

NATIONAL CRAFT CANNABIS COALITION

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NCCC Policy Recommendations for a Small, Independent and Craft Cannabis Market

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On behalf of the National Craft Cannabis Coalition (NCCC), we are pleased to provide recommendations for state-level policies to support small, independent, and craft cannabis producers.

The National Craft Cannabis Coalition (NCCC) is a nationwide advocacy group formed to advocate for policies that support small and independent cannabis producers at the federal level. NCCC operates as a coalition of existing state-level associations and cooperatives that primarily represent small producers, including the Cannabis Association of New York, Farm Bug Co-Op (Massachusetts), FARMS Inc. (Oregon), Maine Craft Cannabis Association, Origins Council (California), Vermont Growers Association, and Washington Sun & Craft Growers Association.

Collectively, NCCC's coalition partners represent over 1,500 member cannabis businesses in these seven states.

In most states seeking to legalize cannabis, the fundamental task facing state regulators has been to establish a legal cannabis framework that provides consumers with access to legal cannabis while also protecting public health and safety.

In establishing cannabis regulations, however, policymakers are also creating markets that determine, explicitly or implicitly, what types of businesses may operate and succeed within the licensed framework. While tightly regulated markets with limited licensure may appear on the surface to offer states greater control and public safety benefits, these markets often suffer from low credibility with consumers, high costs, limited diversity of and quality of products, and persistent illicit markets.

The creation of newly-legitimized cannabis markets out of the legacy of prohibition creates special challenges, but also opportunities. Cannabis is an existing market, not a new one, and one in which small and legacy operators have historically played a predominant role. By ensuring that state regulations promote fair market competition and accessibility for small businesses, states can promote the legal market, enable a just transition for legacy and equity operators, and provide consumers with diverse and high-quality craft products.

With the prospect of legalized interstate commerce on the horizon, there are additional reasons for states to prioritize the creation of in-state markets centered on small, local businesses. Once interstate commerce becomes available, large-scale production is likely to gravitate to a handful of locations around the country – and eventually, around the world – with climates and regulatory frameworks most suitable to low-cost, commodity-scale production.



At the same time, however, interstate commerce is likely to create additional opportunity for small-scale, localized, craft cannabis production both within and across state lines. While not every state will have a “Budweiser” of cannabis, every state does have an opportunity to establish a framework friendly to small, local operators, and many states may become home to craft cannabis businesses that succeed both within and across state lines.

- Regulate cannabis cultivation as agriculture.
- Enable direct-to-consumer sales for small producers.
- Reduce segmentation of the supply chain.
- Consider caps on cultivation size.
- Avoid taxes on production.
- Develop policy in collaboration with representative organizations of small operators.

Below, we consider each of these policies and approaches in turn.

REGULATE CANNABIS CULTIVATION AS AGRICULTURE

Cannabis farmers are farmers, and should be regulated at parity with other forms of agriculture. For agriculture generally, there are a range of policies that state and federal governments typically utilize to support farmers and regulate agricultural uses appropriately, including land use policies, right to farm laws, tax incentives/exemptions, and agricultural research and support programs. Agricultural designation should begin with the cultivation of immature and mature plants, and extend to post-harvest processing and packaging, inclusive of trimming, drying, and curing.

When cannabis cultivation is regulated at a distance from well-established agricultural tools, the result is typically increased barriers to entry, as well as regulatory policies which are inconsistent with farming activities. These policies tend to disproportionately impact small producers who lack access to resources to comply with rules which are out of step with typical agricultural regulation.

Restrictive approaches to cannabis cultivation can be contrasted with hemp, which is currently regulated as agriculture at the federal level and in most state frameworks. From an agricultural perspective, there is little difference between “hemp” cultivated for CBD and “cannabis” cultivated for THC. Both are cultivated using similar methods and have essentially identical land use impact. The 2018 Farm Bill, however, legally classified hemp cultivation as agriculture; and as a result, “hemp” and “cannabis” cultivators often face vastly different



regulatory and land use standards that are not justified by differences in THC content.

