New Jersey Cannabis: Observations on Opportunity Lost Along the Way

Two years ago, when we published "The Business, Regulatory and Legal Challenges – and Opportunity – of Legalized Cannabis in New Jersey," a White Paper covering the prospects for a regulated adult-use cannabis market in New Jersey, the Murphy Administration was not yet seated but had committed to a set of values around legalizing marijuana. All of the functional and political pieces seemed to be in alignment pointing in the direction of an end to the failed policy of cannabis prohibition: correction of the social impact caused by the incarceration of a generation of persons of color, the development of a sound approach to creating an adult-use cannabis marketplace, the creation of thousands of new jobs, and millions in new tax revenue. New Jersey was poised to reap the powerful opportunity created by the confluence of majority acceptance of cannabis legalization and being the first east coast metropolitan area to embrace the creation of this new marketplace.

Instead, New Jersey has watched the action from the sidelines as state after state raced to capture the opportunity. What we have seen is the creation of viable adult-use marketplaces in 11 states and the District of Columbia along with the expungement of cannabis convictions, the creation of thousands of new jobs, and the collection of hundreds of millions of dollars in new tax revenues. We now stand by and watch from the sidelines as rapidly maturing marketplaces in these early adaptor states experience a marketplace reordering, engendered by consolidation and market concentration as private and foreign capital exploit the opportunities and long-term profits.

And in the most dramatic indication of all that dysfunction in our government prevents a workable adult-use marketplace, the legislature punted the issue to voters with a Referendum that could only muster an enthusiasm level best characterized by Governor Murphy's assessment: "It's better than nothing."

It is the latest in a series of moves that seems to leave New Jersey's adult-use cannabis market destined to fail.

Absurd Contradictions. Handicapping New Jersey political decision-making is difficult in real time and challenging even with the application of 20-20 hindsight. Some understanding of the lack of political courage to exploit market opportunity is necessary. Ineffective political strategies that failed to consider the consequences of Home Rule (which we predicted) and divisions among Democrats regarding the social justice issues (which no one could have foreseen) tainted the glidepath toward the adult-use marketplace and ultimately hobbled bona fide legislative efforts. The intervening moments ranged from frustrating to ridiculous for cannabis advocates as multiple trial bills were floated in the legislature without a champion or cohesive policy emerging.

In reviewing our original White Paper, we are struck by the contradictions that have come to characterize the cannabis dialogue:

- First, you would have thought that all the conversation around social justice would have – at the very least – resulted in a more equitable application of existing law. Instead, according to a recent ACLU study, minorities are far more likely to be arrested for cannabis offenses. All because the legislature refused to confront this issue in a mature and effective manner and rally support to end prohibition as the marketplace continues to be dominated by criminals selling adulterated products to unaware consumers. All the while relatively minor offenses ruin the lives of already disadvantaged populations at great costs and distraction for law enforcement.

- Second, it seems like more than two years have passed, as the development of cannabis as an industry in New Jersey truly has come a long way, with: a) media and associations and vendors all contributing to a functional marketplace, especially in response to two Medical Marijuana (ATC) application cycles that will result in an additional 30 cannabis business licenses; and b) the state expanding and professionalizing the role of its cannabis office within the Department of Health – perhaps the high point of achievement for this Administration. However, as always, there is a caveat: some bidders submitted PDF versions that could not be opened by the state and instead of asking for a resubmission, they

were disqualified. It is very difficult to overcome even administrative decisions in a state bidding process but stay tuned – this one could be interesting.

- Third, it seems impossible that, after two years of advocacy and education from these same organizations and institutions, plus cheerleading from the Administration and many members of the legislature, the notion of adult-use cannabis is less popular among elected officials than when we started and has driven the legislature to abandon the issue. Rather than discharge their oath of office, the legislature has punted the issue to the electorate even while failing to even frame the ballot question to be voted upon. If a government could be put on trial for governmental malpractice, the jury's verdict would be clear!

