

# Experts: Delaware's recreational marijuana process takes even approach

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DOVER — The window for cannabis retail and manufacturing licenses closed earlier this week and Delaware business owners are now waiting to see who will be able to open up shop in the state's fledgling recreational cannabis market, which legal and compliance experts say is an equitable regulatory environment improving upon mistakes made in some of the first states to step into adult-use marijuana sales.

This week, the **Delaware Office of Marijuana Commissioner** (OMC) announced 1,239 businesses applied – and only 10% of those applications will be approved. The OMC expects to start issuing 60 cultivation licenses in November, followed by 30 manufacturing licenses, 30 retail licenses and five licenses for testing labs, making it so that businesses can theoretically be up and running by April 2025.

The First State plans to award 125 licenses in all, including social equity licenses for applicants who were impacted by past drug laws or who live in a disproportionately impacted area. Another 30 licenses are set aside for “microbusinesses,” or those who plan to employ no more than 10 people and will not need a facility with a grow operation larger than 2,500 square feet.

With a relatively small license pool, state officials aim to keep from oversaturating a fairly small state, with a population of just about one million people, in a market that has ballooned nationally.

The budding recreational marijuana industry is projected to bring in between \$28.8 and \$45 million per year, according to state estimates. With tax revenue and thousands in business revenue on the horizon, understanding how the system works is the first step for entrepreneurs and big cannabis businesses to navigate **the new system**.

“In many places, you see the cannabis rules are pretty counterintuitive to how a normal business operates, like a restaurant or a copy center,” said Andy Shelley, a former law enforcement officer and founder of compliance firm **CannXperts**. “Everything requires inspections, and you have to follow the rules because the regulators are watching all the time. Even if you think about adding a wall in the business, that requires pre-approval, compared to other businesses.”

## **What’s on the books**

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Delaware’s standard license application fees were set at \$5,000 each, while social equity programs were lowered to \$1,000 per application. Microbusiness license applications cost \$3,000 each.

Under the regulations, **Delaware Marijuana Commissioner** Robert Coupe may deny applications that are incomplete in detail or omit or misrepresent facts. Each application must have a comprehensive business plan, including a budget. It must also detail the expertise of the applicant and managing staff.

The state also requires applicants to include plans for safety and security, much like that which is required by neighboring states Maryland, New Jersey and New York. Delaware also requests each applicant provide a detailed description on how it would comply with guidance issued by the Financial Crimes Enforcement Network on how to operate a business that **struggles to navigate banking revenue** from a product classified as a Schedule I substance. That may include letters on the applicant’s banking history from financial institutions.

As Delaware follows a handful of other states that have already created recreational markets, state officials like Coupe have said in the past that the hope is to learn from previous states’ mistakes while setting up the regulations here.

That seems to be the case, according to **Fox Rothschild** Partner Seth Niederman, who practices in complex commercial litigation as well as cannabis law. With Delaware's population, he said that the 125 licenses are an appropriate start to building a competitive market without oversaturation.

"That number of retail licenses is in line with that of similarly situated states," Niederman told DBT. "Rhode Island offers a good comparison. The two states have similar sized populations of just over one million individuals, and Rhode Island currently offers 24 retail licenses."

Coupe announced Thursday afternoon that Delaware will hold a separate lottery for retail licenses by either November or early December as that category received the most applications of all of the license types coming in at 844.

### **Attempts to negate the monopoly**

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Another provision that helps curb oversaturation is limiting the retail licenses per county. New Castle County, the most populated county in the state, has 14 available retail licenses including social equity retail licenses while Sussex County has 10 and Kent County has six to offer.

Zack Kobrin, a law partner at **Saul Ewing** who practices cannabis law, noted that altogether the 125 licenses is a strong start to build the base of a competitive market without having retail stores flood the market.

"The number of licenses being awarded now is only the beginning," Kobrin told DBT. "Once the regulators are able to see how the adult use market establishes itself and evolves, they will be able to determine if and when new licenses are needed and how many. They don't want to have too many operators which can create a situation where the program is not economically viable to operators and thus problematic for consumers."

