

Regulatory Shift May Offer Lifeline To NY's Cannabis Industry

By **Joseph Cioffi, Louis DiLorenzo and Kevin Kurtz** (November 2, 2023, 1:49 PM EDT)

New York's recreational cannabis industry has the potential to be a multibillion-dollar industry.

Yet, in the first year of legality, New York cannabis is struggling to generate the expected tax revenues for the state government, with a meager \$70 million in legal sales as of August.

This may come as a surprise to New Yorkers, who have become accustomed to seeing dispensaries on virtually every street corner. The delay is due in large part to delays in licensing, with the New York Cannabis Control Board mired in litigation over its licensing policies, and over 2,500 unlicensed dispensaries have popped up to fill the void.

However, recent legal developments may finally give the New York cannabis industry the tools it needs to meet its potential.

The Marijuana Regulation and Taxation Act, passed in 2021 by former New York Gov. Andrew Cuomo, required the Office of Cannabis Management to pursue a goal of awarding licenses to historically disadvantaged communities, including minority- and women-owned businesses, veterans, distressed farmers and communities disproportionately impacted by past cannabis enforcement.

The Marijuana Regulation and Taxation Act also required the OCM to prioritize individuals who were formerly incarcerated for marijuana offenses. The OCM's regulations implemented the latter goal, prioritizing individuals who have been impacted by cannabis convictions.

But, a lawsuit filed this summer, *Fiore v. New York State Cannabis Control Board*, alleges that the OCM did not appropriately consider or prioritize veteran-owned businesses, and in August the New York Supreme Court issued an injunction on further licensing under the Marijuana Regulation and Taxation Act.

This effectively means that only 23 dispensaries — which were open at the time of the decision — can currently operate in New York, while 400 approved licensees are unable to open.

However, recent developments may help to open up the regulatory log jam and increase the number of



Joseph Cioffi



Louis DiLorenzo



Kevin Kurtz

licensed dispensaries in the state, and can eventually allow the licensed cannabis market to win out over unlicensed dispensaries.

A New Batch of Dispensary Licenses

In September, the OCM announced that applications would be opened up to the broader public, including large multistate operators and existing recreational cannabis companies. Although it will take some time, this development will substantially increase the number of available licenses and the size of New York's legal market, and will go a long way in accommodating demand for legal cannabis.

In the interim, New York state and local governments are facing the significant challenge of fighting the flourishing, unrestricted and continuously growing illegal market. With so few licensed dispensaries up and running, New Yorkers' appetite for marijuana has instead been serviced by an estimated 2,500 illegal dispensaries throughout New York state.

These unlicensed dispensaries have been a headache for regulators and licensed dispensaries alike. The lack of legal oversight gives unlicensed dispensaries a leg up on their licensed counterparts.

For one thing, unlicensed dispensaries are not adhering to laws preventing movement of cannabis across state lines. Whereas licensed retailers are only able to sell cannabis grown in New York, whose climate is suboptimal for cannabis production in comparison to year-round warmer places such as California, unlicensed dispensaries are able to purchase cheaper cannabis from other states and from unregulated growers.

Unlicensed dispensaries are also able to sidestep costs resulting from other regulatory requirements, including costs attached to cannabis testing, 24/7 security requirements and costly inventory management software used to report all sales to the OCM.

This is not to mention the 13% New York state tax on cannabis, which goes unpaid from unlicensed dispensaries. Plus, in the absence of regulatory oversight, many unlicensed dispensaries are able to make use of problematic marketing techniques, including packaging that mimics candy packaging, leverages cartoon characters, or otherwise appeals directly to children.

Enforcement Is Heating Up in New York State

Although unlicensed dispensaries were able to thrive in an environment of lax enforcement, New York state and local governments have recently taken steps to combat the illicit cannabis market.

Legislation passed earlier this year as part of the New York state budget imposes criminal liability for the unlicensed sale of marijuana, giving the state government the ability to impose fines of up to \$20,000 a day, padlock noncompliant businesses and cease unlawfully sold marijuana.

Meanwhile, New York City's recently passed Local Law 107 allows the city to go after landlords, imposing fines of up to \$10,000 for landlords who knowingly lease space to unlicensed dispensaries

While these initial steps to eradicate the illegal market and catalyze the state legalized one offer hope to the legitimate cannabis industry, regulators face a long road ahead in establishing a safe, mature and appropriately regulated marijuana industry.

Looking Ahead

What's at stake is significant.

According to CFAH, a health and wellness research group, New York City is the leading cannabis-consuming city in the world, consuming an estimated 62.3 metric tons — worth over \$700 million — in 2022 alone.

While these numbers illuminate the potential of New York's cannabis industry, alarmingly, New York ranked 8th for cannabis-related tax revenue in the first year of cannabis legalization, with only \$70 million in legal sales as of August and a mere \$67 million in tax revenue expected for 2023.

Of course, changes at the state level will not do anything to fix the significant difficulties that dispensaries face as a result of federal law.

As a Schedule I controlled substance under the Controlled Substances Act, it still remains a crime to sell or distribute cannabis. And, although the Drug Enforcement Administration is considering rescheduling cannabis, and the U.S. Congress is considering the Secure and Fair Enforcement Regulation Act, in the meantime even licensed dispensaries have to go with diminished access to banking and credit or debit payments.

Hopefully, the combination of expanded licensure and increased enforcement will stem the tide of illicit cannabis while offering a legal alternative to fill the void and accommodate demand. Until then, New York dispensaries and regulators will continue to struggle to meet their full potential.

Joseph Cioffi is a partner and chair of the insolvency and finance practice group at Davis+Gilbert LLP.

Louis DiLorenzo is an associate at the firm.

Kevin Kurtz is a paralegal at the firm.

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