Amendment 64: Five Years Later

BY ADAM DETSKY

This article looks at pressing issues the marijuana industry faces today, nearly five years after the passage of Amendment 64.

Colorado Constitutional Amendment 64, the ballot measure that legalized recreational marijuana use for adults, is approaching the fifth anniversary of its passage in November 2012. Marijuana has since become a vital aspect of the business landscape in Colorado, generating $1.3 billion in sales in 2016[1] and $129 million in tax revenue.[2] In 2016–17, $40 million in revenue collected from the excise tax will go to Building Excellent Schools Today (BEST), a competitive grant program to help school districts pay for construction or maintenance needs. Revenue from marijuana sales taxes in the past year was allocated to address several needs, including $4.4 million earmarked for grants to help children learn to read, $2.3 million for a grant program to assist with hiring school psychologists and nurses, $900,000 to pay for bullying prevention programs, and another $900,000 for programs designed to prevent students from dropping out of school.[3]

While sales thrive and the Colorado Department of Revenue's (DOR) coffers continue to grow, the industry remains in flux, constantly having to evolve to balance the needs of the industry, the state, local authorities, and residents, and to demonstrate to the U.S. Department of Justice (DOJ) that Colorado is at the forefront of enforcement to meet the mandates of the 2013 Cole Memo, which serves as the foundation around which Colorado's marijuana laws are framed. In the memo, Deputy Attorney General James M. Cole provided nonbinding guidance to U.S. attorneys about the eight priorities of federal law enforcement for purposes of allocating their limited investigative and prosecutorial resources.[4]

Two significant recent events have been (1) the creation of Permitted Economic Interests in marijuana, which opened the door for out-of-state investors to have minority ownership in marijuana licenses,[5] and (2) Colorado's win in the first major federal preemption challenge to its marijuana laws, when the U.S. Supreme Court denied a motion by the states of Nebraska and Oklahoma seeking to file a Bill of Complaint. The Court effectively refused to hear the arguments brought by Nebraska and Oklahoma that

marijuana was being trafficked into their states because of Colorado's legalization.[6] However, for every problem resolved, a new one arises.

Now, nearly five years after Amendment 64 was passed, this article looks at some of the most pressing issues the industry currently faces, outside of government action.

Insurance

Many marijuana license holders pay high premiums for insurance policies, but those policies may not provide any coverage at all. The earliest policies were not written with marijuana in mind and contain boilerplate language that negates the purposes of marijuana insurance policies, including exclusions for: bodily injury or property damages caused in whole or in part by marijuana; distribution; conflicting laws; employment-related negligence; and substances illegal under federal law. These policies also limit how much can be reimbursed for "trees, shrubs, plants or lawn" claims at a valuation more reflective of the cost of a household decorative plant than for cash crop units potentially worth thousands of dollars each. Other policies require contractual agreements or indemnity agreements with vendors—contracts that many avoided due to questions of enforceability and legality.

In 2016 the federal courts began to take notice of these exclusions. In *Green Earth Wellness Center, LLC v. Atain Specialty Insurance Company*,[7] the U.S. District Court for Colorado addressed a commercial property and casualty policy that purported to provide coverage to "Business Personal Property," including "stock."[8] The policy defined "stock" as "merchandise held in storage or for sale, raw materials and in-process or finished goods. . . ."[9] When harvested inventory stored on Green Earth Wellness Center's property was damaged, Atain denied coverage. In the resulting breach of contract and bad faith claims, the court denied Atain's motion for summary judgment, noting that a finding of no coverage rendered the policy nothing more than an illusory promise of insurance operating to unjustly enrich Atain.[10] The matter subsequently settled.

Since *Atain*, the industry has seen more carriers writing policies crafted to meet the industry's needs. This is a vital step toward gaining federal acceptance. However, with limited case law specific to marijuana, and with the industry continuing to innovate at a rapid rate, insurance will continue to remain an issue. For example, many retailers now offer marijuana extracts and oils that are heated by pen-size devices that can be carried in a pocket. These "vaporizer pens" have found a following due to their subtle and discreet design. However, they contain batteries that are capable of reaching extreme temperatures in a matter of seconds, sometimes as high as 700 degrees. Carriers are following these developments and either refusing coverage or creating exclusions specific to the manufacture and sale of these pens.[11]

Now the industry is beginning to look in the direction of captive markets, which will allow license holders the flexibility to write the coverage that they require as needs develop. However, the captive market is only in its infancy in Colorado and its long-term outlook is unclear.

