

LEGALIZING MARIJUANA
THE STRATEGY FOR SUCCESS

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Legalizing Marijuana - The Strategy for Success

The legalization of marijuana for medical and/or recreational purposes is gaining momentum across the country. Lawmakers are increasingly realizing that the public supports marijuana policy reform. In fact, polls show that 86% of Americans support making medical marijuana use legalⁱ. Alaska, Florida and Oregon have marijuana initiatives on the November 2014 ballot. In 2016, it is anticipated that voters in eight states will decide if their state should legalize marijuana.ⁱⁱ

As new marijuana programs are established, states can look to early adopters for guidance. More experience is needed to assemble a set of “best practices” from the various approaches taken. However, these pioneer states have exposed challenges that must be effectively addressed by any state ready to establish a new marijuana program. Three important challenges include:

- Regulating an industry that is legal at the state level but illegal at the federal level
- Reconciling the differing perspectives of the many interested stakeholder groups
- Large-scale multifaceted implementation

The purpose of this paper is to bring attention to these challenges and offer some suggestions for mitigating their negative impact.

Federally Illegal

At present, marijuana is a Schedule I Controlled Substanceⁱⁱⁱ and federal laws are still applicable. However, on August 29, 2013, the federal government published a memorandum for all United States Attorneys, commonly referred to as the Cole Memo. The memo was issued to provide guidance to the states “in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing and sale.”^{iv} In order to focus federal investigative and prosecutorial resources

Cole Memorandum Guidance Regarding Marijuana Enforcement – Federal Priorities

- Preventing distribution to minors
- Preventing revenue from going to criminal enterprises
- Preventing diversion to states where it is still illegal
- Preventing marijuana activity from becoming a cover for other illegal activity
- Preventing violence and the use of firearms
- Preventing drugged driving and other adverse public consequences
- Preventing growing marijuana on public lands
- Preventing marijuana possession or use on public lands

on the most significant threats, the government outlined specific enforcement priorities with respect to marijuana. As long as states do a good job of regulating the industry in their state, the federal government will not interfere. This guidance rests on the assumption that states where marijuana is legal will “implement clear, strong and effective regulatory and enforcement systems in order to minimize the threat posed to federal enforcement priorities.”^v

The consequences of not creating such an environment are currently being seen in California, the first state to legalize medical marijuana. At the time state regulations to effectively govern marijuana businesses were not adopted leaving implementation of laws to local authorities. The lack of a state standard has created inconsistencies in enforcement among California cities which in turn has led to federal scrutiny.^{vi} A federal government crackdown closed hundreds of dispensaries and had a significant impact on projected tax revenues for the State.^{vii} An effective regulatory and enforcement environment requires a multi-dimensional approach:

- A comprehensive set of regulations
- A well-designed organization
- An effective process to evaluate marijuana establishment applications
- Effective electronic systems

Comprehensive Regulations

Each new marijuana state has as models the regulations in states where programs are already established. When regulations were being drafted for the Nevada program, the consultants prepared a topical matrix comparing regulations in fourteen states. This proved to be an invaluable resource during state discussions and helped to ensure that important regulatory topics were not forgotten.

As the industry matures more elements are being regulated. Topics such as labeling and testing requirements, inspections for food preparation and cleanliness, edible potency limits, serving standards, educational requirements for patients and recreational customers are now taking center stage.^{viii} This evolution will continue for years making frequent updating of state regulations a probability.

Well-designed Organization

States have taken different approaches to organizational design. In Nevada all components of the medical marijuana organization reside in a single unit within the Division of Public and Behavioral Health. In Illinois the State has split the responsibility for the different types of establishments between the Department of Agriculture for cultivators, the Department of Financial and Professional Regulation for dispensing organizations and the Department of Public Health for the patient registry. Time will tell if one approach is more successful or if either approach can produce an organization that both serves the needs of the state and achieves the goals of the Cole Memo.

The organizational challenge is magnified when a medical marijuana state legalizes recreational marijuana. In Colorado the medical marijuana program is administered by the Department of Public

Health and Environment. The retail program is administered by the Department of Revenue. An interdepartmental task force has been established to find the best ways to work together. Key to their success is a mutual understanding of purpose, cooperation based on shared interests, effective communications and a clear definition of their data sharing authorization.

