

Cannabis Business Blog

New York: The (H) Empire State?

By Joshua Bloomgarden on 2.15.19 | Posted in Legalization of Cannabis, New York State

New York Governor Andrew Cuomo's Proposed Legislation on Legalization of Cannabis

Under the leadership of New York Governor Andrew M. Cuomo (whose party also controls the State legislature), the Empire State appears poised to become one of the next states to legalize the cultivation, processing, distribution, sale, and adult use of cannabis for recreational purposes.

Indeed, on the heels of a series of public hearings and a report from the New York Department of Health, advocating for decriminalization of cannabis (not to mention similar legislation under consideration in New Jersey), Gov. Cuomo unveiled the proposed legislation, the Cannabis Regulation and Taxation Act (CRTA), to do just that—while also expanding the state's nascent medical marijuana program and differentiating between industrial hemp and hemp cannabis markets.

Key Highlights of Cannabis Regulation and Taxation Act (CRTA)

Without getting too deep into the weeds, below are some key highlights:

Central to Cuomo's proposal in the CRTA is the creation of a regulatory framework to be administered by a newly established Office of Cannabis Management (OCM).

- **The OCM and licensing rules to cannabis businesses.** With regard to the adult-use (21 and over) for the recreational marijuana portion of the legislation, the OCM would regulate and act as the licensing authority for issuing a finite number of non-transferable licenses to cultivators, processors, cooperatives, distributors, retail dispensaries, and on-site consumption licensees – each of which must be made up of officers and directors who are exclusively U.S. citizens or permanent U.S. residents.

Notably, given CRTA's policies discouraging vertical integration (*i.e.*, having a controlling or financial interest in a company at two or more levels in the supply chain), and its caps on licenses available to particular licensees, the CRTA provides fertile ground for small and mid-sized businesses, and, in particular, for minority, women, veteran, and disadvantaged farmer-owned businesses. For example, CRTA would make it unlawful for cultivator, processor and

distributor licensees to have any ownership interest in a retail dispensary license or premises, while limiting the number of dispensary and processor licenses to a particular licensee at three each and the number of cultivator licenses at one each.

- **Taxation.** To help fill New York’s coffers, CRTA would impose taxation at three levels on recreational marijuana: (i) a cultivation tax at the rate of \$1 per gram of cannabis flower or \$0.25 per gram of cannabis trim; (ii) a 20% tax on the sale of marijuana from a wholesaler to a retail dispensary; and (iii) 2% county tax that also gets applied to wholesaler and retail dispensary sales.
- **Opt-out option for counties and cities.** Under the CRTA, all counties and cities with populations of 100,000 or more would be eligible to “opt out” of the CRTA. Wasting little time (and disappointing cannabis activists and pun enthusiasts, alike), the Town of Hempstead in Nassau County is considering proposals to preemptively ban the cultivation, processing, distribution, and sale of recreational marijuana within its jurisdiction. This does not mean that possession of marijuana within that county’s jurisdiction would be illegal under New York State law (of course, under federal law, marijuana remains an illicit controlled substance under the Controlled Substances Act), provided that person possesses no more than one ounce of cannabis or five grams of concentrated cannabis (incidentally, the same amount that a retailer would be allowed to sell to a single person in one day).
- **Update on New York State’s medical cannabis program.** The CRTA also expands upon New York State’s medical cannabis program, giving the OCM authority to issue licenses, on an expedited basis, to new entrants (including out-of-state companies) in addition to the existing 10 Registered Operators (ROs) under current law. The CRTA also increases access to medical cannabis to patients by creating a broader scope of conditions (including autism) eligible for treatment, and permitting hospitals and other health care facilities to obtain licenses to administer treatments.
- **Industrial hemp and hemp cannabis, distinguished.** Closely tracking the newly enacted Federal Farm Bill and the accompanying guidance from the Federal Drug Administration (FDA), the CRTA also establishes a distinction between *industrial hemp* and *hemp cannabis*. *Industrial hemp*, subject to the New York State Agriculture and Markets Law, is used or intended exclusively for an industrial purpose and those food and/or food ingredients that are generally recognized as safe. *Hemp cannabis* contains less than a certain volume of tetrahydrocannabinol (or THC, cannabis’ chemical which has psychoactive properties). It is cultivated for its cannabinoid (including Cannabidiol (CBD)) content and is used or intended for human or animal consumption, or use. Similar to the adult-use provisions, the CRTA also enables the OCM to issue licenses to hemp cannabis cultivators and extractors.

Where Do We Go From Here?

As a reminder and word of caution—before anyone gets “reefer madness” from reading this post—CRTA is only *proposed* legislation for consideration by the New York State legislature. There are still a myriad of details to be hashed out by state legislators.

A prime example of this fact is that, in an apparent nod to FDA regulations deeming CBD as “unsafe” for human consumption (due to the relative lack of studies on the substance), New York City has just placed an embargo on (but has not confiscated) food products containing CBD. This notwithstanding the 2018 Farm Bill’s recent reclassification of CBD as a legal substance if it is derived from industrial cannabis that contains less than 0.3% of THC.

Additionally, it remains to be seen whether the CRTA’s proposed tax levels may be adjusted as it moves through the legislative process. Indeed, in Washington State, many outdoor producers sell cannabis flower for about \$1 per gram, so assuming all else is equal, the proposed New York tax would effectively double the wholesale price. As such, state legislators will have to balance the efforts to raise tax revenue against the need to keep the product out of the black market.

With all that said, CRTA is a promising and exciting development for the prospects of the cannabis industry in New York State. Our [Cannabis](#) practice group will be closely monitoring further developments as the CRTA moves through Albany, particularly with a vote on CRTA (or some derivation thereof) coming as early as this April. If you have any questions, please feel free to contact me, Joshua Bloomgarden, josh.bloomgarden@foster.com or at 212.965.4529.

Warning Regarding Federal Law: The possession, distribution, and manufacturing of marijuana is illegal under federal law, regardless of state law which may, in some jurisdictions, decriminalize such activity under certain circumstances. Penalties for violating federal drug laws are very serious. For example, a conviction on a charge of conspiracy to sell drugs carries a mandatory minimum prison term of five years for a first offense and, depending on the quantity of marijuana involved, the fine for such a conviction could be as high as \$10 million. In addition, the federal government may seize, and seek the civil forfeiture of, the real or personal property used to facilitate the sale of marijuana as well as the money or other proceeds from the sale. Although the U.S. Department of Justice (DOJ) recently rescinded its guidance regarding prioritization of criminal prosecutions of individuals and entities operating in compliance with effective state regulatory systems, DOJ left in place long standing guidance to federal prosecutors regarding how to exercise this discretion. Individuals and companies are cautioned to consult with experienced attorneys regarding their exposure to potential criminal prosecution before establishing business operations in reliance upon the passage of state laws which may decriminalize such activity. Federal authority to prosecute violations of federal law as crimes or through seizures and forfeiture actions is not diminished by state law. Indeed, due to the federal government’s jurisdiction over interstate commerce, when businesses provide services to marijuana producers, processors or distributors located in multiple states, they potentially face a higher level of scrutiny from federal authorities than do their customers with local operations.

Tags: cannabinoid, cannabis businesses, cannabis dispenser, cannabis distributor, cannabis processors, cannabis producers, cannabis products, Cannabis Regulation and Taxation Act, cannabis retailers, CBD, CRTA, FDA, Federal Drug Administration, Governor Andrew Cuomo,

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