



Cannabis legalization in New York: in an unprecedented move, the State discusses it as a question of when and how, not if

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On July 13, the New York State Department of Health released a most remarkable document, a report presenting the results of a study of the impact of cannabis legalization on New York that Governor Andrew Cuomo commissioned in January.

This document, “[Assessment of the Potential Impact of Regulated Marijuana in New York State](#),” contains a comprehensive examination of the policy questions that must be addressed in creating a legal adult-use cannabis market. It stands in marked contrast to the assumptions underlying the overly-restrictive medical use program, a program marked by numerous handicaps and impediments to successful implementation.

The report states in the opening section:

The positive effects of regulating an adult (21 and over) marijuana market in NYS outweigh the potential negative impacts. Harm reduction principles can and should be incorporated into a regulated marijuana program to help ensure consumer and industry safety. Legalizing marijuana could remove research restrictions in NYS, which will enable the State to add to the knowledge of both the benefits and risks. In addition, NYS would be one of the largest regulated marijuana markets. As such, there is potential for substantial tax revenue in NYS, which can be used to help support program initiatives in areas such as public health, education, transportation, research, law enforcement and workforce development. Tax revenues can also support health care and employment. Finally, legalization of marijuana will address an important social justice issue by reducing disproportionate criminalization and incarceration of certain racial and ethnic minority communities.

Notwithstanding New York’s image as an uber-liberal blue state, it is simply regressive in terms of cannabis policy, so those are extremely bold statements.

Here are some general themes in the report:

- Legalization in New York is a question of “how,” not if: “As the Governor has stated, the impact of legalization in surrounding states has accelerated the need for NYS to address legalization. **It has become less a question of whether to legalize but how to do so responsibly**”;
- “No insurmountable obstacles to regulation of marijuana were raised” in the course of the discussion among the multiple New York State agencies and subject matter experts;
- Cannabis prohibition has been ineffective to stop use, especially by youth;
- A “harm reduction” approach must guide legalization.
[For those who don’t know, “harm reduction” is the model of drug control that emerged in the 1980s largely in response to the AIDS crisis as an alternative to abstinence-based prohibition. It recognizes that there are harms associated with the use of psychoactive substances, that people will nevertheless continue to them and therefore the goal should be to implement social policies that focus on keeping drug users safe, such as needle exchange to minimize the spread of HIV.]

It will be essential to ensure public safety and the integrity of the program by, among other things:

- Enforcing the under-21 purchasing ban; □
- Reducing the illegal market and preventing diversion; □
- Ensuring adequate security at cultivation and dispensing facilities; ☒
- Employing a robust monitoring and oversight system with the ability to issue fines for violations and revoke licenses as needed;
- Promoting further study of methods of detecting impaired driving and the impact of legalization of cannabis on the safety of the State’s roadways;
- Enhancing the State’s successful anti-DWI efforts to include impaired driving;
- Educating the public as to the potential risks of excessive use;
- Imposing fines for providing false identification;
- Determining hours of operation restrictions for retail establishments; and
- Imposing a tracking, reporting and compliance system for the regulated cannabis program.

Reasons to legalize the adult-use cannabis market

In many ways, the report reads as a list of the classic talking points for legalization. It discusses research showing a lower incidence of opioid overdoses in states with liberal access to cannabis. It addresses directly the negative effects of cannabis prohibition on communities of colors – which people outside of New York should understand has been the primary driver of political endorsement of legalization here: “Because of the over-prosecution of marijuana, a regulated program in NYS should include provisions to address the collateral consequences of prior criminal convictions for marijuana possession or use, such as barriers to housing and education.” It assumes that changes in

overall patterns of cannabis use after legalization are not likely to be significant. As with the substitution of cannabis for opioids, it assumes that cannabis legalization may help eliminate the market for “synthetic” cannabinoids. It recognizes deportation as a possible collateral consequence of cannabis prohibition and therefore another reason to legalize. It dismisses the notorious “gateway theory.”

Good policies can minimize risks

The report also identifies risks inherent to cannabis: among others, the effect on the developing brain, low birth weight due to fetal exposure to cannabis, harm to the lungs from combustion, lowering the age of onset of psychosis in individuals predisposed to psychosis, and difficulties in preventing and detecting driving under the influence. However, in each case the report takes the position that all of these risks can be minimized through good policy, i.e. none of the challenges are so severe that they prevent legalization. The report states that regulated cannabis introduces an opportunity to reduce harm for consumers through the requirement of laboratory testing and product labeling, a regulated environment will support consumer choice of content because education about THC and CBD levels can be made available, a regulated cannabis program should create guidelines to ensure packaging is not attractive to children, consumer education supports selection of lower potency levels, substance abuse prevention and treatment professionals can help create good policies for identifying individuals at risk for problem use and treating Cannabis Use Disorder, and law enforcement can help create good policies for controlling driving under the influence.

