



NEVADA MARIJUANA LEGALIZATION INITIATIVE, QUESTION 2

BY LYNN FULSTONE, ESQ. AND JESSE WADHAMS, ESQ.

The Initiative to Regulate and Tax Marijuana (Initiative) proposes to amend the Nevada Revised Statutes (NRS) so that the Nevada Department of Taxation would regulate the cultivation and sale of recreational marijuana. The Initiative requires a 15 percent excise tax upon the wholesale value of marijuana sold by a cultivation facility and decriminalizes the personal use, possession and cultivation of marijuana.

In November, Nevada voters will decide whether the Initiative will become law when they cast their votes for or against Ballot Question 2 (Q2). This article provides a brief description of Nevada's initiative petition process; highlights of Q2; and a discussion of how, if enacted as law, Q2 would create a dual regulatory system, impacting the medical marijuana establishments currently operating in Nevada and the new businesses that would cultivate, produce and sell marijuana for recreational use.

Initiative Petition Process

Initiatives are a way for voters to enact state laws. The process for a statutory initiative begins by circulating a petition that proposes a new statute or an amendment to an existing statute. Each petition may embrace only a single subject and related matters. The signatures must be gathered from Nevada's four congressional districts. If the initiative garners 10 percent of voters who voted in the last preceding general election, the proposed language is sent as a bill to the next legislative session for review and action. The legislature may:

1. Enact the initiative, in which case it becomes law;
2. Do nothing, in which case it is sent to the next general election ballot for the voters' consideration; or
3. Reject the bill and offer an alternative, which would send both the initiative and the alternative to the ballot, with the version receiving more votes becoming law.¹

The Initiative qualified with nearly 200,000 signatures and became Initiative Petition 1 (IP1) of the 2015 Legislative Session. Legislators took no action on IP1, thereby sending the Initiative to Nevada's voters for the November 2016 ballot

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as Q2. If a majority of voters in November vote “yes” on Q2, marijuana for recreational use by persons over 21 years of age will become legal in Nevada.

Highlights of Q2

The new law is referred to as the “Regulation and Taxation of Marijuana Act” (Act). The Act’s purpose is to “better focus state and local law enforcement resources on crimes involving violence and personal property.” The Act therefore declares that the use of marijuana by persons 21 years of age and older should be legal and its cultivation and sale regulated like other legal businesses.²

Section 4 of the Act states that no person may operate a vehicle, aircraft or vessel under the influence of marijuana, or knowingly give or sell marijuana to a minor unless pursuant to Nevada’s medical marijuana program under Chapter 453A of the NRS (MMA). Use of marijuana within a correctional facility or school, or undertaking any task under the influence of marijuana that constitutes negligence or professional malpractice, is not permitted. Employers can establish a workplace policy prohibiting the use of marijuana; a governmental agency or private person who owns property can restrict the use of marijuana on that property;

and a locality can adopt local marijuana-control measures.

Section 5 requires the Department of Taxation to adopt all necessary regulations to carry out the Act no later than 12 months after the effective date. If approved by the voters in November, the Act would become effective on January 1, 2017.³ The regulations must include, among other things, procedures for licensing, collection of taxes and the method to

determine the fair market value of wholesale marijuana. The regulations must also include procedures and requirements enabling a dual licensee to operate medical and recreational marijuana establishments at the same location.

Section 6 would allow a person who is 21 or older to possess up to one ounce of marijuana, or one-eighth of an ounce of concentrated marijuana. A person 21 years of age or older would also be able to possess, cultivate and transport not more than six marijuana plants for personal use, as long as the cultivation occurs in an enclosed, locked area and no more than 12 plants are possessed at a single residence at one time.

Sections 7, 8 and 9 further describe lawful activities of licensees. Notably, contracts by licensees pertaining to marijuana are enforceable notwithstanding that the conduct is prohibited by federal law.

