

The Worst of Both Worlds: The Wild West of the “Legal” Marijuana Industry

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As states have legalized marijuana, they have created a booming industry that operates in violation of the federal Controlled Substances Abuse Act. Like the tobacco and alcohol industries, this new legal marijuana industry has the potential to do great harm to American consumers and communities if it is not disciplined and restrained in how it sells and develops its products. Unfortunately the federal government has not yet stepped in to regulate the industry and state governments have imposed only limited controls. In addition, because of the increased threat of criminal and civil liability hanging over the industry, it has been largely shut out from attracting professional stakeholders including banks, venture capital firms, and professional managers which could help impose market discipline. In order to achieve the policy goals behind legalization of marijuana it is important that states do everything they can in the short term to regulate this industry so that it develops in a responsible manner. One of the things states can do is promote the integration of professional stakeholders into this industry. This essay explores what it means to be a “professional” in the marijuana industry and how more professionals could help mitigate some of the harm this industry poses to the public.

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INTRODUCTION

In Colorado and Washington it is truly the Wild West. Unlike the end of alcohol prohibition 80 years ago, there are no established marijuana brands, or brand loyalties. Marketing teams in Denver and Seattle, and across the country, are busy creating the first MJ brand identities and consumer experiences from scratch. Exciting innovations are taking place in packaging, marketing and product creation.¹

Over the last two decades, twenty-three states and the District of Columbia have legalized the sale of marijuana for either medical or recreational purposes.² This has given rise to the booming field of “legal” marijuana sales.³ However, while states have rushed to legalize marijuana, the federal government still classifies it as a Schedule I drug under the Controlled Substances Abuse Act of 1970 (the “CSA”), thus making it illegal to sell the drug even if given a license to do so by a state government.⁴ As a consequence of this conflict of law, the marijuana industry faces many legal challenges not confronting typical legal industries.⁵ In a previous Article, I addressed how this conflict of laws makes it difficult for marijuana businesses and their stakeholders to access common business organization protections.⁶ Specifically, I addressed the fact that many standard business

1. David Rheins, *High Hopes for Cannabis Careers in the Wild West*, AOL JOBS (Jan. 2, 2014, 10:00 AM), <http://jobs.aol.com/articles/2014/01/02/high-hopes-for-cannabis-careers-in-the-wild-west/>.

2. PROCON.ORG, *23 Legal Medical Marijuana States and DC*, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Jan. 8, 2015, 2:50:48 PM) [hereinafter PROCON] (listing twenty-three states and the District of Columbia as having legalized marijuana for medical purposes).

3. The term legal is in quotations to reflect the fact that marijuana is illegal in many jurisdictions including at the federal level. So as not to be cumbersome, this Article will hereafter refer to the “legal” marijuana industry simply as the marijuana industry with the intent that it not include sellers of marijuana who are not attempting to comply with state marijuana laws.

4. 21 U.S.C.A. § 812 sched. I (C)(10) (West 2015).

5. Luke Scheuer, *The “Legal” Marijuana Industry’s Challenge for Business Entity Law*, 6 WM. & MARY BUS. L. REV. (forthcoming 2015).

6. *Id.*

entity law protections, including limited liability or the business judgment rule, are not available for marijuana business stakeholders because of the exception to these rules that there not be intentional violations of the law.⁷ This, in combination with the fact that marijuana businesses have increased criminal liability, a difficult tax situation, a difficult if not impossible time accessing federal courts,⁸ and other unique legal challenges means that this industry has not been able to attract professional stakeholders such as venture capitalists,⁹ bankers,¹⁰ and professional managers that would normally flock to a growing and highly profitable industry. The term “professional stakeholders” in this Article is used to refer to individuals who are trained and experienced in business, generally. This group is generally experienced in operating in legal industries. I do not include in this group individuals who work in the marijuana industry, even if highly skilled,¹¹ because they are devoted to marijuana for policy reasons¹² or had experience selling marijuana while it was still fully illegal. The reason for this distinction is that

7. *Id.*

8. Jim Christie, *Appeal in Marijuana Bankruptcy That Went Up in Smoke*, REUTERS LEGAL, Jan. 8, 2015, available at [https://a.next.westlaw.com/Document/Ifc0fde40972511e4af50e96fe042baa9/View/FullText.html?originationContext=docHeader&contextData=\(sc.Category\)&transitionType=Document&docSource=fe3c22ff286947c28aeda3d070730366&firstPage=true&CobaltRefresh=67363](https://a.next.westlaw.com/Document/Ifc0fde40972511e4af50e96fe042baa9/View/FullText.html?originationContext=docHeader&contextData=(sc.Category)&transitionType=Document&docSource=fe3c22ff286947c28aeda3d070730366&firstPage=true&CobaltRefresh=67363). A federal court which dismissed a Chapter 13 case because the plan of reorganization was funded by proceeds from a marijuana business stated: “A state citizen that chooses to defy one federal law puts himself in an awkward position when he seeks relief under another federal statute - especially when granting that relief directly involves a federal court in administering the fruits and instrumentalities of federal criminal activity . . .” *Id.*; Claire Fezza, *Medical Marijuana: A Drug Without a Medical Model*, 101 GEO. L.J. 1117, 1130 (2013) (“Since collecting data on the Arizona Medical Marijuana Program on April 14, 2011, the Arizona Department of Health Services reported that as of October 27, 2011, the state had denied only seven of the 14,925 applications for marijuana registration cards.”).

9. Jonathan Fahey, *Investor Peter Thiel’s Fund Buys Into Marijuana Business*, YAHOO! NEWS (Jan. 8, 2015, 8:01 AM), <http://news.yahoo.com/investor-peter-thiels-fund-buys-marijuana-business-124023654--finance.html> (discussing a venture capital firm’s foray into the marijuana industry and noting, despite this exception, that marijuana businesses mainly have had to rely on wealthy individuals for funding).

