

CANNABIS LAWTM

& REGULATION REPORTER

C O N T E N T S

FEATURE ARTICLE

2019 Year-End Legislative Update on Cannabis-Related Bills in California and Beyond by Andreas L. Booher, Esq., Kronick Moskovitz Tiedemann & Girard, Sacramento, California 151

CANNABIS LAW NEWS

New Mexico Considering Legalization of Recreational Marijuana—Governor’s Task Force Makes Recommendations 155

California Suspends Hundreds of Cannabis Business Permits 157

LEGISLATIVE DEVELOPMENTS

U.S. House of Representatives Passes Resolution—the Corporate Transparency Act of 2019—with Implications for Cannabis Businesses 159

U.S. House Panel Approves Bill to Remove Marijuana as a Schedule I Substance 160

New Jersey Legislature Approves Putting the Decision to Legalize Recreational Cannabis to the State’s Voting Population 162

REGULATORY DEVELOPMENTS

California Bureau of Cannabis Control Warns Landlords of Illegal Black-Market Activities 164

JUDICIAL DECISIONS

Governor Brown’s Directive that Oregon Ban Flavored Vaping Products Stayed by the State Court of Appeals 166
Herban Industries OR, LLC v. Oregon Liquor Control Commission, Case No. A172546 (Or.App. 2019).

EXECUTIVE EDITOR
Robert M. Schuster, Esq.
Argent Communications Group
Auburn, CA

EDITORIAL BOARD
Andreas Booher, Esq.
Kronick, Moskovitz, Tiedemann & Girard
Sacramento, CA

Mia Getlin, Esq.
Gleam Law, LLC
Portland, OR

Thomas Howard, Esq.
Law Offices
Chicago, IL

Joseph A. McNelis III, Esq.
Fox Rothschild, LLP
Blue Bell, PA

Brittany Ortiz, Esq.
Jackson Tidus
Irvine, CA



Publisher's Note:

Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222; schuster@argentco.com

WWW.ARGENTCO.COM

Copyright © 2019 by Argent Communications Group. All rights reserved. No portion of this publication may be reproduced or distributed, in print or through any electronic means, without the written permission of the publisher. The criminal penalties for copyright infringement are up to \$250,000 and up to three years imprisonment, and statutory damages in civil court are up to \$150,000 for each act of willful infringement. The No Electronic Theft (NET) Act, § 17 - 18 U.S.C., defines infringement by "reproduction or distribution" to include by tangible (i.e., print) as well as electronic means (i.e., PDF pass-alongs or password sharing). Further, not only sending, but also receiving, passed-along copyrighted electronic content (i.e., PDFs or passwords to allow access to copyrighted material) constitutes infringement under the Act (17 U.S.C. 101 et seq.). We share 10% of the net proceeds of settlements or jury awards with individuals who provide evidence of illegal infringement through photocopying or electronic distribution. To report violations confidentially, contact 530-852-7222. For photocopying or electronic redistribution authorization, contact us at the address below.

The material herein is provided for informational purposes. The contents are not intended and cannot be considered as legal advice. Before taking any action based upon this information, consult with legal counsel. Information has been obtained by Argent Communications Group from sources believed to be reliable. However, because of the possibility of human or mechanical error by our sources, or others, Argent Communications Group does not guarantee the accuracy, adequacy, or completeness of any information and is not responsible for any errors or omissions or for the results obtained from the use of such information.

Subscription Rate: 1 year (11 issues) \$595.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60150-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

Cannabis Law & Regulation Reporter is a trademark of Argent Communications Group.

FEATURE ARTICLE

**2019 YEAR-END LEGISLATIVE UPDATE ON CANNABIS-RELATED BILLS
IN CALIFORNIA AND BEYOND**

By *Andreas L. Booher, Esq.*

As the cannabis field moves past the initial phase of implementation of California's state licensing scheme, the California Legislature continues to pass new laws to fill in the gaps, interpret, and expand the regulatory framework in the field. To that end, the Legislature passed, and Governor Newsom signed nearly 20 cannabis-related bills.

What follows is a summary of those bills.

**Recent California Cannabis-Related Bills
Signed into Law**

The California Assembly

• **Assembly Bill 37**

This bill will allow for the tax deduction of certain expenses incurred through commercial cannabis activity. This change is implemented through an amendment to Revenue and Taxation Code § 17209 specifically exempting "commercial cannabis activity" as defined in the Business and Professions Code from the activities described in § 280E of the Internal Revenue Code.

• **Assembly Bill 97**

This bill enables the state's various cannabis licensing authorities to cite individuals who violate the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) whereas previously those entities lacked such authority. This bill also modifies the requirements for provisional licenses and extends the period until which provisional licenses may be revoked to January 1, 2022.

• **Assembly Bill 127**

This bill provides narrow authorization for driving

under the influence of cannabis for testing purposes under the supervision of and on the property of the California Highway Patrol.

• **Assembly Bill 147**

This bill modifies portions of the Sales and Use Tax Law to alter how certain retailers are classified for purposes of their obligations to collect taxes. This bill also grants discretion to the California Department of Tax and Fee Administration to grant relief to certain retailers for penalties arising from the tax reporting periods between April 1, 2019 and December 31, 2022.

• **Assembly Bill 397**

This bill imposes a technical requirement in that beginning on January 1, 2022 it requires California Superior Court case disposition reports to the Department of Justice specify cannabis use where a case results in a conviction for driving under the influence due to cannabis use.

• **Assembly Bill 404**

This bill amends regulations related to cannabis testing in two ways. First, this bill authorizes testing laboratories to make certain minor corrections to certificates of analysis so long as the correction is of a type specifically authorized under the Bureau of Cannabis Control's regulations. Second, this bill would authorize the re-testing of samples where samples failed to meet state-mandated parameters due to some fault in the testing process.

