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# New York Cannabis Applications Take Shape

*What aspiring license holders need to know*

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## Our Panel



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# Cannabis Practice

*Foley Hoag has been at the forefront of the medical and adult-use cannabis industry since the very early stages of its regulation and legalization in specific U.S. states and beyond. Our leading, full-service Cannabis Practice is comprised of attorneys with unique insight and experience to assist cannabis and cannabis-related operators and investors with all aspects of their business.*

## Awards & Accolades

**BENZINGA**

**2022 Best Cannabis Law Firm**



## Areas of Focus:

- Major mergers and acquisitions
- Formation of cannabis funds
- Corporate formation, early-stage company issues, and other business counseling
- Winning competitive licenses at the state and local level
- All phases of state and local permitting
- Regulatory compliance
- Government and public strategies
- Real estate transactions
- Intellectual property matters, including registration and defense of trademarks
- Banking and finance issues
- FDA and FTC compliance and legislative interaction
- Business and investor disputes
- Employment matters
- Labor relations and union organizing

# Today's Agenda

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- Application Guidance/FAQs
- AUCC/AUCP Transition
- ROD/ROND Transition

# Application Guidance/FAQs

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- The application opportunities are effectively capped.
  - OCM *estimates* that over 1,000 licenses will be issued, allocated as follows:
    - Retail: 500-1000
    - Microbusiness: 220
    - Indoor Cultivation (does not include AUCCs):
      - Tier 1: 20
      - Tier 2: 20
    - Processor (does not include AUCCs and AUCPs):
      - Type 1: 55
      - Type 2: 20
      - Type 3: Unlimited, reviewed on rolling basis.
    - Distributor (does not include AUCCs and AUCPs): 30

# Application Guidance/FAQs

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- The application is a lottery where you can greatly increase your chances of winning.
  - Pooling: applications for each type will be *pooled* based on:
    - License type sought.
    - SEE status.
    - REAL ESTATE and Other Factors
    - Provisional status.
    - Applicants for retail (provisional and final) split evenly between NYC and rest of State.
  - Queuing Once application window closes, applicants queued in their pools using a randomized process.
- Those not reviewed or selected must resubmit their application in future rounds.

# Application Guidance/FAQs

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- Net effective of the cap and lottery.
- SEE remains critical.
  - SEE applicants will be reviewed until the Board has issued the number of licenses allocated.
  - Qualifying as multiple SEE categories will increase an applicant's changes in the random order queuing process.
- Site control is critical.
  - REQUIRED for cultivators, processors, distributors, and non-provisional retail and microbusinesses.
  - Proximity protection: where retail/micro with site control selected, then the applicant is granted proximity protection while the applicant works towards final licensure. While higher queued application is being reviewed, all applicants who have proposed a premises nearby that would violate the proximity distances between retailers will not be permitted to move forward with the proposed premises if the higher queued applicant's location is receiving proximity protection.

# Application Guidance/FAQs

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## ■ TPIs and Disclosures

- TPI framework designed to protect the integrity of the two-tier system.
- TPIs include those who are designated as:
  - Direct or indirect financial or controlling interests (DIFCI); or
  - Passive investors (PI).
- TPIs also include those with a right to receive a profit and goods and services providers based on the (10/50/250) rule. Person deemed to have DIFCI if, over the course of a calendar year, they receive the right to or actual payment from a licensee exceeding the greater of:
  - 10% of the payor licensee's gross revenues;
  - 50% of the payor licensee's net profits; or
  - \$250,000.

# Application Guidance/FAQs

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## ■ TPIs and Disclosures

### ➤ Goods and Services Agreements.

➤ Exempt: landlords, financiers, part-time CFOs, lawyers, accountants, and other goods and services providers who do not consult on plant-touching activities.

➤ Non-exempt: includes arrangements licensees have with third-parties consulting on the licensee's cannabis related activities.

➤ Note: stacking exempt and non-exempt agreements can render the entire economic relationship non-exempt.

➤ Distinction between exempt and non-exempt based on potential for control or influence.

➤ Non-exempt service providers, such as those providing inventory management or advisory services, can more easily impact how a licensee conducts business with other licensees, even if not making those decisions for the licensee or touching cannabis or cannabis product directly.

➤ Person may provide exempt or non-exempt goods or services for compensation to a licensee in which they are a TPI, i.e., leasing property or providing debt capital to that licensee.

# Application Guidance/FAQs

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## ▪ TPIs and Disclosures

- Remember that TPIs include not only the beneficial owner, but also their spouses.
- Passive investors under 10% (private company) / 5% (public company) need not be disclosed
- Though a passive investor is a TPI, mock application identifies that:
  - Only “non-passive investor True Parties of Interest must be disclosed by the Applicant.
  - HOWEVER, certain passive investors must also be disclosed, including:
    - a) Owners with greater than 10% proportional aggregate ownership in a privately held company; or
    - b) Owners with greater than 10% proportional aggregate ownership in a privately held entity; or
    - c) Owners with greater than 5% proportional aggregate ownership in a publicly traded entity; or
    - d) Owners who contribute to the applicant’s SEE qualification

# AUCC/AUCP Transition

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- Don't sleep on this round! AUCCs and AUCPs expire on June 30, 2024.
- AUCCs: can transition to an adult-use cultivator, Type 3 processor, and distributor, or a microbusiness license.
  - Only AUCCs seeking to transition to a microbusiness license may pursue a provisional license.
  - AUCC applying for anything other than Type 3 will be queued and reviewed with the general applicant pool.
- AUCPs can transition to an adult-use processor and distributor.
- Ownership/Entity changes.
  - Original hemp grower/processor must remain the majority owner.
  - Can make changes to structure or even apply as a new entity provided the above is met.

# ROD/ROND Transition

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- NOT an application! BUT, must submit documentation acceptable to OCM
- NOT subject to the October 4-December 4 application window! BUT OCM began accepting submissions on a rolling basis commencing on October 4.
- Threshold requirements:
  - Good standing.
  - Four (4) operational medical dispensing sites.
  - Submission of:
    - Community Impact Plan.
    - Part 125 Plans.
    - Any other information required by the Office.

# ROD/ROND Transition

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- Community Impact Plan – plan for how the RO will benefit communities and individuals from communities that were disproportionately impacted by the enforcement of cannabis prohibition, including:
  - Which communities.
  - What benefits will be provided (workforce development, community resources, education, and other community building programs).
  - Scale and size of the target beneficiaries.
  - Plan for implementation (actions, activities, and engagements + frequency).
  - Written agreements/estimated expenses/track record.
- OCM is emphasizing specific details and examples for all of the above provisions.
- Must be measurable in order to track and evaluate performance and implementation.

# ROD/ROND Transition

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- Part 125 Plans.
  - Energy and environmental impact (utility/water/greenhouse gas emissions/sustainable packaging program).
- Medical prioritization plan.
  - Must ensure adequate supply of a variety of cannabis products and an uninterrupted availability of medical cannabis.
  - Assessing cultivation and manufacturing volume data from the last twelve (12) months.
  - Determination of the minimum amount of canopy space that will be dedicated to the cultivation of medical cannabis flower.
  - Required to assess and update plans on an ongoing basis to reflect changes in medical patient demand.
  - If ROD – assessment of minimum amount of shelf space for specified categories of products.
  - If ROD – plan to dedicate 50% of shelf space through 1/1/25



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Questions?

# Thank You



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