

# Marijuana Legalization in Colorado: Learned Lessons

---

*David Blake\* and Jack Finlaw\*\**

In 2012, proponents of marijuana legalization gathered enough signatures to place an amendment to the Colorado Constitution on the statewide ballot. The initiated measure was marketed as “The Regulate Marijuana Like Alcohol Act of 2012” but was commonly known as Amendment 64.<sup>1</sup> Proponents asked Colorado voters to launch a great social experiment: the legalization of marijuana by the State of Colorado despite the substance’s federal illegality.<sup>2</sup> On November 6, 2012, fifty-five percent of Colorado voters approved Amendment 64.<sup>3</sup> It is now codified in the Colorado Constitution as Article XVIII, Section 16.<sup>4</sup>

Amendment 64 did not pass without significant political opposition. Democratic Governor John W. Hickenlooper, Republican Attorney General John Suthers, Denver Mayor Michael Hancock and numerous other officials in Colorado campaigned against decriminalizing adult use of marijuana for recreational purposes. However, the anti-legalization campaign had very lit-

---

\* David Blake is Deputy Attorney General for Legal Policy and Government Affairs in the Colorado Department of Law. Prior to joining the Colorado Department of Law in 2010, Mr. Blake served in a variety of roles with the U.S. Attorney General’s Office between 1996 and 2010. His assignments there included working for the Office of Legislative Affairs and in the National Security Division, serving as a Special Assistant U.S. Attorney in the District of Columbia, acting as counsel to the Guantanamo Detainee Review Task Force, and working as a trial attorney in the Civil Division. Mr. Blake is a 2007 graduate of the George Mason University School of Law and a 1996 graduate of the Virginia Polytechnic Institute and State University.

\*\* Jack Finlaw is Chief Legal Counsel for Colorado Governor John W. Hickenlooper. Prior to joining the Governor’s Office in 2011, Mr. Finlaw held a series of appointed leadership positions in Denver city government between 2003 and 2011. Mr. Finlaw was a corporate and securities lawyer in the cable television industry from 1984 until 2002. He is a 1981 graduate of the University of Denver College of Law and a 1978 graduate of the Georgetown University School of Foreign Service. The views expressed in this article are the authors’ only and should not be taken to reflect the views of any Colorado governmental department or official.

<sup>1</sup> See LEGIS. COUNCIL COLO. GEN. ASSEMB., 68-614, 1st Sess., at 7 (2012), available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251822971738&ssbinary=true>; COLO. CONST. art. XVIII, § 16(3)(d).

<sup>2</sup> 21 U.S.C. § 812(c)(10) (2012).

<sup>3</sup> Amendment 64 received about 60,000 more votes than did President Obama among Colorado voters. *Compare Presidential Electors*, COLO. SEC’Y OF STATE, <http://www.sos.state.co.us/pubs/elections/Results/Abstract/2012/general/president.html> (last visited April 20, 2014) (showing 1,323,102 votes for President Obama), *with Amendments and Propositions*, COLO. SEC’Y OF STATE, <http://www.sos.state.co.us/pubs/elections/Results/Abstract/2012/general/amendProp.html> (select drop-down option for Amendment 64) (last visited April 20, 2014) (showing 1,383,140 yes votes for Amendment 64).

<sup>4</sup> By proclamation of the Governor it became law in Colorado on December 10, 2012. Colo. Exec. Order No. D 2012-052 (Dec. 10, 2012), available at <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=GovHickenlooper%2FCBONLayout&cid=125163768965&pagename=CBONWrapper>.

tle momentum until a few weeks before Election Day. In a presidential election cycle, political attention was directed elsewhere, and many Coloradans thought the measure would simply fail. After all, marijuana was illegal under federal law.

There were many reasons to oppose Amendment 64. For starters, decriminalization raised federal preemption concerns. State and local governments and their employees helping to license marijuana establishments could technically be aiding and abetting criminal acts and therefore be subject to federal prosecution.<sup>5</sup> Similarly, any property and assets related to marijuana establishments, including any state and local taxes raised thereon, could be subject to federal asset seizure laws.<sup>6</sup> In addition to conflicting with the U.S. Department of Justice, passage of Amendment 64 could potentially run afoul of laws in neighboring states, where marijuana remains illegal.

Opponents also forecasted serious health consequences. They argued marijuana use would increase, addiction rates would rise, and treatment and societal costs—such as drug treatment and prevention programs, emergency room visits, crime, health care, traffic accidents, and school dropout rates—would skyrocket. Critics claimed marijuana was a gateway drug and that Colorado would witness increased use of more dangerous drugs, especially in youth populations. Opponents claimed that regular marijuana use by school-aged children negatively affects their school attendance, concentration, and brain development, thus impairing their academic achievement.

Detractors also argued that Amendment 64 would embed a complex new regulatory regime in the state constitution. This would limit the ability of the state legislature and executive agencies to address unforeseen consequences or clarify ambiguities through legislative or regulatory processes. Indeed, any changes to, or clarifications of, defects in the new law would require additional statewide constitutional initiatives—a difficult, wasteful, and time-consuming process required for even the simplest fix. Finally, Amendment 64 risked creating an unfunded regulatory mandate that would

---

<sup>5</sup> See Letter from Jenny A. Durkan, U.S. Att’y, W.D. Wash., and Michael C. Ormsby, U.S. Att’y, E.D. Wash., to Hon. Christine Gregoire, Governor, State of Wash. (Apr. 14, 2011), available at <http://reason.com/assets/db/13050453232855.pdf>.

<sup>6</sup> In hindsight, and with the advent of the “new” Cole Memo issued by the U.S. Department of Justice in August 2013, many of the issues related to federal preemption have not yet materialized. See Memorandum from James Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, to All U.S. Att’ys, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013) [hereinafter Cole Memo], available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. Federal enforcement remains a very real concern, though, with the potential for federal enforcement omnipresent. For example, the DEA has conducted raids of marijuana retail outlets, see Jeremy Meyer et al., *Feds Raid Denver-area Marijuana Dispensaries, Grow Operations*, 2 *Homes*, DENV. POST (Nov. 22, 2013, 1:54 PM), [http://www.denverpost.com/breakingnews/ci\\_24570937/feds-involved-raid-at-denver-area-marijuana](http://www.denverpost.com/breakingnews/ci_24570937/feds-involved-raid-at-denver-area-marijuana), and forfeited property used by marijuana entrepreneurs, see U.S. Att’y’s Office, Dist. of Colo., *U.S. Attorney’s Office Announces a Federal Forfeiture Action Against a Marijuana Warehouse and Related Marijuana Funds* (Mar. 10, 2014), available at <http://www.justice.gov/usao/co/news/2014/mar/3-10-14.html>.

negatively impact the state's general fund, as it did not impose any new sales or excise taxes on retail marijuana.

