



## OHIO: VOTERS REJECT MARIJUANA LEGALIZATION INITIATIVE

### MARIJUANA'S STATUS NATIONWIDE

According to the Pew Research Center, in 1969 only 12 percent of Americans said that marijuana should be legal. Until recently, the number of people who still believed that the drug should be outlawed outweighed those who did not, but between 2010 and 2013, that number shifted significantly. In 2015, 53 percent of Americans now think marijuana should be legal.

As of March 2015, five jurisdictions—Colorado, Washington, Oregon, Alaska, and the District of Columbia—have passed measures to legalize marijuana use. In addition, 23 states plus Washington, D.C. allow medical marijuana, and 14 states have decriminalized certain amounts of marijuana possession.

### OHIO

Ohio is the only state that had a marijuana legalization initiative on its November ballot, though Las Vegas will have one in 2016. In a disappointing outcome for marijuana supporters, 64.14 percent of Ohio voters rejected the legalization of marijuana.

Issue 3, the Ohio Marijuana Legalization Initiative, was a constitutional amendment under which a "yes" vote would have legalized the limited sale and use of marijuana, and created 10 facilities with exclusive commercial rights to grow marijuana. Issue 3 also would have created an Ohio Marijuana Control Commission to regulate industrial and homegrown marijuana production, the chemical content of marijuana products, retail sales, and marijuana taxation.

Under the proposal, anyone 21 years or older could have purchased a license from the Ohio Marijuana Control Commission to use, possess, grow, cultivate, and share up to eight ounces of homegrown marijuana and four flowering marijuana plants. In addition, anyone 21 years or older could have purchased, possessed, transported, used, and shared up to one ounce of marijuana, with or without a license. Further, anyone with a certified debilitating medical condition could have used medicinal marijuana.

All gross revenue at the marijuana production facilities would have been taxed by a flat 15 percent rate, and marijuana retail stores would have been taxed at a flat 5 percent rate. This is in addition to the general business taxes, fees, and assessments.

The tax revenue would have been split up in three ways:

- 55 percent to the Municipal and Township Government Stabilization Fund.
- 30 percent to the Strong County Fund.
- 15 percent to the Marijuana Control Commission Fund.

### THE CONTROVERSY

The standard arguments in favor of and against legalization informed the debate in Ohio. For example, the Drug Policy Alliance supports legalization for reasons concerning criminal justice, among others. The group reveals that 30,494 people are arrested each year for a drug offense, but arrests are racially disparate.

On the other hand, the Fraternal Order of Police of Ohio opposes legalization for "significant public safety concerns," such as the lack of visible enforcement mechanisms, and the danger the drug poses to minors.

Ohio's ballot initiative was controversial for another reason: Issue 3 would have created 10 facilities that would have had exclusive rights to commercial production. They would have had to be run independently to prevent collusion, as required by the Sherman Antitrust Act, and there could have been no vertical integration of marijuana businesses so that those who cultivated the plants could not also sell directly to the public.

State lawmakers who were concerned about granting a monopoly to the marijuana production facilities crafted Issue 2, which was intended to prevent Issue 3 from taking effect, even if voters had legalized marijuana. Issue 2 was drafted to prohibit any constitutional amendment that creates economic monopolies, oligopolies or cartels, or that "specifies or determines a tax rate, or confers a commercial interest, commercial right, or commercial license that is not available to other similarly situated persons."

*The New York Times* recognized that the legalization proposal had a "strange bedfellows coalition of opponents: law enforcement officers worried about crime, doctors worried about children's health, state lawmakers and others who warn that it would enshrine a monopoly in the Ohio Constitution...[resulting in] one of the nation's oddest legalization campaigns."

The no-vote leaves current marijuana laws unchanged, so the possession or use of marijuana for any reason remains illegal. *The Plain Dealer* reported that Rep. Mike Curtin, a Columbus-area Democrat and opponent of marijuana legalization, said he would take up the issue of medical marijuana if Issue 3 failed.

## ILLINOIS: COOK COUNTY BUDGET PROPOSAL INCREASES OR BROADENS CERTAIN TAXES TO HELP CLOSE BUDGET GAP

With over 5 million residents, Cook County, the county seat of Chicago, is the most populous county in the state, containing more than 40 percent of Illinois' residents. It is also the second most populous county in America, after Los Angeles County.