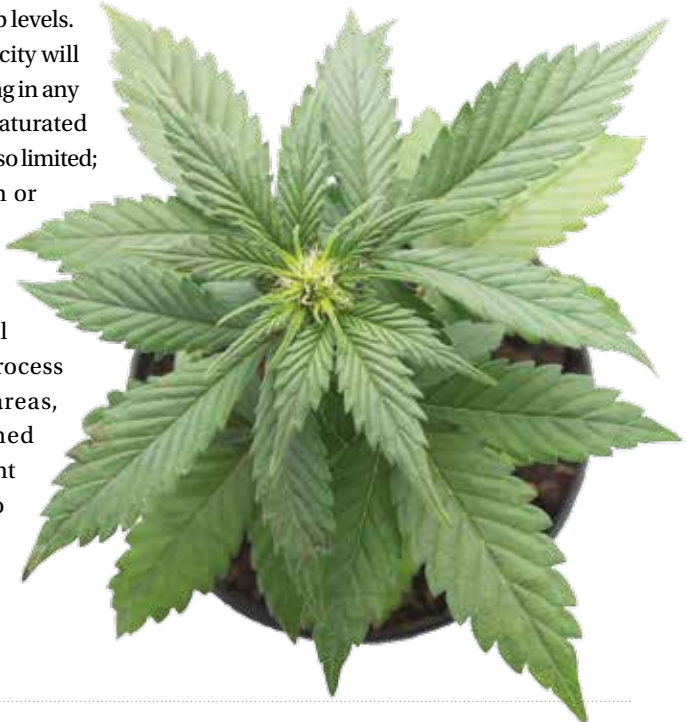
Community Pushback

The past two years have seen some efforts to scale back the industry. In Denver, the City Council passed Bill 16-0291 in 2016,[12] which capped the number of sales and cultivation licenses within the city and created a once-a-year application and blind lottery process for new licenses to be held only if the number of active licenses falls below the cap levels. For each application process, the city will prohibit new licensees from opening in any of the five neighborhoods most saturated with licenses. Viable locations are also limited; the bill prohibits new cultivation or sales locations within 1,000 square feet of residential zones and requires license holders to form a "Good Neighbor" plan with local community groups. This new process effectively disqualifies many areas, including warehouses entrenched in industrial zones, that sat vacant before legalization.[13] Denver also revoked a grow license in 2016 because of community complaints of odors.[14] In addition, Denver has denied permits for the Cannabis Cup convention for the first time and is rumored to be considering an end or major changes to the annual 420 Rally.[15]

Elsewhere, residents of Pueblo County saw a narrow vote (56% to 44%) on a 2016 ballot question to repeal ordinances that allowed recreational marijuana cultivation and retail sales.[16] Had the ballot passed, existing businesses would have been forced to close. The residents of the City of Pueblo faced and defeated a similar measure.[17] The City Council of Broomfield extended its ban on marijuana-related businesses.[18]

At the state level, bipartisan lawmakers decided against authorizing bring-your-own marijuana clubs out of fear of backlash from federal law enforcement.[19] When Denver voters narrowly passed (53% to 47%) Initiated Ordinance 300, the "social marijuana law," which was intended to allow established businesses to permit marijuana consumption on their premises subject to a series of strict requirements, the Colorado DOR immediately issued rules for the liquor enforcement division, stating that no premises with an active liquor license may permit the consumption of marijuana.[20]