The proponents of Amendment 64, however, were very organized. They rallied around the common-sense theme of comparing marijuana to alcohol, developed solid political support, and targeted certain populations with more refined messaging. Proponents addressed young adults with the marijuana-like-alcohol theme<sup>7</sup> and told soccer moms that taxing marijuana would supplement depleted education budgets.<sup>8</sup> To appeal to the sensibilities of Tea Party and libertarian conservatives, they cited the “war on drugs” as an example of preventable government waste, ill-advised governmental intrusion, and misguided government policy.<sup>9</sup> It worked. Advocates received backing from wealthy financiers and capitalized on small donor finances, outraising opponents of Amendment 64 nearly four to one.<sup>10</sup>

It was a perfect storm of impotent opposition coupled with organized, motivated, and well-funded support. In addition, many voters were focused on the 2012 presidential race between Barack Obama and Mitt Romney and remained largely uninformed about down-ticket items like Amendment 64. Between the highly effective, targeted campaign and voter unawareness at large, legalization passed handily in Colorado. And once Colorado legalized marijuana, it seemed likely that many more states could follow suit.<sup>11</sup>

---

<sup>7</sup> In essence, proponents likened the drug of alcohol to the drug marijuana and claimed that marijuana was less, or certainly no more, dangerous to society as a whole than alcohol. See, e.g., Eric Dolan, *Colorado Marijuana Legalization Campaign Runs First TV Ad*, RAW STORY (May 10, 2012, 6:34 PM), <http://www.rawstory.com/rs/2012/05/10/colorado-marijuana-legalization-campaign-runs-first-tv-ad/>. They acknowledged both were addictive but rejected that either was a “gateway” drug to harsher illegal drugs. See, e.g., *Frequently Asked Questions*, CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL, <http://www.regulatemarijuana.org/s/frequently-asked-questions> (last visited Apr. 16, 2014). They frequently compared Prohibition Era violence to the violence associated with drug trafficking and distribution. *Id.* Statistics about deaths due to alcohol were propounded as proof that marijuana was less dangerous—no documented case of death from marijuana overdose is known to the authors. See, e.g., Jen Christensen & Jacque Wilson, *Is Marijuana as Safe as—or Safer Than—Alcohol?*, CNN (Jan. 22, 2014, 11:19 AM), <http://www.cnn.com/2014/01/20/health/marijuana-versus-alcohol/>.

<sup>8</sup> See Phillip Smith, *Colorado's Amendment 64 Heads for the Home Stretch*, STOPPEDDRUGWAR.ORG (Sept. 19, 2012, 5:59 PM), [http://stopheddrugwar.org/chronicle/2012/sep/19/colorados\\_amendment\\_64\\_heads\\_hom](http://stopheddrugwar.org/chronicle/2012/sep/19/colorados_amendment_64_heads_hom).

<sup>9</sup> See, e.g., *Bolster Colorado's Economy*, CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL, <http://www.regulatemarijuana.org/economic-impact>.

<sup>10</sup> See John Ingold, *Breakdown of Amendment 64 Campaign-Finance Report*, DENV. POST: THE SPOT (Oct. 21, 2012, 8:31 AM), <http://blogs.denverpost.com/thespot/2012/10/21/break-downs-amendment-64-campaignfinance-reports/84483/>.

<sup>11</sup> In 2012, the State of Washington also decriminalized recreational marijuana. Wash. Sec'y of State, Elections Div., Initiative Measure No. 502, I-2465.1/11 (2011), available at [http://sos.wa.gov/\\_assets/elections/initiatives/i502.pdf](http://sos.wa.gov/_assets/elections/initiatives/i502.pdf). Unlike Colorado's legalization laws, which are embedded in the state constitution and can only be amended by a majority vote of the people, Washington State's legalization laws are statutory and can be amended over time by Washington State's legislature. See *id.* As of the drafting of this paper, some twenty states plus the District of Columbia have some form of legalized marijuana, mostly “medical marijuana.” *Which States Have Legalized Medical Marijuana?*, USA TODAY (Jan. 6, 2014, 4:58 PM), <http://www.usatoday.com/story/news/nation-now/2014/01/06/marijuana-legal-states-medical-recreational/4343199/>. Decriminalization of medical marijuana, where it is currently

In this piece, we caution policymakers and marijuana advocates to tread lightly when it comes to creating a commodities market for the legal sale of marijuana. Establishing a complex regulatory regime overnight is a massive endeavor. And given that the commodity is clearly illegal under federal law, every policy decision will become a never-ending risk assessment.

Part I provides history on the implementation of Amendment 64 in Colorado. This is important background because it provides a model that worked effectively and cheaply. At the same time, Colorado's implementation illustrates many unanticipated, ongoing challenges. Part II discusses three critical policy issues that Colorado has faced vis-à-vis the federal government: enforcement of the Controlled Substances Act; access to banking for marijuana-based businesses; and the need for federal tax reform that would treat marijuana businesses like any other small business. Part III discusses policy issues traditionally left to the state, including Colorado's own marijuana tax revenue policies as well as drugged driving and prevention programs. Part IV discusses policies Colorado has enacted to encourage cooperation on the local level: a local opt-out option and time and place restrictions.

## I. ADOPTION AND IMPLEMENTATION OF AMENDMENT 64

With passage of Amendment 64, personal use of marijuana is now permitted under Colorado law for adults twenty-one years of age or older. Adult residents of Colorado<sup>12</sup> can possess, use, purchase, and transport up to one ounce or less of marijuana, and possess and grow up to six marijuana plants in their home.<sup>13</sup> There are several limits to permitted personal use and grows, however, which will be discussed further below.<sup>14</sup> Before delving

---

banned, is being considered in at least fourteen new states. Rick Lyman, *Pivotal Point is Seen as More States Consider Legalizing Marijuana*, N.Y. TIMES, Feb. 26, 2014, at A1. Non-medical use of marijuana is likely to advance in Alaska this summer. *Id.* At least seventeen states have introduced bills or initiatives to legalize marijuana. *Id.* The District of Columbia recently decriminalized simple possession for any purpose. Aaron C. Davis, *D.C. Council Votes to Eliminate Jail Time for Marijuana Possession*, WASH. POST (Mar. 5, 2014, 11:58 AM), [http://www.washingtonpost.com/local/dc-politics/dc-council-eliminates-jail-time-for-marijuana-possession-stepping-to-national-forefront/2014/03/04/df6fd98c-a32b-11e3-a5fa-55f0c77bf39c\\_story.html](http://www.washingtonpost.com/local/dc-politics/dc-council-eliminates-jail-time-for-marijuana-possession-stepping-to-national-forefront/2014/03/04/df6fd98c-a32b-11e3-a5fa-55f0c77bf39c_story.html).

<sup>12</sup> Adults twenty-one years and older visiting from another state may only purchase one-quarter ounce of marijuana at a time.

<sup>13</sup> Amendment 64 is commonly credited with "legalizing" marijuana. This is a misnomer. Marijuana remains a Schedule I illegal narcotic under the Colorado criminal code and any person not in strict compliance with the state's constitution, statutes, and regulations can be prosecuted. Colo. Rev. Stat. Ann. § 18-18-406 (West 2013). Amendment 64 is more accurately described as having decriminalized under state law growing, sale, purchase, and consumption of small amounts of marijuana and marijuana products. COLO. CONST. art. XVIII, § 16(3)(d). Nevertheless, throughout this paper, legalization and decriminalization are used interchangeably.

<sup>14</sup> For example, home grows must be in an enclosed, locked space and cannot be conducted openly or publicly, and marijuana from home grows cannot be sold (although up to an ounce can be gifted to another adult). COLO. CONST. art. XVIII, § 16(3)(d). Furthermore,

into the substance of the law, however, it is important to recount Colorado's path to decriminalization to provide a sense of the immense political and legal effort required for legalization.