10. Matt Richtel, *The First Bank of Bud: Marijuana Industry in Colorado, Eager for its Own Bank, Waits on the Fed*, N.Y. TIMES, Feb. 5, 2015, available at http://www.nytimes.com/2015/02/08/business/marijuana-industry-in-colorado-eager-for-its-own-bank-waits-on-the-fed.html?_r=0.

11. In fact a lifetime of selling marijuana illegally is probably valuable experience from the perspective that one would better know how to develop and grow the actual plant. In contrast, a professional stakeholder, such as a CEO coming from a different industry, would likely have none of this experience.

12. See David Freed, *California’s Medical Marijuana Morass*, PAC. STANDARD (Jan. 3, 2012), <http://www.psmag.com/legal-affairs/californias-medical-marijuana-morass-38772/>. A marijuana business owner describes his personal use of his product and how money is not his priority in running the business: “Pot, for us, is about the values. . . . It’s not about the money.” *Id.* (internal quotation marks omitted).

we can count on “professional stakeholders” to make common risk assumptions about violating the law. These risk assumptions will not always lead to a business respecting the law or being a good social corporate citizen but generally speaking these individuals fear criminal and civil punishment and therefore try to respect the law.¹³ For marijuana stakeholders who were used to selling the product illegally or who are selling it for policy reasons, the risk assumptions of violating the law likely change. These stakeholders are most likely more comfortable violating the law than “professional stakeholders” who are used to operating in fields where the threat of federal prosecution is not a constant reality. Therefore, since professional stakeholders have been shut out of this industry, the ones left over to run and develop it are less likely to develop the industry in a manner that shows concern for criminal and civil wrongdoing.¹⁴

Unfortunately, at the moment the marijuana industry is operating in a sort of Wild West culture where no one is providing meaningful oversight. It is in many ways the worst of both the criminal and legal worlds. This split in marijuana policy has resulted in many of the riskier practices that were present when marijuana was fully illegal.¹⁵ But at the same time it has resulted in wider access to the drug as if it was fully legal.¹⁶ There are thousands of small marijuana businesses which have started up and are now selling marijuana only under the loosest of guidelines.¹⁷ For small business

13. See, e.g., FINRA, *Marijuana Stock Scams*, <http://www.finra.org/investors/alerts/marijuana-stock-scams> (last updated May 29, 2014). In contrast to normal stocks, the Financial Industry Regulatory Authority has issued an investor alert that many marijuana stocks are simply scams and detailed how investors can protect themselves. See *id.*

14. See Nancy Benac & Alicia Caldwell, *Marijuana Legalization Gains Support, Confounding Policymakers*, HUFFINGTON POST (June 29, 2013), http://www.huffingtonpost.com/2013/06/29/marijuana-legalization_n_3521547.html. A marijuana business representative on the impact that the federal versus state conflict on marijuana is having on marijuana businesses stated: “Having a regulated system is the only way to ensure that we’re not ceding control of this popular substance to the criminal market and to black marketeers [sic] . . .” *Id.*

15. See *Surge in Marijuana Ills Causes Cries for Stricter Control*, REUTERS, Jan. 6, 2015, available at <https://www.yahoo.com/health/surge-in-marijuana-ills-causes-cries-for-stricter-107307309887.html> [hereinafter *Surge in Marijuana Ills Causes Cries for Stricter Control*].

16. See ABC 7 NEWS DENVER, *Denver Pot Dispensaries: 390; Colo. Starbucks: 208* (Jan. 5, 2010), <http://www.thedenverchannel.com/news/denver-pot-dispensaries-390-colo-starbucks-208> (noting that marijuana dispensaries now outnumber Starbucks in Colorado; there was one medical marijuana dispensary per 1,535 Denver residents in 2010; and that the city was averaging twenty-five applications per day from prospective dispensary owners).

17. *Id.*; Benac & Caldwell, *supra* note 14 (noting that a recent ballot initiative had brought the number of marijuana dispensaries from one thousand down to 135 in Los Angeles). A member of a neighborhood counsel spoke about the decision saying that the marijuana-

owners, operating in such a market is probably exciting. For state policy makers, there should be concern and states need to take steps in order to tame this Wild West culture to ensure that the industry is growing responsibly and not creating more problems than it solves.

This Article addresses the ways in which the lack of professionalism in the marijuana industry undermines the policy goals of the states that legalized this industry. States have legalized marijuana for any number of policy reasons but some of the more common ones include: combating crime, creating a new source of tax revenue, failure of the war on drugs, unnecessarily high incarceration rates,¹⁸ disproportionate impact of criminalization on minorities, and, of course, compassionate care for sick people who would potentially benefit from the pain mitigating effects of the drug.¹⁹ While in

na dispensaries were “just not following what small amounts of rules there are on the books . . .” *Id.*

18. Vince Beiser, *Meet the Grandpa Doing Life Without Parole—for Pot*, YAHOO! NEWS (Jan. 12, 2015), <http://news.yahoo.com/meet-grandpa-doing-life-without-parole-pot-10555273.html>. In the U.S., “[a]n estimated 40,000 people are doing anywhere from one year to life . . . on marijuana charges.” *Id.*

