



UNCERTAIN POSITIONS VS. 280E COMPLIANCE: THE COST OF DOING CANNABIS



BAYDOUN

In 2024, the Michigan adult cannabis market reached \$3.29 billion in sales, a new record¹. Yet, according to *Crain's Business Detroit*, cannabis retailers in Michigan, and across the nation, are on the brink of financial ruin². So, why are so many participants in this booming industry completely broke? "Federal illegality is far from the only reason Michigan's industry is tanking, but it's certainly foundational," says Lance Boldrey, JD, member, Dykema. "The impact of IRC Section 280E, especially on retail, really can't be overstated — a business being taxed at a rate of 21% on revenues less cost of goods sold is only sustainable if it has high margins."



BOLDREY

Unfortunately, Michigan's cannabis market is at capacity, and likely headed for correction. MICPA member Todd Tigges, CPA, managing director, UHY LLP, explains, "The main challenge in the Michigan market is the over saturation in terms of licenses, both on the retail and grow, or manufacturing, side. This oversaturation has led to supply surpassing demand which continues to drive wholesale prices down." He adds, "The competition between retailers for market share has also contributed to lower prices, which has significantly eroded margins at all levels. Further, the larger retail groups have established vertical supply chains to further cut costs, creating more downward pricing pressure on growers and processors alike. Also consider the outdoor harvests, which typically hit the market in the fall, to further add to the oversupply and you have the perfect storm for some of the thinnest gross margins in industry. When you couple that with the non-deductibility of IRC 280E expenses, and the ever-increasing general overhead costs, many of the state's licensees find themselves in a negative cashflow position."



LIEBERMAN

Indeed, Bridge Michigan reports that statewide sales of cannabis are down 11% from August of last year. Moreover, the price of an ounce declined 70%

over the past four years, from a high of \$200 in 2021 to as low as \$63 in June of 2025³. Declining prices and broad taxation are further compounded by the industry's banking challenges. Boldrey explains, "While all of our cannabis clients have bank accounts with cannabis-friendly institutions, there's still a paucity of banks that will extend commercial loans. The cost of capital is extraordinarily high and, in many cases, absent. Cannabis companies' inability to enter bankruptcy is a huge problem for distressed operators, lenders and other creditors. And, of course, illegality makes insurance scarcer, and expensive."

With bankruptcy off the table, some retailers are eyeing a high-profile case which emerged two years ago in Massachusetts following a lawsuit brought by Boies Schiller Flexner LLP, a law firm based in New York City, which claims the Controlled Substances Act is unconstitutional. According to reports, the overall goal is to escalate the lawsuit all the way to the Supreme Court. Some cannabis retailers are using the case as justification to take uncertain tax positions (UTPs) in "good faith" to claim 280E exemption, betting that they will either be justified or that the cost of noncompliance will ultimately be more affordable than the cost of secured private loans⁴.

Richard Lieberman, JD, LLM, senior counsel, Dykema, explains, "Waiver of federal tax penalties generally turns on whether a taxpayer acted with reasonable cause and good faith. It is not clear how lack of knowledge or reliance on advice from a return preparer could be supported in the case of Section 280E. The IRS interest rate is generally determined by the Federal short-term rate plus 3%. Additionally, in the case of corporations, an increased rate applies for underpayments exceeding \$100,000 for a particular period. The current interest rate is around 9% for large corporate underpayments and is compounded daily. It should also be noted that interest applies to penalties as well." Ultimately, he says, "Whether the cost of noncompliance is financially beneficial depends on both the cost of alternative financing plus any legal fees required to defend the tax position, which can be substantial."

From the CPA perspective, Lieberman references the *AICPA Statements on Standards for Tax Services and Treasury regulations regarding uncertain positions*⁴. "A return preparer is generally precluded from signing a tax return under certain conditions. Moreover, depending on whether a return position is disclosed or nondisclosed, a return preparer must have a certain level of confidence that the position will be sustained on its merits before reporting it." He adds, "A return preparer is more than a rubber stamp for a taxpayer seeking to advance a return position that fails to meet the required reporting standards. As such, given the existing judicial and administrative history associated with Section 280E, a reasonable question is whether a competent and ethical return preparer would sign the jurat on a return ignoring Section 280E, whether disclosed or nondisclosed."

Even so, MICPA member Ali Baydoun, CPA, managing director, UHY LLP, says CPAs are divided on the validity of the legal premise large industry players like Trulieve are adopting in their tax positions. "Certain professional advisors are not convinced that the opinion will withstand scrutiny of the tax courts and have shied away from even reporting such a deduction, let alone filing amended returns, for fear that even the Schedule UTP may not protect them from possible preparer penalties." On the other end other of the debate, he adds, "Others view that such legal opinions provide a compelling

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— LIEBERMAN

argument... and the Schedule UTP disclosure provides the adequate coverage to shield the tax professional from any IRS or legal repercussions associated with preparing a return using that position. The IRS has made it clear that they believe that 280E applies to all cannabis companies until it is no longer listed as a Schedule 1 controlled substance."

Overall, Tigges states, "This is not a viable strategy...willful failure to pay taxes can result in significant penalties, including criminal prosecution." He emphasizes legal alternatives. "Businesses that are filing in accordance with 280E, but cannot afford paying the full tax, should make an effort to pay as much as they can and at least pay the normal tax burden that would have been assessed without 280E or arrange for some sort of negotiated payment plan with the IRS." He adds, "Business that are financing their expansion or paying their owners at the expense of the IRS may think that they are skirting the system but, in the long term, they can face serious consequences."

The same goes for preparers, Lieberman says. "Be very careful, and don't rush into taking a return position at the urging of a client simply because peers are allegedly taking a similar position. The primary risk for a return preparer is losing the ability to practice before the IRS or the loss or suspension of their professional license... in the current environment, it would seem best to take a wait and see approach."

Join the MICPA for further discussion on this and other topics in Michigan's cannabis industry at the Cannabis Summit on December 9, 2025 at the MSU Management Education Center in Troy.



1. Walsh, Dustin. "Weed is Cheaper Than Ever..." *Crain's Detroit*. 13 Jan. 2025. Accessed 15 Aug. 2025.
2. Schroyer, John. "Cash-strapped Michigan Weed Businesses..." *Crain's Detroit*. 27 May 2025. Accessed on 15 Aug. 2025.
3. Wilkinson, Mike. "Marijuana Sales Near \$10 Billion in Michigan..." *Bridge Michigan*. 27 Nov. 2024. Accessed on 18 Aug. 2025.
4. "Statement on Standards for Tax Services No. 1-4." *AICPA*. 01 Jan. 2024. Accessed on 18 Aug. 2025.