• **Assembly Bill 420**

This bill authorizes the cultivation of and clini-

The opinions expressed in attributed articles in *Cannabis Law & Regulation Reporter* belong solely to the contributors and do not necessarily represent the opinions of Argent Communications Group or the editors of *Cannabis Law & Regulation Reporter*.

cal trials using cannabis at the Center for Medical Cannabis Research.

• **Assembly Bill 858**

This bill modifies the maximum threshold amounts for cannabis cultivation under Type 1C licenses issued by the Department of Food and Agriculture. Under existing law, different maximum threshold amounts apply depending on whether it is indoor cultivation or outdoor/mixed-light cultivation. This bill modifies the maximum threshold amount for outdoor cultivation to either be 2,500 square feet or, at the Department of Food and Agriculture's discretion an alternative maximum threshold.

Assembly Bill 1261

• Under existing law, individuals convicted of certain offenses involving controlled substances are required to register with local law enforcement, provide a statement regarding their conviction, be fingerprinted, and provide a photograph. Under this bill, these registration requirements would be eliminated for certain cannabis-related offenses and registration information previously provided would no longer be accessible to members of the public.

• **Assembly Bill 1291**

This bill requires cannabis license applicants with 20 or more employees to demonstrate alongside its application that it has already, or will, enter into a labor peace agreement. This bill further requires that cannabis license applicants with few than 20 employees agree to enter into a labor peace agreement within 60 days of hiring their 20th employee. Labor peace agreements are contracts between employers and labor unions that detail certain requirements on both the employer labor unions. Under these agreements, employers are not permitted to disparage the union or interfere with unionization efforts by the employees and labor unions are not permitted to disparage employers or interfere with business operations.

Assembly Bill 1529

This bill imposes certain labeling requirements for "cannabis cartridges" and "integrated cannabis vaporizers." Under this bill, a cannabis cartridge is

defined as "a cartridge containing cannabis oil that is intended to be affixed to an electronic device that heats the oil and creates an aerosol or vapor." An integrated cannabis vaporizer is defined as "a singular device that contains both cannabis oil and an integrated electronic device that creates an aerosol or vapor." Among the labeling requirements are that the marks be either engraved, affixed via a sticker, or printed on the cannabis cartridge or integrated cannabis vaporizer in black or white.

The California Senate

• **Senate Bill 19**

This bill is only tangentially related to the cannabis industry. Primarily, this bill is aimed at the management of California's water resources by requiring the Department of Water Resources to develop a program to deploy stream flow gauges. Within the provisions of this program, this bill requires that plans identifying gauge locations where there are impacts from cannabis cultivation be prioritized.

• **Senate Bill 34**

Under current law, there are strict prohibitions on the provision of free cannabis products by licensed retail cannabis businesses, with limited exceptions made for medical retailers. This bill authorizes retail cannabis licensees to provide free cannabis to medical cannabis patients or their authorized caregivers so long as such transactions meet certain requirements imposed under MAUCRSA.

• **Senate Bill 153**

This bill expands and otherwise modifies the composition of the Industrial Hemp Advisory Board to include five growers, two members from research institutions, one member from the California Sheriff's Association, one county agricultural commissioner, one member from the Hemp Industry Association, two industrial hemp retailers, and one member of the public. This bill also amends certain terms within state law to conform definitions related to industrial hemp with changes made to federal law under the Agriculture Improvement Act of 2018 (also known as the 2018 Farm Bill).

•Senate Bill 185

This bill imposes certain requirements on how cannabis marketing may refer to a cannabis product's place or origin and restricts the use of terminology that would cause consumer confusion with respect to a cannabis product's place of origin.

•Senate Bill 223

This bill allows the governing bodies of school districts to adopt policies that allow for parents and legal guardians of students who are cannabis patients to possess and administer cannabis and cannabis-derived products to cannabis patients on school property. This authorization does not authorize the use of smokeable or vapeable cannabis on school property.

•Senate Bill 527

This bill defines industrial hemp as an agricultural commodity for purposes of the California Land Conservation Act of 1965 (more commonly known as the Williamson Act). Under current law, cities and counties may designate certain areas as "agricultural preserves" and contractually restrict the land uses of certain areas currently used for agricultural purposes. This bill extends the ability of local jurisdictions to use this regulatory tool for land used for cannabis cultivation.

•Senate Bill 595

This bill requires California's cannabis licensing authorities to implement a fee deferral and waiver program by January 1, 2021. Under these programs, licensing authorities must provide for the deferral or waiver of application fees, license fees, and renewal fees for local equity applicants and licensees that can demonstrate a need for such consideration. This bill requires that at least 60 percent of the fees deferred or waived under these programs benefit such local equity applicants.

•Senate Bill 657

This bill authorizes county agricultural commissioners to report to the Secretary of Food and Agriculture certain information related to the condition, acreage, production, and value of cannabis produced within their county. These reporting requirements are applicable to other agricultural products under current law and this bill

extends the requirements to apply to cannabis in conformance with other legislation that reclassifies cannabis as an agricultural product for purposes of California law.

Failed, Stalled, and Vetoed Proposed California Legislation

In addition to the bills that became law this legislative session, a few notable bills failed to make it to the Governor's desk or failed to get his signature once getting there.

•Assembly Bill 1356

This bill would have required local jurisdictions where AUMA was approved of by more than 50 percent of the electorate to issue some minimum number of licenses authorizing retail sales within that local jurisdiction.

•Assembly Bill 1530

This bill would have made competitive grant funds available to local jurisdictions to aid in developing and administering enforcement programs against unauthorized cannabis activities.

•Senate Bill 51

This bill would have created a basic framework for the founding of charter banks and credit unions that could serve cannabis businesses. Under this bill, such financial institutions would have been subject to existing banking and credit union regulations and fallen under the enforcement jurisdiction of the Commissioner of Business Oversight.