19. Benac & Caldwell, *supra* note 14. The authors note that legalization would result in new tax revenue while negatively impacting the profits of cartels as well as the “racial inequity in the way marijuana laws are enforced.” *Id.*; see also Michelle Patton, *The Legalization of Marijuana: A Dead-End or the High Road to Fiscal Solvency?*, 15 BERKLEY J. CRIM. L. 163, 191-203 (2010); Olga Khazan, *How Marijuana Legalization Will Affect Mexico’s Cartels*, WASH. POST (Nov. 9, 2012), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/09/how-marijuana-legalization-will-affect-mexicos-cartels-in-charts/>. Khazan notes that according to a Mexican study regarding the as yet still unpassed Colorado and Washington ballot initiatives to legalize marijuana for recreational use, “Mexico’s cartels would lose \$1.425 billion if the initiative passed in Colorado and \$1.372 billion if Washington voted to legalize. The organization also predicted that drug trafficking revenues would fall twenty to thirty percent . . .” though an American study found that cartels would suffer less of a loss. *Id.*; Caroline Fairchild, *Legalizing Marijuana Would Generate Billions In Additional Tax Revenue Annually*, HUFFINGTON POST (Apr. 20, 2012), http://www.huffingtonpost.com/2013/04/20/legalizing-marijuana-tax-revenue_n_3102003.html. California’s Compassionate Use Act of 1996, listed numerous illnesses which could benefit from marijuana as a treatment. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2007); LEGISLATIVE COUNCIL OF THE COLO. GENERAL ASSEMBLY, 2012 STATE BALLOT INFO. BOOKLET AND RECOMMENDATIONS ON RETENTION OF JUDGES, Research Publication No. 614, at 7-14 (2012), <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251822971738&ssbinary=true> [hereinafter Colorado Voter Guide]; WASH. STATE OFFICE OF THE SEC’Y OF STATE & THE STEVENS CNTY. AUDITOR, STATE OF WASHINGTON & STEVENS COUNTY VOTER PAMPHLET, at 23-31 (2012), https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2012/General-Election/Documents/22-%20Stevens.pdf [hereinafter Washington Voter Guide]; UNITED STATES CONFERENCE OF MAYORS, *In Support of States Setting Their Own Marijuana Policies Without Federal Interference*, USMAYORS.ORG (June 2013), http://www.usmayors.org/resolutions/81st_Conference/cs13.asp.

the long term there may be net gains from legalizing marijuana, in the short term, there is risk of increased harm if the industry does not develop responsibly. Even the long-term policy goals of states are at risk if the industry is allowed to develop without strict controls and become another public health nightmare like tobacco. In my previous Article on this subject I suggested that one way for states to help improve the marijuana industry would be to help promote the inclusion of professional stakeholders. In this Article, I explore some of the risks posed by not bringing professional stakeholders into the industry and how bringing professionals into the marijuana industry could help states achieve their policy goals.

I. THE CURRENT STATE OF THE MARIJUANA INDUSTRY

The marijuana industry began as a “legal” industry in 1996 when California voters passed the nation’s first medical marijuana laws.²⁰ Since then twenty-three states and the District of Columbia have legalized marijuana in some form.²¹ This includes four states which have legalized recreational marijuana: Colorado, Washington, Oregon, and Alaska.²² So far, Colorado is the only state where there are widespread openly recreational sales but in many states, there is widespread open purchase and sale of marijuana under a pretense that it is being bought and sold for medicinal purposes.²³ Despite the openness with which it is sold, the federal prohibition on marijuana remains in place in the form of the CSA, which classifies marijuana as a Schedule I drug, meaning it has no scientific or medicinal purpose.²⁴

This conflict of laws has resulted in the open operation of many businesses in flagrant violation of federal law and at risk of closure, and its stakeholders of prosecution, at any time. Putting the police and prosecutor resources issue aside, the federal government could decide to take a hard line approach to marijuana and raid all the marijuana dispensaries, seize their assets, and prosecute their stakeholders. The Obama Administration

20. Melissa Griffin-Caen, *Why California Wasn't the First State to Legalize Recreational Marijuana*, CBS SF BAY AREA (Nov. 17, 2014), <http://sanfrancisco.cbslocal.com/2014/11/17/pot-why-california-wasnt-the-first-to-legalize-recreational-use-marijuana-cannabis-washington-dc-colorado-alaska/>.

21. Chris Boyette & Jacque Wilson, *It's 2015: Is Weed Legal in Your State?*, CNN (Jan. 7, 2015), <http://www.cnn.com/2015/01/07/us/recreational-marijuana-laws/>.

22. GOVERNING, *State Marijuana Laws Map* (Feb. 24, 2015), <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>.

23. See Rocco Pendola, *Medical Marijuana in California is a Total Scam (But It's Dope!)*, THE STREET (Jan. 27, 2014), <http://www.thestreet.com/story/12262234/1/medical-marijuana-in-california-is-a-total-scam-but-its-dope.html> (noting that getting a medical marijuana card is merely a formality in California and that for all intents and purposes marijuana sales are not limited on a medical basis).

24. 1 U.S.C.A. § 812 sched. I (C)(10) (West 2015).

has opted for more targeted raids of marijuana businesses instead of whole sale crackdowns.²⁵ Nevertheless, even if marijuana businesses are not raided, they are still greatly impacted by this conflict of laws beyond the possibility of criminal liability. This includes the inability to deduct expenses on their tax returns,²⁶ to open bank accounts,²⁷ and even complications in obtaining legal counsel.²⁸

The ultimate solution to this conflict would be for either the states to abandon their attempts to legalize marijuana, not likely to happen, or for the federal government to end its prohibition, more likely to happen. Unfortunately, while it seems likely that the federal government will eventually have to end the prohibition of marijuana, it seems unlikely to happen soon and so the conflict of laws will survive for at least a number of years. The most recent opportunity for the Republican controlled Congress to weigh in on the marijuana issue showed that Republicans were still in favor of its prohibition by passing a spending bill, which bars the District of Columbia from allotting any money to enact marijuana legalization.²⁹ Further indicating that at least a significant part of the Republican Party is not ready to

25. See Evan Perez, *No Federal Challenge to Pot Legalization in Two States*, CNN (Aug. 30, 2013), <http://www.cnn.com/2013/08/29/politics/holder-marijuana-laws/index.html> (noting that the justice department issued new marijuana guidelines for federal prosecutors requiring them to focus on enforcement priorities such as preventing marijuana distribution to minors and drugged driving instead of broadly going after all marijuana users); Memorandum from James M. Cole, Deputy Attorney Gen., to all U.S. Attorneys (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

26. See, e.g., Ben Rooney, *This Colorado Pot Shop Made \$3.6 Million Last Year*, CNN MONEY (Jan. 6, 2015), <http://money.cnn.com/2015/01/06/smallbusiness/colorado-marijuana-best-year/> (noting a marijuana shop's inability to deduct two hundred thousand dollars in rent of its tax returns); Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523 (2014) (noting that marijuana business must currently pay taxes on gross rather than net profits, making it far more difficult for these businesses to be run profitably).

