

Colorado's Rollout of Legal Marijuana Is Succeeding A Report on the State's Implementation of Legalization

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INTRODUCTION AND SUMMARY¹

In November 2012, Colorado voters decided to experiment with marijuana. Formally, they approved Amendment 64, modifying the state constitution.² This move was historic and did something which, to that point, no other state or modern foreign government had ever done: legalize retail (recreational) marijuana.³

As part of the amendment, the state was required to construct legal, regulatory, and tax frameworks that would allow businesses to cultivate, process, and sell marijuana not simply to medical patients—as had been happening in Colorado for over a decade—but to anyone 21 and older. This change came despite existing federal prohibition of marijuana and opposition from the governor, state attorney general, many mayors, and the law enforcement community.

At its heart, this report is about good government and takes no position on whether the legalization of retail marijuana was the correct decision. Instead, it takes for granted that Amendment 64 and its progeny are the law and should be implemented successfully, per voters' wishes. The report examines what the state has done well and what it has not. It delves into why, and how, regulatory and administrative changes were made. Finally, it offers an evaluation of how effective the implementation has been. Key findings include:

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² The final text of Amendment 64 can be accessed here: <http://www.leg.state.co.us/LCS/Initiative%20Referendum/1112initrefr.nsf/c63bdd6b9678de787257799006bd391/cfa3bae60c8b4949872579c-7006fa7ee/>

³ For clarity, "retail marijuana" serves as a shorthand (in regulatory language and for the remainder of this paper) for regulated, commercial, recreational marijuana.



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- It's too early to judge the success of Colorado's *policy*, but it is not too early to say that the rollout—initial implementation—of legal retail marijuana has been largely successful.
- The state has met challenging statutory and constitutional deadlines for the construction and launch of a legal, regulatory, and tax apparatus for its new policy. In doing so, it has made intelligent decisions about regulatory needs, the structure of distribution, prevention of illegal diversion, and other vital aspects of its new market. It has made those decisions in concert with a wide variety of stakeholders in the state.
- Colorado's strong rollout is attributable to a number of elements. Those include: leadership by state officials; a cooperative, inclusive approach centering on task forces and working groups; substantial efforts to improve administrative communication; adaptive regulation that embraces regulatory lookback and process-oriented learning; reorganizing, rebuilding, and restaffing critical state regulatory institutions; and changes in culture in state and local government, among interest groups, and among the public.
- Regulations address key concerns such as diversion, shirking, communication breakdowns, illegal activity, and the financial challenges facing the marijuana industry. However, some regulations were also intended to help regulators, as they endured rapid, on-the-job training in dealing with legal marijuana.
- Despite real success, challenges involving edibles, homegrown marijuana, tax incentives, and marijuana tourism remain, and the state must address them in a more effective way.

Recent failures at the federal level show Americans daily what happens when a government refuses to govern and is unwilling or unable to make changes in the face of policy realities. Colorado has made a conscious effort to preserve enough flexibility for its policy to remain effective over time. A strong rollout is important, but what happens after that is just as important. With its emphasis on flexibility, Colorado is taking out an insurance policy against unintended consequences.

WHY IMPLEMENTATION MATTERS

In any policy area, the implementation of laws and regulations is essential for administration and governance. Legalized marijuana in Colorado is no different. In fact, this specific policy area is unique in many ways that make attention to implementation all the more important.



General Implementation Demands

The implementation of a system of legalized marijuana is critical. Government failures are expensive, create market uncertainty, lower the morale of personnel, create inter- and intra-agency management problems, and cause costly public and political embarrassment. High-profile implementation failures such as the rollout of the Affordable Care Act's federal exchange website, the Federal Emergency Management Agency's response to Hurricane Katrina, or the management of the Vietnam War are ingrained in the minds of many Americans. In each of those cases, public officials faced tremendous backlash.

Implementation matters for more than headlines and political costs, however. The launch of any new program is often its most risky period. Failure rates can be high; politicians' patience can be limited; public skepticism is often substantial. Narratives about success or failure—regardless of the realities of administration—can take root and have dramatic effects on public and political support. This incubation period for public policies can lead to rapid reversal, as was seen in the 1980s after Congress passed the Medicare Catastrophic Coverage Act of 1988.⁴

Moreover, early implementation decisions are often the most important. The way in which a program is initially designed and executed will shape its subsequent development. Because of bureaucratic inertia and political entrenchment, righting the ship is often difficult after a course has been set.

For legalized marijuana, implementation matters for other, unique reasons. First, Colorado's experiment raises unusual federalism issues. While marijuana cultivation, distribution, possession, and use are legal in Colorado, all those activities remain in violation of numerous federal laws and regulations. In response, the Justice Department issued a memo in August 2013 (referred to as the "Cole Memo") that clarified federal government priorities in this area.⁵ The memo says that the federal government expects states that "endeavor to authorize marijuana production, distribution, and possession" will "implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests."⁶

The federal government, in the context of Justice Department enforcement, will take a hands-off approach to the enforcement of the Controlled Substances Act if, and only if, states implement regulation effectively and comprehensively. Shoddy implementation poses a risk that the federal government can step in, in a variety of ways, and shut down legalized marijuana in the state.

