

Riana Durrett*



AND THE TWO SHALL NEVER MEET: A COMPARISON OF NEVEDA'S GAMING AND CANNABIS REGULATORY FRAMEWORKS AND POLICY GOALS

GAMING HISTORY

Nevada's modern gambling framework was legalized in 1931.¹ At that time, the Nevada legislature granted local authorities the power to regulate or prohibit gaming.² In 1945, the legislature created the first state tax of 1% of gross gaming revenue and required casinos to obtain a state license.³ The Nevada Tax Commission (NTC) collected taxes from the industry but did not have any other authority or regulatory oversight over gaming until 1947, when the Attorney General opined that it could limit licensing based on suitability.⁴

* Riana Durrett attended law school at UNLV's William S. Boyd School of Law, earning her J.D. in 2008. She recently completed her LL.M. in Gaming Law and Regulation from the William S. Boyd School of Law, where she also teaches cannabis law and regulation. Durrett was appointed as director of the UNLV Cannabis Policy Institute in August 2023. In addition, the Governor appointed her to serve as the first vice chair of the Nevada Cannabis Compliance Board. Prior to her work with the Cannabis Compliance Board, Durrett served as the executive director of the Nevada Dispensary Association, where she established the association as the primary resource on best practices in Nevada's cannabis industry -- developing the Nevada Dispensary Association into the primary regulatory and government affairs voice for Nevada's cannabis industry. In addition to her work at UNLV, Durrett currently serves on the Boards of the Nevada Taxpayer Association and the Nevada Conservation League.

1. <https://tax.nv.gov/uploadedFiles/taxnvgov/Content/FAQs/NV-Gaming-History.pdf>, slides 4-11

2. Id.

3. <https://tax.nv.gov/uploadedFiles/taxnvgov/Content/FAQs/NV-Gaming-History.pdf>, slide 17.

4. <https://tax.nv.gov/uploadedFiles/taxnvgov/Content/FAQs/NV-Gaming-History.pdf>, slides 17-26.

In 1949, the legislature shifted regulatory authority from local governments to the state.⁵

Organized crime took root in Nevada's gaming establishments in the industry's earliest years.⁶ Organized crime's rise and other issues involving criminal conduct in gaming drew attention from the federal government. For example, Senator Estes Kefauver (Tennessee) threatened greater federal intervention, and, in the 1950s, chaired congressional hearings that discussed and produced a report critical of Nevada gaming and the presence of organized crime.⁷ Around that time, Congress entertained legislation that adopted an industry-decimating excise tax of 10%.⁸ However, Senator Pat McCarran (Nevada) was able to maneuver around proposed legislation that attempted to impose such a crippling excise tax on Nevada's gaming industry.⁹

Nevada recognized that the threat of federal intervention was likely without significant efforts to rid the industry of the influence of organized crime. In 1955, the Nevada legislature created the Gaming Control Board (GCB) to assume responsibility for the regulation of the gaming industry and, in 1959, replaced the NTC's role with the Nevada Gaming Commission (NGC).¹⁰ Governor Grant Sawyer shaped the industry's policy goals within the Gaming Control Act. The Act continues to be the authority on policy goals in Nevada's gaming regulatory framework.¹¹ The Gaming Control Act also made the GCB an independent agency.¹²

There are two relevant bodies: the GCB consists of three board members and an agency divided into six divisions, each led by a chief: Administration, Technology, Enforcement, Audit, Investigations, and Tax and Licensing.¹³ The GCB's Enforcement Division is empowered to conduct criminal and regulatory investigations as well as perform other activities commonly assigned to policing agencies.¹⁴

5. *Id.* at 28.

6. *Id.* at 26.

7. <https://tax.nv.gov/uploadedFiles/taxnvgov/Content/FAQs/NV-Gaming-History.pdf>, slides 30-32.

8. *Id.*

9. *Id.* at 31.

10. *Id.* at 32, 36.

11. *Id.* at 35.

12. *Id.* at 36.

13. *Id.* at 37.

14. <https://gaming.nv.gov/index.aspx?page=46>.