27. See Karen Weise, *Treasury Approves Bank Accounts for Pot Businesses. Will Banks Go Along?*, BLOOMBERG BUSINESSWEEK (Feb. 14, 2014), <http://www.businessweek.com/articles/2014-02-14/treasury-approves-bank-accounts-for-pot-businesses-dot-will-banks-go-along>, archived at <http://perma.cc/M69Q-8BMP>.

28. See Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders*, 91 OR. L. REV. 869 (2013) (discussing whether lawyers providing advice on how to form marijuana businesses may violate rules of professional conduct by assisting their clients in violating federal law, and arguing that while this type of representation is technically a violation of the rules of professional conduct, it may be possible to carefully give advice to marijuana businesses without running afoul of these ethical standards). See also Claire Frezza, *Counseling Clients on Medical Marijuana: Ethics Caught in Smoke*, 25 GEO J. LEGAL ETHICS 537 (2012).

29. See THE GUARDIAN, *Washington DC's Hopes for Legal Marijuana Crushed by Congress* (Dec. 10, 2013), <http://www.theguardian.com/travel/2014/dec/10/washington-dc-legal-marijuana-hope-crushed-by-congress>.

embrace legal marijuana, the Republican Governors of Nebraska and Oklahoma have recently sued Colorado to overturn its marijuana laws.³⁰

II. THE RISKS OF UNREGULATED MARIJUANA

Marijuana industry experts claim marijuana is natural and non-addictive, and consequently not-harmful.³¹ In fact, many in the industry claim it is beneficial for one's health.³² If this is true then there is no good argument for strong regulation of the product. Certainly it is true that marijuana results in far fewer deaths than legal drugs like alcohol³³ or tobacco.³⁴ In fact, the fatality rate of marijuana overdoses may be as low as zero.³⁵ Does this mean that because marijuana is "natural" and does not result in many, if any, fatalities that it should be freely sold without restrictions like it was water? Without turning this essay into a debate on the health effects

30. See John Ingold, *Nebraska and Oklahoma Sue Colorado Over Marijuana Legalization*, THE DENVER POST (Dec. 18, 2014), http://www.denverpost.com/news/ci_27163543/nebraska-and-oklahoma-sue-colorado-over-marijuana-legalization?source=top_stories_bar.

31. Philip M. Boffey, *What Science Says About Marijuana*, N.Y. TIMES, July 30, 2014, http://www.nytimes.com/2014/07/31/opinion/what-science-says-about-marijuana.html?_r=0 ("Casual use [of marijuana] by adults poses little or no risk for healthy people.").

32. See Sean Williams, *5 Diseases You Never Knew Marijuana Could Fight or Potentially Cure*, THE MOTLEY FOOL (Feb. 8, 2015), <http://www.fool.com/investing/general/2015/02/08/5-diseases-you-never-knew-marijuana-could-fight-or.aspx>.

33. See CENTERS FOR DISEASE CONTROL & PREVENTION, *Alcohol Use*, <http://www.cdc.gov/nchs/fastats/alcohol.htm> (last updated Feb. 6, 2015) (noting that 26,654 deaths are attributed to alcohol in the U.S. in one year including alcohol related deaths such as car accidents and homicides).

34. See CENTERS FOR DISEASE CONTROL & PREVENTION, *Tobacco-Related Mortality*, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/index.htm (last updated Feb. 6, 2014) [hereinafter CENTERS FOR DISEASE CONTROL & PREVENTION, *Tobacco-Related Mortality*] (noting that more than 480,000 deaths result from tobacco in the United States annually).

35. See, e.g., Laura Stampler, *Study Claims to Find First Deaths Caused by Marijuana*, TIME (Feb. 27, 2014), <http://time.com/10372/marijuana-deaths-german-study/> (citing a study that may have linked the first ever deaths to marijuana use, though the two deaths cited were individuals who also had other serious health issues including a heart condition and alcohol and other drug use); German Lopez, *The 3 Deadliest Drugs in America Are All Totally Legal*, VOX, <http://www.vox.com/2014/5/19/5727712/the-three-deadliest-drugs-in-america-are-all-totally-legal> (last updated Jan. 31, 2015) (noting that there are no known cases of overdose deaths for marijuana in the United States); Barry Petersen, *Pot Products Spur New Legislation in Colorado*, CBS NEWS (Feb. 8, 2015), <http://www.cbsnews.com/news/pot-products-spur-new-legislation-in-colorado/?ftag=YHF4eb9d17> ("Last year, visiting Wyoming college student Levi Thamba ate a multiple-dose marijuana cookie all at once. He overdosed, and jumped to his death from a hotel balcony.").

of marijuana, the evidence available suggests that we should be cautious about making it too widely available.

While legal marijuana, particularly legal recreational marijuana, has only been sold for a short time, there are already some early reports of increased marijuana abuse in Colorado.³⁶ In Colorado, treatment of teenagers for marijuana abuse increased sixty-six percent between 2011 and 2014.³⁷ This is further troubling when combined with other studies finding that teenagers who smoke marijuana suffer from brain development changes,³⁸ are more likely to drop out of high school, more likely to use other illegal drugs, and more likely to attempt suicide.³⁹ While these are early reports and are hardly conclusive proof that legalization will lead to more drug abuse or other negative outcomes for users, they are certainly not encouraging either.

