

Albany zeroes in on details of marijuana legalization

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The overwhelming consensus among politicians, attorneys and advocates is that New York State will legalize recreational marijuana in 2019.

This is no surprise to most people following the pivot Gov. Andrew Cuomo made from referring to marijuana as a “gateway drug” to commissioning a Department of Health study on the merits of legalization, and later vowing to legalize marijuana as part of the 2019-20 New York state budget cycle.

There are several layers to the legislative marijuana debate in New York, and they start with the two potential laws on the table; the Cuomo-introduced Cannabis Regulation and Taxation Act (CRTA) and the Marijuana Regulation and Taxation Act (MRTA), sponsored by Sen. Liz Krueger, D-Manhattan, and Assemblywoman Crystal Peoples-Stokes, D-Buffalo. While those two laws sound similar, they differ in some key issues surrounding taxation.

Cannabis, as a federally illegal product, falls into a tricky area of tax law as a result of U.S. Code 280E, which disallows business deductions or credits for sale of schedule one or two controlled substances, even if that substance is legal in the state the business was carried out in.

“The result is that marijuana companies end up with an effective income tax rate of 72 to 76 percent sometimes, and the state follows the federal tax code for that purpose,” said Sara Payne, an attorney with Syracuse’s Barclay Damon LLP who specializes in cannabis law. “So even though we’re considering legalization in New York, even in the medical program, these companies that are doing something legal in New York are subject to New York’s version of 280E, so they have that very, very high tax rate in New York as well.”

Cuomo, in his budget address, estimated the total tax revenue for marijuana at \$300 million for the state. The CRTA would work like this: marijuana would be legal for adults over 21, with retailers able to sell up to one ounce to a customer per day, or five grams of concentrate, and those would be the same amounts a person would be legally allowed to possess, with a fine of \$125 for those caught with more. All growing operations would need state-issued licenses; the bill is not clear on whether personal growth would be allowed. And as for taxes, wholesale operations are to be taxed by weight, at \$0.25 per gram of trim and \$1 per gram of flower, plus a 20 percent state tax and 2 percent local tax from wholesaler to retailer. The retail customer would outright pay those taxes if the wholesaler was also the retailer. Factoring in all taxation on a product, the CRTA could impose an effective taxation rate of 66 percent on flower.

The other bill, the MRTA, would tax at \$0.10 per gram of trim and \$0.62 per gram of flower, plus a 17 percent state and local tax, stands to impose an effective 46 percent tax on flower.

"It evens out that the price of an ounce goes up to more than 30 percent of the average black market rate," said Jason Klimek, a corporate and tax attorney with Boylan Code. "You're literally encouraging people to go right to the illicit market because the taxes make it so much higher."

Both Klimek and Payne serve on the Committee for Cannabis Law, and Klimek has drafted his own proposal for how taxation could play out in New York, modeled heavily on Colorado. Among his proposals are placing all excise taxes directly on the consumer in order to work around the federal law. That would mean small businesses wouldn't be as easily taxed out of the market.

Klimek cites California as a cautionary tale, where legal marijuana is costing 11 percent more than the illicit market, resulting in a \$101 million shortfall in expected revenue. California's effective tax rate was about 45 percent.

"People are very, very sensitive to prices," Klimek said.

Cuomo has leaned on the social justice issue in his proposal. Though people of all races use marijuana at approximately the same rate, black men have disproportionately been affected by anti-drug laws. The ACLU reports that black men are 3.73 times more likely to be arrested on marijuana charges than white men for using marijuana. Eighty-six percent of marijuana arrests in New York City are of black men.

Cuomo's proposal emphasizes plans to give minority applicants for cannabis licenses a priority over big business.

"The governor in his State of State address ... indicated this industry should be available for smaller businesses and not just ... large corporations coming in for a profit," said Assemblyman Harry Bronson, D-Rochester. "So, I agree with that sentiment, but I don't think his proposal is strong enough in that area."

Bronson and Klimek both suggested a sort of community reinvestment fund that would be at least partially injected into community incubators to help small cannabis industries get off the ground. But if the CRTA were to go through as it stands, would there be room for the little guy? The legislation's text leans toward "no."

