

1. Options for the new U.S. AG to deal with legalization in the states.

On a practical level, DOJ action against legalization is constrained by just two factors: (1) an appropriations rider, currently in force but that expires at the end of this budget cycle if not renewed, preventing DOJ from spending money enforcing federal law with respect to medical marijuana in states where it is legal; and (2) political considerations.

The former, at least [under current Ninth Circuit caselaw](#), appears to prevent prosecutions of individuals or organizations that comply with state medical marijuana law. It does not, however, apply to non-medical marijuana, and does not appear to prevent action by non-DOJ entities with enforcement powers such as the FDA.

The latter is more salient in terms of the DOJ taking immediate, drastic action to curb the marijuana industry. A move to immediately crack down, for example, via a letter to states demanding that marijuana businesses be closed in 90 days, would likely force a showdown between governors and the federal government that could back governors into a corner, even those anxious to rid themselves of these socially-undesirable programs.

That said, we see three realistic options for DOJ, broadly speaking, listed in declining order of desirability:

- DOJ would issue a memorandum stating that DOJ will enforce federal law on marijuana, and, as an initial step, send letters to governors and key law enforcement officials in states that have legalized marijuana and ask for their cooperation.

This approach has the benefit of providing maximum flexibility with respect to means and timeframe, while ensuring that the overall end—enforcing federal law—is emphasized. Moreover, states with governors and AGs willing to cooperate with DOJ from the outset could make rapid progress.

- DOJ would leave the Ogden and Cole Memos in place, but actually enforce their terms. This would involve issuing, as soon as practical, a concrete plan establishing metrics to track the eight criteria in the 2013 Cole Memo, putting criteria in place for federal intervention when those metrics indicate a violation of the memorandum’s terms, and robustly enforcing federal law when those criteria are triggered—including but not limited to, per the language of the 2013 Cole Memo, “challeng[ing] the [state marijuana] regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions.”

This approach is less robust, but actually putting teeth on the Cole memoranda would likely result in closure of a significant percentage of marijuana businesses. Moreover, the memo expressly leaves DOJ with the power to shut down state marijuana programs wholesale if they do not meet the eight criteria.

- DOJ would leave the current Obama-era policies in place and continue to ignore GAO recommendations for enforcing those policies.

This is the *status quo* and is not recommended.

2. What particular areas of regulation should we in Nevada be concerned with? (Obviously--edibles, potency, advertising, stacking the regulatory process, etc.) Anything you have written or suggested to other states would be helpful.

- **Public health and safety advocates should hold the majority of seats on the advisory committees related to the proposition.** It is imperative that these advisory committees not go the way of their cousins in Colorado, which were dominated by industry voices. As a result, Colorado regulation of potency, edibles, and other important public health issues was—and remains—extremely weak. Ensure that strong voices for the public interest hold a majority of the seats on these bodies, and if not, establish independent oversight panels.
- **Demand a strong *per se* standard for driving while high.** Following in the footsteps of Colorado and Washington, Nevada should expect a surge in fatalities related to driving while high. A strong *per se* standard for driving while high is critical to preventing at least some of these needless deaths.
- **Establish an independent oversight office, staffed solely by public health experts, to track data related to marijuana use.** Following the adage of “you can’t manage what you can’t measure,” an independent office staffed solely by public health professionals needs to gather and track data related to the health impacts of marijuana use. The advisory committees referenced above are not enough—their objective is to make recommendations, not to collect data, and they will also be subject to tremendous political pressure by a powerful pot lobby. An independent body is needed, staffed with experts with deep expertise in addictive substances like that of UCSF’s Dr. Stanton Glantz. Otherwise, the pot lobby will run rampant and there will be no robust data collection to track the

industry's impact.

- **Set up a statewide law enforcement office to measure black market and cartel activity, and coordinate with neighboring states.** Colorado has seen an unprecedented rise in black market activity since legalization. The state had one organized crime filing in 2007, and 40 in 2015. This year, reports of Mexican cartel activity even began to filter in, indicating that they are taking advantage of these lax laws to hide in plain sight. Gathering data on their activity will be critical, and the industry will not shoulder that burden.
- **Pass strong product liability and dram shop laws for marijuana.** Although the marijuana industry claims to want to be regulated like other intoxicants, they have so far been curiously exempt from accountability in the form of product liability lawsuits and dram shop laws. Shops who sell marijuana to individuals who are clearly impaired should be strictly liable to anyone injured by that person. And manufacturers, distributors, and retailers should be liable to those who have adverse reactions from using their product. Municipalities planning on restricting marijuana sales should lawyer up now.
- **Restrict edibles and concentrates as much as possible.** The most serious danger to public health with respect to legal marijuana products are edibles and concentrate products. Their high potency, resemblance to non-laced consumer products (candy, topical lotions, etc.) and ease of use create particular problems. They should be heavily regulated to discourage their advertising, sales, and use.
- **Advertising restrictions.** Like alcohol and tobacco, underage users are a very profitable market for the marijuana industry, even if sales to them are illegal. Early-onset users are more likely to become highly profitable heavy users, and brand loyalty is generally developed and solidified when users are younger. Advertising is therefore an important component to targeting and capturing these users, as this country's experience with tobacco has demonstrated. To the extent possible, therefore, advertising should be heavily regulated and restricted. Moreover, simple prohibitions on ads "targeting minors" has an empirically poor track record—there is too much legal room to debate on what targets minors and what does not. Good restrictions must go farther than that and be general in nature.

