



TAX RATES IN NEW YORK'S ADULT-USE CANNABIS MARKET

Introduction

The New York City Cannabis Industry Association and the Hudson Valley Cannabis Industry Associations (the "CIAs") have issued a joint statement urging the New York State Assembly and Senate to pass adult-use cannabis legalization legislation in 2020 for many reasons, including the promotion of social justice, job creation, and collection of badly-needed revenue to close the budget gap caused by the Covid-19 pandemic. For legalization to have a lasting positive impact, the law in whatever form it is passed must create an environment that will enable the legalized market to thrive and bring legacy market participants within the regulatory framework.

The tax rate assessed by the new law will be a key factor in the short and long-term success of the industry. The regulatory committee of each of the CIAs have reviewed the tax rates proposed by the Marijuana Regulation and Taxation Act ("MRTA") and compared them to the tax rates charged in a number of other states that already have legalized cannabis industries, as well as the proposed rates in neighboring states that are likely to have a legalized adult-use market in the near future.

As set forth in greater detail below, while the tax rates proposed in the MRTA are superior to many states with an adult-use market, New York must do better to address the serious challenges that the legacy market and regulated cannabis markets in neighboring states will pose to a regulated cannabis market in New York. The regulatory committees recommend that any adult-use legalization legislation lower the initial tax rate to 12% from the 22% currently proposed, as the retail prices of cannabis products are highest in the first few years following legalization. The State can gradually increase the tax rate in subsequent years as the industry matures and prices decrease.

Background

As states have legalized cannabis for medical and adult-use, there has been significant debate over the best way to tax this industry at the state and local level. What is known about the consequences of imposing various taxes on the industry is evolving. However, it is clear that a low initial tax rate is essential to attract legacy market participants to the regulated market, thereby reducing the size of the cannabis market that is unregulated and untaxed. It also allows the legal market to gain footing and thrive by keeping overall pricing reasonable when the cost of cannabis is at its highest immediately following legalization. States with legal cannabis industries use a variety of taxes, including weight-, price- and potency-based excise taxes (explained further below). Besides excise taxes, some states also allow for state, local, and special district sales taxes to apply. While some states choose to levy only one of those taxes, others have instituted a multi-tiered taxation system using a combination of the methods below. A brief discussion of these tax types follows.

I. Weight-Based Excise Taxes

Excise taxes are paid on purchases of specific goods and are based upon the quantity of the goods sold (e.g., number of units, volume, and weight).¹ For example, New York places an excise tax on tobacco cigarettes at the rate of \$4.35 per package of 20 cigarettes.

A weight-based excise tax on cannabis can benefit the state because if the volume of cannabis sold stays relatively stable then the amount of tax revenue should remain relatively stable, regardless of fluctuations in the price of cannabis.² For example, Colorado saw wholesale cannabis prices fall by more than half between July 2016 and July 2018.³ A weight-based tax insulates against market variability because the tax remains constant regardless of price.

However, there are drawbacks to a weight-based method of taxation on cannabis. This system would be far more complex for a state to administer. A state using a weight-based excise tax must have a system in place to measure, report, and verify the amount of cannabis being sold. As such, taxes on cannabis should initially be as straightforward as possible to allow the market to mature. Nor do weight-based taxes account for THC potency, somewhat contrary to the notion of a cannabis “excise” tax.

II. Price-Based Excise Taxes

The simplest and most commonly used tax is a price-based excise tax. It can be applied at either the retail or wholesale level at a consistent rate, easing administrative burdens. Another advantage of price-based taxes is that it will lead to higher tax payments on more expensive products, which will likely be purchased by higher-income consumers.⁴ A price-based excise tax will yield higher tax revenues from products with greater THC percentages. For example, concentrated cannabis products are consistently more expensive than cannabis flower products on a per gram basis. A price-based excise tax will result in an increase of tax revenue when concentrated cannabis is purchased.

