



## **LEGALIZATION OF ADULT-USE CANNABIS CREATES NEW OPPORTUNITIES FOR BUSINESSES WITH A SIGNIFICANT PRESENCE IN NEW YORK**

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On March 31, 2021, New York Governor Andrew Cuomo signed the “Marihuana Regulation and Taxation Act” (the “Act”) legalizing the use of cannabis in the State by adults 21-years of age and older. The goals of the Act include generating significant new State revenue, ending the racially disparate impact of existing cannabis laws, and creating new industries and employment opportunities for New Yorkers. The Governor’s office estimates that tax collections from the adult-use cannabis program will reach \$350 million annually, and the new industry ushered in by the Act will create 30,000 to 60,000 new jobs across New York State.

As the 16<sup>th</sup> State to legalize adult-use cannabis, New York was uniquely situated to evaluate and borrow from markets and laws in other States. The resulting legislation limits both vertical- and horizontal-market integration with an emphasis on social justice programs, in order to maximize market participation. As reported in the *Albany Times Union*, New York created “a statewide framework of relatively small retail shops with a focus on awarding licenses in many of the communities where convictions for marijuana-related offenses have been the highest.”

Despite legalization of adult-use cannabis in New York State, marijuana remains an illegal, Schedule I drug under the United States Controlled Substances Act, classified in the same category as heroin, ecstasy, and LSD. As a result, entrepreneurs desiring to participate in the new market for adult-use cannabis must carefully navigate and manage business and legal risks.

### ***Legalization***

In order to create a new market for adult-use cannabis, New York legalized the possession, display, purchase, and transportation of up to 3-ounces of cannabis, and up to 24-grams of concentrated cannabis. The Act also permits an individual to possess up to 5-lbs of cannabis within, or on the grounds of, the individual’s private residence.

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## ***Market Creation and Regulation***

The Act created a new Office of Cannabis Management (“OCM”) within the Division of Alcohol and Beverage Control. The Division exercises alcohol beverage control functions through the New York State Liquor Authority, or “SLA.” As such, market participants should anticipate a regulatory framework similar to existing SLA rules and regulations, updated for the provisions of the Act designed to facilitate effective modern-day cannabis trade.

OCM will be led by an Executive Director who will be assisted by a chief equity officer, with guidance from a 13-person Advisory Board. OCM, by and through the newly created Cannabis Control Board, is authorized to issue licenses to several types of businesses operating within the New York cannabis market. Commentators have suggested that OCM could take anywhere from six to eighteen months to establish and implement all aspects of the Act and the licensing program, including standard applications and other forms, as well detailed regulations applicable to cannabis businesses.

## ***Licensing***

Pursuant to the Act, OCM is authorized to issue licenses to adult-use cannabis cultivators, processors, distributors, transporters, and retail sales agents operating within the State of New York. The various licenses that adult-use (i.e., non-medical, non-hemp) businesses may obtain from OCM include:

- **Adult-use Cultivator License:** A Cultivator’s License permits an individual or business to acquire, possess, plant, grow, clone, harvest, dry, cure, grade, trim, distribute, and sell cannabis from a licensed premises to duly licensed third-party processors. A cultivator may, however, obtain one Processor’s License and one Distributor’s License solely for the distribution of the cultivator’s own product. Licensed cultivators are not permitted to own or maintain a direct or indirect interest in any retail dispensaries. In addition, no person may have an interest in more than one adult-use Cultivator License, although cultivation at more than one location is permitted.
- **Adult-use Processor License:** An adult-use Processor’s License authorizes an individual or business to acquire, possess, blend, extract, infuse, package, label, brand, process, distribute, and sell cannabis from a licensed premises to a duly licensed third-party processor or third-party distributor. A processor may, however, obtain one Distributor’s License solely for the distribution of the processor’s own product. Licensed processors are not permitted to own or maintain a direct or indirect interest in any retail dispensaries, may not hold more than one Processor’s License, although processing at more than one location is permitted, and are required to submit products to independent laboratories for testing and evaluation.
- **Adult-use Cooperative License:** Residents of New York that form a New York LLC or NY LLP, or otherwise meet business structure criteria to be established by OCM, may obtain a license to cooperatively acquire, possess, cultivate, process, distribute, and sell cannabis to duly licensed distributors, on-site consumption sites, and retail dispensaries. Such cooperatives may not, however, sell cannabis to consumers. To qualify, cooperatives must be democratically controlled by the members on the basis of one vote per member and operate according to the seven cooperative principles published by the International Cooperative Alliance in 1995. New York residents may not be members of more than one cooperative or have a direct or indirect interest in any other New York

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adult-use cannabis license. Additionally, cooperatives may not own or maintain a direct or indirect interest in any retail dispensaries.