*History: Precursor to Amendment 64*

All medical and illicit drugs in the United States are subject to the Controlled Substances Act (CSA).<sup>15</sup> This federal legislation was signed into law in 1970 and regulates the manufacturing, importation, possession, use, and distribution of medicines and illicit drugs. The CSA categorizes various drugs by the use of "schedules," which rate the utility and danger of various substances. The Drug Enforcement Administration (DEA) and Food and Drug Administration (FDA) jointly enforce the CSA. Marijuana, regardless of its form, is classified as a Schedule I substance. A Schedule I substance (1) has a high potential for abuse; (2) has no currently accepted medical use; and (3) may be unsafe even under a doctor's supervision.<sup>16</sup>

Before Colorado adopted Amendment 64, it had permitted the use of medicinal marijuana. In 2000, following California's lead,<sup>17</sup> Colorado voters supported a citizen initiative modifying the state constitution to decriminalize certain amounts of marijuana for "medicinal" purposes. Colorado's medical marijuana amendment is referred to as Amendment 20.<sup>18</sup>

Amendment 20 did a couple of important things. First, it mandated a government-regulated scheme by which persons with a "debilitating medical condition" could obtain a government-issued identification card (a "red card") authorizing individual possession and consumption of no more than two ounces of marijuana and no more than six marijuana plants.<sup>19</sup> Second, Amendment 20 created an affirmative defense for any cardholder who was arrested and prosecuted.<sup>20</sup> However, Amendment 20 failed to create a lawful distribution network.

Almost nine years after the passage of Amendment 20, roughly 5000 people had taken advantage of the privilege to obtain a red card.<sup>21</sup> However, in October 2009, the U.S. Department of Justice issued the "Ogden Memo," a public memorandum from U.S. Deputy Attorney General David W. Ogden

---

marijuana cannot be consumed "openly and publicly" or in a manner that endangers others. *Id.*

<sup>15</sup> See 21 U.S.C. §§ 801–904 (2012).

<sup>16</sup> See 21 U.S.C. § 812 (2012) (for definition of Schedule I substance and classification of marijuana as Schedule I substance).

<sup>17</sup> California was the first state in the country to allow for medical marijuana with the adoption of Proposition 215 in 1996. Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 5 (2013).

<sup>18</sup> COLO. CONST. art. XVIII, § 14.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

<sup>21</sup> In January 2009, 5051 registry cards had been issued by the Colorado Department of Public Health and the Environment (CDPHE). *Medical Marijuana Program Update (as of January 31, 2009)*, CDPHE (Mar. 4, 2011), <http://www.colorado.gov/cs/Satellite/CDPHE-CHEIS/CBON/1251593017044> (follow "Archive" hyperlink; then follow "2009: January" hyperlink).

to each of the ninety-four U.S. Attorneys, wherein Ogden announced a federal policy on state-authorized medical marijuana.<sup>22</sup> The memorandum deprioritized marijuana prosecutions of persons in “clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”<sup>23</sup> The Ogden Memo instantly shifted the risk assessment for the sale of marijuana from treacherous to *de minimis*. In August 2010, the number of Colorado red card-approved registrants exceeded six figures.<sup>24</sup> Seventy percent of the registrants were male, more than half lived in the Denver metropolitan area, and ninety-four percent had the chronic illness of “severe pain.”<sup>25</sup> Entrepreneurs came out of the shadows and rented strip mall storefronts throughout Colorado to meet the demand. Persons considered “drug dealers” the night before became “small business owners” by morning; some who never used marijuana saw the opportunity to start a business with seemingly unlimited growth potential. Soon, there were more marijuana shops in Denver than there were Starbucks coffee shops.<sup>26</sup> There was no turning back. An entirely unregulated network had taken root.

Public outcry over the growing unregulated medical marijuana industry peaked in 2010. The Colorado General Assembly responded by passing two hallmark pieces of legislation: House Bill 1284 (HB10-1284) and Senate Bill 109 (SB10-109). SB10-109 focused mostly on regulating the role of doctors and caregivers in the new market.<sup>27</sup> It stipulated how medical professionals in Colorado could make recommendations for medical marijuana,<sup>28</sup> clarified patient privacy and other provisions, and elucidated the Colorado Department of Public Health and Environment (CDPHE) program for managing issuance of red cards.<sup>29</sup> HB10-1284 authorized and regulated

---

<sup>22</sup> Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Justice, to Selected U.S. Att’ys, *Investigations and Prosecutions in States Authorizing the Use of Medical Marijuana* (Oct. 19, 2009), available at <http://blogs.justice.gov/main/archives/192>.

<sup>23</sup> *Id.*

<sup>24</sup> In August 2010, there were 103,468 registrants for medical marijuana. *Medical Marijuana Program Update (as of August 31, 2010)*, CDPHE (Aug. 31, 2010), <http://www.colorado.gov/cs/Satellite/CDPHE-CHEIS/CBON/1251593017044> (follow “Archive” hyperlink; then follow “2010: August” hyperlink).

<sup>25</sup> *Id.* Chronic pain remains the primary justification for red-card acquisition. In November 2013, more than a year after legalization under Amendment 64, there are more than 110,000 registrants and of those, more than ninety-four percent claim severe pain as their chronic illness. *Medical Marijuana Program Update (as of November 30, 2013)*, CDPHE (Nov. 30, 2013), <http://www.colorado.gov/cs/Satellite/CDPHE-CHEIS/CBON/1251593017044> (follow “Archive” hyperlink; then follow “November 2013 statistics” hyperlink).

<sup>26</sup> Christopher N. Osher, *As Dispensaries Pop Up, Denver May Be Pot Capital, U.S.A.*, DENV. POST (Jan. 21, 2011, 12:41 PM), [http://www.denverpost.com/ci\\_14112792](http://www.denverpost.com/ci_14112792).

<sup>27</sup> See S.B. 101-09, 67th Gen. Assemb., 2nd Reg. Sess. (Colo. 2010).

<sup>28</sup> See *id.* Licensed physicians cannot write prescriptions for marijuana without violating DEA regulations and therefore exposing them to forfeiture of their DEA license to issue prescriptions of CSA controlled substances. See *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002) (“[F]ederal policy declared that a doctor’s ‘action of recommending or prescribing Schedule I controlled substances is not consistent with the ‘public interest’ (as that phrase is used in the federal Controlled Substances Act)’ and that such action would lead to revocation of the physician’s registration to prescribe controlled substances.”).

<sup>29</sup> See S.B. 101-09, 67th Gen. Assemb., 2nd Reg. Sess. (Colo. 2010).

the growth, distribution, and sale of marijuana.<sup>30</sup> This policy determination was critical. For the first time, a state legislature directed a state government agency to issue licenses to private entities to grow, manufacture, and sell illicit drugs in blatant disregard of federal law.

Despite, or perhaps because of, Colorado's medical marijuana industry boom,<sup>31</sup> Amendment 64 passed on November 6, 2012. The well-established statewide marijuana distribution infrastructure created by HB10-1284 and a proven market of consumers were undoubtedly important factors as to why legalization proponents targeted Colorado. The fact that the state was perceived to have successfully regulated the medical marijuana industry may also be one of the main reasons why voters chose to permit the growth and sale of marijuana for non-medical purposes.

*Step 1: Governor's Task Force on Amendment 64*

Governor Hickenlooper, while disappointed with the outcome, embraced the new reality and moved quickly to implement the citizens' will to the best of the state's ability. In early December 2012, faced with the challenge of complying with the newly amended state constitution, the Governor established the Amendment 64 Implementation Task Force ("Task Force").<sup>32</sup> The Task Force was charged with "identify[ing] the legal, policy, and procedural issues that must be resolved, and to offer suggestions and proposals for legislative, regulatory, and executive actions that need to be taken, for the effective and efficient implementation of Amendment 64."<sup>33</sup> The Task Force convened for the first time in December 2012 with representatives from the executive and legislative branches of state government, the Amend-

---

<sup>30</sup> See H.B. 10-1284, 67th Gen. Assemb., 2nd Reg. Sess. (Colo. 2010).

