

Could Grocery Stores be the New Drug Dealer?

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“Honey, would you mind picking up some milk, eggs, cereal and an eighth of weed from the **grocery store** on your way home.”

This is a statement I have unsurprisingly never heard from or uttered to anyone in my family, and with good reason. Marijuana is federally banned and the majority of the States continue to outlaw it.

Even in those States that have legalized its use, we tend to still associate marijuana solely with poorly-lit dispensaries managed by a sketchy, stoned, and hippy-esque proprietor. Rarely do we associate brightly lit, well-managed, reputable grocery stores with this trade. It seems very incongruous to think that one could buy cannabis at the local grocery store. But why? If weed is to be regulated in a manner similar to alcohol or tobacco regulation, there should not be a distinction.

Imagine being able to purchase one’s favorite strain of marijuana along with his or her groceries at the local supermarket. Surely, you would have to provide proof of age and the cannabis would be taxed, but this situation is no different than purchasing well-regulated alcohol or tobacco. While humorous, you could even anticipate health-food chains to begin stocking their shelves with marijuana and marketing it as “non-GMO, fully organic, fair trade weed.”

Several states, most notably Colorado and Washington, have recently legalized recreational marijuana. Additional States have decriminalized medicinal marijuana, citing the numerous healing qualities, and others are considering legalization of either medicinal or both medicinal and recreational marijuana. The States that have legalized marijuana have benefitted from an increase in their tax incomes.

Colorado, in 2015, saw almost a billion dollars of marijuana sales occur with approximately 135 million dollars of that figure headed towards State coffers in the form of excise and sales taxes along with other local fees. [1] This figure heartily trumps the State's alcohol tax income by approximately 30 million dollars and amounts to an approximate 35% increase from the previous year's intake of marijuana taxes. [2]

The State of Washington expects to collect in 2016 even more money than Colorado has. Marijuana taxes, at a revamped rate of 37% conferred upon consumer, are anticipated to represent approximately 154.6 million dollars. It can therefore be inferred that retailers are expected to move \$417.83 million worth of pot, before taxes included. This figure is further expected to increase year by year. [3] With marijuana's astounding potential for profit, it seems likely maverick as well as conservative national grocery and other multi-unit, multi-State operators will want a piece of the action.

This conclusion seems further inescapable once one considers the degree to which these national operators are well-placed to enter this arena. These multi-State, multi-unit operators already have the capital required, the physical stores built, the lobbying in place, the regulatory lawyers retained, the employees trained to be responsible retailers of restricted goods, and the institutional mechanisms developed in order to ensure proper and quality-controlled product. In other words, it may be a no-brainer from the profit-seeking perspective.

So could this imaginary experience become the reality in those States where marijuana is now considered legal at least at the State level? At this point, the answer is a resounding "No".

Firstly, marijuana remains federally illegal. Marijuana and its growth, cultivation, selling, possession, giving away, as well as its consumption, are expressly outlawed by the Federal Government of the United States of America. Therefore, those engaging in, shall we call it the marijuana market, are still violating a federal law even though they may be fully compliant with their respective State rules. The current administration has expressed a position of non-enforcement, yet there nevertheless remains minimal enforcement; and, it is unknown what the next Presidential administration will do in this regard. Conformance with State law provides no shield against a federal prosecution. These State laws do, however, regulate how the sale of marijuana will take place.

Colorado and Washington have both adopted Statutes and promulgated rules that effectively prohibit a grocery store or major retailer of any kind from entering the trade. Currently, a marijuana retailer in both States is exclusively restricted to only selling marijuana and marijuana paraphernalia. The retailer may not sell any other item, besides those two above. As an exemplar, Colorado Revised Statute 12.43.407 (7)(a), in pertinent part, provides that

“A licensed retail marijuana store may only sell retail marijuana, retail marijuana products, marijuana accessories, non-consumable products such as apparel, and marijuana related products..., but shall be prohibited from selling or giving away any consumable products...”

Washington’s law on point, Statute 69.50.367, is substantively similar. Such a limiting prohibition, however, conflicts with each State’s mantra that marijuana is to be regulated like alcohol.

This is not simply an adage oft repeated. In fact, Colorado’s State Constitution expressly enumerates that marijuana regulation ought to be similar to alcohol regulation. Section 16 of Article XVIII of its Constitution expressly reflects this mandate, declaring that “...the People of the State of Colorado further find and declare that marijuana should be regulated in a manner similar to alcohol...” In Washington, the enforcing administrative agency is in fact named the *State Liquor and Cannabis Board* (see Washington Statute 69.50.345), further reflecting that marijuana can, should, and is being regulated in a manner similar to alcohol.