Price-based excise taxes on cannabis will likely result in lower tax revenues over time.⁵ As cannabis markets mature over the first few years, prices have been shown to decrease.⁶ In Colorado, the average price of cannabis decreased by more than half in a two-year period between July 2016 to July 2018.⁷ This emphasizes the importance of adjusting the excise tax rate over

¹ Internal Revenue Service, *Excise Tax*, <https://www.irs.gov/businesses/small-businessesself-employed/excise-tax>.

² Davis et. al., *Taxing Cannabis*, INST. ON TAX’N & ECON. POL’Y, 1, 8-9 (Jan. 2019).

³ *Id.* (citing, Colorado Department of Revenue, *Current and Prior Average Market Rates for Retail Marijuana Excise Tax*, (Jan. 2019), https://www.colorado.gov/pacific/sites/default/files/AMR_PriorRates_Jan2019.pdf).

⁴ *Id.* at 10.

⁵ *Id.*

⁶ *Id.* at 12.

⁷ *Id.* at 8.

time. While it is important to keep taxes low initially to prevent a larger divide between the legal market and the legacy market, the tax rate can be increased as the sale price of cannabis to the retailer falls, the legacy market diminishes, and consumers grow accustomed to the benefits of shopping in a legal market.

III. Potency-Based Excise Taxes

Another revenue generation tool for states is to levy an excise tax based upon the THC content of a product, rather than its weight or price. While this would achieve a higher tax rate on higher-potency products, there are several drawbacks to using THC content as the taxing standard: cannabis testing facilities do not have the same regulation and oversight that most labs require,⁸ there is no industry standard for cannabis potency testing, and there are issues with the reliability and replicability of the testing.⁹ Although an interesting possibility for the future, potency-based excise taxes are not recommended now.

Adult-Use Cannabis Taxation Considerations

It is important for any state that legalizes adult-use cannabis to compete successfully with the legacy market. This is especially true in New York, which may have the largest legacy market in the country, if not the world. One significant problem in this competition is the price discrepancy between purchasing cannabis legally and illicitly. Price is the primary reason that consumers continue purchasing cannabis illegally, costing states millions of dollars in lost tax revenues. Current estimates show that 80% of cannabis sold in California comes from the legacy market.¹⁰ The dominance of the legacy market has greatly hindered California's ability to collect tax revenue. Despite projecting over \$1 billion in tax revenue for 2018, California collected only \$345 million.¹¹ Furthermore, California is not alone in losing sales to the legacy market. It has been estimated that over 50% of the cannabis sold in Washington comes from the legacy market as well.¹² Like California, Washington also has extremely high tax rates on cannabis, leading to the continued influence and use of the illicit market.¹³

⁸ *Id.* at 11.

⁹ *Id.*, see Caulkins et. al., *Considering Marijuana Legalization: Insights for Vermont and other Jurisdictions*, Rand Corp. (2015), https://www.rand.org/pubs/research_reports/RR864.html.

¹⁰ Patrick McGreevy, *California's Black Market for Pot is Stifling Legal Sales. Now the Governor Wants to Step Up Enforcement*, LA TIMES (Feb. 18, 2019), <https://latimes.com/politics/la-pol-ca-gavin-newsom-crackdown-pot-black-market-20190219-story.html>.

¹¹ Brooke Staggs, *California made \$345 Million, not Predicted \$1 Billion, on Legal Cannabis in 2018*, MERCURY NEWS (Feb. 19, 2019), <https://www.mercurynews.com/2019/02/19/california-made-345-million-not-predicted-1-billion-on-legal-cannabis-in-2018/>.

¹² Claire Hansen, *Illegal Pot Still Plagues States Where Weed is Legal*, US NEWS (July 23, 2019), <https://usnews.com/news/national-news/articles/2019-07-23/illegal-pot-still-plagues-states-where-weed-is-legal.html>.

¹³ Gene Johnson, *Legalizing Marijuana in Washington and Colorado Hasn't Gotten Rid of the Black Market*, BUS. INSIDER, (Jan. 2, 2015), <https://www.businessinsider.com/legal-marijuana-in-washington-and-colorado-hasnt-gotten-rid-of-the-black-market-2015-1>.

