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FEATURE ARTICLE**A MARKETING CONSULTANT'S VIEWPOINT:
THE IMPACT OF COVID-19 ON THE CANNABIS INDUSTRY IN NEVADA**

By Matthew Janz

Here in the State of Nevada, due to the spread of the Covid-19 virus, Governor Sisolak officially declared a state of emergency on March 12, 2020 with the full closure of all non-essential businesses on March 17, 2020. With this unprecedented move, something amazing happened. Cannabis had moved from a once illicit drug only available on the black market to a legal industry, to an industry deemed “essential” in less than a decade’s time. The cannabis industry was labeled a business that was essential to the health of the citizens of Nevada and as such dispensaries, cultivations, production facilities, and testing laboratories were able to remain open in an otherwise closed state.

The journey through the Covid-19 pandemic would change the landscape of the cannabis industry and hold a long-term impact on our industry. From an increase in average purchase volume, to a reduction in overall transactions, and a shift out of flower’s categorical dominance; our industry has grown in ways that have benefited businesses across the state and country.

Background

Fifty-five percent of Nevada voters approved “Question 2” which permits adults who are not participating in the state’s medical cannabis program to legally grow (up to six plants, including all of the harvest from those plants) and to possess personal use quantities of cannabis (up to one ounce of flower and/or up to 3.5 grams of concentrates) while also licensing commercial cannabis production and retail sales. (Home cultivation is not permitted if one’s residence is within 25 miles of an operating marijuana retailer.) Commercial marijuana production is

subject to a 15 percent excise tax, much of which is earmarked to the State Distributive School Account. The law took effect on January 1, 2017. Recreational sales began July 1st 2017. (See: [https://ballotpedia.org/Nevada_Marijuana_Legalization,_Question_2_\(2016\)](https://ballotpedia.org/Nevada_Marijuana_Legalization,_Question_2_(2016))); and see: <https://norml.org/laws/nevada-legalization>)

The Cannabis Compliance Board (CCB) was established through Assembly Bill 533 during the 2019 legislative session and signed into law by Nevada Governor Steve Sisolak. The CCB consists of five board members appointed by the governor. Board members must have expertise in a range of fields, including financial and accounting, law enforcement, medicine, regulatory and legal compliance, and cannabis.

AB 533 also established the Cannabis Advisory Commission (CAC) which serves to study cannabis-related issues and make recommendations to the CCB. The CAC consists of 12-members appointed by the governor representing relevant state agencies and members of the cannabis industry and the public. Recommendations from the CAC do not bind the CCB but provide information to assist the CCB with its decision making. (<https://ccb.nv.gov/meet-the-cannabis-compliance-board-ccb/>)

For the fiscal year 2019 [from July 2018 to June 2019] the State of Nevada Department of taxation reported \$9.5 million in total tax revenue from the cannabis industry. For the fiscal year 2020, which ended in the early months of Covid-19, total tax revenue of 5.2 million was reported. But to truly track the impact of Covid-19 on cannabis sales, one must look to the 2021 fiscal year, to date, which will end in of June 2021 to see total tax revenue already collected, of just

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a tad shy of \$100 million! (See: https://tax.nv.gov/Publications/Marijuana_Statistics_and_Reports/) Covid-19 meant sales in Nevada were way, up, up, up.

Challenges Faced by the Cannabis Industry in Nevada During Covid-19

Supply Chain Limitations in a High Demand Market

While overwhelmingly positive, the initial shut-down started a frantic series of regulatory changes from moving to delivery only, to requiring aggressive sanitation programs, and in intensively monitoring staff. The industry may have been initially poised to handle a small portion of their business via delivery; however, for most dispensaries delivery services accounted for less than 10 percent of their total business. A large majority of dispensaries also utilized third party services like Blackbird and Hytiva to manage their delivery offerings. What this meant is that the historically high demand of cannabis moved to a delivery-only model that was not properly staffed, scaled, nor mobilized.

As with the great toilet-paper hoarding we saw, cannabis consumers were fueled by a desire to stock up on their cannabis to help them with the ails of the pandemic. With a limited fleet, third party delivery services quickly failed to meet consumer demand and started limiting the number of deliveries they would take per day; eventually moving to next-day delivery scheduling. And with our state's stringent regulatory monitoring, they struggled to set up a regulatory framework for in-house delivery models and approvals. Once the state was able to create a full regulatory guideline for in-house deliveries, dispensaries were then facing the massive challenge of establishing their fleet, delivery software, and staffing (which includes an arduous agent card process that at the time was taking weeks for approvals). With this further slip in supply, demand surged to historic highs and while most businesses were struggling to stay afloat, our industry grew.

This impacted the state of the industry in a number of ways; consumers began purchasing bulk transactions, dispensaries placed high minimums on delivery orders, and the supply chain of flower failed to meet bulk-purchasing led demand.

Consumer Shopping Habits: From Abundance to Scarcity

Consumers were in a state of panic; they bought every inch of toilet paper on the shelves, all the food they could fit into their freezers, and any sanitizing products they could get their hands on. There was a substantial shift in a mindset of commercial abundance to a mindset of necessity scarcity. That seismic shift in consumer transactional psychology led to monumental changes in the way businesses operated. During a time when businesses were required to strongly social distance, avoid any and all contact, and close their storefronts to customers -- they faced a need to increase staffing, supply, and completely reconfigure operations to meet the new way of doing business.