Economic considerations

The report considers numerous factors and estimates the size of the current illegal market for cannabis in New York from \$1.74 billion to \$3.5 billion annually, including sales to both New York residents and tourists. It estimates that 8.5 percent of New York residents are cannabis users, meaning 1.27 million people. It estimates that 1.29 million consumers would access the legal market the first year after legalization of cannabis. It projects annual tax revenue in a range from \$248 million to \$677 million depending on the price per ounce and the tax rate applied.

Conclusions

The report does not contain many definitive policy recommendations. Here are some:

- Limitation on the number of licenses initially available;
- Adoption of a model of licensure similar to that in Massachusetts which prioritizes ownership by or the provision of services to persons who live in areas of disproportionate impact of cannabis over-policing, employment of residents of areas of disproportionate impact, employment of people with drug-related criminal offender record information who are otherwise employable, and ownership by persons of color;

- Limitations on the amount of THC and the types of products offered for sale and limitation of the amount of cannabis that may be purchased to a one-ounce maximum;
- Beginning the legal market with low taxation, e.g. between 7 and 10 percent;
- Expunging prior criminal convictions for cannabis possession.

What's missing

One thing that is distinctly missing from the report is any reference to the Marijuana Regulation and Taxation Act (the “MRTA”), a legalization bill that has been pending in the legislature since December 2013. That absence is noteworthy since the MRTA proposes a comprehensive regulatory system that could have been the starting point for the report’s analysis. It includes criminal justice reform, a tax structure and a system for licensing of the supply side of the market built on New York’s alcohol control law. The report makes only a passing reference to a key consideration: the power of local governments to control the cannabis market, a topic that is addressed in the MRTA. It also omits any reference to what could be a very significant consideration for New York City, how retail onsite-consumption establishments (Amsterdam-style “cannabis cafes,” i.e. cannabis bars) which the MRTA would permit, can actually operate in light of New York’s indoor smoking act.

The omission of any comment on the MRTA, which is essentially the legislature’s legalization proposal, leads to the question, discussed below, of what legislation Cuomo will put forth in January 2019 if he is re-elected. That legislation in turn may set the ceiling for what kind of legalization system could be enacted next June if all the factors line up.

Political considerations

2018 is an election year in New York. There are races for Governor, Attorney General and the Senate, the last of which may be the most critical factor for cannabis legalization. Republican control of the Senate has been a major factor in stopping cannabis law reform for years. The Senate is now split 32 Democrats to 31 Republicans but despite the Democrats’ one-vote majority, the Republicans control the Senate because of a Brooklyn Democrat who votes with them. If the Democrats take actual control of the Senate and also keep the Governorship, passage of a legalization bill and enactment of a viable legalization system next June is a distinct possibility. On the other hand, if the Republicans retain control of the Senate, legalization could remain out of reach or, if they are forced to accept the Department of Health’s position that legalization is inevitable, they could – through New York’s infamous horse-trading in the last days of the legislative session, force adoption of a legalization bill that is so restrictive that it’s dysfunctional (i.e. with taxes so high that there is no incentive for consumers to exit the illegal market) or skewed towards a few very large players, like the current medical market. Election of Republican candidate Marc Molinaro as governor could also bring the movement towards legalization to a halt.

There is another major question: assuming that the incumbent Governor keeps his seat, what type of legalization bill will he sign? The report is just that – a report to the Governor from the Department of Health, not a statement of the Governor’s position. Cuomo has never been a friend of legalization and indeed it seems that he has been forced to relent only because New York is beginning to find itself surrounded on all sides by fully-legal jurisdictions (Canada, Massachusetts and Vermont) and, most important, the indications that New Jersey may legalize. Although Cuomo may personally oppose legalization of cannabis other than for medical use, it may be that it will be difficult for him to reject the conclusions of a report that he commissioned (and presumably reviewed before its release).

Opportunity has come knocking

All in all, the report is an extremely positive step towards creating an adult-use cannabis market in New York. Its premise that there are no obstacles to legalization so severe that they cannot be overcome is truly radical for New York. It identifies many areas in which more study and evaluation are necessary. Even so, there is now a huge amount of work to do in negotiating the particulars of the market. Issuance of the report is in no way the end of the process: although many years of advocacy and struggle have led to this moment, we are now just at the beginning of the next step.

The report circumspectly identifies policy areas in which there is a wealth of knowledge and policy areas in which the evidence is inconclusive. The report shows that this moment should be seen as a great opportunity for experienced participants in the cannabis legalization movement and the cannabis industry to come forward and offer their knowledge and experience in order to help create a viable cannabis market in New York.