Over the first few years of a legalized cannabis market, winning the competition with the legacy market is a crucial factor in the overall success of the industry. However, retail prices tend to be very high initially and the legacy market has continued to thrive, despite a legal option for consumers.¹⁴ States contribute to this problem by imposing high regulatory costs on cannabis businesses.¹⁵ Between licensing fees, high taxes, and other regulatory hurdles, cannabis businesses are forced to increase prices to become profitable.¹⁶ This problem is further aggravated by tax problems at the Federal level. Section 280E of the federal tax law places an increased tax burden on cannabis businesses because it prohibits the deduction of all cannabis business expenses, except the cost of goods sold.¹⁷ Since only cost of goods deductions are allowed, dispensaries are especially hard hit, as they cannot deduct the expenses of labor and cultivation.

For an adult-use cannabis market to succeed in New York, taxes must be kept low for the first few years as the industry develops. As shown in other states, following legalization, cannabis prices start out being much higher than legacy market prices.¹⁸ This gives consumers a disincentive to shop at legal dispensaries, especially for consumers with a history of purchasing from the legacy market.¹⁹ A good strategy for giving legalized cannabis businesses a fighting chance to compete with the legacy market is to increase cannabis taxes gradually as the legalized market matures and evolves over time.²⁰ There is precedent in taking this approach, as it was used by the federal government when alcohol prohibition ended.²¹ This approach would put the legal cannabis industry on a more even footing with the legacy market. Although a price discrepancy will still exist initially, phasing in the taxes as the market matures will reduce the gap.²² However, once the legal market is established, taxes can be increased as the price of cannabis falls, and the legacy market diminishes.

There are also considerations based upon the relationship between medical and adult-use markets within a state. When adult-use cannabis becomes legalized, it is important to avoid cannibalizing the medical market. An “excise” tax on medical cannabis—if any—should be lower than the adult-use market tax rate, given its medical purpose. Adult-use cannabis taxation, rather, acts as a “sin tax” on recreational cannabis consumption. Some policymakers have been concerned that having a medical tax rate that is too low will lead to less recreational tax revenue for the

¹⁴ William J. Meadows, *Cannabis Legalization: Dealing with the Black Market*, OH. ST. UNIV. DRUG ENFORCEMENT & POLICY CENTER, No. 13, 1, 10 (Oct. 2019).

¹⁵ *Id.* at 11.

¹⁶ *Id.*

¹⁷ Jonathan Gass, *What Cannabis Entrepreneurs Should Know About Tax Section 280E*, FORBES, (July 24, 2018), <https://www.forbes.com/sites/theyec/2018/07/24/what-cannabis-entrepreneurs-should-know-about-tax-section-280e/#4e8f79217377>

¹⁸ Richard Phillips, *Issues with Taxing Marijuana at the State Level*, THE INST. ON TAX’N & ECON. POL’Y, 1, 7, (May 2015).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*; Caulkins, note 9 at 89.

²² Davis, *supra* note 2 at 12.



state.²³ They fear people will simply become medical patients to pay less for cannabis. To combat this potential problem, New York state should have a robust regulatory system in place for medical cannabis, which ensures that only patients with legitimate needs become licensed patients.²⁴

In considering a proper tax on cannabis, New York must also look at its greater region to see what methods and tax rates other states are applying to adult-use cannabis. To better incentivize purchases of cannabis within state borders, a state does not want to have tax rates far in excess of competing states nearby. As states continue to legalize cannabis for adult-use, greater interstate competition occurs, as is the case with cigarettes.²⁵ Evidence of this has been seen in between Washington and Oregon, as low-priced cannabis in Oregon has driven some Washington consumers to purchase there.²⁶ Thus, to set an appropriate tax rate, New York must examine what rates competing states nearby are implementing.