In mid-October, Toni Preckwinkle, the Cook County Board President, presented her Executive Budget Recommendation for the Fiscal Year 2016 budget to the county's Board of Commissioners. In her blog, she explained that her plan for the \$4 billion budget closes the projected \$198.9 million shortfall. Her intention is to increase efficiency and "responsibly address [Cook County's] fiscal challenges for the long-term," in part by cutting tax supported expenditures by almost \$108 million.

Stated broadly, the budget does the following:

# Multistate Tax Update November 5 2015

---

- Permanently sustains the reduced jail population, which now is at its lowest level since 1991.
- Realigns and reduces the county's real estate footprint to structurally reduce costs.
- Funds critical technology investments to modernize county government, such as an integrated tax system, and a countywide biometric time and attendance system that will automate timekeeping, reduce fraud, and reduce overtime by \$14.6 million.
- Continues the shift from inpatient to more efficient, patient-centric, and less costly outpatient care at the Cook County Health and Hospitals System (CCHHS). This represents a savings of \$39 million.

In order to achieve these and other goals, among the measures Board President Preckwinkle proposed are the following:

- Expanding the amusement tax base to include in-home cable, ticket resellers, and recreational activities, such as golf, while holding the tax rate steady at 3 percent, which would lead to new revenues of \$20.25 million.
- Increasing the Retailers Occupation and Service Occupation Taxes (collectively referred to as sales tax) by 1 percent, effective Jan. 1, 2016, which would provide a projected \$308 million in additional funding. \$270 million of this would address additional pension appropriations, \$25 million would address increased legacy debt service costs, \$10 million would address increased highway funding, and \$2.5 million would address "pay as you go for technology" spending.
- Taxing e-cigarettes and e-vapor products at \$.20 per milliliter, thus treating them like other tobacco products, which would generate \$1.5 million. Other jurisdictions are considering similar measures, as we **pointed out** last month.
- Increasing the efficiency of operational spending. Although General Fund and CCHHS spending have come down by \$331 million, or 9.4 percent since 2010, legacy debt service and pension costs have grown by 90 percent since that time.

ChicagoTonight seized upon the amusement tax provision in particular, quoting Cook County Commissioner John Daley, an ally of the board president, as saying that it "is a tough sell. If they have any other revenue ideas, hopefully they will offer them."

President Preckwinkle defended it as simply an extension: "If you went to the movies or plays, you've already paid an amusement tax. But if you were golfing or bowling, maybe you didn't at least [pay] the county amusement tax. So we're extending it to things that weren't covered before...We're not raising it. If you bowl for an hour and it costs \$10 an hour, you pay an additional 30 cents. If you golf 18 holes, it's an additional dollar. It's really modest, and people who engaged in other forms of entertainment were already paying it."

All told, the \$107.8 billion in cost reductions would bring about the following savings:

- \$39 million reduction in the CCHHS operating tax allocation.
- \$32.6 million in personnel savings.
- \$12.8 million in management initiatives including the demolition of three divisional jail buildings.
- \$12.6 million from consolidating and eliminating programs.
- \$10.8 million in employee health benefits savings.

"Over the last five years, we have solved more than \$1.6 billion in combined budget deficits by encouraging smart spending, modernizing the county, and pushing to do more with less," said President Preckwinkle. Her budget recommendation continues this trend.

## MASSACHUSETTS: OFFICIALS GRAPPLE WITH DAILY FANTASY SPORTS

"After experiencing unprecedented popularity and financial success throughout the summer and fall, the daily fantasy sports industry, it could be said, is no longer having its moment in the sun," opined a *Sports Illustrated* columnist in a recent article. The author was referring to the month after the news broke that an employee of Boston-based DraftKings, Ethan Haskell, had inadvertently leaked proprietary player ownership data, and then won \$350,000 in a similar tournament on FanDuel, a rival daily fantasy sports site. During that month, various parties filed more than 24 class action lawsuits, which focused on fairness for all participants in Daily Fantasy Sports (DFS).