The pre-pandemic cannabis consumer took advantage of the large product assortments dispensaries carried and purchased in lower quantities with higher frequencies of dispensary visits. With hundreds of cannabis products on the shelf, constant deals from dispensaries, and a newfound legalized legitimacy it was an advantageous way to make their purchases. During the pandemic, this shifted to the inverse; higher quantity purchases with a lower shopping frequency. And while one might make the assumption that this would have created an equally stable market, this in turn ended up increasing dispensary's sell through. With the idea that they had purchased a large quantity, customers consumed a larger amount of cannabis than normal. Whereas they may be saving the last bowl of their eighth, they now felt like they could easily roll a one gram blunt out of their ounce. Without them being directly aware, they had increased their consumption habits, which thus increased their tolerance, and led to further increases in purchases, consumption, and sell through.

Average Dollar Sales Increases Usurping Transaction Decreases

Dispensaries took advantage of this scarcity led demand and placed high minimums on their delivery orders. As expected, this increased "Average Dollar Sales" (ADS)—if customers are expected to spend \$125 on a delivery minimum and your dispensary is running a \$150 half ounce special, you can easily push up your ADS. At my dispensary, we saw an increase of 150 percent in ADS while seeing a 20

percent decrease in transactions. While transactions were down, that was strongly offset by the increase in ADS. Our business became more profitable and drove more revenue during the pandemic and saw a larger increase in overall revenue growth across the past 12 months in comparison to the prior period.

With this intentionally throttled supply, demand continued to increase. And with flower accounting for roughly 70 percent of all dispensary business in Nevada, that drove challenges throughout the entire supply chain. With the dispensary businesses growing because of bulk consumer purchases, cultivation facilities were struggling to keep up with the product demands of the market. This again benefited our industry. Without a steady supply of flower, cultivators were able to increase their price per pound, and increase their margins -- this led to a number of cultivations expanding and increasing their overall business. From the start of the supply chain with cultivators, to the testing facilities now receiving more business for each harvest, and at the end of the supply chain with dispensaries -- everyone benefited from a stronger commercial viability, increased demand, and a limited supply which maintained stronger business.

Looking Outside of Flower

Part of the cannabis consumer change came from a categorical openness outside of flower. While the majority of cannabis consumers still prefer flowers, with Covid-19 being a respiratory disease, consumers quickly became hesitant of any inhalation-based products. There was a legitimate concern in creating any compromised immune systems from damaging the tissues to the throat and lungs. And while vaporizing cannabis is a much safer option than combustion, the concern for any potential damage created an openness for consumers to shift from a flower only preference, to trying ingestibles such as edibles and tinctures, and topicals such as balms and rubs. This new found interest in outside of flower categories led to an expansion in both ingestibles and topicals. Consumers were able to find similar relief with ingestibles and topicals as they were with flower, which increased sales velocity and volume in those categories.

Again, we see a seismic shift in consumer behavior that leads to a benefit across the industry. If we look at the full supply chain, we can see how these new-found categories helped boost our industry's economy. Cultivators were producing larger quantities of flower,

which led to larger quantities of failed flower that is typically turned into extraction products for edibles and topicals. With a larger volume of input material, both edible and topical companies were now able to produce more products. From here, there was more work for our testing laboratories, and again more products to meet the high demand of cannabis consumers at the dispensary level. From each level, we saw an economic benefit that has helped grow our industry to new heights.

Cannabis For Physical and Mental Health

Covid-19 has claimed over 580,000 deaths in the United States alone. From the start of the pandemic, the general public has been filled with trepidation, fear, and sincere concern. And without the ability to see loved ones and friends, it has been a bought of fear in isolation. This has been one of the most challenging and unprecedented times the world has experienced and one product has been able to maintain hope, health, and happiness: cannabis.

Cannabis is known for its ability to help improve mood, alleviate anxiety, and lower stress—that made it the perfect solution for the trying times of the pandemic. Cannabis consumers turned to their flower to help them manage their massive uncertainty, to help them cope with the loss of those they held dear, and to help them have hope for better days ahead. Outside of the mood enhancing benefits of cannabis, there are the physical benefits. While consumers held massive tension from the stress they were facing, cannabis helped them unwind and reduced their inflammation. While consumers lost their appetite from their anxieties, cannabis helped them find appetite and get back to healthy eating habits. Cannabis was there for us when we needed it the most; it kept us connected in an otherwise disconnected world.

With the massive derivative benefits of cannabis, there is no surprise that consumer demand increased.

Conclusion and Implications

The cannabis industry faced what once seemed like insurmountable challenges of Covid-19 and emerged a stronger, more profitable, and larger industry. From the increase in consumer demand with a limited supply, to the increase to ADS, and all the way to the benefits throughout the cannabis supply chain Covid-19 has positively impact the cannabis

ecosystem and economy. While our nation faces the irreparable harm from the nearly 600,000 Americans we lost, the countless jobs and industries destroyed,

and the health implications we've yet to face—we have one hero we can count on for the health of our people and our economy, cannabis.