Current Tax Rates & Proposals for Adult-Use Cannabis

I. Massachusetts

Massachusetts has imposed a tax scheme to facilitate its newly legalized adult-use cannabis industry, learning from the mistakes of states like California and Washington. Massachusetts retail sales began in 2018. It imposes a 10.75% cannabis excise tax at the retail level, with a state sales tax of 6.25%, and an additional local sales tax, up to 3% on cannabis.²⁷ This tax rate is more preferable than the California tax rate for the reasons set forth above and places far less administrative burdens on businesses and the state, as it only places a price-based tax at the retail level. Although having taxes lower than California, it is estimated that up to 90% of cannabis sales conducted in Massachusetts in 2018 were from the legacy market.²⁸ This was due to several factors. Although it has imposed a lower tax rate than California, Massachusetts still suffers from high retail prices and low supply.²⁹ Much of this can be explained by the slow rollout of licensed retailers, which is due to the Massachusetts requirement that dispensaries must first negotiate contracts with local governments.³⁰

²³ Davis, *supra* note 2 at 13.

²⁴ *Id.*

²⁵ Pat Oglesby, *Marijuana Taxes – Present and Future Traps*, TAXNOTES, Vol. 83, No. 4, 391, 399 (Jan. 23, 2017); see (Mark A.R. Kleiman, *Did Tobacco Taxes Really Kill Eric Garner?*, THE NAT'L REV., (Dec. 12, 2014), (“it’s not the absolute level of taxation that creates the most problem. . . . The problem is the difference in tax levels between the states”)).

²⁶ Oglesby, *supra* note 28, see Washington State Economic and Revenue Forecast, 79 (Sep. 2016).

²⁷ MASS. DEPT. OF REVENUE, *Massachusetts Tax Rates*, <https://www.mass.gov/service-details/massachusetts-tax-rates>.

²⁸ Hansen, *supra* note 12.

²⁹ *Id.*

³⁰ *Id.*

II. New Jersey Proposal

The New Jersey Marijuana Legalization Amendment will be on the ballot in New Jersey as a legislatively-referred constitutional amendment on November 3, 2020.³¹ The proposal applies the state sales tax of 6.625% to cannabis sales, while allowing for local governments to apply up to an additional 2% sales tax.³² This is a highly competitive tax rate which will enable legal cannabis businesses to better compete with the legacy market. As the proposed tax rate in New Jersey is substantially less than the tax rate being proposed in the MRTA, New Jersey's legal adult-use cannabis businesses will have a great opportunity to entice buyers from New York, likely faced with higher prices in their own state.

III. Connecticut Proposal

The current proposed bill, SB-16, would place taxes on the wholesale and retail levels. It would begin by placing a weight-based tax of \$1.25/g. for flower, \$0.50/g. for cannabis trim, and \$0.28/g. for wet cannabis.³³ The bill would also apply a 3% excise tax on cannabis sales and the state sales tax of 6.35%.³⁴ Although a low price-based excise tax exists in this proposal, the weight-based tax turns out to be quite expensive. With an additional \$35/oz. in taxes resulting from the weight-based wholesale tax, Connecticut's tax proposal would give New York a chance to offer a lower tax rate, keeping sales within its borders.

IV. California

California legalized adult-use cannabis in 2016, with sales being initiated in 2018.³⁵ It has one of the highest tax rates on cannabis in the United States, utilizing both weight-based and price-based taxes. Adult-use cannabis is taxed at the wholesale level at \$9.65/oz. for flowers, \$2.97/oz. for leaves, and \$1.35/oz. for fresh cannabis plants.³⁶ At the retail level, there is also a 15% cannabis excise tax, local cannabis business taxes (which can reach as high as 20% of gross receipts), as well as state and local sales taxes.³⁷ California is losing an enormous amount of sales to the legacy market, despite retail sales beginning in 2018. The current tax structure places a heavy burden on adult-use businesses, increasing the cost of cannabis products, and driving consumers to illicit sources. Legacy market cannabis prices in California are also less than half

³¹ [https://www.ballotpedia.org/New_Jersey_Marijuana_Legalization_Amendment_\(2020\)](https://www.ballotpedia.org/New_Jersey_Marijuana_Legalization_Amendment_(2020))

³² *Id.*

³³ S.B. 16, 2020 Leg., Feb. Sess. (Ct. 2020).