On the federal level, 2016 saw the U.S. Drug Enforcement Administration (DEA) refuse to reschedule marijuana.[21] The Rohrabacher-Farr Amendment, which prohibits the DOJ from



spending federal funds to interfere with the implementation of state medical marijuana laws, was allowed to briefly lapse in April 2017 before ultimately being renewed as part of the budget negotiations that will keep the federal government funded through September 2017.[22] Other bills pending in the U.S. House of Representatives illustrate how divided legislators remain. For example, pending H.R. 714 seeks to move marijuana to Schedule II,[23] H.R. 2020 seeks to reschedule marijuana as a Schedule III substance,[24] and H.R. 1841 seeks to regulate marijuana like alcohol and de-schedule it.[25] One bill that will be monitored closely is H.R. 975, the Respect State Marijuana Laws Act of 2017. This bill amends the Controlled Substances Act (CSA) to provide that the Act's regulatory controls and administrative, civil, and criminal penalties do not apply to a person who produces, possesses, distributes, dispenses, administers, or delivers marijuana in compliance with state laws.[26]

Criminal Law

Amendment 64 was campaigned under the slogan of "regulate marijuana like alcohol." However, five years later, Colorado's criminal law still treats marijuana and alcohol very differently.

The manufacture, sale, or possession with intent to sell of any alcoholic beverage without a valid license is a class 2 misdemeanor, carrying a minimum sentence of three months' imprisonment, a $250 fine, or both, and a maximum sentence of 12 months' imprisonment, a $1,000 fine, or both.[27] Judges wield sentencing discretion within this range, but the level of offense remains the same regardless of the amount of alcohol manufactured or sold illegally.[28]

For marijuana, the level of offense and corresponding potential penalties varies significantly based on the quantities involved. Charges for cultivation of marijuana plants in excess of the legal limits range from a first-degree drug misdemeanor to a third-degree drug felony.[29] Charges related to unlawful possession or sale of marijuana range from a petty offense for possession of one to two ounces punishable by a maximum fine of $100 [30] all the way to the state's highest-level drug felony carrying a mandatory minimum sentence of eight years in prison.[31]

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While an alcoholic beverage is defined,[32] a marijuana "plant" currently has no statutory definition. The absence of such a definition creates ambiguity as to what should be counted in the prosecution of unlawful marijuana cultivation. In practice, "plants" can range from large flowering plants, each capable of producing over a pound of usable marijuana flowers, to smaller vegetative plants incapable of producing flowers, down to un-rooted clippings known as "clones" that are used to start new vegetative plants in the growth cycle.

Colorado HB 17-1220 recently passed both houses of the state legislature and was signed into law by the governor on June 8, 2017. The bill creates CRS § 18-18-406(3)(c) and enacts a statutory definition of a marijuana "plant" as "any cannabis plant in a cultivating medium which is more than four inches wide or four inches high or a flowering cannabis plant regardless of the plant's size."[33] HB 17-1220 does not take effect until January 1, 2018. While this new bill will provide needed clarity for enforcement of criminal laws, it will not affect the administrative rules for licensed commercial marijuana cultivations, which do not consider a plant for the purposes of calculating inventory limits until such plant reaches a size in excess of eight inches wide or eight inches high.[34]

Given the conflicts in federal marijuana laws, having strict quantity-based limits on possession and cultivation of recreational marijuana may be desirable. But currently, Colorado criminal law clearly does not treat marijuana like alcohol. Whether it should is a topic of future debate for voters and legislators.

Banking and Taxes

There are many obstacles on the path to profitability, and access to banking continues to be a hot-button issue, particularly since the 2016 decision in *Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City*,[35] where the District Court of Colorado rejected a lawsuit to essentially compel federal approval of a credit union for marijuana businesses.[36] The U.S. Department of the Treasury Financial Crimes Enforcement Unit (FinCEN) issued a memo in February 2014 outlining the applicability of the Bank Secrecy Act of 1970 to marijuana businesses. The memo had immediate negative impacts, with many individuals losing their bank accounts.[37] Since then, some banks have been known to charge $1,500 to $2,500 in monthly fees under the guise of needing to perform due diligence to ensure their clients are acting in compliance with the Cole Memo.