Until cannabis is federally legalized and regulated under the USDA, there may be practical or logistical barriers to categorically applying agricultural policy to state-legal cannabis cultivation. In anticipation of federal legalization, however, states should work to establish parity between cannabis and other forms of agriculture to the extent possible. Some states have already started to move in this direction. For example:

- Vermont began to hold a conversation on defining outdoor cultivation as agriculture in 2022 with Act 158, which continued in 2023 with bill H.270, which is expected to become law later this year. In Act 158, Vermont allowed specific tiers of outdoor cultivation to be eligible to be enrolled in “current use” under the 1978 Use Value Appraisal of Agricultural, Forest, Conservation, and, Farm Buildings Property Act, allowing farmers to cultivate cannabis on land zoned for agricultural use exempt from local bylaws. “Current use” designation also enables cannabis farmers to gain some sales tax exemptions, such as for inputs and machines, thereby preventing farmers from having to make separate purchases and use the same inputs and equipment. Bill H. 270 would remove restrictions based on size and allow all outdoor cultivation to enjoy these farming regulatory benefits. By removing “current use” as a requirement, H.270 would allow those looking for land to bring their land into an agricultural designation without excluding cannabis cultivation and also begin to fold cannabis cultivation into Act 250, Vermont’s long-standing land-use law.
- In Oregon, cannabis cultivation was designated as agriculture from the inception of the legal cannabis framework. As a result, Oregon farmers have access to Oregon’s Right to Farm law, which protects cultivators from court decisions based on customary noises, smells, dust or other nuisances or trespasses associated with farming.
- Bill H.94, currently under consideration in Massachusetts, would legally classify both hemp and cannabis cultivation as agriculture.
- Bill S1752, considered in New York in 2023, would expand the definition of crops, livestock and livestock products to include cannabis.

ENABLE DIRECT-TO-CONSUMER SALES FOR SMALL PRODUCERS

In other craft agricultural industries, such as wine and coffee, the ability to engage in direct-to-consumer (DTC) sales has been the cornerstone of ensuring market access for small producers. Small producers typically lack access to sales teams and large marketing budgets, and distributors typically have little incentive or capacity to carry brands that produce in small quantities. Conversely, the ability to sell directly to consumers - whether on



the farm, at farmers market-style events, or shipped through the mail - enables craft cannabis cultivators and manufacturers to differentiate themselves from large-scale, commodity producers.

The critical importance of DTC sales for small operators has been established most clearly in the craft wine industry, where forty-seven states now allow some form of interstate DTC sales. According to the 2018 SOVOS Direct to Consumer Wine Shipping Report,¹ just 10% of the total volume of wine is purchased through DTC channels. However, these channels are utilized almost exclusively by small producers. The SOVOS report finds that over 70% of the value of DTC sales is realized by “small” or “very small” producers, while another 21% of value is realized by “medium” scale producers. Large producers, which typically rely on traditional wholesale distribution channels, account for just 6% of the value of DTC sales.

In the landmark 2005 case *Granholm v. Heald*, the Supreme Court ruled in a 5-4 decision that states which allow in-state DTC wine shipping cannot discriminate against out-of-state producers. As part of this litigation, the industry advocacy group WineAmerica submitted a brief substantiating the critical necessity of DTC shipping for small wine producers.²

The WineAmerica brief describes the challenges for small producers in obtaining access to wholesale distribution channels. *“A winery seeking access to consumers in a state barring direct shipment has only one real option - to obtain a wholesaler to distribute its products,”* they write. However, *“small wineries are unlikely to find wholesalers willing to distribute their wines. Most fundamentally, this is because small wineries cannot offer distributors sales volume comparable to that of the largest winemakers.”*

Small wine producers who are able to partner with distributors face additional challenges. The WineAmerica brief explains that *“even for the rare small winery that succeeds in gaining the representation of a wholesaler, the hard fact is that the winery is likely to realize little or no profit from out-of- state sales... The cost of using a wholesaler is overwhelming from a small winery’s perspective and saps its entire profit, or more.”* Additionally, *“wholesalers are not motivated to aggressively market the products of small wineries, from whom they realize comparatively minimal gross profit.”*

A recent empirical study from Ohio State’s John Glenn College of Public Affairs affirms the positive effects that expanded DTC shipping has had on small wine producers³, concluding that:

“...the results of this article largely suggest that DTC regulations artificially maintained a size distribution of wineries composed of too many large wineries and too few small and medium wineries.