³⁴ *Id.*

³⁵ Darnell, A.J., et. al., *Suppressing Illicit Cannabis Markets After State Marijuana Legislation*, WASHINGTON ST. INST. FOR PUB. POL'Y, 1, 15, (Aug. 2019).

³⁶ Sara Somerset, *Exclusive: California is Raising Taxes on Cannabis Again*, FORBES, (Nov. 22, 2019), <https://www.forbes.com/sites/sarabrittanyosomers/2019/11/22/california-is-raising-its-taxes-on-cannabis-again/#51b4072f74eb>.

³⁷ Davis, *supra* note 2 at 16.



the cost of cannabis from the legal market.³⁸ With effective tax rates that can rise above 40%, not surprisingly, many consumers are still purchasing cannabis from the legacy market.

MRTA Tax Analysis

As drafted, the MRTA provides that adult-use cannabis products would be taxed at a total of 22% at the wholesale level.³⁹ This tax rate consists of an 18% excise tax, along with additional 1% and 3% taxes.⁴⁰ The MRTA also exempts cannabis purchases from sales tax.⁴¹ The MRTA has made significant strides in improving the proposed tax rates for adult-use cannabis. Doing away with the additional weight-based excise tax, as was seen in prior versions, will help legal businesses in their competition with the legacy market. The exemption from sales tax is also a strength of the bill as it further closes the gap between legal and legacy market prices.

Despite the improvements, the proposed tax rate is still too high and should be lowered to a total of 12%. We propose breaking this down to an 8% excise tax at the wholesale level, while maintaining the 1% and 3% taxes as written. As stated earlier, when legal adult-use cannabis markets start retail sales, prices are significantly higher than in the legacy market. However, for the legal industry to succeed, the price gap must be closed. Keeping the tax rate low for the first couple of years, while the retail price is high, is imperative in allowing the New York adult-use market to succeed. Once the market begins to mature and the prices fall, tax rates should be reexamined and increased so the state still collects healthy tax revenue over time. A 12% adult use tax is also higher than New York's medical cannabis excise tax (7%), to discourage matriculation from the medical to adult use market.

As the number of legal cannabis adult-use markets continues to grow, so does the competition between the states. As is done with cigarettes and alcohol, people will go to neighboring states to make purchases at lower prices. Keeping adult-use cannabis prices even or slightly lower than neighboring states will help keep New York residents buying cannabis in New York. The biggest competitors for New York, regionally, will be New Jersey, Connecticut, and Massachusetts. The proposed tax rate in the MRTA is slightly higher than Massachusetts (22% vs. maximum of 20%). However, New Jersey's proposal would greatly encourage New York City residents and those of Westchester County and Rockland County to leave the state when purchasing cannabis. Under the New Jersey proposal, cannabis would only be taxed at 6.625%, plus up to an additional 2%. At a maximum tax rate of 8.625%, New Jersey's rate is far more competitive than New York's, leading to lower New Jersey prices and making it likely that many New Yorkers would make cannabis purchases in New Jersey instead. Connecticut has proposed a two-tier taxing system with a weight-based tax and a price-based tax, to go along with the state

³⁸ S.B. 1527, 2019-2020 Leg. Sess., (NY. 2019).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*



sales tax. This method provides New York an opportunity to have a price advantage over Connecticut.

If New York lowered the cannabis excise tax rate to a total of 12%, the New York adult-use market would be more consumer-friendly than either Connecticut or Massachusetts, and competitive with the New Jersey adult-use tax rate. With a minimal difference between the tax rates in New York and New Jersey, more New Yorkers would stay and make their purchases in-state, leading to more tax revenue. It would also be wise for New York, New Jersey, Connecticut, and Pennsylvania to continue regional coordination efforts on cannabis regulation.⁴² Massachusetts should also join these efforts. By coordinating within the region for the adult-use cannabis market, states could greatly deter their citizens from leaving their state to make purchases. A regional approach would also prevent a race to the bottom between the states. If the regional states have a wide range of tax rates on adult-use cannabis, many consumers will pick and choose where to buy, as price remains a key purchasing decision in the cannabis market. If one state greatly reduces its adult-use taxes, the neighboring states will risk losing consumers, which may in turn cause them to lower their taxes, and so on. If this occurs while the market is maturing, the individual states will see a large reduction in tax revenue. A regional approach to cannabis would ensure that the states remain competitive, keeping their citizens within their borders.