<sup>31</sup> In June 2011, the CDPHE registry reported almost 130,000 registrants. *Medical Marijuana Program Update (as of June 30, 2011)*, CPDHE (June 30, 2011), <http://www.colorado.gov/cs/Satellite/CDPHE-CHEIS/CBON/1251593017044> (follow "Archive" hyperlink; then follow "June, 2011 MMR Statistics" hyperlink). As of December 2013, nearly a quarter million Coloradans had applied at some point since medical marijuana had been approved to the registry. *Medical Marijuana Program Update (as of December 31, 2013)*, CPDHE (Dec. 31, 2013), <http://www.colorado.gov/cs/Satellite/CDPHE-CHEIS/CBON/1251593017044> (follow "Archive" hyperlink; then follow "December 2013 statistics" hyperlink).

<sup>32</sup> Exec. Order No. B2012-004, TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64 (Colo. 2013) [hereinafter TASK FORCE REPORT]. The Task Force adopted the following guiding principles for its work: 1) "Promote the health, safety, and well-being of Colorado's youth," 2) "Be responsive to consumer needs and issues," 3) "Propose efficient and effective regulation that is clear and reasonable and not unduly burdensome," 4) "Create sufficient and predictable funding mechanisms to support the regulatory and enforcement scheme," 5) "Create a balanced regulatory scheme that is complementary, not duplicative, and clearly defined between state and local licensing authorities," 6) "Establish tools that are clear and practical, so that interactions between law enforcement, consumers, and licensees are predictable and understandable," 7) "Ensure that [Colorado's] streets, schools, and communities remain safe," 8) "Develop clear and transparent rules and guidance for certain relationships, such as between employers and employees, landlords and tenants, and students and education institutions," and 9) "Take action that is faithful to the text of Amendment 64." *Id.* at 7.

<sup>33</sup> *Id.* at 119.

ment 64 campaign, the medical marijuana industry, marijuana consumers, the criminal defense bar, the Colorado Attorney General's Office, Colorado's district attorneys, law enforcement, academia, the medical community, employers, employees, and Colorado's cities and counties.<sup>34</sup>

In a mere three months, the Task Force developed a comprehensive framework for the legislation and regulations needed to implement Amendment 64.<sup>35</sup> The Task Force delivered its findings in a 165-page report containing seventy-three distinct recommendations, but several issues remained unresolved.

### *Step 2: Legislating Illegal Legalization*

In response to the Task Force report, the Colorado General Assembly formed a special, bipartisan joint committee of members of Colorado's House and Senate to hold hearings to craft legislation. Three bills were drafted. House Bill 1317 (HB13-1317) and Senate Bill 283 (SB13-0283) incorporated most of the Task Force recommendations, including the framework for regulating retail sales of recreational marijuana,<sup>36</sup> while House Bill 1318 (HB13-1318) referred a ballot question to Colorado voters in November 2013 asking them to approve a fifteen percent excise tax on recreational marijuana and a ten percent recreational marijuana sales tax.<sup>37</sup> Committees of each house and hundreds of floor amendments further revised these three measures.<sup>38</sup> The Colorado General Assembly adopted the final three bills constituting Amendment 64's enabling legislation in early May 2013, and Governor Hickenlooper signed them into law on May 28, 2013.<sup>39</sup> Other adopted legislation addressed drugged driving, legalization of industrial hemp, a unique marijuana-related income tax provision, and a good business participation program.<sup>40</sup>

### *Step 3: Robust Regulations and More Working Groups*

Amendment 64 mandated the establishment of a regulatory scheme for the cultivation, harvesting, processing, packaging, display, and sale of marijuana.<sup>41</sup> Amendment 64 envisioned a scheme in which retail stores, infused product manufacturers, and grow operations would be licensed by the state and local governments.<sup>42</sup> The law required the state to begin accepting and

---

<sup>34</sup> *Id.* at 4–5.

<sup>35</sup> *Id.* at 9–14.

<sup>36</sup> See H.B. 13-1317, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); S.B. 13-0283, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013).

<sup>37</sup> H.B. 13-1318, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013).

<sup>38</sup> 69th Gen. Assemb., Summarized History for Bill Number H.B. 13-1318 (Colo. 2013).

<sup>39</sup> Office of Gov. John Hickenlooper, *Gov. Hickenlooper Signs Numerous Bills* (May 28, 2013), <http://www.colorado.gov/cs/Satellite/GovHickenlooper/CBON/1251642877511>.

<sup>40</sup> *Id.*

<sup>41</sup> COLO. CONST. art. XVIII, § 16.

<sup>42</sup> *Id.* § 16(4).



processing applications for licenses by October 1, 2013, and to begin issuing licenses by January 1, 2014.<sup>43</sup> To ensure purchaser privacy, a provision stipulated that the government could not compel industry licensees to maintain personal information of consumers.<sup>44</sup>

Following passage of the enabling legislation, the Colorado Department of Revenue (DOR) had only months to promulgate rules governing businesses that cultivate and sell retail marijuana. The DOR adopted emergency regulations and began to consult with a broad range of stakeholders on the minutiae necessary for implementation. The first set of emergency rules was adopted on July 1, 2013.<sup>45</sup>

Immediately after adopting the emergency rules, the Department of Revenue convened five representative groups to provide input and substantive suggestions regarding proposed rules governing retail marijuana establishments and medical marijuana businesses in Colorado.<sup>46</sup> The working groups discussed the following diverse set of issues: Licensing, Licensed Premises, Transportation, and Storage; Licensed Entities and Inventory Tracking; Record Keeping, Enforcement and Discipline; Labeling, Packaging, Product Safety and Marketing; and Medical Differentiation.<sup>47</sup> Participants included representatives from law enforcement, the Governor's Office, the Colorado Attorney General's Office, the Colorado Department of Public Health and Environment, local authorities, medical marijuana industry members, trade industries, child protection advocates, and subject matter experts in the fields of substance abuse, toxicology, pharmacology, and marketing.<sup>48</sup> The Department of Revenue issued its permanent rules for the regulation of recreational marijuana on September 9, 2013.<sup>49</sup>

On January 1, 2014, for the first time anywhere in the country, licensed recreational marijuana retail stores opened their doors and legally sold marijuana to thousands of Coloradans.<sup>50</sup>

---

<sup>43</sup> *Id.* § 16(5)(c).

<sup>44</sup> *Id.* § 16(5)(g)–(h).

<sup>45</sup> Emergency Rules Related to the Colorado Retail Marijuana Code, 36 Colo. Reg. 15 (Aug 10, 2013).

<sup>46</sup> Colo. Dep't of Revenue, *Marijuana Taxation Rulemaking Announcement* (Oct. 11, 2013), <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251896291005>.

<sup>47</sup> *Id.* (follow "Meeting Agenda" hyperlink).

<sup>48</sup> COLO. DEP'T OF REVENUE, MED 2013 RULEMAKING WORKING GROUPS INFORMATION (2013), available at <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=Rev-MMJ%2FCBONLayout&cid=1251646986226&pagename=CBONWrapper>.

<sup>49</sup> Permanent Rules Related to the Colorado Retail Marijuana Code, Colo. Code Regs. § 212-2 (2013).