There is also the Nevada Gaming Commission. The five-member Commission may accept licensing recommendations from the GCB, take disciplinary action, and adopt binding regulations.¹⁵

CANNABIS LEGALIZATION

In 2000, Nevada voters legalized medical marijuana by supporting the Nevada Medical Marijuana Act (NMMA), an amendment to the Nevada Constitution.¹⁶ As a constitutional amendment, the change was required to pass by a vote of the people in two consecutive elections, which occurred in 1998 and 2000. The NMMA authorizes medical patients to use cannabis upon the advice of a physician for the alleviation or treatment of certain medical conditions.¹⁷

While NMMA allows patients to use medical marijuana upon the advice of a physician, it did not create a method for legal sales of marijuana in Nevada. The Nevada legislature passed Senate Bill 374 in 2017, which allowed for state licensing of medical marijuana dispensaries, cultivation facilities, and production facilities. The Bill also devised a system of registering medical marijuana patients, commercial licenses, and medical cannabis industry employees with the state.

In early 2014, the Marijuana Policy Project (MPP) filed an initiative petition to regulate and tax marijuana in Nevada.¹⁸ The first medical marijuana licenses were awarded in late 2014.¹⁹ Starting in 2015, licensees were allowed to transfer their registrations to another entity (originally prohibited) via the passage of Senate Bill 276.²⁰ Nevada's first marijuana

15. *Id.* at 55.

16. Nevada Secretary of State, *State of Nevada Ballot Questions* 1998, <https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1998.pdf>.

17. Nevada Const., art. IV, sec. 38, <https://www.leg.state.nv.us/const/nvconst.html#Art4Sec38>.

18. Initiative to Regulate and Tax Marijuana, April 23, 2014, <https://www.webcitation.org/6T06efF7c>.

19. *Nevada Awards 371 Preliminary MMJ Business Licenses*, MJBIZ DAILY, accessed July 26, 2021, <https://mjbizdaily.com/nevada-awards-371-mmj-business-licenses/>.

20. S.B. 276, 2015 Biennium, 78th Legislative Sess. (Nev. 2015), <https://www.leg.state.nv.us/App/NELIS/REL/78th2015/Bill/1788/OverviewOriginalLanguagefromthe2013StatutesofNevadapage3708>:

"The following are nontransferable: . . . 2. A medical marijuana establishment registration certificate."

businesses also opened in the state in 2015, with Silver State Relief in Reno being the first establishment to open in northern Nevada²¹ and Euphoria Wellness the first medical marijuana business to open in southern Nevada.²²

The Nevada Marijuana Legalization Initiative (Question 2) appeared on the 2016 ballot as an initiative petition and was approved by voters.²³ Question 2 authorized anyone 21 years of age or older to possess and consume retail marijuana. Marijuana consumers can possess up to one ounce of marijuana or one-eighth of an ounce of concentrated marijuana. The law also clarified that marijuana can only be purchased legally from a state-licensed retail marijuana store.²⁴

With the approval of Question 2, voters mandated the sale of adult-use cannabis in Nevada beginning on January 1, 2018. However, the NTC approved temporary regulations²⁵ on May 8, 2017, to allow recreational cannabis to be sold as of July 1, 2017, under an “early start” program.²⁶

Changed language from 2015 Statutes of Nevada, page 2978:

“Except as otherwise provided in subsection 2, the following are nontransferable:

A medical marijuana establishment agent registration card.

A medical marijuana establishment registration certificate.

A medical marijuana establishment may transfer all or any portion of its ownership to another party...”

21. Bessette, Chanelle. ‘Nevada’s First Medical Pot Dispensary Now Open in Sparks,’ *Reno Gazette Journal*, 2015, <https://www.rgj.com/story/news/2015/07/29/states-first-medical-marijuana-dispensary-open-friday/30863209/>. Accessed July 26, 2021.

22. Shine, Conor. ‘New Era: Las Vegas Area’s First Medical Marijuana Dispensary Opens,’ *Las Vegas Sun*, 2015, <https://lasvegassun.com/news/2015/aug/24/new-era-las-vegas-areas-first-medical-marijuana-di/>. Accessed July 26, 2021.

23. Nevada Marijuana Legalization, Question 2. November 28, 2016. <https://www.nvsos.gov/sos/home/showdocument?id=4434>.

24. Stinnesbeck, Jann. ‘Fact Sheet: Recreational Marijuana in Nevada,’ Legislative Counsel Bureau — Research Division, September 2018, <https://www.leg.state.nv.us/Division/Research/Publications/Factsheets/RecreationalMarijuana.pdf>.