Matthew Janz, after laying down foundational marketing strategies for regional dispensaries and cannabis brands throughout the West Coast, has focused his years of performance focused cannabis marketing to The Source's national expansion and growing market share with annual revenues reaching \$50M+.

With experience as an American Marketing Association panelist and as a published writer in the cannabis editorial sphere, Matt focuses on consumer psychographics and mindsets, building brand relevance, connective storytelling, and innovative omnichannel strategies that circumvent the limitations of the cannabis industry.

Matt has been featured in the Boston Globe, AdWeek, Leafly, the New York Post, Medium, The Ethel by AARP, Cannabis Dispensary Magazine, Marijuana Business Magazine, Cannabis Business Times, and was recently named 40 Under 40 by Marijuana Venture Magazine in May of 2020.

CANNABIS NEWS**CALIFORNIA GOVERNOR NEWSOM ANNOUNCES
NEW STATE BUDGET PROPOSAL WHICH INCLUDES
\$100 MILLION IN GRANTS TO EASE CANNABIS LICENSING BACKLOG**

California Governor Gavin Newsom announced in May 2021 that his new state budget proposal—known as the California Comeback Plan—will include \$100 million to alleviate a backlog that has left thousands of cannabis companies with provisional licenses in danger of shuttering due to the state's inability to issue final annual licenses to those entities. Newsom also plans to introduce a trailer bill to allow regulators to issue provisional cannabis business permits for an added six months, until June 30, 2022.

Background

These proposals aim to address a growing problem tied to California's provisional cannabis licenses, which under law must at some point be converted to more permanent "annual" licenses. That conversion process has been delayed for years by red tape, complicated environmental regulations and a patchwork of differing local industry ordinances. This has resulted in more than 80 percent of the state's cannabis licenses could be in jeopardy of closing in 2022, at least on a temporary basis, unless the provisional licensing issue is resolved. State regulators currently lack authority to extend provisional licenses beyond December 31, 2021.

Newsom's proposed \$100 million in funds would be doled out to cities and counties to help local officials process the backlog of provisional licenses awaiting approval to secure the mandatory annual permit. The Newsom administration indicates it will divide the money among jurisdictions with high numbers of provisional licenses across the supply chain in order to deliver the biggest impact for the industry.

As of March 2021, there were a total of 9,950 active cannabis licenses in California, and roughly 83 percent of them (or 8,280) were operating on provisional licenses as opposed to the annual permits. A large part of the delays in transferring provisionally licensed entities to annual permits is the California Environmental Quality Act (CEQA).

**The California Bureau of Cannabis Control
Chimes In**

The California Bureau of Cannabis Control (BCC), in obvious support of the proposed \$100 million, stated as follows:

Governor Newsom's California Comeback Plan released today proposes \$100 million General Fund in grant funding for local governments to complete environmental studies, license reviews, and mitigate environmental impacts. The proposal supports a broader effort to transition cannabis businesses into the regulated market and to reduce barriers to entry for small businesses. The California Comeback Plan also proposes a Deputy Director of Equity and Inclusion to lead state efforts to address the impacts of the War on Drugs and allocates nearly \$630 million in cannabis tax funds to public health, environmental protection, and public safety initiatives. (<https://cannabis.ca.gov/2021/05/14/state-cannabis-authorities-laud-governor-newsoms-california-comeback-plan-proposals-for-cannabis/>)

CEQA as a Roadblock

When the BCC references the hurdle of "completing environmental studies and to mitigate environmental impacts," they are referencing the CEQA and its thorough but time consuming and very expensive requirements for cannabis entities to comply with, as well as adding to delays for city and county authorities to process applications and ensure they've completed all necessary requirements. A fulsome environmental analysis, typically in the form of an Environmental Impact Report (EIR) can take months—or even years—to complete, and the COVID-19 pandemic has created unexpected further

delays in processing CEQA applications.

The Newsom administration indicates that the funding will help to speed the process along without short-cutting any of CEQA's strenuous procedural requirements.

Dividing Up the Funds

Under the proposal, the \$100 million would be split among three categories of local governments as follows: The top eight jurisdictions that are home to the most provisionally licensed cultivation permits as of May 5, 2021 would receive 25 percent of the funds; the top eight jurisdictions with the most provisionally licensed manufacturers, distributors, testing labs, microbusinesses and retailers as of May 5 would receive another 25 percent of the funds; and the final 50 percent of the funds will go to any of the top eight jurisdictions with the most provisionally licensed businesses that have received state grant money to support social equity programs.

The amount of grant money received by each city

or county would be broken down by the proportionate share of their entire provisional license population. This funding coincides with the consolidation of the state's three cannabis regulatory agencies into a single new oversight bureaucracy, the Bureau of Cannabis Control. That agency is slated to launch July 1, 2021 and will oversee the dispersal and use of the grant monies.