•Senate Bill 305

This bill would have required certain health care facilities to allow terminally ill patients to use cannabis products within their facilities, subject to certain requirements including that patients provide proof that a physician recommended their use of cannabis. This bill was vetoed by Governor Newsom with a veto message stating that while the Governor agrees with intent of the bill, he does not wish to create conflict between state and federal regulations related to cannabis regulations where many of the health care facilities that would be subject to the bill are dependent on federal funding.

• **Senate Bill 581**

This bill would have required, by January 1, 2022, that California's cannabis licensing authorities publish weekly digests of information regarding all cannabis license applicants.

• **Senate Bill 625**

This bill would have prohibited the smoking or vaping of cannabis products in limousines, taxi cabs, and party buses.

• **Senate Bill 627**

This bill would have allowed for the medical use of cannabis on animals.

New Federal Legislation

Most of the legislative action has been taken on the state level this year with the federal government not adopting any major cannabis bills, but there are some pending federal bills that warrant attention.

• **House Resolution 1588**

Representative Tulsi Gabbard (D-HI) introduced the "Ending Federal Marijuana Prohibition Act of 2019" which seeks to de-listing cannabis from the Controlled Substances Act.

• **House Resolution 1595**

Representative Ed Perlmutter (D-CO) introduced

the "SAFE Banking Act of 2019" which seeks to provide access to financial institutions to business that are involved with the cannabis industry.

• **Senate Bill 2400**

Senator Dick Durbin (D-IL) introduced the "Expanding Cannabis Research and Information Act" which seeks to promote cannabis research by re-scheduling cannabis from Schedule I to Schedule III under the Controlled Substances Act. Other variants of this same effort to re-schedule cannabis has been introduced by Reps. Donna Shalala (D-FL) and Matt Gaetz (R-FL) as House Resolution 4322.

Conclusion and Implications

As the California Legislative session for 2019 ended, Governor Newsom signed into law several bills related to the cannabis industry. Other bills did not [yet] pass legislative muster and died or were tabled, and some made it to the Governor's desk but were subject to his veto. At the federal level, Congress, not yet recognizing cannabis as a legal product, has nevertheless introduced some bills that directly or indirectly address cannabis. We will continue to monitor relevant legislation in California, at the federal level and in other states that have or are considering legalization of cannabis.

Andreas Booher, is an associate attorney at Kronick Moskovitz Tiedemann & Girard, resident in the firm's Sacramento, California Office. Andreas represents public sector clients with a focus on municipal governance, environmental law, water, land use issues, and joint powers authority formation and governance. He provides advice and counsel to public agencies on a broad range of issues including advising on environmental regulatory compliance, Brown Act, Public Records Act and Political Reform Act compliance, code enforcement including issues related to cannabis, and land use entitlement. Andreas assists municipalities and special districts in negotiating, drafting, and reviewing agreements, developing ordinances and regulations, and has experience acting in the capacity of general counsel to special district boards during public meetings. Andreas also heads the firm's burgeoning cannabis law practice group. Andreas sits on the Editorial Board of the *Cannabis Law & Regulation Reporter*.

CANNABIS LAW NEWS**NEW MEXICO CONSIDERING LEGALIZATION OF RECREATIONAL MARIJUANA—GOVERNOR’S TASK FORCE MAKES RECOMMENDATIONS**

Polling indicates that a majority of New Mexico voters support legalizing recreational marijuana, but the decision to legalize recreational marijuana may not end up in the hands of voters after all. The Cannabis Legalization Working Group, a Governor-appointed work group in New Mexico, has finished drafting its recommendations for a recreational marijuana program.

The New Mexico Cannabis Legalization Working Group

Governor Michelle Lujan Grisham’s office issued a statement stating:

[Grisham] is pleased that the working group incorporated her priorities for any potential legalization bill into their study, namely: Rigorous protections for the medical program, public safety and workplace concerns, clear labeling and other areas. The governor will be reviewing the recommendations, and the next steps will be to incorporate the recommendations of this working group into balanced legislation and working to win the support of legislators and stakeholders ahead of the session.

Pat Davis, chairman of the Governor’s work group said:

Our charge from the governor was: create a road map that’s not should we legalize but when New Mexico legalizes, because it’s coming.

The Working Group’s Executive Summary

On October 16, 2019, the Task Force sent the Governor an Executive Summary 16-page report with its recommendations for cannabis legalization for adults, including expungement for low-level convictions, see: <https://marijuanaworkgroup.com/wp-content/uploads/2019/10/Legalization-Work-Group-Exec-Summary-101619.pdf>.

In summary, the report includes: (1) projected tax revenues; (2) taxation schedule; (3) a *prohibition* of municipal “opt outs”; (4) social equity provisions; and (5) enhancement of the state’s medical marijuana program. (*Ibid*)

Tax Revenue

The revenue from recreational marijuana in New Mexico will go toward law enforcement programs and public health programs, such as programs involved in driving-while-intoxicated prevention, housing and education.

“We want to use the new revenues to really change the dynamic in terms of New Mexico’s big issues without raising taxes,” Davis said. It is also expected that New Mexico will use proceeds from recreational marijuana to provide low interest-loans to small cannabis businesses and eliminate taxes on medical cannabis.

Legislative Efforts at Decriminalizing Cannabis

Over the past few years, New Mexico has made some strides when it comes to marijuana laws, including those aimed at decriminalization. In 2015, the state Senate approved a bill to reduce the criminal penalties for possession of up to an ounce of marijuana. Several cities in Santa Fe and Bernalillo counties are strongly in support of decriminalization.