What is perhaps more troubling is what is being done to make marijuana a more powerful drug. The marijuana being sold today is much more powerful than what was being sold in the 1960s and 1970s.⁴⁰ Further, it is often baked into foods, now making its effects more powerful.⁴¹ Finally, it is now being combined with other chemicals, or created in an artificial form, which has reportedly resulted in more serious side effects.⁴² It is not

36. See *Surge in Marijuana Ills Causes Cries for Stricter Control*, *supra* note 15.

37. *Id.*

38. See Boffey, *supra* note 31. While challenged, [a] long-term study based in New Zealand, published in 2012, found that people who began smoking heavily in their teens and continued into adulthood lost an average of eight I.Q. points by age 38 that could not be fully restored. A Canadian study published in 2002 also found an I.Q. loss among heavy school-age users who smoked at least five joints a week.

Id.; Sean Williams, *A 20 Year Study on Marijuana Use Yields 5 Surprising Finds*, THE MOTLEY FOOL (Jan. 11, 2015), <http://www.fool.com/investing/general/2015/01/11/a-20-year-study-on-marijuana-use-yields-5-surprisi.aspx>.

39. See Boyette & Wilson, *supra* note 21.

40. Boffey, *supra* note 31; Adrienne LaFrance, *Was Marijuana Really Less Potent in the 1960s?*, THE ATLANTIC (Mar. 6, 2015), <http://www.theatlantic.com/technology/archive/2015/03/was-marijuana-really-less-potent-in-the-1960s/387010/>.

41. See *id.* By consuming marijuana baked into food “people can quickly ingest large amounts of THC that way, which can produce frightening hallucinations.” *Id.*; Petersen, *supra* note 35 (noting that marijuana dispensaries were selling candies, cookies, etc., which had high levels of THC, high enough that when consumed by children was resulting in emergency room visits).

42. See MYARKLAMISS.COM, *More Dangerous Synthetic Marijuana Compounds Added to Banned Substances List by DHH, Gov. Jindal* (Jan. 19, 2015), <http://www.myarklamiss.com/story/d/story/more-dangerous-synthetic-marijuana-compounds-added/33897/5yS-CYr3XUGclOryZLz8sQ>; THEGOODDRUGSGUIDE.COM, *Mixing*, <http://www.thegooddrugsguide.com/cannabis/mixing.htm> (last visited Feb. 7, 2015).

difficult to start lacing marijuana with other products, chemicals or drugs to make it addictive or more powerful. The tobacco industry has already cracked this formula with tobacco. Before a new pharmaceutical drug can be tested on humans, let alone sold to the market, the drug must go through rigorous screening.⁴³ There is no such screening process for marijuana that is being manipulated or changed from its natural state. In such a “Wild West,” the 1960’s version of marijuana will soon be unrecognizable as it is evolved, or combined with other chemicals, into something much more potent in order to satisfy customer demand. At that point the claims that marijuana is “harmless” or “natural” will no longer be true, if it ever was. Such a drug may have very different health concerns than natural marijuana.⁴⁴ If marijuana is manipulated into an addictive legal drug like tobacco, it could cause a public health crisis that could last for decades. In any case, the point is not whether marijuana is ultimately proven to be harmful or not, it is whether or not at this point in time we should take a conservative or liberal approach to the industry’s development, so as to control the direction that the drug is developed.

III. THE RISKS OF LEAVING THE MARIJUANA INDUSTRY IN THE HANDS OF SMALL BUSINESS OWNERS

Because of the potential for criminal and civil liability, the marijuana industry is dominated by small businesses, what we might call “small marijuana.” Large companies, or “big marijuana,” have been hesitant to enter the market because they have significant assets that can be lost if the federal government chooses to focus on their marijuana activities. In contrast, many small business owners have relatively few assets and the profits they can make selling marijuana can outpace what they would make engaging in other jobs. In the first year of business for Colorado’s legal recreational marijuana market, individual marijuana shops made as much as \$3.6 million in revenue.⁴⁵ For example, 3D Cannabis, a marijuana shop, went from five employees to forty over the course of 2014.⁴⁶ This is incredible revenue

(listing other drugs, both legal and illegal that users can combine with marijuana and what the effect is likely to be).

43. See Lars Noah, *The Coming Pharmacogenomics Revolution: Tailoring Drugs to Fit Patients’ Genetic Profiles*, 43 JURIMETRICS J. 1, 4 (2002). “Sponsors of new drugs typically have to enroll thousands of subjects in randomized controlled trials (RCTs) in order to generate the necessary data” for FDA approval. *Id.*

44. See *Surge in Marijuana Ills Causes Cries for Stricter Control*, *supra* note 15. In the small time Washington and Colorado have legalized recreational marijuana, the states “have been flooded with dangerous products, from infused candies and concentrates, many far stronger than what might have been smoked in the 1960s.” *Id.*

45. See Rooney, *supra* note 26.

46. *Id.*

and growth for a small business in its first year.⁴⁷ In short, small businesses have been willing to take greater risks than large ones in this nascent field. Does leaving the marijuana industry in the hands of small business owners promote the policy goals of states?

One way in which small marijuana could benefit states is by providing good quality middle class jobs.⁴⁸ The growth of large businesses over the last few decades has, in many industries, hurt small business ownership and caused a number of social problems. In particular, being a small business owner provides many Americans the opportunity to be part of the middle class whereas working for large businesses often leaves workers struggling near the poverty line.⁴⁹ As large business has come to dominate many industries, the opportunity to advance as a small business owner has decreased. Restaurants, convenience stores, gas stations, book stores, and other industries have become places where small business owners struggle in the face of big business marketing and economic pressures. The pot industry has promoted itself, in part, as an area of small business growth.⁵⁰ In this way, leaving marijuana in the hands of small business owners seems like a winning formula for states.

While in general, promoting small business ownership is a laudable goal, in the marijuana context states need to consider whether the benefits will outweigh potential risks. Would we want pharmaceuticals and tobacco companies to be small? There are plenty of small retailers who sell tobacco products, but what about small manufacturers? If every retail operation was growing its own tobacco, combining it with other substances would that make it easier to regulate and control from a health and safety standpoint or not? This might be a moot point since for the most part tobacco is unregu-

47. See George Budwell, *Is 1 Drug Really Outselling Legalized Marijuana?*, THE MOTLEY FOOL (Jan. 19, 2015), <http://www.fool.com/investing/general/2015/01/19/is-1-drug-really-outselling-legalized-marijuana.aspx> (“[The marijuana] industry is poised to become one of the fastest-growing industries of all time.”).

