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10 Years After the World's First Legal Sale of Cannabis, What Have We Learned?

Mackenzie Slade, Executive Director

The following is a series from the on-the-ground experts at Cannabis Public Policy Consulting that will be released periodically in 2024.

On January 1, 2014, the state of Colorado launched what is arguably the greatest social experiment of our generation—a federally illicit, state-confined adult-use cannabis market. Twenty-three states, millions of consumers, and billions of dollars of sales later, cannabis legalization has graduated from a one-state experiment to being the law of the land for the majority of Americans. In the decade since Colorado embarked on executing what was considered ambitious plans to bring consumers access, we have seen promises met and promises broken. Nowhere has the tension between good intentions and impossible implementation been felt more acutely than the social equity licensing programs. Legalization has understandably been viewed as a promising way to right the past wrongs of the War on Drugs, providing economic opportunity to those who have been disproportionately impacted by cannabis criminalization. At the same time, eligibility for a cannabis license is often exclusive to those who meet a very specific rigor of business aptitude to promote sustainable economic development. The primary lesson that has emerged for cannabis regulators in the decade since the initiation of the "Green Rush" is that implementation supersedes intent.

While there are many lessons to be learned from the rocky rollout of many state licensing programs, two lessons stand out as fundamental to avoiding a failed program: social equity applicants should be allowed to utilize much of their equity to raise capital, and licensing programs should never utilize scoring systems to determine licensees.

Ownership requirements for social equity applicants is a perfect and pressing example. Nearly every state has taken measures to incorporate social equity in their cannabis program, even if proceeding market implementation. The current template for incorporating social equity is priority in issuing licenses, a first-to-market approach for those who meet the criteria of social equity and will maintain "ownership" of the business. Ownership has a range of definitions across states with most at 51%. However, recently legalized states have exceeded that, such as Maryland at 65%. While at face value, a higher percentage of ownership sounds more equitable, it is counterproductive. As cannabis remains federally illicit, securing investments for cannabis businesses is incredibly challenging. Restricting opportunities for outside ownership restricts a social equity applicant's ability to be financially viable as an applicant and licensee. As a result of this, the implementation of such policies has social equity applicants falling victim to predatory management agreements, having licenses revoked, and/or expending their own friends and family funding on a business with a now notorious low-success rate. While states can be vigilant in kicking out bad actors and educating licensees, restricting the ability for a licensee to trade equity for capital will doom the licensee from the beginning.

Likewise, an extended, litigious process for doling out licenses will hamper a social equity licensee's ability to compete in the market. Statute's like Minnesota's have provided incentive to have social equity ownership by awarding points based on the amount of stake owned by those who meet the definition of social equity for each applicant, proposing similar flaws as well as another issue, application scoring. For states with limited licensing models, scoring is the standard mechanism of selecting applicants. There are numerous faults with application scoring: reviewer bias, subjectivity in reviewer criteria, inconsistencies in reviewing, and human error more generally. The intent behind scoring is to select the "best" applicants operate the market, and subsequently, having the "best" market. However, both intents are unmet in the implementation of traditional scoring methods for one reason: the near guarantee of litigation. Due to the aforementioned flaws, scoring for cannabis licenses is extremely vulnerable to litigation. While some cases are stronger than others, litigation brings the risk of injunction or a stay on the issuance of licenses. Put simply, scoring almost promises that licenses will not get out the door in a timely manner. Such stories can be told by regulators in Missouri, Maryland, New Jersey, Florida, and unfortunately many more. Preliminary predictive modeling suggests that a hasty latency period between legalizing and getting retail sales launched is essential for capturing the market in the immediate and long-term. By using competitive scoring, states are promising a delay in market launch, resulting in the opposite of their intent, a less successful market and less successful businesses.

While these two examples of policy are well intended, they fall short when faced with the realities of implementation. Admittedly, there is no easy solution for successfully ensuring equity in cannabis programs simply because ensuring equity does not ensure that those businesses will be successful in what is a state-confined market approaching a demand ceiling. However, permitting ownership for equity applicants to be as low as 51% provides a financial safety net in the scenario that they are not successful. Similarly, there is no research to suggest that competitive applicants are more successful in this industry than those who may be less experienced. Even multi-state operators are closing their doors. Using a lottery system designed to mitigate vulnerabilities will help licenses get out the door as soon as possible, and potentially result in a more successful market. By using these best practices in cannabis policy, future states may be better positioned to meet the goals driving legalization.