4 For a brief discussion of the Act: <http://www.medicarenewsgroup.com/news/medicare-faqs/individual-faq?faqId=9afa2890-81dd-4620-b7ed-329162f5d88b>

5 The Cole Memo can be accessed here: <http://www.justice.gov/opa/pr/2013/August/13-opa-974.html>

6 Ibid at 5.

Beyond the federal question, Colorado's implementation efforts have consequences for other states. With public opinion changing,⁷ public policy is moving toward legalization, but many states are waiting to see what the experience in Colorado will be.⁸ If the Colorado model is a success, other states that consider retail legalization measures may well model their own legal and regulatory systems on Colorado's. Failure in Colorado will either deter states from legalizing or force them to chart a very different path in administering legalization policy.

In short, Colorado's early implementation decisions will be considered the Colorado Model; that model will inform and influence marijuana policy, potentially, for years to come.

WHAT IS A "SUCCESSFUL" IMPLEMENTATION?

In the context of marijuana policy, implementation involves the design, construction, and execution of institutions, rules, and processes related to a system of legalized marijuana. Success occurs when those institutions, rules, and processes produce a system consistent with the goals of the policy. Some elements of the system are formal legal and regulatory actions; others may be informal efforts, such as outreach and coordination. In the case of marijuana, Amendment 64 sets the parameters of the policy: a legalized, regulated system for the cultivation and purchase of marijuana products, in controlled quantities, for individuals 21 and older. It also provides guidance on taxation, revenue allocation, and local control. Implementation, then, can be said to be successful if the state can construct a system that effectively meets the law's requirements.

It is important to note that implementation is based on *government* action and behavior, and that *implementation* success and *policy* success can be two very different concepts that should not be conflated. By analogy, imagine Congress passes a law that frees every federal prisoner in the U.S. The Bureau of Prisons then draws up plans to time and process prisoners' release, return personal items to inmates, transport inmates to drop-off points in towns and cities near federal detention facilities, and so on. The agency could empty the nation's federal penitentiaries flawlessly, without bureaucratic delays or mix-ups. Implementation, then, could be a rousing success. Nonetheless, the *policy* would most likely be an utter failure, releasing thousands of dangerous criminals onto the streets.

This is not to say marijuana legalization is the equivalent of a nationwide prisoner amnesty law. Instead, it is to emphasize that criticisms of Colorado's marijuana policy may be on point, even in the face of very effective implementation. The reverse can be true as well. Supporters of the Affordable Care Act deeply believe that the policy is a good one and will be successful,

7 In May 2013, E.J. Dionne, Jr., and William Galston wrote about changing public opinion in this area: *The New Politics of Marijuana Legalization: Why Opinion is Changing* (Brookings). Available at <http://www.brookings.edu/research/papers/2013/05/29-politics-marijuana-legalization-galston-dionne>.

8 <http://www.cnn.com/2013/12/30/opinion/hudak-marijuana-2014/?c=&page=1>



even though the October 2013 rollout of the federal exchange website was an unmitigated implementation failure.

KEY ELEMENTS OF THE COLORADO MODEL

A. Rapid Response: The Implementation

Task Force

Policymakers, politicians, regulators, and bureaucrats are notorious for foot-dragging. As policies are implemented, delays are common, and missed deadlines are expected. The architects of Amendment 64 worried that sluggishness could set in and undermine legalization efforts after passage—a concern that seemed not altogether unfounded. In a September 2012 statement, Colorado Governor John Hickenlooper formally opposed the amendment, saying, “Colorado is known for many great things—marijuana should not be one of them.”⁹

As a result, legalization proponents built very strict deadlines into the amendment to force the state government’s hand. For example, the amendment—passed on November 6, 2012—required the Colorado Department of Revenue to “adopt regulations necessary for implementation” by July 1, 2013. State and local licensing procedures had to be established by October 1, 2013. Essentially, the amendment required dramatic changes to state and local administrative procedures in less than a year—a tremendous task for any organization, public or private.

In what was a relief to Amendment 64’s backers, after its passage Hickenlooper announced that his personal opposition would not stand in the way of the implementation of the public’s mandate. In a November 2012 statement he noted, “The voters have spoken, and we have to respect their will. This will be a complicated process, but we intend to follow through.”¹⁰ A month later, Hickenlooper issued Executive Order B 2012-004, establishing the Task Force on the Implementation of Amendment 64.