Lost Opportunities and Ground Lost to Neighboring States. Our initial White Paper noted five points and envisioned up to $1 billion in value to the state from creating an adult-use regime. Much of the market opportunity is now being exploited in more opportunistic and forward-looking states. While New Jersey's opportunity had the inside track two years ago, now both our neighbors to the east and the west are further along in considering the creation of an adult-use market. They have now surpassed New Jersey in every measurable cannabis statistic (number of retail outlets and size of the "canopy" being the two most important).

Responding to paradigms developed in other states, the White Paper's concerns over banking, accounting, tax reporting, and insurance were largely resolved and serve as reminders of just how fast things can change when a sincerely motivated government is at work. The Cole memo itself, which threatened viability of some businesses due to federal guidelines under Jeff Sessions' reign as Attorney General, is largely a footnote. Even the federal government has made more progress toward reconciling the madness of the Schedule I classification for cannabis as various proposals are receiving serious consideration in both the House and the Senate.

Unfortunately, in New Jersey we never got remotely close to having to resolve any of these issues – and we certainly lost the economic benefits of being the first in our region to adopt an adult cannabis regime. The lack of insight into monetizing the industry through a rewarding tax and licensing structure is only matched by the bungling of policy development around the social justice issues related to cannabis. In some perverse sense, these issues actually are co-mingled, in that the award of cannabis licensure is seen by many urban legislators as the deprivation of business opportunities for current entrepreneurial activity in their districts, otherwise known as dealers. The hypocrisy on both sides of the argument is a window into our own political challenges:

- Where some legislators cannot accept that past convictions would necessarily be subject to adjustment for activity that is now legal, others are both arguing for expungement while refusing to vote to legalize.

- Where Administration officials and the legislature tout economic advancements through cannabis legalization for New Jerseyans, no local groups have obtained licenses without substantial back-up from national cannabis industry players, and even our not-for-profit medical marijuana enterprises are being acquired by public companies.

Referendum. The good news is that the legislature released the approved language for the Constitutional Amendment to Legalize Marijuana last week. The bad news is that their confusion at being presented a law by the legislature that it itself refused to pass will only be compounded by the vagueness of the Referendum's language that doesn't answer simple questions like who can sell marijuana and where it can be sold.

Like the most recent statewide Referendum of significant note, the legalization of casinos in northern New Jersey, this Referendum was written to benefit its built-in set of opponents: New Jersey's own municipalities. While the majority of voters would like to see adult-use cannabis legalized, perhaps an even greater number do not want it anywhere near their towns. Despite support from local officials who support medical marijuana in their towns and decry notions of negative impacts –

notably Secaucus – there is a contingent who believe that recreational marijuana is unappealing and despite there being no practical reason to do so, have passed laws prohibiting cannabis businesses from operating in their towns – notably Secaucus.

And herein lies the explanation for why an adult-use bill will continue to be so confoundingly hard to pass in New Jersey: The legislature is elected by local districts. When confronted by statewide policy issues, legislators take the temperature of their district, and even if the majority of people might like to legalize cannabis, those same folks are likely to hold a "Not In My Backyard" perspective. Let's face it: there is no shortage of cannabis availability. If the choice is to accept a legal cannabis retailer on their Main Street or to have to obtain cannabis the old fashioned way (on the street) or to misrepresent a medical condition that qualifies for ATC purchases, most of our friends and neighbors would just as soon keep the status quo.

Meanwhile, New Jersey waits and watches, and may continue to wait and watch for at least another three years if this Referendum doesn't pass. We wait for political courage and common sense to end prohibition to emerge. We wait for the wisdom of universal cannabis conviction expungement to emerge. We wait for the government to tap new sources of tax revenue to ease the burden on the most highly taxed residents in the nation. We wait for municipalities to realize that not allowing cannabis businesses in their towns will only increase the amount of illegal drugs within their borders. We watch while minorities continue to be arrested for cannabis use while other more progressive states succeed in creating jobs and sorely needed tax revenue.

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