Spring 2024

Memo Supporting Potency Tax Reform

The New York Cannabis Retail Association (NYCRA) supports Governor Kathy Hochul's proposal to repeal and replace the potency tax in Article 20-C § 493(a) of the tax law with changes described below. The Governor has proposed a 9% wholesale tax to replace the potency tax. We believe the marketplace is too new and illicit store competition too great to shoulder such a high rate right away. Instead, **NYCRA suggests phasing in the tax over 8 years from 5% to 9%.**

Further, we suggest requiring the Office of Cannabis Management (OCM) to furnish a market study highlighting key indicators of market health in order to guide the legislature in whether an increase is prudent or not.

NYCRA supports S4831-B, introduced by Senator Cooney, Senator Ramos, and Senator Comrie.

About NYCRA

We are an organization of 270 members that advocates for policy that will allow small and social equity retailers to thrive in the New York marketplace. We represent licensed dispensaries in all regions of the State.

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Potency Tax Reform

The New York Cannabis Retail Association supports efforts to repeal and replace the Potency Tax in Article 20-C § 493(a). Our proposed solution would better align with other adult-use states and allow for a more competitive marketplace.

What is the potency tax?

Article 20-C of the Tax Law includes two separate taxes on adult-use cannabis – a 'potency tax' on the wholesaling of cannabis and a retail surcharge at the point of sale to the customer. The potency tax rate is calculated based on the number of milligrams (mg) of the psychoactive chemical in cannabis – known as THC, and differs depending on the product category. This tax is paid by distributors, typically cultivators and processors, and is included in the price that retailers pay for the products.

Proposed Replacement:

Our proposal considers the definition of *illicit cannabis* and the importance of continued enforcement of the illicit marketplace. Therefore, we maintain a tax collected at the distribution to retail.

- Phase the wholesale tax in over 8 years beginning with 5%.
- Require the OCM to conduct a market study a year before each scheduled increase.

Table A: NYCRA Proposal, Inline with S4831-B

Year	Wholesale Tax	State Surcharge at Retail	Local Retail Tax
FY 2024	5%	9%	4%
FY 2028	7%	9%	4%
FY 2031	9%	9%	4%

The increase in tax over 8 years is critical for the legal market to compete with illicit stores that charge no taxes. A market study would inform lawmakers of the effects that increasing the tax would have on the market ahead of planned increases.

Why does the Potency T

Problem 1: High taxes can strangle a new market.

The current effective tax rate can soar to up to 60% and is out of line with other state markets. This is keeping lower-income consumers from accessing legal cannabis and driving them to illicit, and potentially harmful, sources. Our members have told us countless stories of consumers just not being able to afford to purchase quality, regulated, and safe cannabis.

The governor's proposed 9% wholesale tax, while significantly less than the current potency tax, adds to the price of cannabis in a way that the market cannot bear at this moment. It would keep our tax rate higher than neighbouring states, as demonstrated in Table B, and allow the illicit to consistently undercut our legal store's pricing.

Table B: Other State's Cannabis Tax Rates

State	Wholesale Tax	Retail Tax	
New Jersey*	-	10%	
Massachusetts	-	13.75%	
Vermont	-	14%	
Maine	$335/lb	10%	
Michigan	6%	10%	
Rhode Island	–	13%	
Ohio		10%	

Source:
https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/marijuana-taxes

**New Jersey has recently changed their structure based on market conditions and charged a $1.24/ounce tax in addition to normal sales tax of 6.625% while localities are allowed to add a 2% surcharge. All in, it is a 10% tax rate.*

Problem 2: The tax compounds from wholesale to retail.

The current potency tax, and a proposed wholesale tax, gets included in the price that producers wholesale products for, resulting in a doubling of the tax's effect. The standard, and necessary, retail markup for cannabis is 100%. Table C demonstrates the compounding effect that occurs when tax is collected at the wholesale level.

Table C

Price from the farmer	$15.00
THC Tax Collected	$5.00
Wholesale Price	$20.00
Retail Price	$40.00
Increase of price due to the tax	**$10.00**

As you can see in our example, taxation at wholesale increases the price by twice of what the state collects. Lowering the amount of tax levied at wholesale and changing it to a percentage based, significantly lowers the retail price – increasing consumer access.

Problem 3: The fixed nature of the current weight-based tax.

The potency tax is functionally a *fixed* weight-based tax where the amount of tax due does not change based on the price of the product. As prices naturally compress, the fixed tax acts as an immovable barrier that squeezes the margins of producers.

As retailers, we look to compete with the illicit market and provide accessibly priced cannabis to consumers. Data and experience from our members have shown that price matters. Consumers in New York have options – both on the illicit market and in neighbouring states where they can find lower-priced products. As these pressures drive retailers to find lower prices – it puts equal pressure on producers to reduce their profit margin.

A fixed tax stands to advantage larger suppliers who can operate at low margins do their size and scale. While the small brands that we have developed close relationships with – won't be able to absorb the margin compression.

It is imperative that the state does not opt to keep a static or fixed weight-based tax and instead uses a percentage of the sale. The three states with the highest amount of tax revenue per capita (Washington, Oregon, and Colorado), all have **percentage-based taxes**. In contrast, the lowest per capita tax revenue state, California, has recently abolished their fixed, weight-based, tax.