Conclusion and Implications

These funds come at a crucial time for the California cannabis industry, which could see statewide shutdowns in a matter of months if substantial annual licenses are not issued in the interim. Barring a longer-term legislative solution, the new money is the best chance these businesses have to keep their doors open into 2022. The following link provides additional details regarding the \$100 million: <https://cannabis.ca.gov/2021/05/14/state-cannabis-authorities-laud-governor-newsoms-california-comeback-plan-proposals-for-cannabis/>
(Jordan Ferguson)

NEW UNIVERSITY STUDY SUGGESTS THAT MASSACHUSETTS MUNICIPALITIES THAT AUTHORIZE RETAIL CANNABIS BUSINESSES ARE COMMANDING FEES AND INCENTIVES THAT STATE LAW AND GUIDELINES MAY NOT PERMIT

Background on Massachusetts and Legalized Cannabis

On November 8, 2016, citizens of Massachusetts voted in favor of ballot question four, the Marijuana Regulation and Taxation Act (Question 4), later enacted as Chapter 334 of the Acts of 2016. Question 4 outlined a legal and regulated recreational cannabis market that restricted municipal power, limited the imposition of additional fees and taxes, and prohibited the delay of final licensing by the newly created the Cannabis Control Commission (CCC or Commission). However, the Legislature delayed the implementation of much of the initiative until July 2017, when House Bill 3818 (H 3818) passed. The bill substantially revised the voter-passed initiative, expanding the role of municipalities in the regulatory process.

The Commission's 2019 report outlines the origin of the language regarding Host Community Agree-

ments (HCAs) in H 3818. It noted that much of the text originated in the House version of the bill that went to conference committee in the summer of 2017 and traces the language to the Commonwealth's 2012 effort to legalize gaming. The gaming bill did not permit the Gaming Commission authority to review agreements, but rather empowered municipal voters to review and potentially reject any location in their town where a gaming establishment might seek to open. Similarly, H 3818 lacks an explicit mandate that the CCC review HCAs, requiring only that the agreements be signed as part of granting a final license to each cannabis establishment.

A 2013 report by the Collins Center at the University of Massachusetts on land use development agreements for the Massachusetts Gaming Commission makes clear the purpose and intended design for these agreements, characterizing them as follows:

. . . part vision statement, part road map, and part contract, a development agreement is more than just a legal document, it is arguably the most important and complex relationship a municipality and property owner can enter into.

The report shows that gaming agreements often contained elements like business descriptions, key facts agreed upon by both parties, agreements on property usage and utilities payments, and developer commitments like hiring local workers. At the same time, the report notes that the gaming establishments for which the report was commissioned would have unique impacts and needs and encouraged readers to note certain distinctions.

Host Community Agreements for cannabis establishments, too, have taken on a particular character relevant to their usage.

Host Community Agreements as a Land Use Tool for Revenue?

While H 3818 states that municipalities can only ask for 3 percent of gross revenues as part of the so-called “community impact” fee, the Commission’s March 2019 report and similar updates released by the agency indicate that municipalities have some latitude under state law *to seek additional payments* from licensees as part of these agreements. Despite these payments sometimes being labeled as donations, for example, the Division of Local Services has taken the position that any payments made under these agreements must be deposited into the municipality’s general fund for later appropriation. As cited in the Commission’s 2019 analysis, the 2018 Local Finance Opinion states:

We understand that some of these agreements have characterized all or some of the payments as gifts or gifts in the nature of trusts. However, a payment made by a private party to a municipality in connection with a regulated activity, contract, or other municipal action is not a gift, donation, or grant within the meaning of and for the purposes of G.L. c. 44, § 53A. Therefore, it may not be accounted for in a separate account and spent without appropriation. These payments lack the donative intent that is an essential characteristic of the genuine gift required by that statute. A gift is ordinarily defined as

a voluntary payment of money or transfer of property made without consideration. Although a private party’s decision to engage in a regulated activity or contract with a municipality may be one of choice, it is doing so with the expectation of receiving valuable consideration in return, *i.e.*, a privilege or benefit, or some municipal action or authorization. *In this case, the execution of a host agreement is a condition precedent to being able to operate or continue to operate as a licensed marijuana establishment or registered medical marijuana treatment center. It is doubtful that any payments the establishment or treatment center agree to make are for a purpose other than to obtain the necessary host agreement.*

Despite the fact that the Commission has taken the position that it lacks the authority to review HCAs, the Commission has released an updated guidance on negotiating HCAs in January 2020. This guidance makes clear that the Commission does not believe it has the authority to regulate HCAs but advises that municipal officials should seek to be transparent and act in good faith, noting the additional scrutiny from state and federal officials. This guidance explicitly allows for payments in excess of the 3 percent cap but advises that these should be collected consistent with state law. For the community impact fee, costs should be proportional to actual expenses incurred.

The guidance warns against using revenue from these impact fees for budget planning.

Statutory Guidance on Home Community Agreements

The relevant statute governing HCAs in the Commonwealth can be found in Chapter 94G:

(d) A marijuana establishment or a medical marijuana treatment center seeking to operate or continue to operate in a municipality which permits such operation shall execute an agreement with the host community setting forth the conditions to have a marijuana establishment or medical marijuana treatment center located within the host community which shall include, but not be limited to, all stipulations of responsibilities between the host community and the marijuana establishment or a medical marijuana

treatment center. An agreement between a marijuana establishment or a medical marijuana treatment center and a host community may include a community impact fee for the host community; *provided, however, that the community impact fee shall be reasonably related to the costs imposed upon the municipality by the operation of the marijuana establishment or medical marijuana treatment center and shall not amount to more than 3 percent of the gross sales of the marijuana establishment or medical marijuana treatment center or be effective for longer than 5 years.* Any cost to a city or town imposed by the operation of a marijuana establishment or medical marijuana treatment center shall be documented and considered a public record as defined by clause Twenty-sixth of section 7 of chapter 4. (emphasis added)

So, What Are ‘Reasonably Related’ Fees in HCAs?