25. <https://tax.nv.gov/uploadedFiles/taxnv.gov/Content/Meetings/Marijuana-Overview-2-14-19.pdf>

26. Rindels, Michelle. ‘Tax Commission Approves Regulations Allowing Early Start for Nevada’s Recreational Marijuana Industry,’ *The Nevada Independent*, 2017, <https://thenevadaindependent.com>

Modeled after the GCB, the Cannabis Compliance Board (CCB) was created by the passage of Assembly Bill 533 (AB 533)²⁷ at the end of Nevada's Eightieth Legislative Session in 2019.²⁸ Nevada had undergone considerable shifts prior to that with regulation initially under the Department of Agriculture, then the Division of Health and Human Services, and eventually, the Department of Taxation.²⁹

Cannabis manufacturing and distribution continue to be prohibited under the Controlled Substance Act (CSA) at the federal level.³⁰ Marijuana is classified as a Schedule I substance by the CSA.³¹ Schedule I drugs are defined as "drugs with no currently accepted medical use and a high potential for abuse."³²

/article/regulations-shaping-nevadas-recreational-marijuana-industry-up-for-decisive-vote. Accessed July 27, 2021.

27. A.B. 533, 2019 Biennium, 80th Legislative Sess. (Nev. 2019). <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/7056/Overview>.

28. Shine, Conor. 'New Era: Las Vegas Area's First Medical Marijuana Dispensary Opens', *Las Vegas Sun*, 2015, <https://lasvegassun.com/news/2019/jun/03/cannabis-compliance-board-state-collective-bargain/>. Accessed July, 27, 2021.

29. The Division of Public and Behavioral Health, under Nevada's Department of Health and Human Services, initially regulated legalized medical marijuana businesses and sales. To efficiently govern and wisely utilize resources, the Nevada Legislature combined the medical marijuana and adult use regulatory programs by moving the medical marijuana regulatory responsibilities to the Nevada DTC in 2017. In 2019, in collaboration with the Governor's Office, the Nevada legislature relieved the Department of Taxation of most of its oversight over the cannabis industry by creating the Cannabis Compliance Board (CCB) with the passage of AB 533. AB 533 bestowed the CCB with governing authority over medical and adult-use cannabis licenses and sales beginning July 1, 2020. The CCB has the authority to adopt, amend, and repeal regulations. In addition, the CCB has the authority to issue, deny, and revoke cannabis business licenses, subject to certain state laws. AB 533 also created a Cannabis Advisory Commission (CAC), but that body is strictly advisory.

30. 21 U.S.C § 841.

31. <https://fas.org/sgp/crs/misc/R45948.pdf>.

32. *Id.*

CREATION OF THE CANNABIS COMPLIANCE BOARD

In 2019, Governor Steve Sisolak issued Executive Order 2019-03, establishing the Advisory Panel for the Creation of a Nevada Cannabis Compliance Board (Governor's Advisory Panel).³³ The Executive Order notes that "Nevada's [world-class] gaming industry and the renowned regulatory structure which protects the gaming industry, its patrons, and the State's reputation evolved in a manner instructive to Nevada's medical and retail cannabis economies."³⁴ The Executive Order goes on to note:

Whereas, the historical parallels between the development of Nevada's legal gaming industry—the result of the genius and initiative of the industry's most important figures and the active management of the industry by Nevada's world class regulatory structure, often responding to considerable pressure from federal law enforcement agencies— and the early history of Nevada's nascent medical and retail cannabis industry, subject to similar law enforcement scrutiny and pressure, suggests that the latter, if properly managed could follow a similar trajectory as Nevada's successful gaming industry.³⁵

Four of the five members of the Governor's Advisory Panel included the Governor's then-General Counsel, former Chief of the Gaming Division within the Attorney General's Office, former GCB Chairman Dennis Neilander, and gaming law attorney and professor Jennifer Roberts.³⁶ There is no mistaking that the Governor's Advisory Panel planned to model their proposed compliance board after the regulatory structure of gaming in Nevada.³⁷

AB 533 adapted elements of Nevada's gaming model but was not an exact replica. The bill, which created an entirely new state agency and regulatory model for cannabis, was discussed and passed by Nevada's legislative body in less than two weeks.

Pursuant to AB 533, the CCB consists of a five-member Board with regulatory authority and the Cannabis Advisory Commission (CAC) with 12 members who provide recommendations to the CCB.³⁸ The Board has the

33. <https://tax.nv.gov/FAQs/Cannabis-Compliance/>.

34. file:///Users/rianadurrett/Downloads/Executive%20Order%202019-03%20(2).PDF.