Establishment Evaluation Process

The legal marijuana industry is estimated to be worth billions of dollars.^{ixx} This huge growth opportunity attracts many interested parties. Extending licenses to ethical, knowledgeable and well prepared applicants is a major success factor for creating a manageable enforcement environment. A comprehensive application coupled with a well thought out set of evaluation criteria and well trained evaluators is essential.

In Massachusetts numerous mistakes were made in the process. As reported by Marijuana Business Daily the State Health Commissioner failed to disclose a fund-raising partnership with a former congressman who was awarded three of the coveted twenty licenses for dispensaries. The licensing process then came under fire when the local media pointed out inconsistencies in scoring and potential conflicts of interest. Two winning licensees later admitted to falsifying support from local politicians and providing misleading education information on their applications. Overall, eleven of the twenty licenses originally awarded were revoked.^{xi}

The difficulties with the Massachusetts evaluation process cast a shadow over the program before it got off the ground. Numerous lessons can be learned.

- Don't assume all the information provided by the applicant is factual. Thorough background checks are essential.
- Consider, as Nevada did, separating the organizational and resume information from the main proposal to blind all but a few reviewers to the identity of the applicant. This allows the proposal to stand on its own merit without preconceived bias for or against the applicant.
- Give importance to the selection of the evaluation teams. Their background and experience should be relevant to the section of the application they will be evaluating.
- Conduct training on the evaluation criteria so that scoring is consistent. Multiple scorers of a given section of the proposal should

System Functions That Support the Marijuana Program

- **Licensing System to track applicants, fees, issuance, renewals and revocations**
- **Agent (establishment employee) card application, renewals and revocations**
- **Patient and caregiver cards, renewals, revocation and usage**
- **Sales and tax revenue tracking**
- **Accounting**
- **Automation of inspections and audits**
- **Compliance and follow-up tracking**

produce nearly the same score. To further ensure scoring fairness scorers can work in teams. Each member of the team scores the section independently. Then the scores are reviewed and reconciled. The final score for the section can either be the average of the team scores or a consensus score arrived at through team discussion.

Systems

As with most new programs, enabling technology is required to support effective processes and produce the data to account for and evaluate the program once it is operational. One of the most important systems to support the Cole Memo is an inventory control system that tracks product at each step in the process, often referred to as seed-to-sale tracking. This type of system helps businesses and regulators focus their enforcement activities. The system can also provide some level of assurance to federal regulators that the State is taking compliance efforts seriously.

A number of vendors provide software including seed to sale tracking systems. Two tasks should be completed before purchasing any technology: documenting a thorough set of business and technical requirements; and preparing a vendor scope of work. These documents will help ensure the right system is selected and that there is mutual understanding between the vendor and the state about roles and responsibilities.

Who Is Interested in Legalization of Marijuana?

- Citizens
- Patients and Caregivers
- Physicians
- Local Jurisdictions
- Dispensary Applicants
- Cultivators
- Manufactures of edibles and potions
- Testing Laboratories
- Financial Institutions
- Law Enforcement
- Courts
- Industry Experts

Differing Perspectives

Every new government program must do its best to reconcile the perspectives of the various affected stakeholder groups into a program that achieves the stated objectives while garnering the widest level of support. Legalization of marijuana is a topic of broad interest and deeply held opinions. Implementing a successful state marijuana program should include a plan to productively harness this interest to the benefit of the program.

One of the factors contributing to the success in Colorado was the strong collaborative approach taken by Governor John Hickenlooper. Although he formally opposed legalization, one of his first actions was to form a task force consisting of a diverse and broad-based membership, including passionate

legalization supporters, staunch opponents, law enforcement representatives and citizen groups.^{xii} This collaborative approach led to many recommendations which were ultimately approved by the State Legislature and formed the basis for the changes and transformation needed to execute an effective program. Inclusivity from the start produced a balanced set of regulations which continue to evolve.

The State of Nevada developed a proactive approach, creating a series of stakeholder meetings where various topics were discussed, giving interested parties the opportunity to offer suggestions or comments. In one case, by working collaboratively with key industry experts, the state was able to develop a set of marijuana laboratory testing requirements that was more comprehensive than any state had previously developed.