Legislative Efforts at Legalization

With respect to legalization, State Senator Jerry Ortiz y Pino has sponsored legislation to legalize recreational marijuana since 2014, including constitutional amendments. Now that Governor Grisham has taken office, the effort is expected to pass by statute. If the recommendations pass during the legislative session in January, New Mexico would be the second state to pass recreational marijuana by statute and without the voters’ approval. Vermont has been the only other state to legalize recreational marijuana through the legislative process. Other states, includ-

ing New Mexico's neighboring states like Colorado, have legalized recreational marijuana through ballot initiatives.

In 2016, the effort reached the Senate floor as a constitutional amendment. However, the Senate voted against the proposed amendment 17-24. While Republican opposition was expected, six democrats were also against the proposal. Ortiz y Pino said that several Republicans have indicated that they would consider recreational marijuana legalization if it is not presented as a constitutional amendment. "That was the excuse they gave previously for voting against it, that it didn't belong in the constitution," Ortiz y Pino said.

Medicinal Cannabis

For now, only medical marijuana is legal in New Mexico, which passed under the Lynn and Erin Compassionate Use Act in 2007. Recreational use of marijuana, on the other hand, can result in a fine or jail time, depending on the amount. Even though New Mexico is on its way to legalization of recre-

ational marijuana, the Governor's work group has made it clear that medical marijuana patients will receive priority. Davis remarked that the recreational programs in other states have caused medical marijuana patients to lose access because "there's a lot more money to be made on adult use." Davis said that New Mexico's recreational marijuana program will require medical marijuana patients to be taken care of first:

If there's ever a shortage, patients are first in line and that's because for them, it's medicine; it's not something fun to do on a Friday afternoon after work.

Conclusion and Implications

As with most states that have legalized recreational marijuana, it is likely that once New Mexico enacts legislation, high taxes and stiff restrictions could continue to put the black market at an advantage over legal businesses. This effect is something that recreational marijuana states have yet to fully mitigate. (Brittany Ortiz)

CALIFORNIA SUSPENDS HUNDREDS OF CANNABIS BUSINESS PERMITS

Background

In early November, California suspended their 407th cannabis business permit, incapacitating roughly 5 percent of the state's legal marijuana supply. These businesses, including merchants, distributors, and delivery services have had to cease all business for not participating in the mandatory track-and-trace system. They had failed to complete online training and credentialing.

The system, known as the California Cannabis Track-and-Trace (CCTT) has been instituted by the state Bureau of Cannabis Control (BCC), and is designed to monitor the flow of cannabis "from seed-to-sale" across California. Speaking to the *Associated Press* (AP), BCC spokesperson Alex Traverso explained that this group represents those bringing up the rear:

these were just the stragglers, it turned out to be a couple extra months that we gave them. It's just a matter of getting a password, getting a log-in and doing the training.

The Track-and-Trace System

CCTT contracts Florida-based Metrc, Inc. and their eponymous online system Metrc: a compliance management program and cloud-based software used by multiple regulatory bodies for oversight of the cannabis industry. The system is made up of a web application, web services, a mobile application for site inspection, and another mobile application for industry use. Each license facility adds: employees, strains, items, and rooms (if a site of cultivation) to the system for tracking. Within the system, two types of inventory items are tagged—"Plants" and "Packages." The California Department of Food and Agriculture (CDFA) website further clarifies this:

Plants are immature or flowering. All plants must enter the system through immature plant lots (up to 100 plants / lot).

- Immature plant lots (up to 100 plants) are assigned a Unique Identifier Plant tag.

- Each immature plant must be labelled with the lot Unique Identifier (UID).

- Individual flowering plants are assigned a Plant tag.

Packages are created from immature plants, harvest batches, testing lab samples, production batches, and other packages.

Like the plants, packages also receive a UID. The CDFA states that for any cannabis product or amount of cannabis "that may be sold, manufactured or transferred, must be placed into one or more packages, each package having a UID (package tag) created in Metrc." The online system tracks most measurable aspects of the process "from seed-to-sale" meticulously. For more overview of CCTT/Metrc, see the following link put together collaboratively by the CDFA, BCC, and California Department of Public Health (CDPH): https://static.cdfa.ca.gov/MCCCP/document/Introduction%20to%20CCTT%20System%20v1.2_1.30.18.pdf.

Ongoing Issues with Licensing

As of mid-November, roughly 277 of these had not been reinstated to an "active" license status, representing a bit less than 4 percent of the state's total 7,392 licensed cannabis businesses. Of California's licensed 7,392 licensed cannabis businesses, the BCC oversees 2,630 companies.

The Bureau of Cannabis Control

Of California's licensed 7,392 licensed cannabis businesses, the Bureau of Cannabis Control oversees 2,630 companies. Prior to Summer 2019, there were a large number of temporary licenses in the state, and the Metrc requirement is part of the process for a provisional license—a transitional step between a temporary license and a permanent annual permit. In Summer 2019, all temporary licenses in the state of California expired. The process itself is not intensive; BCC spokesperson Alex Traverso estimates it will take companies around three hours to complete, and doubts any companies will not eventually comply to have their suspensions lifted.

The California Department of Food and Agriculture

The California Department of Food and Agriculture administers a total of 3,830 marijuana farmers. While the CDFA did not list any suspended licenses, when contacted, spokesperson Rebecca Foree wrote to the *Marijuana Business Journal* that 103 cannabis farmers had been sent notices, with 100 of those responding promptly to begin the credentialing process.

The CDPH

The California Department of Public Health governs the remaining businesses—932 cannabis manufacturers. Of these, 23 were not properly credentialed, with 13 recently being suspended.

Implications for Business—Illicit and Otherwise

Some members of the cannabis industry feel the suspensions raise red flags, and are indicative of wider issues. Josh Drayton, communications director for the California Cannabis Industry Association, expressed concern that 63 retailer licenses and 61 business services were suspended, as this represents roughly 10 percent of the legal cannabis businesses and 20 percent of the legal delivery services. According to Drayton:

There's a huge pause right now. And in a time when we're trying to incentivize consumers to buy regulated, tested product ... it's minimizing their options. We're kind of incentivizing the illicit market, which is a much more affordable

option right now (for consumers). What we really need to be focused on is access and affordability.