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*Requiring wineries to ship through a distributor appears to act as a barrier to entry, in particular for small and medium wineries, which are infrequently represented by a distributor (Mullins, 2009) and for which direct sales make up a larger portion of their revenue (Peden, White, and McMillan, 2018). As summarized by Justice Kennedy in *Granholtz v. Heald* and Justice Alito in *Tennessee Wine and Spirits Retailers Association v. Thomas*, laws restricting DTC act as protection [for large operators].”*

The dynamics affecting small winemakers are remarkably similar to those currently affecting small cannabis producers around the country. Without access to DTC channels, many small producers simply will not have access to a market for their products, regardless of the quality or craft of what they produce.

While interstate direct-to-consumer shipping is currently not possible without access to interstate commerce, States have considered or implemented a variety of policies to enable direct-to-consumer sales for small producers within the context of state-legal framework.

- **Farmers market-style events** - New York regulators recently announced an intent to establish cannabis “farmer’s markets” where producers may sell their products directly to consumers.

The California legislature is currently considering AB 1111, legislation that would enable small and equity cannabis producers to sell their own products directly to consumers at licensed cannabis events. California has an existing and successful framework for regulating temporary cannabis events, established by AB 2020 in 2018. If passed, AB 1111 would enable small and equity cannabis farmers to vend at these events alongside traditional retailers.

- **Delivery/microbusiness models** - Massachusetts has established delivery and microbusiness permit types that enable small operators to reach consumers directly. Bill SD.51, currently under consideration in Massachusetts, would further allow craft marijuana cultivator cooperatives to also engage in delivery directly to consumers.

In Maine, delivery is authorized for medical caregivers in conjunction with the state’s 500 square foot canopy limit and open supply chain structure with low barriers to entry.

New York’s microbusiness license is the only Adult Use-only license type that allows for vertical



integration. Micro producers are able to sell their product directly to consumers, as written in the MRTA.

- **On-farm sales (“farm-stands”)** - HB 1885, introduced in Washington in 2021, would have allowed small cultivators and processors to apply for an “endorsement” that would enable them to conduct direct-to-consumer sales from their licensed premises.

S.127, currently under consideration in Vermont, would expand the allowances for licensed small cultivators and manufacturers to sell directly to the public, with regulation to be developed by the state cannabis agency.

- **Direct-to-consumer shipping** - in September 2022, Rep. Jared Huffman (D-CA) introduced H.R. 8825, the Small and Homestead Independent Producer (SHIP) Act, in the House of Representatives. If passed, the SHIP Act would provide an affirmative right for small cannabis producers to ship and sell their products directly to consumers within and across state lines through the U.S. Postal Service or another common carrier.

While federal prohibition remains in place, the direct-to-consumer shipping policy proposed in the SHIP Act will face practical barriers to enact at the state level. If and when prohibition is lifted, however, and interstate commerce becomes a reality, policies like the SHIP Act will be critical for small producers to compete on a level playing field.

Each of these approaches to DTC sales may be more or less appropriate depending on context. State and region-specific variables including land use regulations, distance from markets, capital requirements, and the structure of the rest of the supply chain can affect whether any given approach to DTC is appropriate for a given context.

For example, approaches that rely on direct-to-consumer delivery may be challenging for small producers in remote and rural areas, and approaches that rely on on-farm sales may be more or less viable depending on applicable zoning restrictions within a given jurisdiction. In many cases more than one version of DTC may be appropriate, just as alcohol producers may have access to DTC sales through microbreweries, beer festivals, wine tastings, farmer’s markets, mail shipping, etc.



REDUCE SUPPLY CHAIN SEGMENTATION AND AVOID A MANDATORY DISTRIBUTION TIER

Most states establish some degree of separate licensing authority for cannabis cultivation, manufacturing, transportation, testing, retail, and often other activities. While some degree of license segmentation is appropriate, regulators can significantly improve the viability of craft cannabis production by taking steps to reduce this segmentation, including by avoiding a separate distribution tier.

Generally speaking, the more that state laws segment commercial activities into different license types, the greater difficulty small producers will face in successfully bringing high-quality products to market. From a quality perspective, maintaining craft standards is extremely difficult if a producer is unable to control the drying, trimming, packaging, and storage of their product. From a marketing perspective, sales are extremely difficult if a producer is unable to transport their own product, or represent themselves in sales to retailers or consumers.