- Adult-use Distributor License: A Distributor License authorizes individuals or businesses to acquire, possess, and sell cannabis to licensed retail dispensaries and on-site consumption sites. Licensed distributors are not permitted to own or maintain a direct or indirect interest in any microbusiness, retail dispensary or adult-use on-site consumption site. To the extent that a distributor holds an interest in any licensed cultivator or processor, the distributor may only sell cannabis products cultivated or processed by such licensed cultivator or processor.
- Adult-use Retail Dispensary License: The newly created New York Retail Dispensary License authorizes the acquisition, possession, sale, and delivery of cannabis products to end consumers from retail locations. Individuals and businesses may not have a direct or indirect interest in any more than three licensed dispensaries. Retail Dispensary licensees must own, lease or otherwise control the premises to be licensed for term of not less than 2-years. Retail dispensaries must provide a street-level main entrance from a public thoroughfare, may not be located within 500-feet of school or within 200-feet of place of worship, must require valid proof of age in connection with each transaction, and may not permit alcoholic beverages on-site. No person holding a Retail Dispensary License may own or maintain a direct or indirect interest in any licensed cultivator, processor, microbusiness, cooperative, or distributor. Importantly, the Act provides that OCM may issue regulations with respect to the “minimum and maximum margin” for retail dispensary markups of cannabis products.
- Microbusiness License: A Microbusiness License would, as determined by OCM, allow limited cultivation, processing, distribution, delivery, and dispensing of the business’ own product to retail dispensaries. Licensed microbusinesses may not own or maintain a direct or indirect interest in any retail dispensaries. It is anticipated that there will be significant size and volume limits applicable to licensed microbusinesses, which are specifically intended to promote social and economic equity applicants.
- Delivery License: A Delivery License authorizes an individual or business to deliver cannabis products to adult-use consumers through no more than 25 full-time employees using vehicles owned by the licensee, or vehicles hired from a trucking or transportation company registered with OCM. Delivery Licenses are specifically targeted to promote social and economic applicants.
- Nursery License: Nursery Licenses permit the production, sale and distribution of seeds, immature plants, clones, and other agricultural products for the cannabis industry. Nursery Licenses are likewise specifically targeted to promote social and economic applicants.
- Adult-use On-Site Consumption License: An On-Site Consumption license authorizes on-site consumption of adult use cannabis products within a licensed premises. On-Site Consumption licensees must own, lease, or otherwise control the premises to be licensed for a term of not less than two years, and may not have a direct or indirect interest in more than three On-Site Consumption licenses. Further, the On-Site Consumption premises may not be located within 500-feet of any school, or within 200-feet of any place of worship.

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General rules applicable to adult-use cannabis licensing and sales generally include, but are not limited to, the following:

- Licenses are considered a privilege, and not a right.
- Individual applicants must be 21-years of age or older.
- Applicants for a license must have a “significant presence in New York state, either individually or by having a principal corporate location in the state; is incorporated or otherwise organized under the laws of this state; or a majority of the ownership are residents of this state.”
- Licenses are limited to a period of two years. Licensees may apply for renewal within the last 90-days of the license period.
- Not less than 30-days, nor more than 270-days, before filing an application for a license for an adult-use retail dispensary or an on-site consumption license, the applicant must notify the municipality in which the cannabis-related facility would be located of the pending application, using a standard form to be developed by OCM. If the municipality expresses an opinion in favor of or against the approval of such license, such opinion shall be deemed part of the official record upon which OCM shall base any licensing decision, and OCM must respond in writing to such municipality with an explanation of how the municipality’s opinion was considered in the granting or denial of a license.
- The initial adult-use cannabis Retail Dispensary License application period shall be opened for all applicants at the same time.
- Licenses will only be issued if they are in the “public interest.” Factors to be considered include, but are not limited to: (i) the racial and ethnic diversity of an applicant; (ii) ownership structure and classification of the applicant; (iii) evidence of good moral character; (iv) the layout and features of the premises to be licensed; and (vi) general financial condition and prospects of the applicant.
- One goal of the Act is for OCM to award 50% of adult-use cannabis licenses to “social and economic equity applicants” including (i) individuals from communities disproportionately impacted by the enforcement of cannabis prohibition, (ii) minority-owned businesses, (iii) women-owned businesses, (iv) minority and women-owned businesses, (v) distressed farmers, and (vi) service-disabled veterans.
- The Act mandates that OCM adopt a social and economic equity plan that affords “extra priority” to applicants who (i) are members of community disproportionately impacted by the prior enforcement of cannabis prohibition, (ii) have an income lower than 80% of the median income of the county in which the applicant resides, and (iii) were convicted, or had a qualifying relative convicted, of marijuana related offense prior to March 31, 2021.
- Employees of any licensee must be 18-years of age or older. Any employee 18-years of age but less than 21-years of age may not have direct interaction with consumers. Sales are not permitted to be made to individuals under 21-years of age or who appear visibly intoxicated.

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- Licenses may not be pledged or otherwise used as collateral for a loan or other credit facility.

### ***Business and Legal Risks***

Despite the provisions of the Act, prospective New York adult-use market participants continue to confront, and will need to effectively manage, significant business, enterprise, and legal risks including, but not limited to:

- Barriers to Market Entry: Established cannabis providers already dominate the New York market and will likely be able to ramp-up production, distribution, and sales to the disadvantage of new market entrants. Many new market entrants will require access to capital that has not been readily available.
- Competition: OCM may, but is not required to, limit the number of licenses issued, which could impact the adult-use market generally, as well as the intrinsic value of any license.
- Price Protection: OCM is authorized to set minimum and maximum markups on cannabis products sold in New York, potentially limiting free-market pricing.
- Municipal or Location Based Market Limitations: The Act allows cities, towns and villages to opt-out of permitting retail dispensaries and on-site consumption sites to be located within their jurisdiction by adopting a local law, subject to a permissive referendum completed no later than December 31, 2021.
- Private Party Based Market Limitations. Numerous leases and other real property related instruments and agreements prohibit the use of real estate for marijuana-related purposes. At present, it's unclear whether the Act's prohibitions on discrimination against cannabis-related businesses and consumers will invalidate these prohibitions.
- Cash-Based Business: Given that marijuana remains illegal under Federal law, marijuana-based businesses are unable to utilize traditional federally regulated banking and credit services.

The attorneys at Whiteman Osterman & Hanna LLP have the knowledge and expertise to guide you through the opportunities, as well as the legal, structural, and operational challenges, presented by the newly created Empire State adult-use market. Given the anticipated "green gold rush," it is critical to begin preparations now. Please feel free to contact us at your earliest convenience for appropriate guidance and counsel.

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