Estimates of the total business done by the California cannabis market vary, but cannabis market research firm BDS Analytics concludes that the California industry is done with growing pains, and on its way to \$3.1 billion in sales by the end of 2019, and \$7.2 billion yearly by 2024 (https://bdsanalytics.com/press_releases/new-report-californias-legal-cannabis-market-on-track-to-reach-3-1-billion-in-2019-sales-7-2-billion-in-2024/). Despite this, the illegal cannabis industry is estimated at \$8.7 billion for 2019, or more than double the amount spent on legal sales (<https://www.latimes.com/california/story/2019-08-14/californias-biggest-legal-marijuana-market>).

Conclusion and Implications

4-5 percent of the California legal market being suspended by the BCC, CDFA, and CDPH might not seem like much when contrasted with the 95 percent complying faithfully. However, with 2019 wrapping soon, in many ways the legal cannabis industry is still finding their footing. While California has perhaps the largest potential market for cannabis in the U.S. and beyond, they are arguably not the most successful—with exemplar Nevada doing more than double the *per capita* business of California. With illicit cannabis sales still representing double that of legal, the manner in which California regulates its industry will play a significant role in its level of success on the national and global cannabis stage. (Miles S. Schuster)

LEGISLATIVE DEVELOPMENTS

**U.S. HOUSE OF REPRESENTATIVES PASSES RESOLUTION—
 THE CORPORATE TRANSPARENCY ACT OF 2019—
 WITH IMPLICATIONS FOR CANNABIS BUSINESSES**

On October 22, 2019, the United States House of Representatives passed HR 2513, the Corporate Transparency Act. This bill requires certain new and existing small corporations and limited liability companies to disclose information about their beneficial owners. How might this be related to the cannabis industry? The bill may directly impact owners and purchasers of residential and commercial real estate acquired as investment from earnings derived from cannabis industry businesses—which are deemed illegal by the federal government.

Background

House Resolution 2513 is a two-part bill. The first part, Division A, would enact the Corporate Transparency Act (CTA). The second part, Division B, would enact the Counter Act (CA). The bill was sponsored by Assembly Member Carolyn Maloney (D-N.Y.). Ms. Maloney described the bill and its main purpose—to require more corporate/business disclosures to help curb money laundering from illegal source activities into, legal holdings, such as real estate:

The illicit use of anonymous shell companies is one of the most pressing national security problems we currently face. . . They are being used by money launderers, criminals, and terrorists – but we can stop that. We’re the only advanced country in the world that doesn’t already require disclosure of this information—and frankly, it’s an embarrassment. We owe this to law enforcement. Beyond the impacts for law enforcement, this bill will also help to crack down on New York’s *real estate* being used to *park illicit money*, driving up housing costs and limiting availability. It seems that more than ever before, there are too many dark windows in apartments in NYC at night – but with this bill, it is my hope that this practice will be put to an end. Too many anonymous LLCs instead of families own NYC

apartments. The Senate needs to act to pass this bill without delay (emphasis added; see: <https://maloney.house.gov/media-center/press-releases/house-passes-maloney-bill-to-crack-down-on-anonymous-shell-companies>).

House Resolution 2513

HR 2513’s preamble of purpose is:

To ensure that persons who form corporations or limited liability companies in the United States disclose the beneficial owners of those corporations or limited liability companies, in order to prevent wrongdoers from exploiting United States corporations and limited liability companies for criminal gain, to assist law enforcement in detecting, preventing, and punishing terrorism, money laundering, and other misconduct involving United States corporations and limited liability companies, and for other purposes. (<https://www.govinfo.gov/content/pkg/BILLS-116hr2513rh/pdf/BILLS-116hr2513rh.pdf>)

Basic requirements of HR 2513 include the following:

- Requires corporations and limited liability companies disclose their true, beneficial owners to FinCEN at the time the company is formed.
- Establishes minimum beneficial ownership disclosure requirements: must provide beneficial owners’ name, date of birth, current address, and driver’s license or non-expired passport number.
- Requires companies to file annually with FinCEN a list of its current beneficial owners, as well as a list of any changes in beneficial ownership that occurred during the previous year.
- Provides civil and criminal penalties for persons

who willfully submit false or fraudulent beneficial ownership information, or who knowingly fail to provide complete or updated beneficial ownership information.

Under Division A, the Bank Secrecy Act is amended and requires, in general:

Each applicant to form a corporation or limited liability company under the laws of a State or Indian Tribe shall file a report with FinCEN containing a list of the beneficial owners of the corporation or limited liability company. . . .

As to *existing* corporations and limited liability corporations, they too, if not otherwise exempt, will need to fill out disclosures as follows:

On and after the date that is 2 years after the final regulations are issued to carry out this section, a corporation or limited liability company formed under the laws of the State or Indian Tribe before such date shall be subject to the requirements of this subsection unless an officer, director, or similar agent of the entity submits to FinCEN a written certification. . . .

According to the Representative Maloney, the rigors of the bill are not arduous and exemptions do apply:

Many companies are already required to disclose their beneficial owners, such as Federally regulated banks, credit unions, investment advisers, broker-dealers, state-regulated insurance companies, churches, and charitable organizations. As such, these companies are exempt from the bill's

requirements. . . . Companies with over 20 employees and over \$5mm in gross receipts or sales, and which have a physical presence in the U.S., are also exempt from the bill's requirements, because companies that employ this many people and that have legitimate, business-related income are very unlikely to be anonymous shell companies that were created to hide or launder illicit funds. (<https://maloney.house.gov/media-center/press-releases/rebs-maloney-king-and-malinowski-introduce-bipartisan-corporate>)

Conclusion and Implications

While generally aimed at smaller corporations deriving profit from illicit purposes, such as drug cartels and those involved in human trafficking—and attempting to launder that money into real estate—the implications for cannabis related businesses is obvious. Cannabis businesses which are illegal under the federal regime and but legality under the laws of several states and the District of Columbia won't insulate these businesses from the requirements of House Resolution 2513. There are many disclosure requirements for certain new businesses and after a period of time for existing businesses. Exemptions do exist.