"New York State said they want to discourage big business from coming in and eating up the market," Payne said. But she pointed out the legislation calls for auctioning some of the licenses. "Tell me what part of selling a license to the highest bidder is consistent with keeping out big business?"

As part of the CRTA proposal, the cannabis management program is tasked with deciding who receives a business license, and the office would be granted the authority to host a competitive bidding process where licenses would be auctioned to the highest bidder. The CRTA does include a “social and economic equity plan” which would grant business licenses to minority and women-owned businesses. However, the bill does not specify how much of the total licenses those will make up, and Klimek said it’s essentially irrelevant if the cost of business is as high as the CRTA is proposing.

“Until the federal law changes, you aren’t going to get loans from the bank, so you’re either going to be bootstrapping or finding cannabis investors,” Klimek said. “The minority community is probably just not going to have that. We need to see some funds available so these businesses can succeed.”

New York big businesses are already showing interest in the cannabis market. Last year, Constellation Brands made a \$4 billion investment into Canadian cannabis company Canopy Growth, a 38 percent stake, although Constellation has not announced any plans to enter the cannabis market in New York prior to federal legalization. The CRTA is also unclear how existing medical marijuana companies like Columbia Care will be treated as the market goes to recreational, but there are already a lot of big hitters waiting in the dugout.

And with that comes a lot of money, something Mayor Lovely Warren has been adamant about. The CRTA allows for counties and municipalities over 100,000 residents to opt out of legalization. Rochester will not be one of those municipalities.

“Communities most impacted need ... to receive the most support, to ensure they’re given support in communities affected by the drug trade,” Warren said, at a press conference on Feb. 13.

Warren has claimed tax revenue in Rochester could reach \$2.4 million in a legal market.

If legalization is to go forward, the social justice component will likely remain the most hot-button issue. Klimek suggested a community reinvestment fund, which would inject revenue back into communities harmed by anti-marijuana laws.

For Roc NORML, the local chapter of the National Organization for the Reform of Marijuana Laws, legalization is the first step down the road to an equitable and sustainable industry.

“For us, it’s about getting all of the big players at a roundtable and finding the solutions to these problems, rather than continuing riding this prohibition wave,” said Steve VanDeWalle, deputy chief at Roc NORML. “It really all comes down to educating those who need to be educated.”

As part of the state budget, CRTA would need to see approval by April 1, but with the amount of issues unaddressed, Bronson is uncertain on whether that deadline will be met.

"I'd like to get it done this year, but I'd also like to do it right, and if we can do that through budget negotiations, I'm comfortable with that, but both speaker Carl Heastie (D-Bronx), and (Senate majority leader) Andrea Stewart-Cousins (D-35th District) have indicated that getting it right is more important," Bronson said. "So if we need to do it outside the budget we may go down that path."

Bronson said the importance of passing a bill this year rests at least partially by the fact that New York is becoming surrounded by legal states, including Massachusetts, Vermont and potentially New Jersey, as well as Canada.

The MRTA, supported by NORML, was introduced and died in the Senate in 2013 and virtually every year since. But now a Democratic majority in the Senate and Assembly makes passage of a marijuana bill more likely.

The MRTA includes a community grants reinvestment fund paid through marijuana tax revenue, as well as allowing for personal growth of up to six plants. Twenty-five percent of revenue will go to the state lottery, 25 percent to drug treatment and public education and the remaining 50 percent goes into the community reinvestment fund.

"It'll likely be passed as a separate bill from the budget bill sometime in June," Klimek said. "So, if we're talking now four months, I think they can easily change the tax provision, and if they're going with the MRTA or some version of the MRTA, it's a very thorough bill as opposed to CRTA."

Those components of the MRTA are all things Bronson would like to see as well and emphasizes the importance of the social justice dynamic in any legalization bill. Ultimately, it is not just about tax revenue but reversing damage done as a result of criminalization.

"I think you have to have programs to help people develop business models and become a part of the industry, and we also have to invest in those businesses," Bronson said.

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