

Commission to Study the Legalization, Regulation, and Taxation of Marijuana

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This presentation is intended for informational purposes only, and is not a substitute for seeking professional advice or for reviewing the applicable laws and rules. This presentation represents some positions of the Department on the limited issues discussed herein, based on the law in effect at the time of the presentation and Department interpretation thereof, as well as the opinions and conclusions of its presenter.

For the current status of any tax law, practitioners and taxpayers should consult the source documents (i.e., Revised Statutes Annotated, Rules, Case Law, Session Laws, etc.) for independent verification.

Department of Revenue Administration

Mission

The mission of the Department of Revenue Administration is to fairly and efficiently administer the tax laws of the State of New Hampshire, collecting the proper amount of taxes due, incurring the least cost to the taxpayers, in a manner that merits the highest degree of public confidence in our integrity.

Tax Policy Generally: Define Goal

- Compensate for Costs – Imposition of a levy on an individual or entity who benefits from a service or engages in an activity that has a cost. For example: property tax, tobacco tax.
- Discourage Behavior – “Sin” tax. Intended to discourage or eliminate the taxed behavior. For example: alcohol taxes, tobacco taxes.
- Raise Revenue – Generate revenue to fund the operations of all levels of government, public services, etc. Typically applied at the point in time when the taxpayer has realized a gain (the point in time when the taxpayer is most able to incur the tax). For example: personal income tax, Business Profits Tax.

Tax Policy Generally: Identify Taxpayer

Possible Taxpayers:

- Cultivator
 - Smallest number of taxpayers to interact with and limited transactions to monitor.
- Wholesaler
 - Small number of taxpayers to interact with and limited transactions to monitor.
- Retailer
 - Large number of taxpayers and high volume of transactions.
 - If intended to be a “sin” tax, having the consumer directly incur the cost of the tax is likely to be most effective.

Tax Policy Generally: Define Tax Base

There are several ways to tax marijuana:

- Percentage of sales price (wholesale or retail)
- Market price
- Weight
- THC (Tetrahydrocannabinol) content
- More than one method depending on the product

Tax Policy Generally: Tax Types

There would be several taxes that would apply to the marijuana supply chain:

- State and local property taxes
- Business Profits/Business Enterprise Tax
- Perhaps others: Real Estate Transfer Tax, Meals & Rooms Tax
- Marijuana Tax (if enacted)

Other States

State	Tax Type	Tax Base	Tax Rate	Taxpayer
Colorado	State Sales Tax	Sale Price	2.9%	Consumer
	Local Sales Tax	Sale Price	Varies	Consumer
	Marijuana Sales Tax	Sale Price	15% (10%)	Consumer
	Marijuana Excise	Market Price	15%	Cultivator
Washington	Marijuana Excise	Sale Price	37%	Consumer
Oregon	State Marijuana Sales	Sale Price	17% (25%)	Consumer
	Local Marijuana Sales	Sale Price	Up to 3%	Consumer
Alaska	Marijuana Excise	Ounce	\$50	Cultivator
California	State Marijuana Excise	Market Price	15%	Consumer
	Cultivation Tax	Ounce	\$9.25/\$2.75	Cultivator
Massachusetts	State Marijuana Excise	Sale Price	10.75%	Consumer
	State Sales Tax	Sale Price	6.25%	Consumer
	Local Sales Tax	Sale Price	Up to 3%	
Maine	Marijuana Sales Tax	Sale Price	10%	Consumer
Nevada	Marijuana Excise Tax	Market Price	15%	Cultivator
	Marijuana Sales Tax	Sales Price	10%	Consumer
	State Sales Tax	Sales Price	6.85% (plus local)	Consumer

Tax Policy Generally: New Hampshire Constitution

Smith v. New Hampshire Dept. of Revenue Admin., 141 N.H. 681 (1997).

“Three provisions of the New Hampshire Constitution work in conjunction to ensure the fairness of any scheme of taxation enacted by our legislature.”

1. Part I, Article 12: “[R]equires that a given class of taxable property be taxed at a uniform rate,” and that “similarly situated taxpayers be treated the same.”
2. Part II, Article 5: Allows taxes that are “proportionate and reasonable, equal in valuation and uniform in rate...”
3. Part II, Article 6: Allows the Legislature to “classify property for purposes of taxation.”

Tax Policy Generally: New Hampshire Constitution

- To summarize, the New Hampshire Constitution allows the classification of taxpayers but NOT property. Each class of property must be taxed equally.
- Issue: Do marijuana products fall within an existing class of taxable property such that it must be taxed at the same rate?
- The case law tells us that substantial latitude is given to the Legislature to tax.

Tax Policy Generally: New Hampshire Constitution

Judicial Standard

Is there a “just reason” to tax two classes of property differently? *Opinion of the Justices*, 117 N.H. 512, 515 (1977).

- Similar to rational basis review- very deferential to the lawmaking body.
- Is marijuana meaningfully different from tobacco? Is a marijuana brownie meaningfully different from a brownie purchased from a bakery? Is Marijuana meaningfully different from a beer or glass of wine?

Agency Responsibility

State	Agency Responsible
Colorado	Department of Revenue – Marijuana Enforcement Division
Washington	Liquor and Cannabis Control Board
Oregon	Oregon Liquor Control Commission
Alaska	Marijuana Control Board
DC	N/A
California	Bureau of Cannabis Control
Massachusetts	Cannabis Control Commissioner
Maine	Department of Agriculture, Conservation and Forestry
Nevada	Department of Taxation

Possible Areas of Oversight

- Taxes
- Age Restrictions
- Possession Limitations
- Health Inspections
- Pesticide Testing
- Potency
- Warning Labels
- Licensing

No one New Hampshire state agency currently has the expertise to administer all aspects of marijuana regulation and taxation.