However, the largest roadblock is actually taxes. At the federal level, 26 USC § 280E (IRC § 280 E) forbids federal tax deductions and credits to companies trafficking controlled substances as defined by the CSA.[38] Section 280E has been challenged twice in Colorado within the past year. The U.S. Court of Appeals for the Tenth Circuit rejected one challenge in May 2017. In the most recent challenge, a large Denver dispensary, The Green Solution Retail, Inc., argued in part that the IRS lacks the statutory authority to make a finding that the company was a "trafficker." However, the Tenth Circuit noted in *Green Solution Retail, Inc.* that the December 2016 decision by the District Court of Colorado in *Alpenglow Botanicals, LLC v. United States* clarified that § 280E has no requirement

that the DOJ conduct a criminal investigation or obtain a conviction before § 280E applies.[39]

IRC § 280E has a disparate impact on businesses that sell marijuana compared to businesses that cultivate or manufacture marijuana. The IRC allows businesses to take cost of goods sold (COGS) deductions, which are a key factor in reducing their taxable income. For producers of cannabis, production-related wages, rents, and repairs can be considered COGS. However, the rules are far less favorably interpreted for a dispensary. A December 2014 memo from the IRS Office of Chief Counsel provided that the costs that sellers incur are nondeductible because they are directly related to the trafficking of marijuana under the Internal Revenue Code.[40] The result for dispensaries is a higher taxable income and a higher tax burden.

Section 280E alone is merely the start of the overwhelming tax burden on license holders. Other taxes include use tax, cultivation tax, special district taxes, local taxes, federal and state employment taxes, sales tax, city and county real and personal property taxes, filing and licensing fees, capital gains taxes, and federal and state income tax.

Adding to the burden is the DOR's announcement that cannabis businesses will be audited at least every three years. The DOR seeks to ensure that license holders are keeping accurate records and maintaining arm's-length relationships with related entities not subject to § 280E, and that shareholders are not siphoning corporate funds, among other areas of concern.

While tax revenue is growing, it comes at the expense of crippling all license holders—from "mom and pop" shops to growing corporations. In fact, the taxes will increase in 2017 following the release of the new budget agreed on by the Joint Budget Committee in May 2017.[41] To mitigate these tax burdens, many businesses will be compelled to get creative and sophisticated with their accounting, just to stay afloat; others will likely fold.

Pesticides

Outside of the marijuana industry, pesticide exposure has been found to be toxic and potentially carcinogenic and has been known to result in symptoms such as vomiting, rash, nosebleed, tremors, and even comas. The result is that pesticides are heavily regulated at the federal and state levels.

At the federal level, the Environmental Protection Agency (EPA) regulates pesticides under authority granted by the Federal Insecticide, Fungicide, and Rodenticide Act.[42] At the state level, pesticides are regulated by the Colorado Department of Agriculture (CDA) and the state's Pesticide Applicator Act. Both the EPA and CDA require a detailed risk assessment of each pesticide to determine how, when, and where each product can be safely used; instructions can be found on the label of each pesticide. However, in virtually all instances, none of the common pesticides has been approved or labeled for use in conjunction with cannabis.

A 2013 Executive Order[43] issued by Governor Hickenlooper required the CDA to establish a list of pesticides that are prohibited from use in the cultivation of cannabis. The CDA has instead focused on creating a list of pesticides allowed for use on cannabis.[44] This list is posted on the CDA's website and is updated frequently.[45]

Since 2014, Colorado has not been shy about enforcing the CDA requirements, and as of March 2016, the CDA has adopted rules that set forth the criteria specific to pesticide use in the cultivation of cannabis. However, the CDA's focus is primarily on consumer protection from pesticide exposure. There are separate regulations intended for worker protection. The federal Worker Protection Standard places additional requirements on producers of any agricultural commodity if they have people working in an area where plants have been treated with pesticides or where pesticides are applied or mixed. Workers who apply pesticides are required to obtain commercial applicators' licenses, and there are numerous pesticide storage requirements for businesses.