The interpretation of “reasonably related” is a main point of disagreement in the debate over HCAs and the impact fees they contain. The Report seeks to provide clarity on how towns and cities have been implementing this clause. However, what is clear from the Report is that many localities have insufficient public records of the money they have collected.

The Study/Report

The McCormack Graduate School of Policy and Global Studies, part of the University of Massachusetts published the Report: “An Analysis of Cannabis Host Community Agreements in the Commonwealth of Massachusetts in May 2021.” The Report was sponsored by the Massachusetts Cannabis Business Association. The Report conducted an analysis of HCAs between Massachusetts local governments and cannabis business operators. HCAs were set forth in the November 2016 legalization of cannabis as amended by the Massachusetts Legislature and have been the subject of legal scrutiny. Disagreement centers around interpretation of certain provisions of the law and of the regulatory role played by the Cannabis Control Commission.

This Report conducted a systematic coding review of 460 HCAs, which covers 85 percent of licenses issues.

A Vast Inconsistency in Fee Categories and Fees Assessed via Community Host Agreements

The study revealed particular variation in description of community impacts of cannabis businesses and the means by which the agreements attempted to control for these impacts. Many HCAs provided financial incentives for host communities which the study found, were over the legal cap, amounting to excess fees paid of approximately \$2.4 million. These excess fees paid took the form of 1. Local charity donations, aka community benefit payments; 2. Donations of employee time to education efforts with few municipalities having in place any plan for the spending of the fees paid and according to the study, not in alignment with the guidance promulgated by the Cannabis Control Commission. The study further found that many of the HCAs obligate cannabis retailers to make payments towards poorly defined or inadequately operationalized impacts and little to no provisions for review or accountability.

State sales of retail cannabis were over \$390 million in the first year of legalization for the period November 20, 2018 and November 20, 2019. During this period local government via HCAs were estimated to take in nearly \$12 million in revenue “for which there is little oversight.”

Study Recommendations

The Report recommends that the Massachusetts Legislature authorize the Cannabis Control Commission to:

...issue regulations on Host Community Agreements. ...and establish standards for what agreements can pay for as well as a more robust and transparent accounting structure to track funds, including a provision allowing the Commission to void unlawful portions of agreements or to decline license renewal to operators under agreements that include unlawful financial incentives—to include ‘voluntary’ donations to local groups and reimbursement for costs beyond the impact fee[s]. We also strongly recommend that municipalities assess their [HCAs] in compliance with state law and state guideline issues by the Commission.

Conclusion and Implications

In most states that have legalized recreational cannabis, municipalities have been given the power to regulate the grow, manufacture and retail sales [and delivery] of cannabis. It is considered land use prerogative and land use decisions in the United States are made at the local level for the most part. In California, for example, local government can decide to not permit the retail sales of cannabis altogether despite statewide legalization. With land use decision-making comes the ability to assess impact fees and impact mitigation in the form of a negotiated development agreement. In essence, these Community Host Agreements are just that. But the Report found a patchwork of demands by local government that are not operating yet under the watchful eye

of the Commission which itself doesn't feel its task is to oversee and regulate HCAs. The Report finds that until the Legislature makes clear who should be promulgating regulations regarding these development agreements, and until such regulations are established, municipal government will continue to see their power of permitting cannabis sales within their jurisdictions as an opportunity for revenue and perhaps, governance beyond the state's original mandate to legalize cannabis. It's a bit of the Wild West on a local government level for now—or perhaps more accurately, the Wild East. The Report/Study is available online at: <https://static1.squarespace.com/static/5be334281aef1d1e8355725a/t/609b18e4879a066885c071ca/1620777191447/HCA+Report+May+2021+by+Dr+Jeffrey+Moyer.pdf>
(R. Schuster)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA ASSEMBLY DEBATING TWO BILLS WHICH ADDRESS CANNABIS MARKETING

In recent months, two new assembly bills have been introduced this legislative session to revise California's rules on cannabis marketing. These bills were drafted in response to the January 11, 2021 San Luis Obispo County Superior Court decision in *Farmer v. Bureau of Cannabis Control & Lori Ajax* striking down a California Bureau of Cannabis Control (BCC) regulation on cannabis marketing. 16 C.C.R. § 5040(b)(3), the invalidated BCC regulation, prohibited cannabis licensees from advertising cannabis or cannabis products on outdoors signs and billboards within a 15-mile radius of the Arizona, Nevada, and Oregon borders along any state and interstate highway that crosses any of those borders. (See: https://www.lacba.org/docs/default-source/section-documents/cannabis-law/cannabis-newsletter-jan-2021/1_charney_phillis.pdf)

With § 5040(b)(3) being invalidated, the BCC clarified that in its absence, cannabis licensees could not advertise anywhere within the state along any state or interstate highway that crosses state lines pursuant to Business and Professions Code § 26152(d). The BCC further clarified that all licensees were to cease installing new billboards and work to remove any billboards already installed along qualifying state and interstate highways. While the state of cannabis marketing regulations following the *Farmer* decision is clear—no cannabis billboards along state and interstate highways—clarification on the California Legislature's position with respect to marketing is appropriate here where the legislature had deferred regulatory authority to the BCC and that regulation was overturned.