35. file:///Users/rianadurrett/Downloads/Executive%20Order%202019-03%20(2).PDF.

36. file:///Users/rianadurrett/Downloads/Executive%20Order%202019-03%20(2).PDF.

37. <https://tax.nv.gov/FAQs/Cannabis-Compliance/>.

38. AB 533, 2019.

authority to adopt and repeal regulations, license businesses, and impose disciplinary sanctions.³⁹ The CAC does not have binding authority, but may make recommendations to take various actions and inform CCB policies.⁴⁰

In 2023, Senate Bill 328 placed the CCB under the Administrative Procedures Act.⁴¹ This was a major change for the CCB as it afforded more due process protections to licensees and added more oversight from the Nevada Legislature when adopting or changing regulations.⁴² In addition, the Bill added a vice chair position, created a mechanism for rotating the chair position, and imposed additional standards to board positions, among other governance reforms.⁴³

COMPARISON OF CODIFIED PUBLIC POLICY

The Governor's Advisory Panel aimed to emulate the gaming industry's successful history of regulation. Among other things, the gaming industry has been declared to be vitally important to Nevada's economy.

NRS 463.0129 Public policy of state concerning gaming; license or approval revocable privilege.

1. The Legislature hereby finds, and declares to be the public policy of this state, that:
 - a. The gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants.
 - b. The continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming and the manufacture, sale and distribution of gaming devices and associated equipment are conducted honestly and competitively, that establishments which hold restricted and nonrestricted licenses where gaming is conducted and where gambling devices are operated do not unduly impact the quality of life enjoyed by residents of the

39. AB 533, 2019.

40. AB 533, 2019.

41.

<https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10235/Overview>.

42.

<https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10235/Overview>.

43.

<https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10235/Overview>.

- surrounding neighborhoods, that the rights of the creditors of licensees are protected and that gaming is free from criminal and corruptive elements.
- c. Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments and the manufacture, sale or distribution of gaming devices and associated equipment.
 - d. All establishments where gaming is conducted and where gaming devices are operated, and manufacturers, sellers and distributors of certain gaming devices and equipment must therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State, to foster the stability and success of gaming and to preserve the competitive economy and policies of free competition of the State of Nevada.⁴⁴

It is interesting to note that the stated public policy for cannabis regulation was adapted from gaming regulation, using similar or exact language from the Nevada Gaming Control Act:

- . . . c. Cannabis establishments do not unduly impact the quality of life enjoyed by residents of the surrounding neighborhoods;
- d. Cannabis licenses and registration cards are issued in a fair and equitable manner;
- e. The holders of cannabis licenses and registration cards are representative of their communities; and
- f. The cannabis industry is free from criminal and corruptive elements.

44. In 2023, the Nevada legislature made changes to this section. The most relevant changes state that the cannabis industry is “significant” to the economy, giving the cannabis industry’s perceived contribution a boost from “beneficial.” The legislature also added language referencing the illegal market in this initial preamble. As of the writing of this Article, the changes have not been incorporated into the legislature’s online version of the Nevada Revised Statutes. How these changes will impact the regulatory approach and how they will be implemented remain to be seen.

3. All public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of cannabis establishments.

4. All cannabis establishments and cannabis establishment agents must therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State, to foster the stability and success of the cannabis industry and to preserve the competitive economy and policies of free competition of the State of Nevada.

SIMILARITIES IN LEGISLATION AND FUNCTIONS

From the inception of cannabis business licensing and regulation, there has been discussion of regulating cannabis like gaming and developing a “gold standard of regulation.” Despite the title of the campaign, called “Regulate Marijuana Like Alcohol,” the ballot initiative’s name and a slight nod to “distributors” are the only links to alcohol regulation.

The basic, high-level similarity between gaming and cannabis regulation is that each is controlled by a state agency that licenses businesses, conducts enforcement, and adopts regulations to carry out state statutes. The legislature also bestowed the CCB with authority similar to the gaming regulatory framework, although they operate differently in practice. The following functions of cannabis regulation are similar to, or adopted from, gaming regulation:

- Suitability requirements for licensing, including good moral character⁴⁵
- Licensing of all persons that exercise control over a licensed business, including officers, directors, etc.⁴⁶
- Specific licensing rules for publicly traded companies⁴⁷
- Extensive recordkeeping, including financial documents, that must be made available to the regulatory body⁴⁸
- Registration of employees⁴⁹
- Natural and imposed barriers to entry
- Requisite approval to transfer interest⁵⁰
- Product approval and quality controls⁵¹