The likelihood of "approved for cannabis use" appearing on any pesticide label in the near future is almost nonexistent. The ever-changing CDA list of pesticides "allowable" on cannabis presents an ongoing challenge for grow operations with a very steep penalty (product recall) for using an "unallowable" pesticide. When cultivators use chemicals not approved by the CDA, enforcement and notice to the public is swift. Recent years have seen pesticide-related recalls, most notably for the use of a pesticide named Eagle 20, which turns into cyanide when burned.[46] Most recently, in April 2017, the Colorado DOR, in conjunction with the CDA and the Colorado Department of Public Health and Environment issued public health and safety advisories after pesticide residues were found in specific harvests by a particular license holder. Those health and safety advisories were prominently published with the names of the cultivator and seller, batch numbers, and license numbers.[47]

Conclusion

As the marijuana industry continues to advance and grow, so do the legal and public safety issues. As the country moves farther along the path to legalization, the number of eyes looking at Colorado as the model for regulation and enforcement will increase as well. While the issues highlighted in this article are by no means exhaustive of the issues the industry faces "five years later," this snapshot of issues must be addressed at the federal and local levels for the industry to continue to grow and create not only tax revenue but also jobs. Some projections show that the marijuana industry will create more jobs than the manufacturing sector by 2020.[48] Other reports project marijuana to be a $24 billion industry by 2025.[49] For these projections to become reality, the federal government, the state government, and the industry must work together to resolve these issues.

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Proclamation

Nancy E. Rice
Chief Justice
Colorado Supreme Court

S. James Anaya
Dean
University of Colorado
Law School

Bruce P. Smith
Dean
University of Denver
Sturm College of Law

Richard S. Gast
President
Colorado Bar Association

Declaring October 2017 Legal Professionalism Month in the State of Colorado

***WHEREAS**, the Supreme Court of Colorado is vested with the authority and responsibility to determine who is possessed of the moral and ethical character, knowledge, and skill to represent clients and serve as an officer of the court; and*

***WHEREAS**, law schools teach such knowledge and skill and foster the formation of professional identity; and*

***WHEREAS**, members of the legal profession are public citizens having special responsibility for the quality of justice, the improvement of the law, the access to the legal system, the administration of justice, and the quality of service rendered by the legal profession; and*

***WHEREAS**, members of the legal profession in Colorado have established the Colorado Bar Association; and*

***WHEREAS**, the objectives of the Colorado Bar Association include advancing the science of jurisprudence, securing more efficient administration of justice, advocating thorough and continuing legal education, upholding the honor and integrity of the bar, cultivating cordial relations among the lawyers of Colorado, and perpetuating the history of the profession and the memory of its members; and*

***WHEREAS**, the Chief Justice of the Supreme Court of Colorado has established the Commission on Professional Development to foster among members of the legal profession a commitment to service, excellence, respect, ethics, and trustworthiness, as well as a commitment to the preservation of the rule of law;*

***NOW THEREFORE**, the Chief Justice of the Supreme Court of Colorado, the President of the Colorado Bar Association, the Chief Justice's Commission on Professional Development, and the Deans of the University of Colorado School of Law and the University of Denver Sturm College of Law do hereby declare and proclaim October 2017 to be **Legal Professionalism Month in the State of Colorado**;*

***AND IN FURTHERANCE THEREOF**, encourage*

- *Members of the Legal Profession to rededicate themselves to demonstrating the highest standards of professionalism and integrity, and promoting public trust in the rule of law;*
- *Professional Entities, including law firms, corporate and public law offices, bar organizations, and Inns of Court, to promote legal professionalism and public confidence in the profession;*
- *Judicial Officers and Court Staff to promote public confidence in the courts, our system of justice, and the professionalism of the bench and bar; and*
- *All Members of the Legal Profession to foster diversity and inclusion within the profession;*

***AND IN COMMEMORATION THEREOF**, invite all judicial officers and members of the legal profession to attend a Special Session of the Supreme Court of Colorado at Boettcher Concert Hall on October 30, 2017, at 3:30 p.m., to welcome to the legal profession those who then will be admitted to the practice of law;*

***Declared and Proclaimed** this 15th day of August 2017.*

Nancy E. Rice
Chief Justice
Colorado Supreme Court

S. James Anaya
Dean
University of Colorado
Law School

Bruce P. Smith
Dean
University of Denver
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