<sup>50</sup> John Ingold, *World's First Legal Recreational Marijuana Sales Begin in Colorado*, DENV. POST (Jan. 2, 2014, 8:08 AM), [http://www.denverpost.com/news/ci\\_24828236/worlds-first-legal-recreational-marijuana-sales-begin-colorado](http://www.denverpost.com/news/ci_24828236/worlds-first-legal-recreational-marijuana-sales-begin-colorado).

## II. FEDERAL ISSUES

Perhaps the greatest challenge of the implementation process has been dealing with federal authorities. Within days of the passage of Amendment 64, Governor Hickenlooper and Attorney General Suthers had a telephone meeting with U.S. Attorney General Eric Holder to seek federal guidance on the conflict between Amendment 64 and federal law, specifically the inclusion of marijuana in the Controlled Substances Act.<sup>51</sup> Although Colorado did not receive a formal response to these requests for guidance from the U.S. Department of Justice until August 29, 2013, officials of the Justice Department informally shared their concerns about Colorado's new laws, thereby signaling their enforcement priorities. The Justice Department's views about the issues raised by the legalization of marijuana encouraged the Governor's Office to focus its efforts on developing a robust regulatory and enforcement regime for retail marijuana in Colorado. In this section, we discuss three results of Colorado's cooperation with the Justice Department: the continued enforcement of the federal Controlled Substances Act, access to banking for marijuana-related businesses, and the provision of business expense tax deductions for marijuana-related businesses.

*Federal Enforcement of the Controlled Substances Act*

In adopting the final rules, the Department of Revenue affirmed that “[a]bove all . . . these rules accomplish the state of Colorado’s guiding principle through this process: to create a robust regulatory and enforcement environment that protects public safety and prevents diversion of Retail Marijuana to individuals under the age of twenty-one or to individuals outside the state of Colorado.”<sup>52</sup>

This was largely a nod to the August 29, 2013 letter from U.S. Attorney General Eric Holder to Governors John Hickenlooper of Colorado and Jay Inslee of Washington, and an accompanying memorandum from Deputy Attorney General James Cole to all U.S. Attorneys.<sup>53</sup> In the latter correspondence, which came to be known as the Cole Memo, the Justice Department clarified that it would continue to enforce the Controlled Substances Act in Colorado. However, it would not challenge Colorado’s ability to regulate the retail marijuana industry in accordance with state law, based on the expectation that the state and local governments would implement strong, effective regulatory and enforcement systems to address public safety, public

---

<sup>51</sup> Michael Roberts, *Marijuana: John Hickenlooper Stresses Urgency in Amendment 64 Call to Eric Holder*, DENV. WESTWORD (Nov. 12, 2012, 11:28 AM), [http://blogs.westword.com/latestword/2012/11/amendment\\_64\\_john\\_hickenlooper\\_eric\\_holder\\_urgency\\_marijuana.php](http://blogs.westword.com/latestword/2012/11/amendment_64_john_hickenlooper_eric_holder_urgency_marijuana.php). Washington State officials also reached out to federal officials seeking guidance on the implementation of its new marijuana law.

<sup>52</sup> Permanent Rules Related to the Colorado Retail Marijuana Code, Colo. Code Regs. § 212-2 (2013).

<sup>53</sup> See Cole Memo, *supra* note 6.

health, and other public interests.<sup>54</sup> The Cole Memo listed the federal government's eight enforcement priorities:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and,
- Preventing marijuana possession or use on federal property.<sup>55</sup>

Despite their generic quality, the priorities were the most concrete guidance the federal government had provided states in more than five years. Moreover, Colorado was—and continues to be—aligned with the perspectives and guidance contained in the Cole Memo. Indeed, Colorado currently shares the Justice Department's desire for robust enforcement actions against those who will not abide by Colorado's laws and regulations related to the cultivation, sale, transport, and use of marijuana. Governor Hickenlooper's administration has committed to working with federal, state, and local law enforcement authorities to ensure the enforcement of the eight enforcement priorities in the Cole Memo.

#### *Access to Banking*

The next federal priority was for the Department of the Treasury and other federal agencies overseeing the nation's financial institutions to address the access to banking challenges faced by marijuana businesses. This was a public safety issue—businesses forced to operate as cash-only businesses because they are denied access to the banking system are a magnet for crime and criminal activity. It was also a regulatory and enforcement issue—it is more difficult to account for and track revenues and audit tax payments of businesses that do not use financial institutions. Banking was moreover an equity issue for the small business owners engaged in the medical and retail marijuana industry in Colorado who needed payroll checking accounts and access to other banking services including small business working capital and/or capital construction loans. Finally, banking was a

---

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

customer service issue—persons seeking to buy medical and retail marijuana would benefit from the convenience of using debit and credit cards to make their purchases.

In October 2013, Governors Hickenlooper and Inslee urged federal banking regulators to issue formal guidance to banks, credit unions, and other financial service providers allowing these financial institutions to provide regular banking and financial services to legal, licensed marijuana-related businesses in states allowing marijuana use.<sup>56</sup> The Governors noted that federal banking regulators have the discretion and authority under current law to issue guidance to regulated entities allowing licensed businesses operating in states and localities that have enacted laws relating to adult marijuana use to appropriately access the banking system if certain safeguards are in place and proper diligence is conducted.<sup>57</sup>

In February 2014, the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued guidance to clarify Bank Secrecy Act (BSA) expectations for financial institutions seeking to provide services to marijuana-related businesses. The FinCEN guidance addressed how banks and other financial institutions could "provide services to marijuana-related businesses consistent with their BSA obligations, and align[ ] the information [they] provided . . . in BSA reports with federal and state law enforcement priorities."<sup>58</sup> FinCEN told banks that they were, in effect, part of the enforcement team and should consider the following in performing customer due diligence:

- Verifying with appropriate state authorities whether the business is duly licensed and registered;
- Reviewing the license application and related documentation submitted by the business for obtaining their state license to operate a marijuana-related business;
- Requesting from state licensing and enforcement authorities available information about the business and related parties;
- Developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the types of customers to be served (e.g., medical- versus recreational-use customers);
- Monitoring publicly available sources of adverse information about the business and related parties; and,
- Monitoring for suspicious activities including for any of the red flags described in the Cole Memo.<sup>59</sup>

The FinCEN guidance also affirmed that financial institutions' obligations to file Suspicious Activity Reports (SARs) were unaffected by any

---

<sup>56</sup> Letter from John Hickenlooper, Gov. of Colo., & Jay Inslee, Gov. of Wash., to Jacob Lew, Sec'y of the Treasury, Dep't of the Treasury, et al. 2 (Oct. 2, 2013) (on file with authors).

<sup>57</sup> *See id.*

<sup>58</sup> FIN. CRIMES ENFORCEMENT NETWORK, FIN-2014-G001, GUIDANCE: BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES 1 (2014).

<sup>59</sup> *Id.* at 2.

state law legalizing marijuana.<sup>60</sup> Indeed, the guidance set out more complex SAR reporting requirements for banks dealing with marijuana-related businesses than for other banks.

Colorado's banking community reacted swiftly and definitively. Almost immediately, the Colorado Bankers Association (CBA) issued the following statement:

The guidance issued today by the Department of Justice and the U.S. Treasury only reinforces and reiterates that banks can be prosecuted for providing accounts to marijuana related businesses. . . . Bankers had expected the guidance to relieve them of the threat of prosecution should they open accounts for marijuana businesses, but the guidance does not do that. Instead, it reiterates reasons for prosecution and is simply a modified reporting system for banks to use. It imposes a heavy burden on them to know and control their customers' activities, and those of their customers. No bank can comply.<sup>61</sup>

It may be that the only real solution to the banking dilemma is the adoption of the Marijuana Businesses Access to Banking Act.<sup>62</sup> This bill, which has bipartisan congressional support, would provide banks, credit unions, and other depository institutions the legal clearance to provide banking services to a marijuana-related legitimate business. However, the chances of this legislation moving through a gridlocked Congress any time soon seem very low.