45. NRS 463.1625, NRS 678B.200.

46. NRS 463.160, NRS 678B.200.

47. NRS 463.490, NCCR 5.

48. NGCR 5.107, NRS 678B.510.

49. NGCR 5, NCCR 5.

50. NGCR 8, NCCR 5.

51. NGCR 14, NCCR 11.

- Regulation of third parties on company premises⁵²
- A division of the Attorney General's Office dedicated to assisting the state agency and pursuing disciplinary charges against licensees⁵³
- Exemption from Nevada Administrative Code (with the caveat that the Nevada State Legislature may object to regulations adopted by the CCB).⁵⁴

DIFFERENCES IN LEGISLATION AND FUNCTIONS

There is often confusion about the roles of the CAC and the CCB because the Governor's Advisory Panel was clearly tasked with creating a structure similar to gaming, but the CCB and CAC do not perform the same functions as the NGC and GCB.

In gaming, the NGC is meant to be the policy body, with the authority to adopt regulations and certain GCB recommendations.⁵⁵ In cannabis, the CCB is the body with the authority to adopt regulations and is the body that is meant to set policy. In cannabis, the CAC is more analogous to the Gaming Policy Committee (GPC) than the NGC. Like the CAC, the main purpose of the GPC is to receive input on industry policy from various groups, discuss these matters, and advise. Its recommendations are not binding. The CCB also assumes a similar role to both the NGC and the GCB.

Another striking difference between the two regulatory bodies is that the GCB's "Tax and License Division collects, deposits, distributes and dedicates all gaming taxes, fees, penalties, interest and fines."⁵⁶ Whereas the Department of Taxation imposes and administers excise tax collection on the cannabis industry pursuant to NRS 372A. Additional high-level differences between the statutorily created frameworks include:

- Cannabis dispensary licenses are numerically limited, whereas gaming licenses are not⁵⁷
- The size and budget of the GCB is much larger than the CCB

52. NRS 463.0129, NRS 678B.040.

53. NRS 463.0199.

54. NRS 22B.039.

55. Gaming Regulation and Gaming Law in Nevada: As Remembered by Robert D. Faiis, by R.T. King.

56.

<https://gaming.nv.gov/index.aspx?page=48#:~:text=About%20the%20Tax%20and%20License,%2C%20penalties%2C%20interest%20and%20fines.>

57. NRS 678B.220.

- Cannabis tax revenue is mostly dedicated to the State Education Fund, whereas the Gross Revenue Gaming tax is dedicated to Nevada's General Fund⁵⁸

AND THE TWO SHALL NEVER MEET

This often quoted, and almost poetic refrain comes from the Chair of the NGC's admonishment that gaming operations were prohibited from engaging in legal cannabis business operations.⁵⁹ The GCB first weighed in on whether licensed gaming operators could "invest in or otherwise participate in medical marijuana establishments" on May 6, 2014.⁶⁰ At that time, GCB Member Terry Johnson issued a letter to licensees concluding that:

[U]nless the federal law is changed, the Board does not believe investment or any other involvement in a medical marijuana facility or establishment by a person who has received a gaming approval or has applied for a gaming approval is consistent with the effective regulation of gaming. Further, the Board believes that any such investment or involvement by gaming licensees or applicants would tend to reflect discredit upon gaming in the State of Nevada.

The NGC later took up the discussion on their licensees' potential involvement with the legal cannabis industry after voters legalized recreational cannabis establishments in November 2016.⁶¹ The NGC discussed such involvement at a hearing on August 24, 2017.⁶² Chair Tony Alamo led a policy discussion, at which time the Commissioners opined as to whether cannabis sales discredited the gaming industry and discussed the propriety of:

- Events on the premises of a licensed gaming establishment that cater to or promote the use, sale, cultivation, or distribution of marijuana.
- Contracting with or maintaining a business relationship with an individual or entity engaged in the sale, cultivation, or

58. NRS 372A.290.

59. <https://www.cbsnews.com/news/nevada-marijuana-law-smoking-las-vegas-tourists/>

60. <https://gaming.nv.gov/modules/showdocument.aspx?documentid=8874>.

61. <https://gaming.nv.gov/modules/showdocument.aspx?documentid=12308>.

62. *Id.*

distribution of marijuana, including vendors and landlord/tenant relationships.