The issue of oversaturation of the market came to the forefront in west coast states like Oregon and Colorado, where Andy Shelley said Oregon in particular issued 2,800 licenses in all. In a sense, that created a free market system, but it also made it hard on regulators to keep those businesses in check and ensure their success in generating tax revenue.

"That resulted in manufacturing way too much marijuana, and it cut the prices down as well as the competition. It affected everything from the farmers to the retail stores," Shelley said. "You should be looking at population densities and consider how many licenses per those areas. For example, Ohio has 500 licenses and it has a quarter of the geographical size of Oregon and it doesn't have this massive competition that's killing the economy."

Shelley said in Eugene, Ore., cannabis retail stores line the streets, so it's pretty common to see the stores lower their prices again and again. In 2023, Oregon marijuana prices **hit an all time low** at \$4 per gram.

“It just gets to a point where you’re undercutting yourself [when it comes to lowering prices],” Shelley added.

## Equity for all?

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Even with a proportionate number of licenses available, attorney Kobrin added that Delaware’s marijuana regulations are unique in that successful applications across all types can be decided through a lottery. As such, the barrier to enter the lottery is lower compared to other markets.

For example, Florida regulators charge a high fee for medical cannabis licenses, and the application process is in-depth and requires information on financial capacity, operations, property ownership and other factors that are used to score on a rubric. Florida Health officials also adopted a new rule that raised the license renewal fee for medical marijuana operators to \$1.3 million every two years – more than 22 times the \$60,000 fee first set in 2016. New applications fees in the Sunshine State were also raised to \$146,000.

**As of May**, Florida had not announced who will receive a medical cannabis license in its April 2023 applicant pool.

Instead, Delaware regulators require cannabis license applicants to include plans on how the business will bank, while those who seek to grow marijuana or manufacture byproducts to include a quality assurance plan. The OMC may also require any applicant or entities that hold controlling interest to complete paperwork to certify that it meets the requirements.

Once an applicant wins the Delaware lottery for their respective license type, they will then be required to provide substantive information, complete a financial and criminal background, submit a tax clearance certificate, disclose any civil litigation they may be a party to, among other matters.

“Delaware’s approach has allowed for more people to apply and enter the lottery, as compared to other states where applicants can spend hundreds of thousands of dollars raising capital, securing real estate and entering into any number of costly commitments that may ultimately be unnecessary if the license isn’t awarded,” Kobrin said.

Delaware’s approach has been to only require these costly steps once an applicant meets the minimum criteria and wins the lottery. Delaware’s regulations are also unique in that it does not require license holders to have a minimum financial capital threshold to be eligible for consideration.

“This is very different from the application process in most other states,” he added.

“[Delaware] has implemented the least subjective process by using a lottery to award licenses and has essentially said they want as many eligible people or companies as possible to be able to apply and take a shot.”

Delaware is also maintaining horizontal licenses – or keeping licenses separate for manufacturing, retail and production – which experts have found to create favorable market conditions for all types of companies, including experienced multi-state operators.

Jonathan Robbins, the cannabis law chairman at **Akerman LLP**, also pointed out that Delaware marijuana regulators have also baked in opportunities for microbusinesses as a way to ensure that small businesses won't have to compete against companies with significant venture capital funds that back them.

“What that does is it avoids creating a monopoly like we see in Florida. It may allow people who would otherwise never be able to be on the market to throw their hat in the ring,” Robbins said. “The bar is high in many jurisdictions for young entrepreneurs, but I think it's a good thing that Delaware opens the door for that, and the license fees are reasonable. They have a fair chance of getting a license, if they're qualified.”

Even so, the reality is that the license holders will have to spend significant amounts of capital to meet the requirements for safety and security systems, as well as transporting the revenue safely and even waste disposal.

“At the end of the day, it's still a fairly expensive proposition and you're still going to need access to capital if you want to run a business like this, particularly in cultivation,” Robbins added. “The equipment alone can cost millions of dollars. And this isn't just an issue Delaware's facing, you're seeing it everywhere.”

The competition appears to be stiff regardless. There are 549 social equity applications across all license categories and more than half of those are for retail licenses. Coupe announced that social equity lab testing would be exempt from the lottery as the number of applications matched or fell below the licenses available.

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