Political observers have opined that the odds of the Senate passing a similar or complimentary bill are better than 50 percent so we *may* see action from the Senate in the coming months.

The full text of HR 2513 and its disclosure requirements is a must read for those advising cannabis related business, and is available online at: (<https://www.govinfo.gov/content/pkg/BILLS-116hr2513rh/pdf/BILLS-116hr2513rh.pdf>). (Robert Schuster)

U.S. HOUSE PANEL APPROVES BILL TO REMOVE MARIJUANA AS A SCHEDULE I SUBSTANCE

Despite some polls indicating that two-thirds of Americans favor some sort of national legalization of marijuana, the federal government still continues to classify marijuana as a Schedule I substance under the Controlled Substances Act. This could soon change. The U.S. House Judiciary Committee recently approved a bill 24 to 10 that would decriminalize marijuana at the federal level. The bill called the

“Marijuana Opportunity Reinvestment and Expungement (MORE) Act,” proposes removing marijuana as a Schedule I substance and decriminalizing it at the federal level.

Legalization and Banking

Schedule I substances are defined as having no recognized medical benefits and are prone to abuse

by users. Currently, with marijuana as a Schedule I substance, marijuana businesses have limited or no access to basic banking services. This is because many banks are insured by the Federal Deposit Insurance Corporation (FDIC). FDIC-insured banks could face criminal and/or financial repercussions if they assist marijuana companies in obtaining loans and/or lines of credit. Marijuana companies even have trouble establishing checking accounts. Marijuana businesses can also be subjected to § 280E of the tax code, which disallows businesses selling Schedule I and II drugs from taking normal corporate income tax deductions, with the exception of costs of goods sold. Declassifying marijuana as a Schedule I substance will allow marijuana businesses to utilize banking services through FDIC-insured banks.

Decriminalization and Expungement of Past Federal Convictions

Additionally, the Marijuana Opportunity Reinvestment and Expungement Act would require federal courts to expunge prior convictions for cannabis offenses, or at least allow prior offenders to request expungement or review of their cases. According to the American Civil Liberties Union (ACLU), cannabis-related arrests account for more than half of the drug arrests in the United States. Cannabis-related arrests are particularly high in minority communities. Lawmakers have been pushing for the decriminalization of marijuana to help alleviate the imbalance of arrests in minority communities. Chairman Representative Jerrold Nadler (D-NY) noted:

The criminalization of marijuana has been a mistake. The racial disparity in marijuana enforcement laws only compounded this mistake with serious consequences, particularly for minority communities.

Federal Taxation

Only 11 states in the United States and Washington D.C. have legalized recreational marijuana,

while medical marijuana is legal in 33 states and the District of Columbia. Despite that the MORE Act could be a victory for consumers, for marijuana businesses, it could cause serious disadvantages. The bill would establish a 5 percent federal tax on cannabis in addition to the state, local, excise, and wholesale taxation that many legal businesses face. These taxes can be steep. In California, for example, legal marijuana businesses face a 15 percent excise tax, a state and local tax, and a wholesale tax on leaves or dried cannabis flower for every sale. Such taxes have actually decreased the total revenue from recreational and medical cannabis sales by \$500 million, in comparison with previous years' revenue for medical-only cannabis sales. This has put the black market at a greater advantage, since illegal producers and distributors do not have to pay such taxes.

The 5 percent federal retail tax, however, would go toward many social programs, including job training for those convicted of cannabis-related offenses. The tax would also assist in funding drug abuse programs.

Conclusion and Implications

While the full House—which is Democrat-controlled—is likely to approve the MORE Act, the bigger battle is expected to take place in the Senate, which is Republican-controlled. Currently, only 51 percent of self-identified Republicans are in favor of legalizing marijuana. Senate Majority Leader Mitch McConnell (R-KY) has blocked riders targeting marijuana reform in the past. Representative Ken Buck (R-CO) said, “I don’t think a majority of Republicans will support this bill. It is even less likely that the Senate would take it up. Therefore, I would suggest that we deal with the other bills that we can get a much larger bipartisan support from.” Representative Nadler, however, is not without hope. Nadler noted that House Democrats are willing to negotiate with the Senate, as they are fully aware that the Senate will not take the bill “as is.”

(Brittany Ortiz)

NEW JERSEY LEGISLATURE APPROVES PUTTING THE DECISION TO LEGALIZE RECREATIONAL CANNABIS TO THE STATE'S VOTING POPULATION

The New Jersey Democrat dominated Legislature had voted to place a ballot measure on the November 2020 ballot for the state's citizens to vote whether or not to legalize recreational cannabis.

Background

On Monday 16, 2019, on the last day of the session, the New Jersey Legislature voted to place a ballot measure for vote in the fall 2020 whether or not to legalize cannabis in the state. The bill approving the ballot measure must still be signed by Governor Phil Murphy which is expected to happen. The decision to place the decision with the state's voters came upon the heels of failed attempts to pass legislation legalizing cannabis. Senate President Steve Sweeney (D) and Senate Judiciary Committee Chairman Nicholas Scutari (D) announced in a press release that:

...while they had 'made further attempts to generate additional support in the Senate to get this done legislatively,' the 'votes just aren't there.'