- Licensees receiving financing from or providing financing to an individual, entity, or establishment that sells, cultivates, or distributes marijuana.⁶³

The NGC did not engage in any formal rulemaking at its 2017 hearing, but the GPC met to further discuss and pass a resolution providing further guidance to those approved to conduct gaming activity.⁶⁴ The GPC's determinations do not carry the weight of state law or regulation. However, the resolution does provide guidance as to how gaming regulators would view gaming licensees' involvement with the legal cannabis industry. The GPC resolved that those approved to conduct gaming activities:

- Shall not "participate in the marijuana industry"
- Shall not "contract with or maintain business relationships with or enter into landlord/tenant agreements with individuals or entities for the purpose of engaging in the sale, cultivation or distribution of marijuana"
- Shall not "receive financing from or provide financing to individuals, entities or establishments that sell, cultivate or distribute marijuana"
- Shall "continue to follow all federal direction regarding AML obligations and SAR reporting, in line with FINCEN guidance"
- Shall be allowed to "host conventions, trade shows, or similar conferences that may be related to marijuana but whose focus is primarily networking between participants...and other trade or educational activities that do not facilitate the actual possession or consumption of marijuana on a licensed property"
- Shall "take care to ensure that any events on the premises of a licensed gaming establishment do not promote illegal activities or foster incidents which might negatively impact the reputation of Nevada's gaming industry"
- Shall "conduct necessary due diligence and exercise discretion and sound judgment to prevent violations of Nevada or federal law in all business and financial activities"⁶⁵

63.

<https://gaming.nv.gov/modules/showdocument.aspx?documentid=12308>.

64.

<https://gaming.nv.gov/modules/showdocument.aspx?documentid=13216>.

65. Nevada's Gaming Policy Committee Passes A Resolution Regarding Marijuana and the Gaming Industry, *by Jennifer Gaynor, Kate Lowenhar-Fisher, Greg*

As a result of the above guidance, persons approved to conduct gaming activities are expected to avoid cannabis-related business activities. In addition, the consumption of cannabis is prohibited in gaming establishments, as is the legal delivery of cannabis or cannabis products.

SIMILARITIES IN POLICY AND PRACTICE

While both industries are susceptible to organized crime and criminal activity has been present in both gaming and cannabis; both are now strictly regulated. The participation of organized crime in Nevada's legal gaming industry has been well documented and widely depicted in entertainment media. The gaming industry has been on the brink of federal shutdown on at least two occasions, the first being when Senator Kefauver proposed a crushing 10% excise tax and the second time when Governor Grant Sawyer worked to avoid a federal raid led by Robert Kennedy and FBI Director J. Edgar Hoover.⁶⁶

Legal gaming in Nevada involved the mafia attempting to operate within the legal, newly regulated system, whereas illegal activity has not permeated the legal cannabis regulatory structure. From the outset, cannabis business licensing has required background checks, suitability requirements, and financial resources.⁶⁷ Illegal cannabis sales have been conducted by perpetrators of criminal conduct prior to and after legalization. However, when legalizing cannabis businesses in Nevada, policymakers actively rejected and avoided negative images of cannabis sales.⁶⁸ One of the primary proponents of legal cannabis, Senator Mark Hutchison (Nevada), noted that Nevada "[...] will never be Venice Beach, California [...] [with people [...] walking down the boardwalk, being sucked into facilities where doctors write prescriptions for medical marijuana. California [...] is a nightmare in terms of what [Nevada] want[s] to do."⁶⁹ Not only did Nevada create a system that

Gemignani, and Jeff Silver, citing <https://gaming.nv.gov/modules/showdocument.aspx?documentid=13216>.

66. <https://www.nvbar.org/wp-content/uploads/15-Wagering-Excise-Tax.pdf>, <https://knpr.org/show/nevada-yesterdays/2018-06-22/nevada-yesterdays>.

67. https://www.leg.state.nv.us/Session/77th2013/Bills/SB/SB374_EN.pdf.

68. <https://www.leg.state.nv.us/Session/77th2013/Minutes/Senate/JUD/Final/624.pdf>, pg. 31.

69. <https://www.leg.state.nv.us/Session/77th2013/Minutes/Senate/JUD/Final/624.pdf>, pg. 31.

would be unfriendly to crime, the cannabis industry would also have to rise above negative stereotypes created by California head shops.