Competition with neighboring states is not the only threat facing the adult-use market in New York. The state will also face stiff competition from the legacy market that already exists here. The legacy market is well-established in New York, especially in the greater New York City area. New York City cannabis consumers can find dispensary-quality cannabis at low prices. It is not uncommon for an ounce of cannabis to cost between \$200-250. Even the more expensive delivery cannabis services running in the city charge around \$50 per eighth. With the deals many provide, an ounce from these delivery services can often cost around \$300. Under the previous version of the MRTA, the National Organization for the Reform of Marijuana Laws estimated that an eighth of cannabis flower would cost between \$60-70.⁴³ Although the proposed reduction in taxes will lower this price, the legal businesses will still be at a significant disadvantage versus the legacy market. As prices are naturally higher during the first few years of an adult-use industry, many customers will continue making purchases from the legacy market, where cannabis can be purchased at half the price. Between the legacy market that exists in the area and the low tax proposal in New Jersey, New York's adult-use market could be under serious threat. Heavy users (consuming cannabis five or more times a week) are reported to account for between 71-75% of cannabis sales.⁴⁴ With price being an important factor, New York must act to keep these consumers within their borders. New York does not want to be left in a position where the majority of adult-

⁴² Fred Mogul, *Governors of NY, NJ, CT, And PA Meet For A Weed Summit*, GOTHAMIST, (Oct. 18, 2019), <https://www.gothamist.com/news/governors-ny-nj-ct-and-pa-meet-weed-summit>.

⁴³ <https://blog.norml.org/2020/03/03/why-the-mrta-gets-an-a-the-crta-gets-a-c/>.

⁴⁴ Orens et. al., *Market Size and Demand for Marijuana in Colorado: 2017 Market Update*, MPG, 1, 12 (Aug. 2018), see also, (Bethany Gomez, *Reaching the Key Cannabis Consumers*, CANNABIS BUSINESS TIMES (<https://www.magazine.cannabisbusinesstimes.com/article/january-2016/reaching-the-key-cannabis-consumers.aspx>)).



use sales are from novelty or tourist purchases. Without the support of its own residents, the adult-use market in New York will be in a precarious position.

Conclusion

Using a price-based excise tax method will yield the lowest administrative burden to the State and if the total rate is initially set to 12%, it will lower the retail prices of cannabis, while market prices are temporarily inflated following legalization. It is important that New York monitor its market after legalization, so it can modify tax rates over time as the market matures and prices decrease. New York also should make sure the medical tax rate remains lower than the adult-use rate, and that medical cannabis is limited to the patients that need it. Finally, New York can learn from mistakes made by other states in their regulation of an adult-use cannabis industry.

To prevent the legacy market from maintaining a large market share, New York must lower the proposed excise tax rate, or risk facing the same loss in tax revenue as California and Washington have. New Jersey poses a significant threat with its proposed tax rate and recent polls show 61% of New Jersey residents support the cannabis amendment.⁴⁵ However, appropriate taxation of the adult-use cannabis market will make it likely that New York will attain substantial benefits from legalization.

This analysis was researched, debated and authored by the Regulatory Committees of the New York City Cannabis Industry Association and the Hudson Valley Cannabis Industry Association, as led by Sheri Tarr (NYCCIA) and James Landau (HVCIA). We wish to express our deep appreciation for the hard work of our members of this joint collaboration: Ansel Ivens-Anderson, Jacqueline Ferraro, David Guevara, Craig Hyland, James Licata, Amanda Reyes, Eliyahu Scheiman, Jeffrey Schultz, David Serrano, Bruce Sterman, Douglas Trokie and David Wenger.

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⁴⁵ *Dems Hold Edge for Prez, Senate; House More Competitive*, MONMOUTH UNIV. POLLING INST., (Apr. 23, 2020), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_nj_042320/.