While certain activities may require separate license types or activity-specific regulations, state regulators can take steps to dramatically reduce these barriers:

- **Avoiding mandatory distribution** - in California, a mandatory and capital-intensive distribution tier is required in order to transport cannabis products from a producer to a retailer. Mandatory distribution has resulted in significant barriers to quality control, marketing, and sales for small producers, as well as a systematic problem with unpaid invoices between retailers, distributors, and producers.⁴ By contrast, in states including Maine, Oregon and Vermont, the use of a wholesaler (distribution tier) is voluntary, and producers in these states can sell directly to processors and dispensaries. The use of a wholesaler in these states reflects a business decision, rather than a regulatory requirement.
- **Automatic transportation allowances for licensees** - in addition to imposing a mandatory distribution tier between production and retail, California also requires a separate state license in order to transport cannabis for any purpose, including from a cultivator to a processor or manufacturer. While California regulators have taken steps to make this transportation license relatively accessible, the presence of an additional license type creates significant bureaucratic barriers for licensees. By contrast, Maine, Massachusetts, Oregon and Vermont establish transportation as an inherent entitlement for cultivation licensees.
- **Immature plants, clones, seeds, and cannabis genetics** - to facilitate access to specialty genetics within the cannabis supply chain, cultivators should be authorized to freely cultivate, sell, and share immature cannabis plants, including seeds and clones. For example, Maine allows sales of seeds and clones, and Vermont is considering legislation along these lines.



- **On-farm trimming, drying, curing, and packaging** - producing high-quality products depends as much or more on post-harvest processing activities, including trimming, drying, curing, and packaging, as it does to cultivation itself. If these activities are incentivized or required to occur off-site, producers lose control over their products, and quality is likely to suffer immensely. State regulations should allow, and streamline, the ability to conduct post-harvest processing activities on-farm. For example, New York's requirement for all processors to be cGMP certified creates a significant barrier for cultivators who simply seek to package whole flower products. While standardization and safety are great benefits to the industry, states should consider alternative pathways to accomplish those goals without creating undue barriers for craft cultivators and on-farm production.
- **"Endorsement" mechanisms** - while expanding allowable activities under a given license type may be the most streamlined way to reduce supply chain segmentation, regulators can also consider "endorsement" mechanisms to enable operators to conduct additional activities under an existing license, without applying for a fully new license. Endorsements can enable regulators to apply additional requirements to licensees where needed, without the burdens associated with applying for a fully new license.

Policies along these lines, which establish greater flexibility for small operators to participate in a variety of supply chain activities, are one of the most important steps that states can take to support small operators within their state.

Conversely, to the extent that state regulatory frameworks establish bottlenecks at any point in the supply chain, small businesses are likely to suffer. For example, if a state has highly limited access to legal retail - whether directly through a statewide retail cap, or indirectly through systematic limitations or bans by local jurisdictions - this bottleneck will tend to create excessive market power in the hands of retailers. The greater choice that exists within the market for small operators, the less any given market participant or sector will be able to exert undue market power.

CONSIDER CAPS ON CULTIVATION SIZE

There are several reasons why states may want to strongly consider caps on cultivation size for a given operator or entity, both to encourage market participation for small producers, and to encourage the long-term viability of in-state production.



First, overproduction of cannabis is a significant risk in many states due to cannabis' unusually high productivity per unit of land area. Large-scale cultivation sites, even in states with larger populations, can single-handedly account for a significant proportion of statewide demand. Caps on cultivation size can help to ensure that supply and demand stay in relative balance within a state-siloed market.

Second, state policies that allow or encourage large-scale production may create unsustainable boom-and-bust cycles when interstate (and international) commerce become available. In an open nationwide or international market, large-scale production is likely to concentrate in regions most friendly to commodity-scale cannabis agriculture. By contrast, policies that encourage localized, small-scale, and independent production are more likely to be resilient to the opening of interstate commerce, since craft operators do not need to produce cannabis at the lowest possible cost in order to be viable.

While caps on cultivation size are worthy of consideration, a cap should be considered in relation to specific in-state variables including the level of demand within the state, the number of producers who may try to enter the in-state legal market, and the likelihood that the state will become a commodity producer of cannabis when interstate or international commerce becomes available.

AVOID TAXES ON PRODUCTION

While most states levy cannabis taxes at retail, several states also impose cannabis taxes at the production level. These production taxes are likely to cause practical challenges at the state level, and once interstate commerce opens, will place states with production taxes at a competitive disadvantage.

From a practical perspective, taxes on agricultural production - whether levied by weight, or by price - are uncommon in other industries, in part due to the inherent challenges in taxing agricultural products. Taxation by weight or plant count cannot account for widely varying quality of cannabis plant material, and results in dramatic increases in effective tax burden when wholesale prices fall. Similarly, taxation based on wholesale price is unreliable given the potential for substantial wholesale price volatility, which tends to be more extreme than retail price volatility.