Also, keep in mind that any such restrictions must also be compatible with First Amendment protections on commercial speech—but it is unclear whether that protection would apply to activities that are illegal under federal law. Additionally, litigation over advertising restrictions is likely to

cast the marijuana industry in a bad light as it claims a right to advertise an addictive substance.

- **Heavy penalties for advertising or selling to minors.** Given the importance of keeping marijuana out of the hands of minors, this is a critical, if not obvious, component of a strong regulatory policy.
- **Targeting investors with enforcement actions.** Strong enforcement should address those financing non-compliant marijuana operations, as well as the operators.

3. Are there any particular legal arguments (that realistically) can be made by the AG's office in the state prior to legalization?

Without being an expert on Nevada law, it is impossible to provide a legal opinion here. But some potential options come to mind. It is conceivable that the state could refuse to implement a law it considers incompatible with federal law per the Supremacy Clause of the U.S. Constitution. Nonetheless, there are thorny political considerations to such a course of action, as well as the legal question of whether or not Question 2's proponents could sue to compel state officials to implement it.

Other, potentially more practical strategies could include:

- Proactively promising, via a formal memorandum, to refer marijuana businesses that do not comply with state law to federal law enforcement, or promising to bring state racketeering prosecutions and/or forfeiture actions against not only the operators but also their investors, no matter where they are located. (Creating potential criminal liability for investors is key to controlling the industry—those solely interested in returns are highly unlikely to risk white-collar prosecutions in exchange for a slightly higher ROI.)
- Issuing a formal memorandum promising a zero-tolerance policy for any advertising of marijuana and marijuana products based on federal law, FCC policy, and public health/safety concerns, with a promise to refer cases to federal authorities, and to aggressively prosecute any violations of state law.

4. Report on SAM's efforts nationally and in the states, etc.

Nationally, SAM is working with transition team officials to design a new federal approach to marijuana policy focused on scientific evidence and enforcing federal law across the country. Aside from working with DOJ, it is also designing policy

briefs for the Department of Health and Human Services, the Department of Education, and the Department of Labor. Moreover, it continues to push for rules that facilitate legitimate medical research on marijuana and marijuana compounds, and for evidence-based alternatives to incarceration for marijuana users.

On the state and local level, SAM has launched the Marijuana Accountability Project (MAP) that will work with all states and localities—whether they have legalized marijuana or not—to hold the marijuana industry accountable and halt its advance:

- **Congressional Outreach:** SAM will boost federal lobbying efforts to stop legalization on the federal level.
- **State Report Card Tracking Project:** Evaluate the states with legal recreational marijuana across the following metrics: Public health (incidence rates of poisonings across age and demos), public safety (car crashes, ER visits), marketing (evaluate and compare based on other legal drugs), political influence (track lobbying and spending), and economic impact (promises made on funding, promises kept?).
- **Community Roundtables:** We anticipate holding up to five community roundtables, open to the media, in select states in the first year. At these events, we will release the results of the tracking project, and hear from citizens who have been impacted by legalization and the industry as a whole. These roundtables will serve two purposes: show the real life impact of legalization, and promote MAP as a critical oversight voice.
- **Public Education/PSA Campaign:** SAM will launch a media campaign called “Are We Sure?” that asks localities if they really want marijuana stores in their neighborhoods. The campaign will also be used in non-legalization states, and will educate the public on today’s high THC marijuana and its impacts.
- **Earned Media:** Earned media will be a critical component to ensure the accountability messaging and approach is well understood in our target states, and pushes the agenda forward. Our tactics will include op-eds, rapid response, editorial board visits, press conferences, and reporter briefings.
- **Organization of Municipalities Concerned about Marijuana (OMCM):** OMCM will consist of officials from localities that have implemented strict controls on marijuana, including those that have banned marijuana stores altogether, and officials from other jurisdictions interested in promoting public health-based marijuana laws. Through OMCM, these localities will share best practices, model ordinances, and other strategies.

- **SAM Legal Initiative:** SAM will launch an initiative to hold marijuana businesses accountable to the law of the land, and research legal compliance issues.
- **SAM State Legislative Caucus:** The SAM State Legislative Caucus will bring together likeminded state legislators who want to stop legalization and commercialization, and share best practices on marijuana policy.
- **Model laws:** MAP will also develop copies of model state laws and local ordinances to control the marijuana industry, incorporating best practices from existing laws and input from scientific and legal experts.