The illegal cannabis market, in general, sells a similar product at a lower price. If a legal cannabis business is struggling, it may be tempted to sell its product where there is a well-worn demand through illegal distribution channels. This has happened in states where the legal market has struggled. In Oregon, “[it is] an open secret some licensed growers have funneled product to the out-of-state black market just to stay afloat.”⁷⁰ However, in the illegal gambling market, products may be the same, and pricing may not be much different either. The real difference is that the operator is typically from out of the country, and the bettor may have options to participate in gambling activities anonymously and on credit.

Consumer Protection

The state’s gaming mandate in Nevada is that it must maintain public confidence and trust through strict regulation of all persons, locations, practices, associations, and activities related to the operation of gaming establishments.⁷¹ The same language is found in the state policy for cannabis.⁷² In gaming, the mandate refers to maintaining trust that the gaming industry does not cheat patrons and is free from crime or criminal elements. In cannabis, the same language refers to the quality and safety of cannabis products. While the language is similar, the purpose and responsibilities of the policies is far different.

Barriers to Entry and Suitability

Both industries impose licensing requirements that cull would-be participants by examining their backgrounds and financial means. Cannabis establishment applicants must show evidence that they control at least \$250,000 in liquid assets.⁷³ In addition, Nevada expressly caps the number of retail stores permitted in the state.⁷⁴ Gaming licenses do not require a specific amount of assets but include the requirement that “[n]o license will be issued for use in any establishment until satisfactory evidence is presented that there is adequate financing available to pay all current obligations and, in

70. <https://apnews.com/article/cannabis-marijuana-420-legal-california-oregon-washington-ae7880387eee7dbfcfeaff563d0b211>

71. NRS 463.0129.

72. NRS 678A.005.

73. file:///Users/rianadurrett/Downloads/SB374_EN.pdf, pg. 11, file:///Users/rianadurrett/Downloads/AB533_EN%20(1).pdf, page 33.

74. NRS 678B.220

addition, to provide adequate working capital to finance the opening of the establishment.”⁷⁵

Nevada legislation requires that the initial medical dispensaries have “an appearance, both as to the interior and exterior, that is professional, orderly, dignified and consistent with the traditional style of pharmacies and medical offices.”⁷⁶

In addition to financial means, both industries require “good moral character,” although gaming has developed its process for determining good moral character more systematically and in-depth. Gaming, of course, has had many decades to develop and implement its approach to conducting suitability investigations, whereas cannabis had less than one decade. In cannabis, according to NRS 678B.200, “[w]hen determining whether to approve an application to receive a license or registration card, the Board may consider whether the applicant is: (a) A person of good character, honesty and integrity.”⁷⁷ In practice, cannabis registration cards are issued by staff and do not require CCB approval. When the CCB approves new cannabis licensees through the sale or transfer of existing establishments, there is a limited review of criminal and personal background, but this is not nearly as extensive as the reviews conducted by the GCB.

Disciplinary Action

AB 533 reflected the Governor’s Advisory Panel members’ concerns about the lack of disciplinary action against licensees. The Bill created a new structure for disciplinary action involving referral of investigations to the Attorney General’s Office and pursuit of complaints against licensees by the Attorney General’s Office.⁷⁸ This process and other aspects of the new disciplinary regime were an attempt to incorporate some aspects of the gaming model. There has been pushback from the cannabis industry, which has been expressed at CCB hearings and culminated in Senate Bill 195, known as a disciplinary action “reform” bill, which passed in the 2023 legislative

75. NGCR 3.050.

76.

https://www.leg.state.nv.us/Session/77th2013/Bills/SB/SB374_EN.pdf

77. NRS 678B.200.

78. AB 533, 2019, page 17.

session.⁷⁹ The Bill caps civil penalties and requires the CCB to apply certain mitigating factors when making decisions about disciplinary action.⁸⁰

DIFFERENCES IN POLICY AND PRACTICE

IRS Code § 280E and State Tax Rates

Gaming taxes in Nevada are quite low, with a tax rate of just 6.75% of gross gaming revenues over \$1 million, compared to other U.S. jurisdictions that have enacted up to a 51% tax rate for certain types of gambling.⁸¹ Nevada gaming companies are also not subject to Internal Revenue Service Code Code § 280E.

Cannabis industry representatives, however, have stressed that taxes imposed on cannabis are extremely high. State taxes imposed are often high, but another factor that makes the business uniquely costly and less likely to be profitable is IRS Code § 280E, which prohibits cannabis businesses from claiming standard business deductions, except on the cost of goods sold. The code states the following:

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.⁸²

Section 280E effectively increases the amount of taxes paid or tax impact compared to businesses not subject to the provision because it imposes federal taxes on gross income rather than net income (as many other businesses would pay) and prohibits standard business deductions. According to a Bloomberg Tax article published in April of 2022, the impact of Section 280E is such that:

79. *Generally*

<https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/9955/Text#>.