Compiling a list of stakeholder groups and producing a comprehensive and bidirectional communication plan at the beginning of the project is important.

General Public

While acceptance of legalization is growing there are still competing perspectives among the general population. Proponents of legalization for medical purposes rely on evidence that its use can be an effective treatment for many debilitating diseases and conditions. Those with friends and loved ones who have benefited from this treatment give passionate testimony to the benefits. Opponents argue that marijuana is addictive, may be a gateway drug, may harm the body, impairs driving and other activities that require judgment, and is unnecessary as other treatments are available for most of the named conditions. They are also very concerned that marijuana can be diverted to illegal or unintended purposes.^{xiii}

The full impact of legalizing marijuana on health and crime will unfold with time and experience. The communication plan should include steps to inform the public as to how the program plans to collect and report data on health outcomes and changes in criminal activity as a part of the program's continuing evaluation.

Benefits of Broad Stakeholder Involvement in Building a Marijuana Program

- Access to industry expertise
- Minimize the surprise of problems that might hinder the program later during implementation
- Opportunity to understand and deal with competing ideas
- Forum for achieving a shared vision
- More broad-based support for the final program
- Coordination of authorities and priorities among involved governmental entities

Local Jurisdictions

Regulations are developed at the state level but marijuana business will be transacted in local jurisdictions that will be sensitive to the prevailing attitudes of the citizens in their domain. For example, in Oregon as of May 21, 2014, 146 cities and 26 counties had issued a moratorium on marijuana in their jurisdiction^{xiv}. Working together from the outset, state and local jurisdictions can develop a set of shared expectations to drive the planning and implementation of the marijuana program. Recognizing that local jurisdictions may want to influence regulations and restrictions that apply to their area opens the door to their active involvement. The resulting state regulations are more likely to work well at both levels.

Cooperation between state and local jurisdictions is especially important when developing the application process. How much approval from the local jurisdiction is required to accompany the application to the state? If approval is granted at the local level what happens if the state does not approve the applicant? Or in the opposite case, what happens if the state approves an applicant that is unacceptable to the local jurisdiction. A thorough application process eliminates confusion by considering these possibilities in advance and having a plan to deal with them.

When and how the local jurisdictions approve marijuana establishment applications can greatly affect the number of applications received at the state. If the applicants are approved or denied at the local level prior to the state application deadline, it will most likely decrease the number of applications that get submitted to the state. Generating an accurate estimate of state revenue from the application process depends on understanding how local jurisdictions plan to handle applicants. Working out a cooperative process during the planning phase through frequent work sessions and active communication will pay dividends when it is time to grant licenses.

Patients, Caregivers and Physicians

Marijuana consumers are interested in the convenience of obtaining their product. This could include making home growing legal, authorizing dispensaries within reasonable geographic proximity, or for maximum flexibility, allowing both.

Equally important to both patients and physicians is the availability of the strains most suited to the specific condition being treated. The active chemicals that provide therapeutic benefits are collectively referred to as cannabinoids. By hybridizing the two main varieties, Sativa and Indica, a large number of unique strains have been created that produce different effects in the body.^{xv}

Understanding the patient community helps ensure that the cultivation strategy meets constituent needs. On one hand the state's cultivation strategy should include enough production capacity to ensure sufficient availability at a fair price of the marijuana strains that will be in demand. On the other hand an oversupply could result in failed cultivators or diverted product.

Applicants and Industry Experts

Industry experts come to the discussion willing to provide awareness of issues that have been solved by or still exist in other states, hoping to offer advice that will avoid previous pitfalls. Many successful dispensary operators or cultivators are interested in expanding into new states as the opportunity presents itself. While it must be acknowledged that they have a vested interest in making suggestions that are advantageous to their position, their past experience can be invaluable, especially in the drafting of regulations that are clear, practical and state of the art.