Against this backdrop, Massachusetts, and others, are beginning to grapple with fundamental questions underlying DFS, like whether it should be considered gambling and, thus, subject to pre-existing laws, how to regulate it, along with the tax implications of any such regulations.

## LITTLE LEGAL PRECEDENT

*The Boston Globe* revealed that officials in the Bay State, like Gov. Charlie Baker, Senate President Stanley Rosenberg, and Attorney General Maura Healey, think that Massachusetts should oversee and regulate DraftKings and its ilk for the protection of consumers. However, at this time, there is little legislative or regulatory guidance. What is more, it is not clear whether DFS is even legal under a 2011 state law that authorizes casinos, and which defines gaming as "dealing, operating, carrying on, conducting, maintaining, or exposing any game for pay."

In a public meeting that the Massachusetts Gaming Commission held on Oct. 29, 2015, one of the commission's staff attorneys presented a memorandum addressing the legal history of gaming in the state and its potential intersection with DFS.

The memorandum explains that illegal gaming is defined as a "banking or percentage game played with cards, dice...for money, property, or checks..." The lottery, when conducted by the state lottery commission, horse racing, bingo, and charitable games, when operated in accordance with state laws, are excluded and not considered to be illegal.

Despite this definition, there is no direct criminalization of participation in an illegal gaming scheme. Instead, the law addresses illegal gaming peripherally, applying numerous criminal statutes to secondary matters, like where, when, and how the gaming is conducted or financed. Consequently, courts rely, in part, on the definition of lottery: an activity consisting of the payment of a price for the possibility of winning a prize, depending upon hazard or chance. Relying on World War II era case precedent, Massachusetts courts consider a game to be an illegal lottery when it is run outside of a gaming establishment if the element of chance, as opposed to skill, predominates.

As to how this relates to DFS, the memorandum observes that "[t]o date, no Massachusetts case has addressed whether fantasy sports or daily fantasy sports would constitute a 'lottery...'" This is because the meager case law concerning lotteries has only considered the chance versus skill question in the context of games in which the player had a direct effect on the outcome, like choosing cards or throwing darts. This is quite different from DFS, in which the player's only skill is in choosing a roster, so "[i]t is not clear whose skill a Massachusetts court would examine in determining the skill versus chance contest in the fantasy sports arena."

Another feature of DFS is betting pools, in which the participants' entry fees go into a pool, from which the winner is paid. Certain aspects of betting pools are considered to be crimes under Massachusetts law, but as with lotteries, no Massachusetts court has addressed whether DFS would qualify as betting pools, and thus run afoul of the laws.

## A WORKING DRAFT OF INCOME TAX, WITHHOLDING, AND REPORTING RULES FOR CERTAIN WAGERING INCOME

As the memorandum shows, Massachusetts will need to come to terms with whether DFS constitutes a game in which the predominate element is chance or skill, and from there, whether and how to regulate and tax it.

In what could become increasingly relevant, the Department of Revenue posted **Working Draft TIR 15-XX**, which explains changes to the personal income tax calculation, income tax withholding, and income reporting rules with respect to wagering income. The draft does not invoke or consider DFS in particular, so its application to fantasy sports is uncertain. Even so, the memorandum notes that the attorney general has stated that DFS is not "expressly illegal" under gaming laws, but that she wants to discuss consumer protection mechanisms with DFS officials.

## OTHER STATES

The memorandum acknowledges that only a few other states have tackled DFS regulation. For example, Kansas has excluded DFS from the definition of a bet under certain conditions. Florida does not have any statutory or regulatory authority on DFS, but the attorney general has taken the position that statutory law prohibited the fantasy football league where the \$100 entry fee constituted a bet, stake, or wager on a contest of skill.

In Washington State, there is no DFS because of the way in which state law defines gambling. But a bill was introduced in 2015 that defined fantasy sports as skill-based and not gambling.

In Nevada, DFS operators are in the business of accepting wagers on sporting events, so they must be licensed to operate within the state. Similarly, in California, a pending bill requires DFS operators to have a license. In Michigan, DFS is illegal.

As for Massachusetts, there is no pending legislation. This could be the case for a while; the memorandum neatly concludes that "the legal status of DFS is in flux."

---



DAVID KALL

[Read More](#)