#### *Federal Tax Code and Marijuana-Related Businesses*

It took nearly five years to get an enforcement policy from the U.S. Department of Justice. The Internal Revenue Service (IRS) has been even more obtuse.<sup>63</sup> Indeed, the IRS has taken enforcement actions against some cannabis businesses in other states.<sup>64</sup> One particularly difficult aspect of federal tax policy has been the application of Section 280E of the Internal Revenue Code, the starting point for determining state income tax liability based upon federal taxable income.<sup>65</sup> Under Section 280E, marijuana businesses

---

<sup>60</sup> *Id.* at 3.

<sup>61</sup> CBA Statement Regarding DOJ and Treasury Guidance on Marijuana and Banking, COLO. BANKERS ASS'N, <http://www.coloradobankers.org/displaycommon.cfm?an=1&subarticlenbr=60> (last visited April 20, 2014).

<sup>62</sup> Marijuana Businesses Access to Banking Act of 2013, H.R. 2652, 113th Cong. (2013).

<sup>63</sup> Kelly Phillips Erb, *IRS Just Say No to Medical Marijuana Deductions*, FORBES (Apr. 9, 2014, 10:12 PM), <http://www.forbes.com/sites/kellyphillipserb/2011/10/06/irs-just-says-no-to-medical-marijuana-deductions>.

<sup>64</sup> Peter Hecht, *Medical Marijuana Dispensary Takes on IRS Over What It Calls 'Punitive' Taxes*, WASH. POST (Feb. 23, 2014), [http://www.washingtonpost.com/politics/medical-marijuana-dispensary-takes-on-irs-over-what-it-calls-punitive-taxes/2014/02/23/25fa6458-9cd3-11e3-ad71-e03637a299c0\\_story.html](http://www.washingtonpost.com/politics/medical-marijuana-dispensary-takes-on-irs-over-what-it-calls-punitive-taxes/2014/02/23/25fa6458-9cd3-11e3-ad71-e03637a299c0_story.html).

<sup>65</sup> I.R.C. § 280E (1982). Section 280E states "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

may not deduct certain substantial expenses that other businesses can, such as office supplies, furniture, business equipment, software, mileage, insurance premiums, retirement contribution, and telephone charges. As a result, their taxable income is much higher, and that amount flows down to the amount that the State also charges.

With the passage of House Bill 13-1042,<sup>66</sup> Colorado did what it could to assist Colorado marijuana businesses. Beginning in tax year 2014, the new law allows state-licensed marijuana businesses to claim a state income tax deduction for business expenses that are otherwise eligible to be claimed as a federal income tax deduction but are disallowed under Section 280E of the Internal Revenue Code. These expenses, which include rent and personnel costs, are currently taxed at a state rate of 4.63 percent.<sup>67</sup>

### III. STATE ISSUES

While the federal regulatory overlay posed huge difficulties itself, Colorado faced even more policy hurdles that fell squarely within traditional state regulatory power. Two of these challenges were (1) sales and excise tax revenues (which likely represent the greatest regulatory success during this process) and (2) state law enforcement challenges.

#### *State Taxing Policy, A Rare Success*

One of the provisions of Amendment 64 directed the Colorado General Assembly to levy an excise tax on retail marijuana at the point that it is transferred from a cultivation facility to an infused product manufacturer or a retail store. However, voter approval of Amendment 64 was not sufficient under Colorado law to authorize the General Assembly to impose such a tax.<sup>68</sup>

A separate proposition was necessary. On November 5, 2013, Colorado voters approved Proposition AA, effectively providing for both an excise tax and a special sales tax on retail marijuana.<sup>69</sup> Proposition AA, which became Colorado law on December 10, 2013:

---

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.”

<sup>66</sup> H.B. 13-1042, 69th Legis., 1st Reg. Sess. (Colo. 2013).

<sup>67</sup> Colo. 69th Gen. Assemb., Fiscal Note for Bill Number H.B. 13-1042 (2013).

<sup>68</sup> See TASK FORCE REPORT, *supra* note 32, at 28.

<sup>69</sup> Amendment 64 specifically proscribes an excise tax on medical marijuana. And because any excise or special sales tax on medical marijuana would require voter approval, which has not been sought, sales of medical marijuana will not be subject to the excise tax and special sales tax imposed on retail marijuana for the time being. Both medical and retail marijuana are still subject to the state’s standard 2.9% sales tax and the sales taxes imposed by local governments. H.B.13-1318, 69th Legis., 1st Reg. Sess. (Colo. 2013).

- Imposes a fifteen percent state excise tax on the average wholesale price of retail marijuana when the product is first sold or transferred by a retail marijuana cultivation facility, with public school construction receiving the first \$40,000,000 of any tax revenues collected annually;
- Imposes a ten percent state sales tax on retail marijuana and retail marijuana products, in addition to the existing 2.9% general state sales tax, to increase funding for the regulation and enforcement of the retail marijuana industry and to fund related health, education, prevention, and public safety costs;
- Directs fifteen percent of the revenue collected from the ten percent state sales tax to cities and counties where retail marijuana sales occur; and,
- Allows the state legislature to increase or decrease the excise and sales taxes on retail marijuana so long as the rate of either tax does not exceed fifteen percent.<sup>70</sup>

The tax measure was designed to ensure that Colorado would have the financial resources for a robust regulatory and enforcement regime, for an effective education and prevention program to protect youth from the harmful effects of marijuana, and for the health and public safety costs associated with the retail marijuana industry.<sup>71</sup>

The tax structure appears to be successful so far.<sup>72</sup> About \$2,000,000 in revenue was generated in the first month of retail cannabis sales alone.<sup>73</sup> While estimates of tax revenue remain in significant flux, sustained growth in these tax revenues is expected.

#### *Issues in State Law Enforcement*

The state law enforcement issues are too numerous and complex to address completely in the remaining space, but some warrant special attention: the definition of “open and public consumption,” drugged driving, and the home-grow gray market. Other important state law enforcement issues not discussed here include licensing, background checks for owners and employees of marijuana-related businesses, employee rights, addiction in the context of family law, enforcement of marijuana-related contracts, cultivation-practices, potency limits, labeling, advertising, and online sales.

---

<sup>70</sup> See *id.*; Colo. 69th Gen. Assemb., Fiscal Impact Statement for Proposition AA (2013).

<sup>71</sup> See TASK FORCE REPORT, *supra* note 32, at 15; Colo. 69th Gen. Assemb., Fiscal Impact Statement for Proposition AA (2013).

<sup>72</sup> See, e.g., Gregory Wallace, *Colorado Residents May Get a Refund for Pot Tax*, CNNMONEY (Mar. 14, 2014, 8:01 AM), <http://money.cnn.com/2014/03/14/pf/taxes/colorado-marijuana-refund>.

<sup>73</sup> Katie Lobosco, *Colorado Gets \$2 Million from Marijuana Taxes*, CNNMONEY (Mar. 10, 2014, 7:41 PM), <http://money.cnn.com/2014/03/10/news/marijuana-tax-revenue>.