Yet, alcohol regulation in general allows for off-sale licenses to be granted to grocery stores. While the subtleties of liquor law vary State to State and municipality to municipality, this generality holds up. Many States do indeed allow grocery stores to be licensed. This includes California, Nevada, Arizona, New Mexico, Wyoming, North Dakota, South Dakota, Missouri, Wisconsin, Illinois, Michigan, Arkansas, Indiana, Ohio, Connecticut, and Maine, among other States [\[4\]](#).

Washington and Colorado are, nonetheless, a little unique. In Washington, beer and wine are allowed to be sold by a grocery store pursuant to Washington Revised Statute 66.24.360. Liquor sales, however, are allowed in stores that exclusively sell liquor. In Colorado, grocery stores are also only allowed to sell beer and wine.

Despite these limitations, it should be highlighted that grocery stores are still very much allowed to enter the alcohol trade in Washington and Colorado, albeit with only beer and wine, unlike the outright grocery store prohibition of each States' marijuana regulations. They nevertheless showcase that different regulations may be applied to different types of retailers, as the respective State Legislatures feel appropriate. If marijuana is truly to be regulated like alcohol, it would seem appropriate that grocery stores in Washington and Colorado should still be allowed to enter the trade, just subject to specific legislation that the respective constituents feel appropriate.

In general, moreover, grocery stores are often preferred to liquor stores by regulators, rightly or wrongly, as the more responsible and reputable retailer of such restricted goods. Many regulators appreciate that grocery stores sell mostly non-vice products, ie. groceries and sundries, in addition to alcoholic ones. Regulators generally consider major grocery stores, unlike smaller single unit type liquor stores, to have more effective mechanisms and systems in place, including ID scanners and well-trained employees, to prevent underage sales and/or sales to overly and obviously intoxicated minors or adults.

So the question now becomes how to make this a reality. Of course, whether privately or publicly owned, multi-unit, multi-State operators will be reticent to envelop themselves in anything that rests on murky legal footing, especially considering the potentially devastating impact of a federal prosecution of the company and/or its executives. Pursuant to Section 812 of the Controlled Substances Act, marijuana is considered a Schedule 1 narcotic, and thus its use, consumption, manufacture, and distribution is illegal (See Section 841 of Controlled Substances Act).

As a result, marijuana will either need to be downgraded to a different Schedule of narcotic, thereby allowing some degree of use, or removed entirely from the listed Schedule of controlled substances. Fortunately, while Congress can opt to amend the law, Congressional action is not the only way to do so. In fact, the Attorney General is expressly authorized by Statute to do so. He or she may promulgate a rule, dependent upon sufficient and supporting evidence of course, reclassify marijuana, either removing a substance from the list or upgrading or downgrading its current classification as a Schedule 1 Substance (See Section 812 of Controlled Substances Act).

Major retail operators, unlike most of the current marijuana proprietors, have the lobbying clout needed to affect change federally. Many already belong to powerful lobbying organizations.

The political feasibility of this may not be that distant. The negative connotation of marijuana seems to be rapidly disappearing. According to a Gallup poll conducted between October 7 and 11 of 2015, 58% of Americans believe that “the use of marijuana should be made legal.” [\[5\]](#)

Within the legalization mantra, there are political rationales that both progressives and conservatives will be able to support. For progressives, this has, unsurprisingly, long been a cause of wide support. For conservatives, this is a State’s rights issue first and foremost. Conservatives may see this issue as a privilege that should be relegated to the desire of a State’s electorate. If or when the Federal Government revokes marijuana’s status as a Schedule 1 Narcotic, the next step will be to amend the State Statutes so as to allow marijuana to be sold along with other, consumable goods.

Lawful marijuana cultivation, sales, and use is becoming a reality, and most likely sooner rather than later. Through industry lobbying, amendment of federal and State statutes, and proactive regulations, grocery stores and other major retailers may soon be allowed to sell marijuana. When that happens the bottom line of profits for these multi-unit multi-State operators are likely to soar. And I will be able to call my mother and say the unthinkable

“Mom, we’re running low on weed and cookies. Would you mind picking some up at Gelson’s.”

This article was to the best of our knowledge correct at the time it was written, but laws change continuously so no one should rely on what is written in this article as the current state of the law. The reader should always consult a practicing lawyer for an evaluation of how the current law affects any particular factual situation at the time when it occurs.

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[1]

<http://www.thecannabist.co/2016/02/09/colorado-marijuana-sales-2015-reach-996-million/47886/>

[2]

http://www.huffingtonpost.com/entry/colorado-marijuana-tax-revenue-2015_us_560053c4e4b00310edf806d3

[3]

<http://www.bloomberg.com/news/articles/2015-10-23/washington-expects-pot-sales-tax-revenue-surge-to-1-billion>

[4] http://www.huffingtonpost.com/2014/08/26/here-are-all-the-states-t_n_5710135.html

[5] <http://www.gallup.com/poll/186260/back-legal-marijuana.aspx>