Financial Institutions

Financial institutions must deal with the fact that marijuana is still illegal at the federal level. To date their resistance to opening accounts for marijuana establishments has made this largely a cash-only industry. In an attempt to mitigate this problem, the federal government issued another Cole Memorandum on February 14, 2014 to clarify the government's position^{xvi}. Under the Memo the banks would file "suspicious activity reports" for marijuana accounts. The reports would be coded to distinguish between accounts the bank believed to be working within the eight federal priorities and those that may not be. The memo was not reassuring to the banks and resistance to opening accounts for marijuana businesses continues. Even though the Financial Crimes Enforcement Network attempted to reinforce the message a legislative solution may be required to finally resolve this issue.^{xvii}

Still, according to Jennifer Shasky Calvery, Director of the Treasury Department's Financial Crimes Enforcement Network, as of August 2014, 105 financial institutions across the country have banking relationships with marijuana businesses.^{xviii} Knowing the banking environment within a state relative to this issue is important. Marijuana establishments must have effective measures within their security plan that protect against embezzlement and theft. The marijuana program planners at the state must also consider a cash only environment when training the auditing and compliance team and working with law enforcement.

Law Enforcement and the Courts

Law enforcement may be slow to embrace legalization of marijuana since historically a significant amount of officer time has been expended identifying and apprehending marijuana users. Legalization of marijuana only for medical use does not entirely free them from this activity. If an officer smells the unmistakable odor of marijuana smoke it is now unclear if an offense is occurring. What action should be taken to determine if the user has a valid authorization? In Massachusetts doctors are authorized to give letters to patients certifying that they may use, possess and grow a 60-day supply of marijuana. Police, however, are in some cases disregarding the letter and making arrests because current regulations do not dictate a standard for so letters making them hard to authenticate.^{xix} Better communication between the State and law enforcement during drafting of regulations might have prevented confusion and frustration on the part of citizens who believe they are following the law.

On the positive side legalization would free officers to pursue more serious crimes. Likewise, court calendars freed up from hearings on small marijuana offenses would be able to accelerate more significant cases. Still, transitional questions emerge. How should the courts treat those who are currently in the legal system for charges that, based on new marijuana laws, are no longer felonies? What should be done with those already incarcerated? In March 2014 the Colorado Court of Appeals overturned a 2011 conviction for possessing less than an ounce of marijuana and possessing marijuana concentrate. While the verdict is not expected to create a flood of overturned cases, it may be a precedent for cases that were in the appeal process on December 10, 2012 when the amendment legalizing marijuana passed.^{xx}

Large-scale multifaceted Implementation

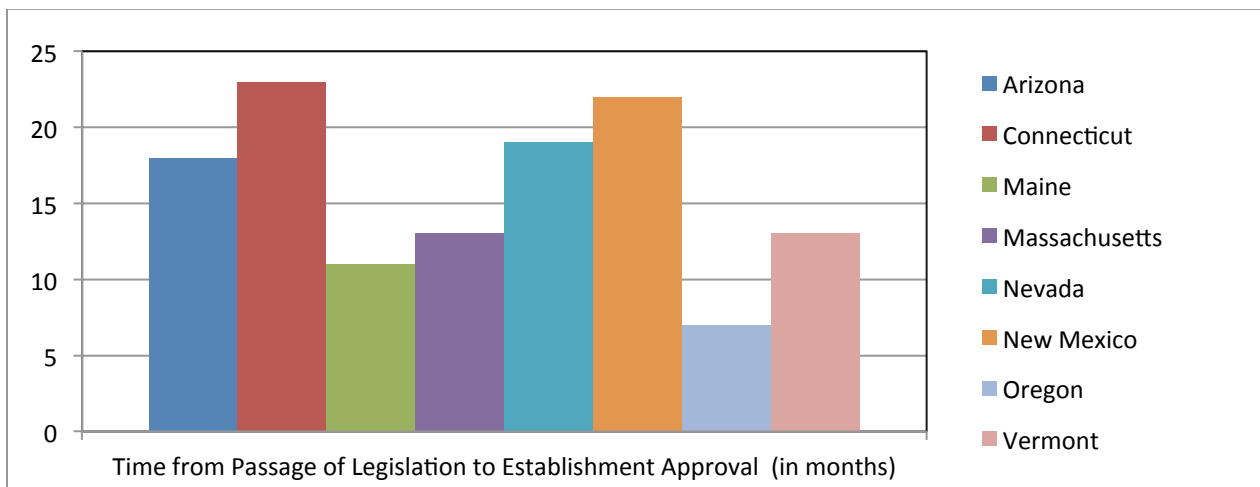
Creation of a completely new government program is a big undertaking. The unique circumstances of a medical or recreational marijuana program and the need to actively engage with stakeholders to build a broad base of support add to the complexity. There are many hurdles in the processes to adopt regulations, establish approved organizational structures, hire staff and implement electronic systems that must be taken into account. And often the enabling legislation includes time constraints that present additional challenges. For example, in Nevada according to the law, an application for a marijuana establishment must be acted on within 90 days of receipt of the application. This may not seem like a significant constraint until the competitive nature of issuing licenses is considered. All applications must be reviewed and ranked before a single applicant can be approved. With over 500 voluminous applications received, the 90 day window presents a significant challenge.