Assembly Bill 273

Assembly Member Jacqui Irwin introduced Assembly Bill 273 to restrict cannabis product marketing beyond the scope of Business and Professions Code § 26152's current restrictions. Under Assembly Bill 273's modifications, cannabis marketing would be restricted to print, digital, and broadcast audiences where market data shows that at least 71.6 percent of

the audience is reliably expected to be over the age of 21.

Assembly Bill 273 would further restrict cannabis licensees from advertising buy one get one free promotions, contests, sweepstakes, raffles, and free products in exchange for donations. Marketing materials would also be prohibited from containing any of a long list of items, foods, and activities that would appeal to children or could be confused by children as being intended for children.

Finally, Assembly Bill 273 contains specific language regarding how the BCC is to punish cannabis licensees in the event its new marketing requirements are violated. For example, Assembly Bill 273 would call for an automatic one-year license suspension for any violation and it would impute any violation committed by an advertising agent, contractor, or representative through an act or omission. (See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB273)

Assembly Bill 1302

Assembly Member Bill Quirk introduced Assembly Bill 1302 to legislatively re-enact the status quo as it had stood before the *Farmer* decision. With Assembly Bill 1302, Assembly Member Quirk is seeking to modify Business and Professions Code § 26152(d)'s prohibition on billboard marketing within the state by adding language to limit that prohibition to apply only "within a 15-mile radius of the California border."

AUMA authorizes the Legislature to amend the act to further the purposes and intent of the act with a $\frac{2}{3}$ vote of the membership of both houses of the Legislature, except as provided. Existing law, the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), among other things, consolidates the licensure and regulation of commercial medicinal and adult-use cannabis activities.

Existing law prohibits a licensee from advertising or marketing on a billboard or similar advertising device located on an Interstate Highway or on a State Highway which crosses the California border.

This bill, instead, would prohibit a licensee from advertising or marketing on a billboard or similar advertising device located within a 15-mile radius of the California border on an Interstate Highway or on a State Highway which crosses the California border.

This bill would declare that its provisions further the purposes and intent of AUMA.

According to the legislative analysis, Assembly Member Quirk is proposing this change to strike a balance between the competing interests of cannabis licensees who are seeking to market their lawful businesses and the public interest served by protecting minors. (See: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1302)

Conclusion and Implications

As the legislative analysis for Assembly Bill 1302 points out, the licensed cannabis industry in California is continuing to struggle with competition from illicit black market cannabis operators who are not subject to the same licensing and enforcement scheme. In allowing marketing along some highways throughout the state, the state would give the legal cannabis industry a helpful tool not equally available to the illegal cannabis market.

Assembly Bill 273 would have quite the opposite impact by imposing new market data requirements and content-based restrictions on cannabis marketing. Though the precise impact these requirements would have on cannabis marketing are hard to judge in the abstract, it is likely that smaller cannabis licensees would be hard-pressed to devise fully compliant marketing materials whereas more substantially financed cannabis licensees are more likely to be able to fund compliant marketing.
(Andreas Booher)

REGULATORY DEVELOPMENTS

FEDERAL DRUG ENFORCEMENT AGENCY RELEASES ITS 2020 YEAR-END REPORT ON ‘CANNABIS ERADICATION AND SUPPRESSION’

Recently the federal Drug Enforcement Agency (DEA) released its 2020 year-end report from its “Domestic Cannabis Eradication/Suppression Program” (DCE/SP or Program). The numbers indicate in 2020 the DEA “eradicated” over 4.5 million plants, which represents an increase of approximately 1/2 million plants that were eradicated in 2019. 2020 was the year that Covid-19 restrictions were in place for nearly the entire year.

Background

The DEA’s Program has its genesis in Hawaii and California in 1979. The program rapidly expanded to include programs in 25 states by 1982. By 1985, all 50 states were participating in the DCE/SP. In 2019, the DEA continued its nation-wide cannabis eradication efforts, providing resources to support the 130 state and local law enforcement agencies that actively participate in the program. This assistance allows the enhancement of already aggressive eradication enforcement activities throughout the nation. In 2020, the DEA continued its nation-wide cannabis eradication efforts, providing resources to support the 127 state and local law enforcement agencies that actively participate in the program. This assistance allows the enhancement of already aggressive eradication enforcement activities throughout the nation. (See: <https://admin.dea.gov/operations/eradication-program>)

The DEA reports that marijuana is the only major “drug of abuse” grown within the U.S. borders. The DEA aggressively strives to halt the spread of cannabis cultivation in the United States, and to accomplish this aim, the agency initiated the DCE/SP, which is the only nationwide law enforcement program that exclusively targets Drug Trafficking Organizations (DTO) involved in cannabis cultivation. (*Ibid*)