48. That is undoubtedly one of the reasons why Colorado limits ownership of a marijuana dispensary in the state to residents of Colorado. See BUSINESSNAMEUSA.COM, *How to Start a Marijuana Dispensary in Colorado* (Apr. 10, 2013, 12:00 AM), <http://www.businessnameusa.com/view/How%20to%20Start%20A%20Marijuana%20Dispensary%20in%20Colorado.aspx> (listing requirements for opening a marijuana dispensary).

49. See Paul Caron, *Corporate Profits Soar, Average Incomes Plummet*, TAXPROF BLOG (Jan. 30, 2015), http://taxprof.typepad.com/taxprof_blog/2015/01/corporate-profits-soar-.html (noting a continuing trend in America that has seen corporate profits grow while salaries have stagnated or even fallen for the average Americans).

50. See Joey Bunch, *Colorado Pot Lobby Loud, Clear on Regulations, as Government Listens*, THE DENVER POST (Dec. 26, 2014), http://www.denverpost.com/potanniversary/ci_27174815/colorado-pot-lobby-loud-clear-regulations-government-listens (noting that the pot lobby had won over Republican support in Colorado because both the pot industry and Republicans want to promote small business ownership).

lated, but states do not need to make this same mistake with marijuana. They should ask whether, if there were thousands of marijuana brands in each state, it would be easier to track what was in the products, what the health effects were etc. It seems obvious that it would be easier to regulate if there were only a few large manufacturers who could be held accountable. Since marijuana is also being sold as a medicine, we could also make a comparison to the pharmaceutical industry. It is one thing for there to be small business pharmacies selling drugs made by large pharmaceutical companies; it is another thing to go back in time to the days when pharmacies and doctors were creating their own drugs, like medieval alchemists. Should we leave it in the hands of thousands of small business owners, each growing and selling their own unique strains of marijuana to determine the strength and additives to this medicine? Such a market system simply cannot be regulated. The only way it works is with the understanding that marijuana is not an actual medicine that needs specific dosing, nor can it be manipulated or combined with other compounds to make it less “natural” and therefore more dangerous. If not, how will government ever regulate such an industry? Suing or monitoring one big company for wrong doing is going to be a lot easier than if ten thousand marijuana businesses which are all cooking up and developing their own products.

Another parallel for this argument is to compare marijuana to the micro-beer industry. There are thousands of micro-breweries across the United States, each selling their own craft alcohols.⁵¹ The problem with this comparison is that alcohol, as noted above, kills over twenty-six thousand Americans a year and so, while the micro-brewery industry model may be functional, it has still contributed to a public health crisis in America. In addition, alcohol, whether produced by a large company versus a small company seems to be fairly consistent in its effect. There are different alcohol levels depending on ingredients and brewing techniques but that has been dealt with by disclosure rules on alcohol labels. Marijuana seems to be distinct from alcohol in that it is being combined with other products that alter the effect of marijuana to make it more powerful or to produce different effects. It may turn out that marijuana like alcohol can be varied only in terms of strength, but it appears that that is not the case. Further, when alcohol has been combined with other drugs, such as caffeine in the case of

51. See Press Releases, Brewers Ass'n, Brewers Ass'n Reports 2012 Mid-Year Growth for U.S. Craft Brewers (Aug. 6, 2012), available at <http://www.brewersassociation.org/press-releases/brewers-association-reports-2012-mid-year-growth-for-u-s-craft-brewers/> (noting that in 1979 there were eighty-nine breweries in the United States but by 2012 there were 2,126).

“Four Loko,” it results in hospitalizations and deaths so that the producer had to reformulate the product back to straight alcohol.⁵²

The point is not that small marijuana cannot work. But it will be difficult to regulate and control. An industry with many small retailers and a few large manufacturers might be best from a public health perspective.

IV. THE RISKS BIG BUSINESS POSES IF IT TAKES OVER THE MARIJUANA INDUSTRY

We cannot seriously discuss the risks of developing a small business model for the marijuana industry without also confronting the risks with putting this industry into the hands of big business such as the tobacco or pharmaceutical industry. These industries have a natural fit with selling marijuana since they have the experience selling and developing drugs, the product pipeline, and marketing experience.⁵³ If big marijuana takes over this industry, it will solve some of the problems discussed above, specifically the difficulty of trying to regulate thousands of growers and producers, each doing who knows what with the drug they are selling. The tobacco industry is the most obvious developed industry that surely wants to move into the marijuana field if the potential legal issues can be resolved. It goes without saying that the tobacco industry, despite all the professional stakeholders who work there, has hardly been a model for corporation behavior. They have manipulated their product to make it more addictive, they concealed the negative health effects of their product from the public,⁵⁴ and they have attempted to undercut governmental efforts to reduce tobacco consumption for health reasons.⁵⁵ Finally, their products result in hundreds of thousands of American deaths each year, far more than are currently killed by marijuana.⁵⁶

On first consideration, it would seem that the marijuana industry should be structured so that it is as different from the tobacco industry as

52. See THE WEEK, *The Rise and Fall of Four Loko* (Nov. 24, 2010), <http://theweek.com/articles/489262/rise-fall-four-loko>.

53. See David Gould, *Why You Should Invest in Tobacco & Marijuana*, CANNABIS CULTURE (Mar. 5, 2013, 8:35 AM), <http://forums.cannabisculture.com/forums/index.php?/topic/182707-why-you-should-invest-in-tobacco-marijuana/> (noting that some pharmaceutical companies do sell marijuana related products for use in cancer treatment).