The creation of the task force was among the most important administrative actions in the implementation of legalized marijuana in Colorado. It was also among the most successful. The task force was comprised of 34 standing members and dozens of additional members assigned to working groups that engaged specific, relevant topics.¹¹ It was chaired by Hickenlooper’s

⁹ <http://www.colorado.gov/cs/Satellite/GovHickenlooper/CBON/1251630730489>

¹⁰ <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=GovHickenlooper%2FCBONLayout&cid=1251633686228&pagename=CBONWrapper>

¹¹ There were five working groups under the task force. They were the Regulatory Framework Working Group; the

chief legal counsel, Jack Finlaw, and the executive director of the Department of Revenue, Barbara Brohl, whose agency would be broadly responsible for implementation, regulation, and enforcement.

Membership on the Implementation Task Force was diverse and broad-based. It included some passionate legalization supporters, including those active in the Amendment 64 campaign, as well as staunch opponents of the measure from the medical and law enforcement communities and citizen groups. Stakeholder groups from government, business, health care, law enforcement, labor and other areas designed a set of recommendations for the state legislature to consider and the Department of Revenue to review.

Although task forces can be prone to delays, this one seemed motivated by the importance and scope of its mission, and by its ambitious deadline: the governor gave it less than three months to complete its job, and Amendment 64 mandated a strict constitutional timeline.

In March 2013, the task force completed its work and issued a nearly 200-page report on how the state of Colorado should implement Amendment 64. Many of the recommendations were approved by the state legislature and governor that spring. Implementation thereupon began in earnest, and a series of drastic changes and transformations ensued.

B. Signals from the Top: Gubernatorial Leadership

Drastic administrative change cannot be successful without leadership that is committed to making it work. In Colorado, leadership at the top was absolutely critical. Hickenlooper set a tone from which many state officials took cues. He essentially told state workers, appointees and career staff alike: Whatever your personal opinions, we have a job to do.¹² The governor's conspicuous commitment ensured that the Department of Revenue and other state agencies would have backing from leadership to carry out the constitutionally required mission.

In interviews, state employees, including Brohl, the executive director of the Department of Revenue, noted that the governor's tone, approach, and support had an impact on the business of government. People inside and outside of government praised his willingness to accept the public will, uphold the constitution, and be supportive of the process. Christian Sederberg, a Denver attorney who helped lead the Amendment 64 effort (later serving on the Implementation Task Force), explicitly noted Hickenlooper's "good-government approach."

Leadership is contagious within government. Weak leadership, corner-cutting, bureaucratic resistance, and organizational strife can compound each other's ill effects. Alternatively, good leadership can breed good decision making and effective governance. Hickenlooper's style is

Local Authority and Control Working Group; the Tax, Funding, and Civil Law Working Group; the Consumer Safety and Social Issues Working Group; and the Criminal Law Working Group.

¹² Similar signals came from other top state officials like Attorney General John Suthers, as well.

no magic elixir that guarantees success. However, if the governor had taken a more polarizing approach or one that reflected his personal opinion, the results would have been quite different.

C. Preventing Crossed Wires: Internal Coordination

Hickenlooper's leadership went beyond setting a constructive tone and organizing a task force. Within his own office, he saw a need for better coordination and leadership on the marijuana issue. In response, in February 2014, he hired Andrew Freedman to be the state's first Director of Marijuana Coordination. Freedman works closely with state government and private stakeholders, organizing twice-monthly policy meetings with the governor's staff to help coordinate policy, identify problems that exist or may arise, and improve communication among policy staff.¹³ Hickenlooper also organized monthly cabinet meetings that were described as "collaborative."

Although routine in the private sector (the background from which the governor hails), in state government these kinds of measures to foster internal coordination are not necessarily common. They should be, however, because they offer important advantages. Regular face-to-face coordination encourages stakeholders with diverse viewpoints and interests to communicate and collaborate. Director Brohl noted, "The task-force model has been used throughout the process...and keeps everyone at the table." Regular meetings can also increase morale, accountability, and rapport.

In Colorado, the emphasis on coordination reflects a reality: marijuana legalization affects more than just the Department of Revenue (the agency charged with regulating marijuana). The reform affects agriculture, transportation, public health, law enforcement, and more. Bringing leaders together regularly can help decrease the likelihood that communication and policy breakdowns will occur.

D. Administrative Reboot: Agency Reorganization and Staffing

Changes within government occurred beyond the office of the governor. Initially, enforcement of legalized medical marijuana fell within the jurisdiction of the Department of Revenue's Medical Marijuana Enforcement Division (MMED).¹⁴ MMED was established in July 2010 to bring regulatory order to what was widely seen as a chaotic and out-of-control medical marijuana system. The division was fraught with problems, from leadership to administrative inefficiency to funding, and a 2013 audit shed a very public light on the problems at MMED.

In response to the audit and the passage of Amendment 64, the Implementation Task Force

¹³ This kind of internal coordination is essential for good administration, but is often underutilized in government. Some of the most notorious recent scandals in federal and state governments involve failures of communication and coordination within government.

¹⁴ Medical marijuana was approved by voters through Amendment 20 in 2000.