So, in 2020, was the federal government “looking the other way” with so many states legalizing can-

nabis use? Not according to Paul Armentano, the deputy director of the National Organization for the Reform of Marijuana Laws (NORML), who said in a press release issued in response to the DEA’s 2020 Report, that federal prosecution of cannabis-related offenses continues despite strong support for marijuana legalization:

While marijuana enforcement is arguably not the same priority that it once was for the DEA – likely because of changes in state policies and in federal budgetary guidelines – this does not mean that the agency is content to look the other way at violations of federal marijuana law. . . . There are still several thousands of Americans arrested for federal marijuana violations each year – even at a time when some seven in ten Americans believe that the plant ought to be legal for adults to use and possess. (<https://norml.org/news/2021/05/06/dea-marijuana-related-seizures-arrests-increase-in-2020/>)

Trends in ‘Illegal’ Grows

The DEA has reported on the trends in grows that are seeing and attempting to eradicate. These trends include the following:

- Cultivators have been forced to abandon large outdoor cannabis plots in favor of smaller, better concealed illicit gardens;
- Cultivators are growing indoor and outdoor cannabis “under the cover of various states legal cannabis grows”;
- Cultivators have turned to sophisticated technology to cultivate cannabis plants indoors including the use of hydroponics;
- Cultivators are adopting new technologies to

increase the potency of Tetrahydrocannabinol (THC), the psychoactive ingredient in cannabis plants; and

- Cultivators are utilizing more Butane as method for extraction of THC, which causes unique alarm at the agency to its volatility.

Comparing Some of the 2019 and 2020 Totals

The DEA's 2019 Report is available at: <https://admin.dea.gov/sites/default/files/2020-04/2019%20DCESP%20Program%20Stats.pdf>

California Leads the Nation in Every Significant Category in the 2020 Report

California has legalized recreational and medicinal cannabis and is the largest state by population so the 2020 Report for the state is a good place to gage the trends in the nation.

California's totals far exceeded any other single state in nearly every category of the Report. A summary of some of the totals from the 2020 year-end report are as follows:

- *Illegal Outdoor Grow Sites Eradicated*
The DEA shut down over 1,500 "illegal" outdoor grow sites in 2020. The next closest states with illegal grow sites "eradicated" was Ohio at 532 and Kentucky at 494. By contrast, Colorado, which lead the nation in legalizing recreational cannabis, had 1 and Nevada had 1.
- *Total Eradicated Indoor Grow Sites*
For this category, California had 680 sites shut down. Only one other state had a triple digit number: that of the State of Indiana with 130 sites. No other state exceeded 64.
- *Total Cultivated Plants Seized or Eradicated*
In the category of total plants seized from either indoor or outdoor grows, California again takes the lead with over 3.7 million plants. The next highest number of plants seized was in the State of Kentucky with just over 409,000. All other state

had five figures or less of plants seized. In this final category the State of Washington lead the way with nearly 79,000 plants seized.

- *Assets Seized*
In an attempt to quantify in dollars the amount of cannabis seized by the DEA in the United States, the agency reports that in total in 2020, a staggering \$41.1 billion was seized/eradicated. California again the lead the way with seizures totaling over \$14.7 billion. The State of Georgia came in second in this category with \$10.2 billion in seizures and Washington State came in third with over \$2.4 billion. The States of Indiana, Kansas, Louisiana, Michigan, Mississippi, and Oklahoma were also in the billion-dollar category.

- *Arrests*
In the category of total arrests made, California was far and away the leader here too with approximately 2,000. The next closest states were Indiana with 631 and Kentucky with 473.

Conclusion and Implications

In 2020 the federal government continued to treat cannabis as an illegal drug. Under the Biden administration, which took office in early 2021, enforcement at the federal level of current federal law has been deprioritized. And then there was [and for some time to come] Covid-19 and the stay-at-home restrictions which spiked demand for cannabis use. It is also interesting to reflect on the nature of what was an "illegal grow" in the eyes of the DEA in 2020. Were they also illegal under state law or just large enough to catch the DEA's attention and time? With Covid vaccinations thriving in the nation and a return to "normal" is now in sight, and with a Biden administration, one might expect the 2021 year-end number to be quite different.

The 2020 Statistical Report is available online at: <https://dev9.dea.gov/sites/default/files/2021-04/2020%20DCESP%20Sourcebook%20Stats%20-%20April%202021.pdf.pdf>

(R. Schuster)

JUDICIAL DEVELOPMENTS

MISSISSIPPI SUPREME COURT STRIKES DOWN MEDICAL MARIJUANA INITIATIVE APPROVED BY STATE VOTERS IN NOVEMBER 2020

In Re Initiative Measure No. 65, et al. v. Secretary of State for the State of Mississippi,
Case No. 2020-IA-01199-SCT (May 14, 20201).

The Mississippi Supreme Court has struck down a ballot initiative that passed in November 2020 which authorized medical cannabis sales and use. The Court found that the ballot measure to amend the state’s Constitution to permit medical cannabis was void.