54. See Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 64 (1997).

55. *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 677, 703 (Sean D. Murphy ed.) (2000). Efforts to undermine WHO tobacco health work was “devised at the highest levels of tobacco companies.” *Id.*

56. See CENTERS FOR DISEASE CONTROL & PREVENTION, *Tobacco-Related Mortality* *supra* note 34.

possible. After all, there are few industries with a worse public health record or impact than tobacco. But many of the worst problems associated with the tobacco industry do not have to be repeated in the marijuana industry if the industry is restrained and regulated early in its development. State government can ban combining marijuana with other products, except for those the State believes enhances any medical properties, and because there would be relatively few producers with significant assets on the line if they violate these rules, enforcement would be manageable.

Ultimately, whether this industry stays in the hands of small business owners or large business owners, it will still pose a risk to the public if the products it sells are not responsibly developed and marketed. This is just the nature of selling a drug as your sole product. Strong governmental regulation can go a long way towards protecting consumers but in the end there will be some inherent risk for this industry's customers. While government regulation will be a strong restraining force, government regulation alone cannot protect against the possible mis-development of this industry. It is also important that the industry exercise self-restraint. One way to help the industry in this regard is to promote the incorporation of professional stakeholders with significant personal assets who will be more hesitant to break the law or take risky action that could result in personal liability.

V. WHAT VALUE DO PROFESSIONAL STAKEHOLDERS BRING FOR POLICY MAKERS

The jury is still out on whether professional stakeholders make businesses more legally compliant or socially responsible.⁵⁷ The major corporate scandals of the 2000s, including Enron and the financial collapse of 2008, involved professional stakeholders. Despite all that these stakeholders had to lose,⁵⁸ they still engaged in fraudulent conduct. That being said, these scandals, as frequent and damaging as they are, still involve only a tiny fraction of the professional stakeholders working in America today. The

57. See Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' & Officers' Liability Insurance Market*, 74 U. CHI. L. REV. 487, 542-43 (2007). Some professional stakeholders "view compliance with rules as subservient to entrepreneurial goals." *Id.* See Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 590 (2008) (noting that a delivery company that authorizes its delivery drivers to park illegally and get tickets on occasion might very well experience greater economic gain than the cost of those tickets. In fact, due to limited parking in many cities, it is possible that many delivery businesses can only operate by knowingly violating traffic laws).

58. See Kevin McCoy, *Ex-Enron CEO Skilling's Resentenced to 14 Years*, USA TODAY (June 21, 2013), <http://www.usatoday.com/story/money/business/2013/06/21/ex-enron-ceo-skilling-resentenced-to-14-years/2447223/> (discussing the sentence for Enron former CEO and founder's to fraud and conspiracy charges).

vast majority are not engaged in this kind of illegal behavior.⁵⁹ So, while it cannot be said whether professional stakeholders actually increase legal compliance in ordinary businesses, in the case of the marijuana industry, we can make some reasonable assumptions because of the unusual background of many of the stakeholders currently working in this industry.⁶⁰ Many, though certainly not all of the operators in this industry, used to sell marijuana prior to its legalization in their state. If an individual started selling marijuana prior to its legalization, they were operating with no protection of the law and would expect none. For these individuals, the current conflicted state of the law is a big step out of the shadows and into legitimacy. Most of these operators are probably very excited about the opportunity to conduct their business without violating the law. Nevertheless, they come from a background in which they used to break laws for a living and so cannot be expected to be the most legally compliant business people in America.

Professionals from outside this industry are not used to so openly violating the law. Insurance companies, venture capitalists, professional managers, bankers, accountants, attorneys, and other professional stakeholders all bring a similar trait to businesses. Namely they all bring concern over liability, whether as a result of civil or criminal wrongdoing. For workers in these industries there is substantial financial risk to violating the law. Firm, client, and personal wealth in the millions or even billions can be lost.⁶¹ Consequently, while there is an occasional professional stakeholder such as a hedge fund manager who flagrantly flouts the laws, professional stakeholders on the whole are rather cautious about it. They prefer pushing the boundaries of legal activity rather than openly violating it. At least a large

59. See Richtel, *supra* note 10. He notes the hesitancy of banks to get involved with the marijuana industry because of legal liability issues.

To banks, the pre-eminence of federal law has been a powerful deterrent to allowing pot businesses to set up accounts. In fact, Don Childears, chief executive of the Colorado Bankers Association, said his reading of the federal law was that “the very receipt of a deposit is the definition of money laundering.” His train of logic: Marijuana is illegal at the federal level; banks that take money from illegal drug operations are guilty of money laundering; therefore, the banks that take pot money face serious criminal and civil liability.

Id.

60. See Benac & Caldwell, *supra* note 14; Bruce Barcott, *How to Invest in Dope*, N.Y. TIMES, June 25, 2013, http://www.nytimes.com/2013/06/30/magazine/how-to-succeed-in-the-legal-pot-business.html?ref=magazine&_r=0. Private equity fund’s managers discuss the need to install new management in marijuana businesses they invest in because “[e]ntrusting great sums of cash to the equivalent of Harold and Kumar seemed foolhardy.”

Id.

61. *Id.*

reason for this is because of the substantial wealth these professionals are at risk of losing if they engage in illegal activity.

VI. WHAT CAN BE DONE TO PROFESSIONALIZE THE MARIJUANA INDUSTRY

We have to assume that Congress will not legalize and regulate marijuana in the near term.⁶² Without federal control, we need to look to another source to create discipline for this industry. One source of discipline is the private market of professional bankers, lawyers, accountants, MBAs, and venture capitalists. States can pass legislation to encourage these professional groups' participation in this industry. Some work has already been done along these lines.⁶³ Even the federal government has recognized the problems caused by not allowing the marijuana industry's access to professional stakeholders. The Obama administration changed banking regulations to make it easier for marijuana businesses to open up bank accounts, though this has not yet persuaded banks to openly take the risk of violating federal law.⁶⁴ While some small steps have been taken, states need to get more aggressive in normalizing this industry.