The Legislators went on to clarify the situation to put the ultimate vote directly to the state's citizens:

We are moving forward with a plan to seek voter approval to legalize adult use marijuana in New Jersey. . . . We introduced legislation today to authorize a public referendum for a proposal that will lead to the creation of a system that allows adults to purchase and use marijuana for recreational purposes in a responsible way. (See: https://twitter.com/brian4NY/status/1196522992957902849/photo/1?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1196522992957902849&ref_url=https%3A%2F%2Fwww.marijuanament.net%2Fnew-jersey-voters-will-decide-on-marijuana-legalization-next-year-senate-leaders-say%2F)

Assembly Speaker Coughlin chimed in on the decision as follows:

Social justice and social equity have always been the foundation of support for me and my caucus for adult use cannabis. . . . Those issues should not fall by the wayside if we are not able to achieve the votes for adult-use cannabis. Too many of our residents, particularly those of color, have been marked for life over a mistake they've made once in their youth. This is a social justice issue that must, and will be addressed.

Governor Murphy, who is expected to approve of the decision for a referendum, expressed his disappointment that the Legislature didn't decide on the issue of legalization themselves:

[I am] disappointed that we are not able to get this done legislatively and that our failed status quo—which sends roughly 600 people to jail a week for possession, the majority of them people of color—will continue. (See, https://twitter.com/GovMurphy/status/1196539628955803649?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1196539628955803649&ref_url=https%3A%2F%2Fwww.marijuanament.net%2Fnew-jersey-voters-will-decide-on-marijuana-legalization-next-year-senate-leaders-say%2F)

He went on to state his position on legalization as follows:

...I have faith that the people of New Jersey will put us on the right side of history when they vote next November. . . . By approving this ballot measure before the end of this legislative session, New Jersey will move one step closer to righting a historical wrong and achieving what I have spent more than three years advocating for.

The Vote to Approve the Ballot Measure for 2020

The New Jersey Assembly voted 49 to 24 approve the referendum going to the fall ballot. The measure passed with 24 “yes” to 16 “no” votes. The measure passed was Resolution ACR840/SCR183.

The referendum will ask voters if they wish to approve of recreational cannabis in the state for people 21 years of age and older. It also confirms that cannabis sales would be subject to the state’s 6.625 percent sales tax. Little more detail is expressed except that municipalities would have the option to add to the state sales tax in the form of local additional taxes on sales. The sparse wording of Monday’s vote by the Legislature had promoted the American Civil Liberties Union to question the referendum, and perhaps portend legal battles ahead:

A constitutional amendment asks voters to make a decision first and find out the details later, undermining the principles of a representative, participatory democracy, said Amol Sinha, the executive director of the state American Civil Liberties Union. (See, <https://www.cbsnews.com/news/new-jersey-marijuana-legalization-to-be-on-ballot-in-2020/>)

Conclusion and Implications

A recent poll by Monmouth University indicates that six of ten New Jersey residents approve of legalizing recreational cannabis. (See, https://www.monmouth.edu/polling-institute/reports/monmouth-poll_NJ_021819/) The ballot measure will come in the form of seeking a constitutional amendment. The ACLU described the process: “The process of amending the Constitution requires several distinct legislative steps, in addition to the ballot question. In the upcoming 2020-2021 legislative session, the Legislature will have to pass a second resolution to include a constitutional amendment on the ballot before the question can appear in the November election. If voters approve the question, the Legislature must pass additional follow-up legislation to decide on the details of legalization.” (<https://www.aclu-nj.org/news/2019/12/16/marijuana-ballot-question-and-expungement-reform-marijuana-1>)

If the voters approve of the constitutional amendment in November 2020, New Jersey would become the 12th state, along with the District of Columbia to legalize in some form recreational cannabis sales and use.

(Robert Schuster)

REGULATORY DEVELOPMENTS

CALIFORNIA BUREAU OF CANNABIS CONTROL WARNS LANDLORDS OF ILLEGAL BLACK-MARKET ACTIVITIES

In November 2019 the California Bureau of Cannabis (Bureau) announced its ongoing efforts to crack down on illegal cannabis grows, manufacturing, promotion and sales in the form of letters warning landlords of potential civil and criminal liability for allowing the illegal activities on their property.

Background

While recreational cannabis is now legal in California, there are extensive laws and regulations in place to monitor, regulate, tax and control the industry. While maintaining an orderly system of regulation, tax revenue is impacted by illegal activities. Tax revenue is often one very important aspect for any state to consider in balancing the pros and cons in its determination whether to head towards legalization or not.

In California the Bureau of Cannabis Control is the sharp tip of the spear in the promulgation and enforcement of the laws and regulations allowing for recreational cannabis. In terms of tax revenue, many observers have pointed out that projected tax revenue has been weaker than anticipated. They further opine that diminished revenue traces to competition between black-market sales and much more expensive legal sales. (See, e.g. <https://www.sfchronicle.com/opinion/openforum/article/High-cannabis-taxes-keep-black-market-alive-in-14065408.php>).

In an effort at enforcing the regulations in terms of illegal operations, the Bureau has targeted the landlords of those sites of their potential liability for allowing those operations on their property.

The November Warning Letters

In November 2019, the Bureau sent out:

... hundreds of letters notifying landlords that the Bureau has information their property is being used for illegal cannabis activity. These letters warn landlords that they may personally be subject to criminal and civil penalties for al-

lowing illegal cannabis activity to occur on their property. (<https://cannabis.ca.gov/2019/11/26/bcc-sends-warning-letters-to-landlords-of-illegal-cannabis-businesses/>)

The letters outline the potential liability of the landlords as follows:

Examples of the types of penalties outlined in the letter include California Health and Safety Code section 11366.5, subdivision (a), which makes it a criminal offense to allow property to be used for any illegal cannabis activity. Additionally, illegal operators are subject to forfeiture and other criminal penalties. A person who aids and abets in the commission of a crime, including unlicensed cannabis activity, may be held liable for the crime as if the person directly committed the offense. In addition to criminal liability, landlords may be subject to fines and civil liability. Business and Professions Code section 26031.5 allows for the imposition of fines up to \$30,000 per day for illegal cannabis activity. (*Ibid*)

As to these letters, Bureau Chief Lori Ajax has stated:

This action is an important step in the state's effort to combat the illegal cannabis market. . . . It is our hope that by detailing the penalties faced by landlords who rent their space to illegal operators, landlords will better understand the severe consequences that could come with knowingly facilitating illegal commercial cannabis activity and those currently breaking the law will have fewer options where they can conduct their businesses. (*Ibid*)

Conclusion and Implications

All industrial cannabis activity in the state needs to be take place on premises with a valid state license.