Background

According to the Supreme Court, “On November 3, 2020, a strong, if not overwhelming, majority of the voters of Mississippi approved Initiative 65, which establishes a legal medical-marijuana program.” Under Initiative Measure No. 65 the Mississippi Constitution would be amended:

...to allow qualified patients with debilitating medical conditions, as certified by Mississippi licensed physicians, to use medical marijuana. . . and would allow medical marijuana to be provided only by licensed treatment centers. The Mississippi Department of Health would regulate and enforce the provisions of this amendment.

The proposed amendment to the State Constitution would, among other things:

- Insulate a qualified patient or caregiver from criminal or civil sanctions the use of medical marijuana obtained from a marijuana treatment center;
- Insulate a physician from such sanctions for issuing a physician certification;
- Continue to make unlawful the smoking of medical marijuana in a public place, subjecting a violator, upon conviction, to a fine of not more than \$100.

The Supreme Court’s Decision

On May 14, 2021 the Court struck down the ballot

initiative on several ground.

The 1992 Legislative Proposal and Voting Tied to the State’s Congressional Districts

In 1992 the Mississippi adopted a *resolution* that established “the people’s right to propose and enact initiatives to amend the constitution.” This measure was approved by the voters in November 1992 which “then enshrined in article 15, § 273(3) of the Mississippi Constitution.”

The Court pointed out that the issue before it was:

...the third subsection within section 273. . . which defines the initiative process and the signature requirements for placing initiatives on the ballot during a statewide election: The people reserve unto themselves the power to propose and enact constitutional amendment by initiative.

Interpreting Section 273

The Court stated the key issue of interpretation before it as follows:

In article 15, section 273(3), of our State’s Constitution of 1890, “The people reserve unto themselves the power to propose and enact constitutional amendments by initiative.” So important did the drafters of section 273 consider the right of the people to amend their constitution to be that, in section 273(13), the Legislature is forbidden from in any way restricting or impairing “the provisions of this section or the powers herein reserved to the people.” . . . The people did not, however, reserve the right unfettered by constitutional prerequisites that must be met before proposed amendments could be included on the ballot. An initiative sponsor must collect a number of

signatures equal to twelve percent of all votes cast for Governor in the preceding gubernatorial election. Miss. Const. art. 15, § 273(3). At issue today is the additional requirement that the “signatures of the qualified electors from any congressional district shall not exceed one-fifth (1/5) of the total number of signatures required to qualify an initiative petition for placement upon the ballot.” Id. Section 273 mandates that any signatures from a given congressional district that exceed twenty percent of the total number of required signatures “shall not be considered” when making the determination that the proposed amendment may be placed on the ballot.

The Court went on to state the challenge which produced this Court review as follows:

Petitioners challenge the Secretary of State’s approval of the [medical cannabis] initiative for inclusion on the ballot by advancing a straightforward argument. Petitioners point out that Mississippi now has four, not five, congressional districts. They further point out that four (the number of districts) multiplied by twenty (the maximum percentage of signatures that may come from any one congressional district) equals only eighty. Therefore, petitioners assert, it would have been impossible for the petition seeking to place Initiative 65 on the ballot to be properly certified as meeting the section 273 prerequisites by the Secretary of State. As the petition was certified in error, the Petitioners contend that all subsequent actions are void.

As to this primary argument the Court found that “In the tension created by the decrease in representatives and the unchanged text of section 273(3) lies the Petitioners’ argument.” The Court went on to state that it was:

. . .persuaded that when section 273 ties the twenty percent cap to qualified electors in a congressional district it necessarily means the congressional districts as they exist at the time a petition is presented for approval. . .[1992].

. . .The people of Mississippi, when they ratified the ballow-initiative process, ratified of it including the twenty percent cap.

In the end, the Court found that the analysis of what it actually took to correctly and legally put the medical cannabis initiative on the ballot for vote in November 2020 was faulty and incorrect. As such the ballot initiative was *void ab initio*:

Pursuant to the duty imposed on us by article 15, section 273(9), of the Mississippi Constitution, we hold that the petition submitted to the Secretary of State seeking to place Initiative 65 on the ballot for the November 3, 2020, general election was insufficient. Because Initiative 65 was placed on the ballot without meeting the section 273(3) prerequisites for doing so, it was placed on the ballot in violation of the Mississippi Constitution. *Whether with intent, by oversight, or for some other reason, the drafters of section 273(3) wrote a ballot-initiative process that cannot work in a world where Mississippi has fewer than five representatives in Congress. To work in today’s reality, it will need amending—something that lies beyond the power of the Supreme Court. (Emphasis added.)*

Conclusion and Implications

Mississippi’s system of tying the votes needed to place a ballot initiative before the voters of the state to amend the constitution to the state’s congressional districts is complicated. Arguments were made to look to history and not 1992 to determine this correct number. The Court disagreed and the Court offered its own interpretation of what the number of votes needed to be. The dissent and the position of the Secretary of State was to the contrary and ultimately rejected by the Court. So now the state of medical cannabis prescription and use would appear to be once again, illegal. It is highly likely, however, that since Initiative 65 passed by an overwhelming vote, the process will begin anew for a new initiative. The Supreme Court’s lengthy decision and analysis is available online at: <https://courts.ms.gov/Images/Opinions/CO154253.pdf> (Robert Schuster)

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