If the initiative passes, the Department of Taxation must begin receiving license applications no later than January 1, 2018.⁴ For the first 18 months after applications are accepted, the department will accept retail store, cultivation and product manufacturing license applications only from persons holding an existing registration certificate under the MMA. In addition, during those first 18 months, the department will only issue licenses for marijuana distributors to persons holding a wholesale dealer license under Chapter 369 of the NRS, unless there is an insufficient number of such applicants. Retail store licenses will be limited in number, depending on the population of the county in which they would be located. If competing applications are received, an impartial, numerically scored, competitive bidding process must be used to determine which applications will be approved.

Section 14 establishes penalties for, among other things, personal cultivation of marijuana within 25 miles of any licensed retail store; smoking or consuming marijuana in a public place, retail store or moving vehicle; and knowingly giving or allowing persons under 18 years of age access to marijuana. Also, the Legislature may amend the Act to provide conditions in which a locality may permit consumption of marijuana in a licensed retail store. Section 15 provides for the imposition of the 15 percent excise tax on the fair market value of marijuana wholesale sales, in addition to any sales and use tax on retail sales. Section 16 requires tax revenue, fees and penalties to be used first for the costs of the department and localities in carrying

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out the Act, with remaining funds to be deposited in the State Distributive School Account in the State General Fund.

Discussion

The statutory scheme for recreational marijuana is loosely modeled on the three-tier system of alcohol distribution in Nevada. Under the Act, five types of licensed marijuana facilities will be created: a marijuana cultivation facility, a marijuana product-manufacturing facility, a marijuana testing facility, a retail marijuana store and a marijuana distributor. In the MMA, there are analogues only to the first four; the marijuana distributor is unique to the Act.

Under the Act, recreational marijuana facilities must use a marijuana distributor to move product between facilities. Although similar to the alcohol distribution system, in that a wholesaler is required to take possession of and move product to the retailer, there are differences. For example, whereas the liquor excise tax attaches at the distribution level, with recreational marijuana, the distributor has no role in the imposition or collection of the excise tax. The role of the marijuana distributor is more akin to a courier service than a liquor wholesaler and distributor. Also, with recreational marijuana, a single entity could cultivate, transport and sell marijuana, as long as each license is obtained. This concept is expressly prohibited under Nevada's alcohol distribution laws.

Should Q2 become law, the medical and recreational marijuana regulatory schemes will coexist. Under the MMA, a 2 percent excise tax attaches at the cultivation and production levels, as well as to the retail sale to the patient. Under the Act, the sale of recreational marijuana is taxed at 15 percent, but attaches only at the cultivation level on the wholesale sale to production facilities or retailers. The excise taxes are in addition to the retail sales and use tax in both cases.

Notably, the Act gives enforcement authority to the Department of Taxation, whereas the Division of Public and Behavioral Health of the Department of Health and Human Services is the enforcement agency under the MMA. The Act gives an 18-month head start to those currently licensed under the MMA to obtain dual licenses, albeit under differing regulatory schemes and state agencies. Under the Act, the Department of Taxation is required to enact regulations so that a dual licensee can operate both licenses at the same location and is prohibited from altering provisions of the MMA. It is unclear how medical marijuana establishments that become dual licensees will operate under both systems. Under the MMA, medical marijuana establishments may freely move their product between licensees without a distributor, whereas the same entity holding a license under the Act would need to use a marijuana distributor to move its recreational product between facilities. The rule-making process of the Department of Taxation under the Act will be critical in shaping the practical effect of the Act and this dual system.

Should the voters support Q2 in November, the Act becomes law and cannot be amended, repealed or otherwise altered for three years following its effective date.⁵ Should an unintended consequence of the law arise, policymakers' hands will be tied until January 2, 2020. **NL**

1. Nevada Constitution, Art.19, Sec 2; See generally NRS Chapters 293 and 295.
2. Initiative to Regulate and Tax Marijuana, filed with the Nevada Secretary of State on April 23, 2014, which can be found at <http://nvsos.gov/index.aspx?page=1541>.
3. *Id.* at Sec. 18.
4. *Id.* at Sec. 10.
5. Nevada Constitution, Art.19, Sec 2(3).

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