80.

<https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/9955/Text#>, pg. 3,7.

81. [New York Takes A Gamble With 51% Tax On Online Sports Betting \(forbes.com\)](https://www.forbes.com)

82. 26 U.S.C. § 280E.

[S]eemingly simple business decisions like choice of entity, accounting methods, and ownership structure have crucial implications for purposes of risk management. If a cannabis business is not structured carefully and thoughtfully from a tax perspective, the effect of Section 280E's disallowance of deductions can easily result in effective tax rates and tax bills equaling or exceeding the economic profits of the business, often leaving the business operating in the red.⁸³

Illegal Market and Profitability

The AGA estimates “that Americans bet more than \$ 510.9 billion a year with illegal and unregulated operators. This costs the legal industry \$ 44.2 billion in gaming revenue and state governments \$ 13.3 billion in lost tax revenue.”⁸⁴ In Nevada, for example, gaming establishments are not typically competing with unlicensed brick-and-mortar operations, although illegal online gaming operations are accessible. While both industries lose revenue to the illegal market, it is possible that the ratio of unlicensed cannabis sales to licensed sales is far greater than the corresponding ratio of illegal gaming to legal. The profitability of the cannabis business is starkly different from gaming and should be taken seriously when considering regulatory approaches.

Collection of Tax Revenue

Nevada enumerates the economic impact of gaming and cannabis as the first policy goals in the Nevada Revised Statutes (NRS) that govern each industry. When participating in the Governor's Advisory Panel, former GCB Chair Dennis Neilander stated that the primary policy goal of both areas of regulation is to collect tax revenue.⁸⁵ He expressed that revenue collection is almost 99.9% in gaming due to the speedy and severe consequence of license revocation if taxes are unpaid.⁸⁶

83. <https://news.bloombergtax.com/tax-insights-and-commentary/cannabis-under-federal-law-whats-the-fuss-about-section-280e>.

84. [Sizing the Illegal and Unregulated Gaming Markets in the U.S. - American Gaming Association](#)

85. Brin Gibson, Esq. questioning DOT Deputy Director Jorge Pupo, Nevada Governor Advisory Panel for Creation of Cannabis Compliance Board, time stamp 2:06, https://tax.nv.gov/uploadedFiles/taxnvgov/Content/Meetings/02152019094810_Old_Assembly.mp3.

86. *Id.*

Although tax revenue collection is listed as the first codified priority for cannabis regulation under NRS, the speedy and severe consequences for nonpayment of taxes have not been replicated in cannabis governance. There have been many CCB meetings in which the CCB admonishes and, in some cases, disciplines licensees for unpaid and/or late taxes.⁸⁷ No cannabis license has been revoked for late and/or unpaid taxes.

One of the main reasons for the divergence in the strictness relating to tax collection is that the GCB is in charge of tax revenue collection while the CCB is not. The Department of Taxation continues to govern revenue collection from cannabis establishments.

GOING FORWARD

Successful regulation is difficult, and attempting to measure the success of a regulation or regulatory model is challenging. From the outset of legalization, Nevada public officials and community leaders have focused on achieving the “gold standard” in cannabis regulation in the country by looking to the success of gaming regulation. However, Nevada and other states with legalized cannabis programs may need to focus more on the viability of the industry and the loss in tax revenue as a result of the myriad factors discussed above.

With regards to modeling cannabis after gaming regulation, the two industries may be too divergent—especially in size and when considering major obstacles, such as Section § 280E and the illegal cannabis market—to successfully model cannabis regulation after gaming regulation. Further, there are too many public policies and policy goals converging onto the cannabis legalization experiment in Nevada. If the state prioritizes the economy—as it purports to in the first sentence of the cannabis chapters under the NRS—then it must avoid policies and goals that conflict with this goal, such as imposing costs and taxes that are so high that the legal industry is at a significant competitive disadvantage to the illegal market. Perhaps Nevada could benefit from a reexamination of the public policy related to cannabis regulation and a determination on whether the cannabis laws that have developed since 2013 are likely to meet the policy goals.

87. Generally <https://ccb.nv.gov/public-meetings/>.
