cigarettes, vaporizer cartridges containing excess cannabis, and vaporizer batteries are polluting the environment without product controls.

It is also recommended, therefore, that state cannabis legislation require minimal packaging requirements to reduce the amount of material used to house the cannabis product for sale to consumers. California has enacted such environmental controls for its adult use and medical marijuana products and, therefore, New York should commission a study of California's and other states' regulations on cannabis environmental laws to understand how to best implement a section on recycling regulations in New York's cannabis regulations.

### **III. CONCLUDING REMARKS**

NSYBA's Committee on Cannabis Law will continue to monitor the evolving legal status of cannabis at both the state and federal level. In addition to offering top-quality cannabis law continuing education and resources for its members, the Committee hopes to be a resource to New York's and federal legislatures to help set the highest possible legal and business standards for legalized cannabis products. We hope that you found this report useful and will endorse it for the broader acceptance by NYSBA's House of Delegates and the Association generally.