*Definition of “open and public consumption”*

Defining “open and public consumption” of marijuana, which is expressly prohibited by the plain language of Amendment 64, has proven to be one of the most contentious issues in the new law. The Governor’s Task Force could not reach consensus on this issue after hours of debate. A common hypothetical posed was the burning of a joint in a backyard or on a front porch. Since one’s front porch is private property but viewable from the curb, and a burning joint can certainly be smelled from afar, it was unclear if such conduct constituted open *and* public use.<sup>74</sup> The Denver City Council also grappled with this issue. By a close vote, the city rejected an ordinance that would have specifically prohibited smoking a joint on a front porch.<sup>75</sup>

There is also confusion about when a gathering is private enough for “consumption” to occur. Most would agree, on the one hand, that a group of friends aged twenty-one and above gathered in a private home can smoke or otherwise consume marijuana without violating the law. On the other hand, most would also agree that public facilities such as bars and restaurants are off limits. However, there is a wide gray space in between these two extremes. For example, does an otherwise public facility that charges a “membership fee” for admission to an evening of marijuana consumption create a space private enough to pass legal muster? What about a private club with initiation fees and monthly dues?

The confusion about what is not “open and public” has prompted a clamoring for marijuana social clubs—public locations run for the exclusive purpose of providing a controlled environment in which to consume marijuana and socialize with like-minded consumers. There are advantages to licensing such establishments. For example, under the new law, tourists visiting Colorado for mountain sports can legally purchase and possess up to one-quarter ounce of marijuana, but unless they stay at a pot-friendly hotel, they cannot consume the product. A mountain town social club dedicated to marijuana would solve that problem. However, social clubs have yet to be authorized by state authorities, as they bring with them myriad issues related to local zoning, public health, nuisance complaints, and drugged driving. Only a few establishments have conducted a risk assessment and opened their doors as private clubs, including one with local government approval.<sup>76</sup>

---

<sup>74</sup> TASK FORCE REPORT, *supra* note 32, at 108–09.

<sup>75</sup> Jeremy P. Meyer, *Denver Council Flips Vote on Pot Smoking in Front Yards*, DENVER POST (Dec. 3, 2013, 8:02 AM), [http://www.denverpost.com/breakingnews/ci\\_24641054/denver-council-flips-vote-front-yard-pot-smoking-ban](http://www.denverpost.com/breakingnews/ci_24641054/denver-council-flips-vote-front-yard-pot-smoking-ban).

<sup>76</sup> Mitch Byars, *Club Ned Cannabis Cafe to Open in Nederland*, DAILY CAMERA (Mar. 7, 2014, 5:09 PM), [http://www.dailycamera.com/marijuana/ci\\_25299457/club-ned-cannabis-cafe-open-nederland](http://www.dailycamera.com/marijuana/ci_25299457/club-ned-cannabis-cafe-open-nederland) (discussing a cannabis cafe); Garrison Wells, *Marijuana Social Club Back Open in Colorado Springs After Panel Grants Appeal*, THE GAZETTE (Feb. 21, 2014), <http://gazette.com/marijuana-social-club-back-open-in-colorado-springs-after-panel-grants-appeal/article/1515117> (discussing zoning regulations that allow pot smoking at private club).



A central challenge of crafting rules in this area is distinguishing between burning cannabis and consuming an edible cannabis product. While an argument could be made that smoking a joint on a front porch clearly visible from a public sidewalk constitutes open and public consumption, it would be difficult also to conclude that a group of friends inconspicuously eating candies or cake infused with marijuana on that same porch would be engaged in open and public consumption. And because Colorado law makes no distinction between smoking tobacco and smoking marijuana when prohibiting both in public places, smoking marijuana is generally proscribed in all indoor facilities open to the public. But could an infused edible product be enjoyed in a public gathering place—from a bar or restaurant to a sports stadium or public park—if its consumers give no notice that it contains cannabis?

The state legislature has not produced a definition or guidance as of this paper's publication. Rather, it appears that the courts must sort out the meaning of public consumption.

### *Drugged driving*

Cognizant that legal access to recreational marijuana by anyone in the state would likely lead to more people driving while impaired, Colorado enacted legislation that gave state and local law enforcement additional tools to prosecute persons driving under the influence of marijuana.<sup>77</sup> As controversial as the tax policy was, legislation on driving under the influence of marijuana generated even more rancorous discussion. Much of the argument surrounded the “science” of determining when a driver was actively inhibited by marijuana while operating a motor vehicle.

For years, drugged driving has been prosecuted based on the expertise and observations of the patrol officers conducting the vehicle stop. Colorado does not have a per se limit on blood marijuana content, unlike the fourteen other states (as of 2013) that have such limits that operate like per se drunk driving limits.<sup>78</sup> The difficulty with a uniform per se limit is that marijuana blood content does not dissipate at a consistent rate in most humans. Additionally, residual marijuana can remain in the human body for extended periods of time. The latter issue, however, can be eliminated by testing only for the active psychotropic isomer of tetrahydrocannabinol (commonly referred to as THC) in a suspect's blood. Colorado law now provides that if a driver's blood contains five nanograms or more of active THC per milliliter of whole blood, it can be inferred by a jury that the driver was under the influence of one or more drugs.<sup>79</sup> But tests to determine the

---

<sup>77</sup> H.B. 13-1325, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013).

<sup>78</sup> See Paul Armentano, *Should Per Se Limits Be Imposed for Cannabis? Equating Cannabinoid Blood Concentrations with Actual Driver Impairment: Practical Limitations and Concerns*, 35 HUMBOLDT J. SOC. REL. 41, 41 (2013).

<sup>79</sup> H.B. 13-1325, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013).

amount of active THC in a driver's blood require blood testing, which is far more invasive than the oral breathalyzer test typically used to test blood alcohol content and thus raises potential Fourth Amendment concerns. There is also controversy over whether five nanograms of active THC means a person is "high"—though of course this problem also arises with alcohol, which affects different people differently over time. The key to any drugged driving case remains the probable cause observed by the police officers and subsequent observations of inebriation. Colorado is providing more money for officer training on best practices and new testing equipment.

### *The Gray Market: Regulating Home Growers*

Perhaps the most significant state law enforcement issue is what has become known as the "gray market." The passage of Amendment 64 without the repeal of Amendment 20 has created confusion about medical marijuana caregivers. A "primary caregiver" is a "person, other than the [red-card holder] who is eighteen years of age or older and has significant responsibility for managing the well-being of a patient who has a debilitating medical condition."<sup>80</sup> Caregivers, if identified by the red-card holder, are allowed to grow the allotted number of plants on behalf of the registrant—up to six plants per person.<sup>81</sup> Many unregulated, unlicensed grows have developed across the state, with their operators claiming to be caregivers. These caregivers, however, are often unable at the time of confrontation to produce up-to-date red cards for patients for whom they are the *primary* provider. Often, these medicinal grows are found in a "caregiver's" garage and contain hundreds of plants. There is no substantive difference between such grows and the illegal drug dealer growing operations of the black market that existed just a few short years ago.

However, there is a significant legal difference: these grows proclaim themselves to be handled by "caregivers," who are by law allowed to have up to five patients each. Technically, a caregiver can legally grow up to thirty-six plants, assuming they have authorization from the maximum number of patients, and can also grow for themselves. Abuse of the program structure is systemic; enforcement is never simple; and there are numerous actors willing to take blatant advantage of the "gray market" for personal benefit, despite the risk to society. The effect of such practices is simple and clear: since five people alone, regardless of how sick they are, cannot con-

---

<sup>80</sup> COLO. CONST. art. XVIII, § 14(1)(f).