As a result of these challenges, legislatures in several states, including California and Washington, have chosen to roll back taxes on cultivation that were initially imposed at the onset of legalization.

Tiered taxes on production, where small producers pay a lower rate, may be tempting to consider as a way to promote small-scale production. At the federal level, for example, taxes on the first 60,000 barrels of beer



produced by a brewer are 80% lower than taxes levied on larger producers.⁵ In the context of eventual interstate commerce, however, any tax on small-scale production will place small producers at a disadvantage compared with producers in states that do not levy a production tax. For this reason, states should consider financial incentives for small-scale production that do not rely on the imposition of a production tax.

MAINE’S MEDICAL CANNABIS PROGRAM: A CASE STUDY IN COMPETITIVE MARKETS

Many states with cannabis programs have implemented one or more of the above policy prescriptions in a piecemeal fashion. Among NCCC member states, however, Maine is worthy of specific mention as a state that incorporates all six of the above policy recommendations, and whose pro-competition policies have enabled a large diversity of small businesses to operate and grow within its medical cannabis market.

Maine’s medical cannabis program consists of over 2,000 medical caregiver licensees licensed to grow, process, package, wholesale, retail, and deliver directly to consumers under one affordable license, together with 60 new and unlimited “dispensary” licenses with the same authorized activities. In 2020, medical cannabis became Maine’s most valuable crop, with medical marijuana sales exceeding \$220 million between January and October.⁶

In Maine’s program, significant limitations were placed on cultivation size for the majority of licenses. Medical caregivers—who have historically constituted the majority of sales—are limited to 500 square feet of flowering canopy or 30 flowering plants and governed by an open regulatory framework in which they are not burdened with many of the operational restrictions found in other states. As a result, thousands of small entrepreneurs have been able to enter into Maine’s medical market, and are able to operate freely and grow within the market once they are established. The outcome is a medical program that has been popular with residents and visiting patients from around the Northeast which has served as an economic engine for the state and an incubator for small entrepreneurs.

Recently, Maine began issuing unlimited medical dispensary licenses that allow for unlimited canopy, a retail store, production and delivery. In transitioning into this licensing framework, the state’s prior experience with the caregiver model helped these businesses develop and gain the experience needed to transform into larger enterprises from small roots. In comparison to many states, the dispensary framework is also significantly more permissive and less restrictive in its rules, helping those businesses transition with lower capital demands.

Maine’s medical model serves as an alternative vision for how states can promote small cannabis operators within their borders. Rather than building an overall regulatory framework in which licensing, operational, and compliance requirements require large amounts of capital - and then seeking out additional, affirmative policies



to support small business within that framework - Maine's medical program begins with a presumption that small operators should have an opportunity to operate with low barriers to entry. While not all aspects of the Maine model may be transferable to other states, we view Maine as an important case study both for states that currently regulate cannabis, and those that may be looking to establish a regulatory framework.

DEVELOPING POLICY IN COLLABORATION WITH SMALL OPERATORS

Experience from cannabis-legal states across the country provides a wealth of information for states to draw on when seeking to establish policies to support small, independent, and craft cannabis businesses. As states seek to develop these policies, however, we believe it is important that any given policy is not viewed as a one-size-fits-all solution, and that all policies are considered within the appropriate local context.

Each state has a distinct regulatory framework, political context, and market conditions, leading to different policy considerations depending on local conditions. Further, policies which appear to be supportive of small operators in principle may be ineffective, or even harmful, if their implementation is not considered in relation to the practical, on-the-ground realities of operation.

These dynamics make it critical that small and independent operators - and representative associations of these operators, if available - are approached as collaborators in the creation of policies designed to support small businesses. Even as associations of small operators within our respective states, we do not believe it would be appropriate for NCCC to prescribe policies to support small operators in another state absent close collaboration with those operators. In this spirit, the specific policy recommendations offered in this paper are offered only as ideas for consideration, rather than as prescriptions applicable in all contexts.

As a newly-regulated market with a long history of craft and small-scale production, we believe the cannabis industry is uniquely suited to the development of equitable markets that support and include small and legacy operators. We urge states to act on this opportunity, and to work in collaboration with small operators to establish the cannabis industry as a model for fair and equitable markets.



CITATIONS

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