One way in which states can encourage professionals to enter this market is to pass legislation addressing the problems that marijuana stakeholders have in accessing standard business entity law protections.⁶⁵ Many business entity law protections, including limited liability⁶⁶ and the business judgment rule,⁶⁷ have been created to protect the personal assets of shareholders and managers. These rules allow individuals with substantial assets the ability to participate in businesses without fearing that they will be personally liable even if the business incurs liabilities.⁶⁸ But these same rules

62. Budwell, *supra* note 47 (noting that the most recently elected Congress is more conservative in its attitude towards legalizing marijuana).

63. Kristen Wyatt, *Colorado Approves First Marijuana Banking System*, HUFFINGTON POST (May 7, 2014), http://www.huffingtonpost.com/2014/05/07/colorado-marijuana-banking_n_5284442.html (discussing Colorado lawmakers' attempt to provide marijuana businesses access to basic banking services).

64. Karen Weise, *Treasury Approves Bank Accounts for Pot Businesses. Will Banks Go Along?*, BLOOMBERG BUS. (Feb. 14, 2014), <http://www.businessweek.com/articles/2014-02-14/treasury-approves-bank-accounts-for-pot-businesses-dot-will-banks-go-along>; Richtel, *supra* note 10.

65. See Scheuer, *supra* note 5.

66. DOUGLAS M. BRANSON ET AL., *BUSINESS ENTERPRISES: LEGAL STRUCTURES, GOVERNANCE AND POLICY CASES, MATERIALS AND PROBLEMS* 275 (2d ed. 2012).

67. See Lori McMillan, *The Business Judgment Rule As An Immunity Doctrine*, 4 WM. & MARY BUS. L. REV. 521, 526-527 (2013).

68. *Id.*

have exceptions including, for intentional violations of the law.⁶⁹ As a consequence, shareholders and managers of marijuana businesses are at greater risk of personal liability than the stakeholders of other businesses, even putting aside the more risky nature of the marijuana industry. This is because nearly everything marijuana businesses do is an intentional violation of federal law and will therefore cost them their limited liability, business judgment rule, and other standard business entity law protections.⁷⁰ Business entity law protections are state law and, therefore, within the power of the state to correct even while the conflict over marijuana law continues with the federal government. States can pass a targeted amendment to their state business entity laws exempting “legal” marijuana businesses from the application of business entity law exceptions that rely upon violations of the law.⁷¹ This would allow businesses to make use of standard protections such as limited liability or the business judgment rule that professional stakeholders standardly expect and depend on.⁷²

None of what is proposed above is a perfect solution. By itself, the proposed changes to state business entity law will not be sufficient to persuade most professional stakeholders that it is worth the risk to join the marijuana industry. But when combined with other measures, such as the Obama administration’s stance of only focusing on marijuana businesses that are distributing to minors or are promoting other negative social ef-

69. See, e.g., *B & E Gibson Enters. Inc. v. Darngavil Enters. LLC*, No. 6:12-cv-1865-Orl-31GJK, 2013 WL 1969288, at *3 (M.D. Fla. 2013) (“Piercing the corporate veil is proper if the corporation is a mere device or . . . where the purpose is to evade some statute or to accomplish some fraud or illegal purpose.”) (internal quotation marks omitted). See also *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825, 840 (Cal. Dist. Ct. App. 1962). *Associated Vendors* lists “the use of a corporation as a subterfuge of illegal transactions” as one of the situations where piercing is appropriate. *Id.* There is little subterfuge regarding illegal transactions for most marijuana businesses; they are open about it. The fact that a business openly violates the law might in fact impact which creditors can pierce. See *MAG Portfolio Consultant, GMBH v. Merlin Biomed Grp. LLC*, 268 F.3d 58, 63 (2d Cir. 2001); *In re Checiek*, No. 8:12-bk-06696-MGW, 2013 WL 2468865, at *2 (Bankr. M.D. Fla. 2013). Some courts require that the equity holder exercise control over the business entity so as to commit the illegal or unlawful act. See *My Father’s House No. 1 v. McCardle*, 986 N.E.2d 1081, 1089 (Ohio Ct. App. 2013). But of course, with marijuana businesses, the equity holders formed the business and hired managers to break the law. This should serve as evidence of control of the illegal act.

70. See *Miller v. Am. Tel. & Tel. Co.*, 507 F.2d 759, 762 (3d Cir. 1974). Even if directors were given the benefit of the business judgment rule, it would offer them no protection—“[W]e are convinced that the business judgment rule cannot insulate the defendant directors from liability if they did in fact breach [a federal statute], as plaintiffs have charged.” *Id.*

71. See Scheuer, *supra* note 5 (providing a more fulsome discussion of this proposed exception).

72. *Id.*

fects,⁷³ this should encourage more professionals to bring their experience into this market. Ultimately, the marijuana industry has to simply wait for the conflict between state and federal marijuana laws to be resolved and for a federal administrative body, such as the Food and Drug Administration, to pass comprehensive rules that aim at respecting the state policy goals that drove the legalization of marijuana while also regulating the industry so that it does not develop into a serious health crisis for America. While states wait for this conflict to be resolved, they need to take what small steps they can to make sure this industry does not get out of control.

VII. CONCLUSION

It is a very exciting time for the marijuana industry as it rapidly grows into the world of post-marijuana-prohibition to serve the needs to this billion-dollar a year market place. Over the coming years there will be opportunity to become wealthy as businesses fight to become the established marijuana brands. While exciting for business owners, policy makers need to ensure that they are providing the proper controls so that this industry does not develop into something more dangerous than what came before marijuana was legalized. Controlling this industry will ultimately have to be a multifaceted approach with government, especially the federal government, taking a large role in regulating it. But market forces can also act as a restraining force if allowed. While states are waiting on federal legalization, they should do what they can to promote the integration of professional stakeholders into this industry. These venture capital, insurance, management, banking, and other professional classes bring with them the experience of running legally compliant businesses and the discipline to fear liability brought on by their substantial assets.

73. Perez, *supra* note 25.