<sup>81</sup> Six plants, three flowering at any one time is the default under both Amendment 20 and Amendment 64 for a single person to grow at home. Certain doctors have engaged in the practice of recommending higher plant and ounce counts, apparently justified by "medical necessity" despite there being no clear authority for elevated plant and ounce recommendations. Some physicians have recommended unjustifiably high plant counts; one doctor recommended upwards of 70 plants for multiple patients. See Eric Gorski, *Scrutiny Turns to Colorado Pot Doctors Who Sign Off on High Counts*, DENV. POST (Aug. 23, 2013, 2:33 PM), [http://www.denverpost.com/breakingnews/ci\\_23928322/scrutiny-turns-colorado-pot-doctors-who-sign-off](http://www.denverpost.com/breakingnews/ci_23928322/scrutiny-turns-colorado-pot-doctors-who-sign-off).

sume the harvest of 36 plants, let alone hundreds of plants cultivated illegally, the excess supply necessarily extends beyond the regulated community.

A more recent abuse has developed pursuant to Amendment 64, also related to home grows: “cooperatives.” Similar to urban vegetable cooperatives, marijuana cooperatives develop when cannabis users get together and “assist” each other (in fact often letting one person do all the work) in growing their six plants authorized by Amendment 64. The theory behind cooperatives is similar to that behind the caregiver model. A group of adults aged twenty-one and over make an agreement that they will grow their plants together to maximize the return on investment in the necessary accouterments to successfully produce a flowering plant. The investment—in hydroponics, proper lighting, and humidity controls—can be substantial. Cooperatives also leverage expertise in growing and maintaining marijuana. Because growing and maintaining a marijuana plant is much more difficult than most people understand, an expert may be crucial to a novice. However, cooperative agreements are subject to few clear constitutional or statutory restraints. Home growing is entirely unregulated, so theoretically, there is no limit to the number of individuals that could cooperate. A mega-cooperative, if fully operational, could become larger and more successful than a licensed grow facility, since cooperatives operate in a quasi-legal environment beyond the control of regulators and are not subject to licensing costs. The sole limitation of a cooperative is that none of its members may exchange marijuana for remuneration. In theory, this should be crippling. Operation of even a small cooperative without incentives for the expert grower seems illogical and would likely be nothing more than a ruse. To avoid exchange of remuneration, all members would have to share equally all costs invested in a cooperative, and there would be no profits, which seems to defeat the attraction of participating in a cooperative. And yet, cooperatives are popping up across Colorado.

Both caregiver grows and cooperatives are operating beyond the regulated market and fail to benefit from the testing, labeling, or safety checks. They do not pay taxes. They do not pay fees. And it is known that they divert the overgrow to recreational users paying less than the market value, further undermining the legitimate businesses and market participants.

#### *Other Issues That Must Be Addressed*

The issues described above only cover some of the many issues that Colorado has faced and will continue to face as it continues implementing Amendment 64. States that are considering their own decriminalization schemes will likely face several of the following questions:

- What is required to be a licensed cultivator, wholesaler, or retailer of marijuana? What other regulations are necessary to ensure that owners and operators of retail marijuana business are not involved in criminal or gang activity?

- Should the retail sale of marijuana be controlled exclusively by the state, similar to the alcohol regulation schemes of Alcohol Beverage Control states? How will regulations affect the free market availability of marijuana?
- How does a state make the transition from a medical marijuana scheme to a fully decriminalized system? What happens, for example, when medical marijuana regulations are used as an end-around to bypass stringent standards under the new regulatory regime?
- How will the legalization of marijuana play out in other facets of the court system besides the criminal system? Can courts refuse to recognize a contract between two participants in the regulated marijuana trade because it is contrary to public policy? What role can marijuana use play in family law disputes? What rules can employers place on their employees' use of marijuana?
- What health and safety regulations are needed to ensure the safe cultivation and processing of marijuana? What labeling and packaging rules are necessary to ensure complete health and safety information is being passed on to consumers? Should potency limits be capped?
- What advertising regulations are necessary to ensure that marijuana is regulated like alcohol or tobacco? Will retail marijuana stores be allowed to sell online? Where can they advertise? What in-store displays can they use?
- What are the appropriate penalties for violations of any regulations designed to address the above?
- How should the criminal code be modified to reflect a decriminalization scheme? Should past convictions for behavior that now would not be considered a violation be pardoned? Should the collateral consequences of those convictions (for example, effects on sentencing or disqualifications for government benefits) be relaxed?

The sheer number of complications illustrates how difficult legalization can be. Colorado has addressed many of these questions and continues to address others as the project of legalization unfolds.

#### IV. LOCAL GOVERNMENTS

Finally, just as effective implementation of Amendment 64 required cooperation with the federal government, the process of legalization also required cooperation with local governments in Colorado. This was and continues to be especially difficult in a local control state like Colorado, where localities, counties, and home-rule cities have substantial autonomy. Moreover, Colorado is very diverse in population and geography. What might be acceptable in Denver may be frowned upon in Durango.

*Local Opt-Out*

Amendment 64 compels state and local cooperation and deference. For example, Amendment 64 permits local governments in Colorado to regulate the time, place, manner, and number of marijuana establishments in their communities, including the power to ban marijuana establishments within their jurisdiction. Localities may not ban possession or consumption on private property, but they similarly cannot be compelled to allow retail storefronts or growing and manufacturing establishments within their boundaries. Likewise, under Colorado's taxing scheme, as the state collects tax dollars from the marijuana establishments, it must "share-back" a certain percentage with the local authorities. If a locality or city chooses not to allow marijuana businesses to exist within its boundaries, it of course forgoes any tax share-back. If a locality opts in, not only does that locality get its part of the tax share-back, it can also levy a locality tax. At present, relatively few jurisdictions have opted in. Denver is such a locality and provides a good example of the issues localities will face.

*Education and Funding*

As mentioned above, the first \$40,000,000 of any state excise tax revenues on marijuana goes toward public school construction. This is one way that the primary regulatory success—increased revenue for the state—has trickled down to help local governments directly.

Other marijuana-related tax revenues are earmarked to fund related health, education, prevention, and public safety initiatives. Colorado is developing a public awareness campaign to educate youths ages twelve to twenty of marijuana's risks, with the goal of decreasing marijuana use by this segment of the population. The Office of the Governor, in consultation with state agencies and other stakeholders including industry representatives and members of the public, has established a marijuana educational oversight committee to develop and implement recommendations for the education of all necessary stakeholders on issues related to marijuana use.<sup>82</sup> This committee will develop and distribute educational materials regarding appropriate use of recreational marijuana. The number one goal of this committee is to consult with medical and marketing experts to distill best practices for marijuana prevention messaging targeted at those age twenty and younger who may be potential marijuana users.

In addition to these funds for public school construction and health, education, prevention, and public safety initiatives, Amendment 64 directs fifteen percent of the revenue collected from the ten percent state sales tax to cities and counties where retail marijuana sales occur. This is a potentially huge financial benefit for those local governments that opt in.

---

<sup>82</sup> S.B. 13-283, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013).

In short, if these health, education, prevention, and public safety initiatives do work (which is no guarantee), legalization can be a net positive for local governments, which will enjoy the benefits of increased funding for education.

#### IV. CONCLUSION

In legalizing retail marijuana for adults, Colorado forged a radical path in this country. Despite formidable challenges, the state has attempted to fund and implement a robust regulatory and enforcement regime, limit production so that the marijuana produced in Colorado is consumed within state borders and not diverted to other states, educate Coloradan youth on the dangers posed by marijuana, and prevent the distribution of marijuana to those under age twenty-one.