

Empire State Cannabis Update: OCM Cease & Desist Letters Make Clear & Present Threat to Gray Market Operators



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On February 9, 2022, the Office of Cannabis Management (OCM) sent more than two dozen cease and desist letters to certain operators involved in the unlicensed sale of cannabis in New York State. The warning contained in these letters (example below) was clear: “Failure to cease this activity puts your ability to obtain a license in the legal cannabis market at substantial risk. The unlicensed sale of cannabis is illegal and subjects you to substantial fines and possible criminal penalties.”

This wasn’t the first warning issued by New York regulators to operators seeking to [skip the licensing line](#) by either “gifting” cannabis by tying it to the sale of a non-cannabis item (e.g., selling a \$60 sticker and gifting an eighth of

flower) or by selling products at private pop-up events. During the Cannabis Control Board’s (CCB) second meeting, Chair Tremaine Wright condemned these “loopholes” that have emerged in New York since the Marijuana Regulation and Taxation Act (MRTA) was passed in March 2021:

[A]ny unlicensed sale or distribution of cannabis remains illegal. While gifting or transferring cannabis under the possession limit between adults . . . is legal, gifting does not include instances when cannabis is given away at the same time as another transaction nor when it is offered or advertised in conjunction with an offer for the sale of goods or services. . . . The cannabis being exchanged in the transactions just described—those remain illicit. . . . This conduct is not legal and must stop. Individuals who do not cease run the risk of severe financial penalties.

As such, the cease and desist letters issued by the OCM were not unexpected and, equally as important, the penalties described therein are not veiled threats, but rather very real consequences set forth in the MRTA.

One of the legislative goals of the MRTA is to “generate significant new [tax] revenue.” By operating unlicensed dispensaries that sell untaxed cannabis products, operators are, in the eyes of regulators, submarining the legal market that is projected to be the [second largest in the nation](#) and depriving the state of the tax revenue it sought by passing the MRTA in the first place.

Accordingly, it comes as no surprise that the CCB and OCM are cracking down on unlicensed sales, especially with adult-use regulations set to be released in “[late winter or early spring](#)” 2022. Should these gray market sales continue, New York regulators are strapped with significant enforcement mechanisms to penalize offending operators.

One of those mechanisms is the ability to withhold or deny licenses to certain applicants. The sample OCM cease and desist letter is clear on this matter: “Failure to cease this activity **puts your ability to obtain a license in the legal cannabis market at substantial risk.**” If you are a cannabis entrepreneur seeking a license and simultaneously operating in the existing gray market and the OCM discovers this activity, there is a strong chance it will affect ability to be granted one of the State’s adult-use licenses.

Beyond licensing, the OCM can also issue significant financial penalties. Indeed, Wright’s comments back in October 2021 made no mistake in using the term “illicit.” “Illicit cannabis” is defined in MRTA § 492 as “cannabis flower, concentrated cannabis, cannabis edible product and cannabis plant on which any tax required to have been paid . . . has not been paid.”

The “substantial fines” referenced in the OCM cease and desist letter and the “severe financial penalties” Chair Wright described in her comments are taken directly out of MRTA § 496-c, entitled “Illicit Cannabis Penalties.” This provision punishes offenders based on the amount of illicit cannabis possessed, as outlined in the chart below:



Finally, there MRTA also provides for criminal penalties for the unlawful possession and sale of cannabis, as shown in the charts below:



Takeaway

As regulators draw nearer to releasing the adult-use regulations that will define the makeup of New York’s adult-use market and the OCM continues to add to its staff, the perceived leeway granted to hopeful adult-use licensees will be less and less. The OCM’s cease and desist letter is an unequivocal warning to gray market operators that it will be using its enforcement tools if need be.

These threats are made even more real by two pre-licensing busts by law enforcement officials the same week the letters were issued. First came a [bust in New Jersey](#) that involved both local police and the Federal Drug Enforcement Agency, which culminated in the confiscation of hundreds of pounds of cannabis flower, THC edibles, THC wax/oil, and approximately \$305,000 cash, shows that these are very real threats. More close to home, on Friday, February 11, 2022, officers with the Tioga County Sheriff’s Office, Waverly Police Department and New York State Police (apparently in conjunction with the [Tioga County District Attorney’s Office](#)) [raided at least 3 “sticker shops”](#) in Owego, Nichols, and Waverly, New York. The officers reportedly kicked in the door of at least the Waverly store, armed with guns pointed at employees and put the employees in handcuffs. It remains to be seen whether charges will be pressed.

Despite the significant excitement surrounding New York’s burgeoning cannabis industry, future applicants must take care to abide by the MRTA because failure to do so could be costly, both financially and criminally. Put simply, temporary gray market gain could result in outright denial from the adult-use market—a steep price to be paid for a short-term profit.

Lippes Mathias’ [Cannabis Practice Team](#) will continue to monitor the developments in New York’s cannabis burgeoning industry, including additional enforcement actions by OCM, the release of the highly anticipated adult-use regulations, and when license applications are expected to be released. If you have any questions, please contact one of our attorneys.