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## Cannabis and COVID-19: Testing the ability of regulation to be the facilitator of marketplace innovation



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Does a tightly regulated cannabis industry possess the necessary flexibility to adapt to the unique challenges posed by this unprecedented time?

The short answer is maybe; though the outcome is not free from doubt and depends on the inventiveness and ingenuity of the marketplace, and the ability of the regulator to bend with the needs of the program.

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## Let's start with the question of "is it possible?"

Yes. The New Jersey medical marijuana program has two important things going for it amidst all the madness: One, the right regulations, especially in the form of a provision called "waiver"; and two, the right regulator in Jeff Brown.

New Jersey has one of the best tools in its arsenal in the form of a regulatory provision entitled "waiver." N.J.A.C. 8:64-7.11 provides that the Department of Health "may waive a requirement regarding the operations of [an alternative treatment center (ATC)], if in the DOH's determination, such a waiver is necessary to achieve the purpose of the [Jake Honig] Act and provide access to patients who would otherwise qualify for the use of medicinal marijuana to alleviate the suffering from debilitating medical conditions, and does not create a danger to the public health, safety or welfare." In layman's terms, this provision says, "we don't have to follow our own regulations if we don't think it's in the public's interest to do so."

## Some background

How that provision has been used is particularly instructive. By way of background, until amendments to the medical marijuana program were signed into law on July 2, 2019, the state had an express regulatory prohibition on existing operators having satellite facilities, i.e., the ability to open up a second dispensary aside from its flagship location. Remember, prior to Gov. Murphy taking office, the medical marijuana program languished over a seven year period, rising only to 15,000 patients serviced by only five ATCs.

However, beginning in 2018, and fueled in large part by Murphy's Executive Order #6, the state began to see a tremendous boost in the patient population, albeit with an ATC infrastructure that was ill-suited to scale with this demand.

Facing this precarious situation, Jeff Brown, the head of the state's medicinal marijuana program, invited the then existing ATCs to submit waiver requests for the purposes of opening additional satellite facilities to meet this growing demand. This process ultimately resulted in the additional approval and operation of two new dispensary facilities, the first by Garden State Dispensary

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in Union, and the second by Compassionate Care Foundation in Atlantic City, thereby inventively increasing the total available number of dispensaries by approximately 20%.

## How does that translate to the current crisis?

Demand for medical marijuana has only increased since the declaration of the Covid-19 pandemic. Amanda Hoover reported on NJ.com on what is quickly becoming the “new normal” for medical marijuana patients in New Jersey, i.e., long lines, limited facility access, strain shortages, facility hours limitations, self-imposed purchase limits, and the general challenge facing all citizens of having to simultaneously avoid human interaction and maintain social distancing despite the critical need of engaging with others for the purposes of obtaining personal necessities.

Indeed, practical wisdom has suggested that everyday people stock up on a two-week supply of medicine, a daunting task for medical marijuana patients given the preceding. Luckily, the state has already risen to the occasion, and, as of Monday, it announced approval of waiver requests to permit existing ATCs to allow curbside pickup of medical marijuana at their facilities.

## What are some other solutions?

While increased capacity could provide one avenue of relief, we know that 24 additional licenses are stayed by virtue of ongoing litigation related to the 2019 request for applicants (RFA); so that is one source of relief that is unlikely to come to fruition until that litigation has run its course. We know that there are five additional entities from the 2018 RFA who have yet to open their dispensary locations.

More streamlined review and approval of those facilities will certainly help to alleviate the backlog.

One of the more inventive potential solutions is the very same one that retailers across the country are pivoting to en masse: delivery.

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In New Jersey, delivery is expressly prohibited under the current regulations, N.J.A.C. 8:64-10.12. But, as we all now are well-aware, social distancing is our best tool for avoiding the spread of Covid-19. Notwithstanding that, medical marijuana patients have to brave facilities teeming with patients; many of whom, given their underlying qualifying condition, are already immunocompromised. Interestingly, the more recent amendments to the Jake Honig Law, signed into law on July 2, 2019, expressly provide for delivery to be incorporated into the expansion of the medical program; however, the amendments to the law task the Cannabis Regulation Commission, which has yet to be formed, with drafting regulations for this tool's implementation.

## Could delivery be another tool to help patients?

Absolutely. But how will we regulate it?

Luckily, New Jersey is the beneficiary of our sister states' prior iterations of legalization. Several states already permit delivery, in some capacity, and, as a result, we have some level of institutional knowledge that can be gleaned from entrepreneurs who have successfully undertaken the growing pains and learning curves of this newer market facet.

Eaze, as just one example, is a company that was formed for the express purpose of facilitating lawful marijuana deliveries in several regulated marketplaces, and who has taken a keen interest in the New Jersey marketplace.

Similarly, Columbia Care, one of the entities successful in the 2018 RFA, was the first operator permitted to launch medical marijuana deliveries just across the river in New York State.

None of the preceding is meant to question or doubt the validity of having regulations in general, or meant to overlook the safety concerns associated with seeking to swiftly change, waive, or alter those regulations on the fly. But what our regulator recognizes, admittedly better than his counterparts in other states, is that the cannabis industry as a whole is a great reservoir of relevant experience. This is part of the reason why the greatest percentage of points in

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every RFA cycle is tied to experience (constituting roughly a third of total points in each round).

## We need to trust entrepreneurial innovation

Government will always have its place in this regulated market, but amidst the current economic and public health emergencies, we need to trust in our entrepreneurs to help craft appropriate solutions.

The brilliance of a regulatory framework is the ability to innovate as needed, to permit New Jersey businesses not only to invent creative solutions for the future, but more so, to provide fundamentally necessary changes to the infrastructure of the present, all while ensuring the safety of patients in the process. As a State, we need to be open to new and inventive ideas, especially in these trying times.