Recent New Hampshire Legislation

2017 Legislative Session

House Bill 656

- \$30/ounce flower, \$15/ounce other parts. Paid by cultivator
- 15% sales tax paid by consumer
- \$250 license fee for cultivation facility/marijuana establishments

2016 Legislative Session

House Bill 1675

- \$30/ounce paid by cultivator

House Bill 1694

- \$530 per ounce flower, \$15/ounce other parts paid by cultivator
- 15% sales tax paid by consumer
- \$250 license fee for cultivation facility

Fiscal Impact Analysis

Identifiable Components

- Estimated rate of current marijuana use in NH
- Estimated average consumption volume
- Estimated average market price
- Calculate revenue based upon identified tax types and rates

Unidentifiable Components

- Possible increase in use from legalization
- Cross border sales – legalization in surrounding states and comparative tax rate
- Impact of level of taxation on continued illegal use (price elasticity)

Fiscal Impact Analysis: An Example

\$30 Per Ounce Marijuana Excise

2016 NH Population for Aged 20 or older from United States Census Bureau	1,037,400	
2016 Marijuana Use in Past Year among Persons Aged 20 or older from National Survey on Drug Use and Health	20.6%	
	213,186	
Average Marijuana Consumption, per-year per-individual from Colorado Futures Center	3.53	ounces
Estimated Ounces Per Year Consumed in NH	752,546	
Tax Rate	\$30	ounce
Estimated Additional Revenue	\$ 22.6	million

15% Marijuana Sales Tax

2016 NH Population for Aged 20 or older from United States Census Bureau	1,037,400	
2016 Marijuana Use in Past Year among Persons Aged 20 or older from National Survey on Drug Use and Health	20.6%	
	213,186	
Average Marijuana Consumption, per-year per-individual from Colorado Futures Center	3.53	ounces
Estimated Ounces Per Year Consumed in NH	752,546	
Average Retail Price of Marijuana, Source: Multiple Internet Sites	\$200	ounce
Total Price of Marijuana Sold	\$ 150,509,104	
Tax Rate	15%	
Estimated Additional Revenue (High End of Range)	\$ 22.6	million

Other States Revenue Analysis

Colorado

Year	Actual CO Revenue	<i>Estimated NH Revenue*</i>
2014	\$34.6 million	<i>\$8.3 million</i>
2015	\$65.4 million	<i>\$15.7 million</i>
2016	\$172.6 million	<i>\$41.4 million</i>

- Includes revenue from 15% sales tax on marijuana sales to consumers levied as a percentage of the sale price and 15% excise tax on marijuana cultivators levied as a percentage of the market price.
- Does not include regular state or local sales tax revenue.
- Colorado population: 5.5 million
- New Hampshire population: 1.3 million (24%)

*Estimated NH revenue was calculated by assuming that NH would enact the same taxes at the same rate as CO. Further, it is assumed that NH has the same average rate of marijuana use as CO and the same per person consumption volume.

Other States Revenue Analysis

Washington

Year	Actual Washington Tax Revenue	<i>Estimated NH Revenue*</i>
2015	\$129.4 million	<i>\$23.3 million</i>
2016	\$257.6 million	<i>\$46.4 million</i>

- Includes 37% marijuana excise tax levied as a percentage of the sale price and paid by the consumer.
- Does not include regular sales tax revenue.
- Washington population: 7.3 million.
- New Hampshire population: 1.3 million (18%).

*Estimated NH revenue was calculated by assuming that NH would enact the same taxes at the same rate as Washington. Further, it is assumed that NH has the same average rate of marijuana use as Washington and the same per person consumption volume.

Other Considerations: Confidentiality

21-J:14 Confidentiality of Department Records. –

I. Notwithstanding any other provision of law, and except as otherwise provided in this chapter, the records and files of the department are confidential and privileged. Neither the department, nor any employee of the department... shall disclose any information obtained from the department's records, files, or returns or from any examination, investigation or hearing, nor may any such employee or person be required to produce any such information for the inspection of any person or for use in any action or proceeding except as hereinafter provided.

Any legislative proposal to legalize, regulate, and tax marijuana should consider whether the DRA's confidentiality provision should be changed to accommodate the types of data sharing and reporting that will be required to adequately regulate, oversee, and report on marijuana legalization, tax revenues, industry activities, etc.

Other Considerations: Enforcement

Bankruptcy

Federal courts will not allow marijuana businesses to use bankruptcy to reorganize or seek protection from creditors because they will not employ equitable jurisdiction to aid in criminal activity. This means collecting tax debts from marijuana businesses in distress would be without the benefit of the orderly process of bankruptcy and we would thus require the utilization of state court procedures.

Banking/Cash

Cash based businesses are significantly more difficult to audit and collect unpaid taxes from. There is also a greater opportunity to underreport sales and sales tax collected from cash transactions.

Other Considerations: Federal Tax Law

Internal Revenue Code § 61(a)

Gross income means all income from whatever source derived...

-Regulation 1.61-14(a) specifically provides that income from illegal activities is taxable.

Internal Revenue Code § 280E

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.

Net Impact: Gains from illegal activities, such as the sale of marijuana, are taxable federally, but the amount of tax paid by marijuana businesses is much higher because the business cannot deduct any of the expenses associated with operating a marijuana business, even if the sale of marijuana is legal in the state where the business operates.