Manufacturing, distributing or the sale of goods without a state license or at a place that is not licensed is a violation of state law.

The Bureau of Cannabis Control has set up a website which can identify registered legal businesses and their licensed locations. In this way anyone in

California suspecting illegal black-market cannabis related activities can check the business name and location against the website and report it to the Bureau or law enforcement. (See: www.CApotcheck.com)
(Robert Schuster)

JUDICIAL DEVELOPMENTS

GOVERNOR BROWN'S DIRECTIVE THAT OREGON BAN FLAVORED VAPING PRODUCTS STAYED BY THE STATE COURT OF APPEALS

Herban Industries OR, LLC v. Oregon Liquor Control Commission, Case No. A172546 (Or.App. 2019).

Vaping illness, or lung damage due to consuming THC and nicotine vaping products, exploded into the headlines and forced states and, in some instances, local jurisdictions, to take swift action to clamp down on the availability of vape products. Much action was taken without the benefit of conclusive evidence as to the cause of the illness. We are now seeing some of that action challenged. On November 4, 2019, the Oregon Court of Appeals issued a ruling overturning the Oregon Liquor Control Commission's (OLCC) emergency rule banning the sale of all vaping products containing flavoring.

Background

As we covered in detail in the October issue of the *Cannabis Law & Regulation Reporter* at page 137, on October 4, 2019, Governor Brown issued Executive Order #19-09, directing state agencies to ban sales of all flavored vaping products, including both those with THC and those with nicotine, for 180 days. After a week of emergency rule making, the Oregon Liquor Control Commission (OLCC) released its emergency rule in accordance with the Governor Brown's directive, and immediately banned sale of all vaping products with any flavoring other than terpenes (the naturally occurring essential oils that give cannabis its smell and taste) derived from cannabis.

Now, both the nicotine and cannabis related bans are on hold. In this article we cover the temporary downfall of the flavored cannabis vaping products ban.

A Dual-Pronged Challenge to the Ban on Flavored Cannabis Vaping Products

A Petition for Judicial Review

Following a successful challenge of Oregon's ban on flavored nicotine vaping products, Portland litigators at Green Light Law Group filed a petition for

judicial review of the OLCC rule banning the favoring additives. The OLCC rule followed the Governor's order. The petition asserts that the OLCC failed to follow the required rulemaking process and is thus invalid. This petition has not been reviewed yet but provided the basis for the motion to stay enforcement of the rule.

A Motion to Stay Enforcement

The second prong of the attack was a motion to stay enforcement of the OLCC rule, pending a decision on the petition challenging the rule. The motion claimed the named plaintiff would suffer irreparable harm under the ban and, thus, the ban must be stayed unless and until the OLCC wins its defense of the petition. The result is that, pending a decision on the petition, Oregon recreational marijuana businesses can resume the manufacture and sale of cannabis vaping products flavored with botanically-derived terpenes and other flavoring additives.

What the Research Says Now

Since the ban was imposed, new research has confirmed our suspicions that additives in illegal vaping products are causing the vaping illnesses. Specifically, the Center for Disease Control has tied vitamin E acetate to vaping illness. Vitamin E acetate is added to illegal vape oil cartridges as an additive and, while perfectly safe in many common products, causes lung damage when inhaled. Vitamin E acetate is not present in legal Oregon vape products and the OLCC formally banned it as an additive. The CDC continues to investigate other substances in vape products. Meanwhile, their current recommendation to the public is to avoid vape products from "informal sources" and not add any after-market substances to vaping products, not to avoid legal recreational cannabis vape products.

Absent new evidence implicating legal recreational cannabis products in vaping illnesses, which seems

highly unlikely at this point, efforts to restrict legal vaping products would be counterproductive.

Conclusion and Implications

Now that it seems unlikely that flavoring additives used in legal vaping products are to be implicated in any illnesses or deaths, how hard will Oregon fight to enforce the ban? Perhaps, not very hard at all. As discussed last month, flavored vaping products have come under scrutiny for attracting children and teens. The blame for this, many opine, lies squarely on nicotine vaping companies, whose ads often specifically target potential users under the legal age of consumption. Tighter restrictions on marketing by Oregon recreational cannabis companies means that legal recreational cannabis products in the state are not marketed to children. However, there is a risk that the state will decide to use the vaping illnesses to address this issue and pull cannabis vaping products into the fight.

While a ban on flavored nicotine products would likely decrease the number of children and teens picking up vaping, attacks on the legal cannabis industry might very well have the opposite effect. The still-booming illegal cannabis market makes obtaining cannabis products from black-market sources easy for Oregon's youth. And the more difficult the state makes it for legal recreational marijuana companies, who do not sell to minors, to compete with the black-market players, the more those bad players will thrive and the more accessible their products will be. Commentators have argued that rather than seeking to defend restrictions on legal vaping products, the state's efforts and resources might be better utilized to improve public health and safety by clamping down on black market cannabis products.

The Court of Appeal's ruling is available online at: <https://files.constantcontact.com/a8db0b19601/73dfa00e-d131-4ec5-8170-3165d85f1b0c.pdf>.

(Mia Getlin)

Cannabis Law & Regulation Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108