Detailed planning is the key to making sure that the implementation of the marijuana program completely addresses the full range of activities required in an efficient and effective manner. Three planning documents are useful:

- The Project Plan describes the scope, project approach, team roles and responsibilities and reporting relationships, success criteria, assumptions and constraints. It includes a detailed work breakdown structure with dependencies, task durations, time frames and resource requirements. The plan solidifies executive support, embodies user input, and represents shared expectations built on a well thought out approach and detailed project schedule. Everyone knows their role and how their efforts contribute to success.
- Equally important is a comprehensive Communication Plan that includes interactions with all stakeholder groups from the beginning of the project to full implementation. The Communication Plan clearly defines how the project team will ensure that all concerns are heard, how decisions will be made and what stakeholders can expect at each stage in the project.

- Special attention should be given to identification of risks that could jeopardize the project and development of corresponding mitigating strategies. The resulting Risk Plan provides an important tool for managing the project and recognizing and addressing potential threats before they impact the success of the program.

Together the planning documents foster a shared understanding of the project and its desired end state. It becomes the road map to the end goal and a tool to measure progress along the way. The time required to implement the marijuana program varies by the nature of the program and the resources available. In an analysis of the time between passage of marijuana legislation and licensing of establishments, lapsed time varied from eight to twenty-three months with the average being approximately sixteen months.



This analysis does not take into account the length of time required for dispensaries and cultivators to get their businesses up and running. Clearly there is a significant period of time between getting started on implementation and when tax revenues begin to ramp up. By interacting early with state lawmakers a realistic plan for funding can be achieved. The project planning activity will help to get the dollar amount right. If planning is done prior to the legislation being finalized, the fiscal notes can be supported by the Plan. Common startup costs include:

- Consultants or contractors to assist with tasks before the permanent staff can be hired
- Procurement of space, furnishings and supplies
- Consultants to assist in development of business and systems requirements
- Procurement of technology
- Implementation of technology
- Travel
- Temporary help during application processing

Conclusions

Legalizing marijuana holds the promise of new state tax revenues that can be put to use improving education or public health. It is also a new industry rising from an illegal past. There will be many challenges ahead before the smooth business-as-usual environment that is the case with most other government licensing programs is realized. But strong regulations, effectively enforced will prevent federal scrutiny. Highly functional data systems will provide the link to patients and marijuana establishments needed to evaluate the program and focus resources on problem resolution. Open communications with stakeholders will create an atmosphere of transparency and foster broad support. The key is effective planning at the outset and diligent execution of the plan.

About Us

QuantumMark, a Nationally Certified Women Owned Small Business, provides marijuana consulting services, facilitating every aspect of State Program development including regulations, licensing, applications, evaluations as well as project management, oversight, and implementation. Additionally, QuantumMark serves private sector business owners by assisting them to optimize their license applications and preparing the master plan for their new business implementation. Please visit us at www.quantummark.com or on Facebook and Twitter.

ⁱ Marijuana Policy Project Website, Key Marijuana Policy Reform Bills, 2014, Updated July 24, 2014

ⁱⁱ Marijuana on the Ballot, http://ballotpedia.org/Marijuana_on_the_ballot#tab=By_year

ⁱⁱⁱ Drug Schedule, Drug Enforcement Administration, <http://www.justice.gov/dea/druginfo/ds.shtml>

^{iv} Memorandum for All United States Attorney, Office of the Deputy Attorney General, James M. Cole, August 29, 2013, page 1.

^v Memorandum for All United States Attorney, Office of the Deputy Attorney General, James M. Cole, August 29, 2013, page 3.

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