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# **'Potentially deadly' tax loophole exist in New York's cannabis regulations**

Published: May. 17, 2023, 7:45 a.m.

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There is a silent but potentially deadly tax loophole in the Office of Cannabis Management's recently released proposed rules and regulations. If allowed to linger beyond the next public comment period, this excise tax, which may be unique to New York City alone, would truly stink for the future of the Empire State's licensed adult-use retail program.

In short, there is risk that through the loophole, New York City may be able impose up to \$1.50 excise tax on cannabis products, as it does on tobacco products. This would be above and beyond the 13% permitted in the Marihuana Regulation and Taxation Act (MRTA).

For more than a decade, the Big Apple [has been authorized](#) by the New York State Department of Tax and Finance to impose an excise tax above and beyond the state-mandated taxes on smokable, vaporizable, and orally consumed tobacco products.

As stated above, the Department of Taxation and Finance has permitted New York City to impose its own excise tax on tobacco products which adds a \$1.50 on top of the \$4.35 in state taxes imposed on tobacco products without preemption by Tax and Finance. The excise tax was imposed more than a decade ago after New York City successfully lobbied the state legislature to authorize the excise tax on the grounds that: (1) it is the largest city in the nation and provides access to health care to millions of New Yorkers and patients from afar, (2) tobacco-related illnesses are devastatingly expensive to treat and those illnesses are experienced by a significant number of city residents in need of treatment, (3) New York City has unsurpassed hospitals and medical treatment centers to which New Yorkers and people around the world flock to receive treatment for tobacco-related illnesses, and (4) the magnitude of patient treatment related expenses borne by the city cause it to experience staggering direct and indirect economic costs and consequences not otherwise compensated or partially offset without the excise tax.

Consequently, New York City was granted authority to impose the \$1.50 tobacco excise tax which will, as of September 2023, raise the total cost of state, local, and NYC excise tax to \$5.85 per pack of cigarettes.

The potential loophole is created through the proposed rules and regulations issued last week by the Office of Cannabis Management and approved by the Cannabis Control Board.

Under the “Municipal Rulemaking” section, municipalities are “preempted” from passing any local law or rule “... pertaining to ... [an] adult-use cannabis license” that has the net effect of “imposing a special fee that is specific to cannabis businesses or the licensee that intends to operate within the jurisdiction of the municipality.” The rule further prohibits the municipality from “imposing a tax ... on the ... sale of cannabis or cannabis product in this state, other than any usual and customary fees associated with similarly situated businesses.”

There's the loophole as it may pertain to New York City and the ability to impose the \$1.50 excise tax on tobacco products.

Given that cannabis products may be smoked, vaporized, and orally consumed just like tobacco products, is there a risk that a similar excise tax may be imposed in the Big Apple to offset any alleged consumer health care costs that are arguably associated with cannabis use?

No doubt, there are inherent differences between the health risks of tobacco and cannabis products whether smoked, consumed or ingested. But, New York City could exploit the loophole and impose an excise tax on cannabis products without violating the anti-preemption provisions of the new rules and regulations by arguing that the consumption modes of products derived from tobacco and cannabis plants are similar.

Depending on your news source, there is a purported spike in emergency room admissions and medical treatment costs for conditions like hyperemesis which are being incurred by the city's health care system for cannabis consumers experiencing an adverse reaction to consumption.

Some information sources contend that those incidents are allegedly on the rise at a corresponding rate with the proliferation of adult-use legalization and pernicious expansion of illicit operators in the boroughs. (The author makes no representation about the severity or accuracy of those claims).

If accepted as true, New York City's health care system would face economic impacts

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attributable to retail cannabis sales in the same manner that it did and still does with tobacco. While it may take years or decades for scientists to assess the health care costs and associated conditions attributable to cannabis, will New York City wait, or could it exploit the loophole to impose an excise tax as the legal retail market is starting to roll out?

The success of that argument hinges on that provision of the current iteration of the rules and regulations of whether a cannabis excise tax is “unreasonably impracticable” under Sections 119.2(a) and 119.5(a). Is the weight of New York City's argument with enough heft to nullify the supremacy of the 13% tax allowed under the MRTA and capitalize on this loophole which will only drive the cost of cannabis products up in New York City?

Only time will tell if the loophole is not shut down during the present 45-day public comment period. If unremedied, this excise tax would further perpetuate the legacy and gray market at the expense of the legal retail market roll out.

While the New York City Cannabis Industry Association (NYCCIA) and its Hudson Valley counterpart (HVCIA) raised this issue in prior public comment to the last iteration of the rules and regulations. Nonetheless, the loophole remains and its unpalatable effect of driving the overall cost to consumers ever higher still lingers.

If unremedied, the ability to impose an excise tax on cannabis products just like tobacco products threatens the sustainability of lawful cannabis dispensary and delivery-based sales in the world's largest and most sophisticated retail market – New York City. This only ensures the perpetuation of the legacy and gray market which needs to be absorbed into the legal marketplace, not incentivized to remain outside of it.

The NYCCIA and HVCIA strongly urge that the local excise tax loophole be closed in the final version of the rules and regulations.

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