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# Colorado's Proposition 122: Too soon for the mushroom boom?

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Rachel K. Gillette of Holland & Hart LLP discusses the steps ahead for implementing Colorado's natural psychedelic medicine laws following passage of Proposition 122 and questions that remain in terms of the federal government's approach.

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In November 2022, Colorado passed Proposition 122 (Prop 122), arguably one of the nation's first "legalize and regulate" natural psychedelic medicine laws, and people are already filled with romantic images of magic mushroom shops popping up on Colorado's street corners. Quixotic entrepreneurs and investors are already daydreaming of getting in on the ground floor of what may become the "Mushroom Boom."

And why shouldn't they dream? Arguably Prop 122 is reminiscent of Colorado's journey through marijuana legalization, which began in 2000 with Amendment 20, followed by cannabis licensing and regulation in 2010 with the passage of Colorado's House Bill 10-1284, and ultimately Colorado voters' passage of Amendment 64. Ten years ago, Colorado became the first state in the nation (along with Washington, one hour later) to legalize, tax, and regulate adult use of marijuana for persons 21 years or older. Colorado dared to dream big, and the sky did not fall. Across the country, the "Green Rush" made many people wealthy.

## **Colorado's Prop 122 — what to expect and when to expect it**

Similar to Amendment 64, and Colorado's medical marijuana program before it, Prop. 122 creates a regulatory framework — a "Regulated Natural Medicine Access Program" — under which persons 21 and older can receive "Natural Medicine Services" provided by a licensed Healing Center.

A Natural Medicine Advisory Board, consisting of 15 members and appointed by the Governor on Jan. 31, 2023, will advise regulators on program implementation. The Board will advise on public health and safety, research, qualifications and educational requirements for program applicants, responsible and affordable access to natural medicines, and all rules to be promulgated under the Act.

By Jan. 1, 2024, regulators must develop rules governing the manufacture, cultivation, and sale of "natural medicines," defined only as Psilocybin and

Psilocyn until June 2026. Going forward, more "natural medicines," such as DMT or Mescaline may be added. By Sept. 30, 2024, the regulatory agency will begin accepting applications for licensure of Healing Centers and other permitted entities. Applications will be reviewed and licensing decisions made within 60 days. Those seeking licenses should expect the rules to require certain levels of training and qualifications, which will be determined throughout the rulemaking process.

Thoughtfully, Prop. 122's drafters sought to include social equity license components as part of the regulatory framework, a concept left out in the early years of Colorado's cannabis regulation. Prop 122's regulatory access program must be equitable, inclusive, and promote licensing to persons from communities that have been disproportionately harmed by high rates of controlled substances arrests, persons who face barriers to access to health care, those persons who historically have used natural medicines as part of their indigenous or traditional history, and veterans.

Wisely, the drafters also included language which would prohibit localities from fully "opting out" from allowing licensed facilities, a misstep Colorado made in in the early years of regulating medical and adult use marijuana. Even today, many jurisdictions in Colorado don't allow any form of marijuana businesses, leaving members of those communities to grow their own or travel (sometimes significant distances) for access to legal cannabis. Some may say those Colorado communities prohibiting cannabis licenses continue to prop up the state's black market for cannabis.

Other rules to be developed will limit how many financial interests an individual may have in a licensed Healing Center (limited to five), allow Health Care facilities to share premises with licensed Healing Centers, and even allow natural medicine services to be provided in private residences.

### **Putting the 'fun' back in fungi?**

Most importantly, Prop. 122 seeks to decriminalize the personal use, possession, growth, and transport of certain "Natural Medicines," starting with psilocybin and psilocyn (commonly known as "Shrooms" or "magic mushrooms"). Dare I say, with no fear of arrests, can Coloradoans now put the "fun" back in fungi?

With the passage of Prop 122, for persons over 21, it is no longer a crime in Colorado to possess, store, use, transport, purchase, or ingest Natural Medicine. A person over 21 may give away, without remuneration, natural medicine to another person over 21. This is similar to Colorado's cannabis laws — selling will be strictly limited to licensed businesses only.

In addition, the law allows adults over 21 in Colorado to grow and process Natural Medicine for personal use, so long as the plants and fungi are kept in or on the grounds of a private residence and they are secured from access from persons under the age of 21.

The law includes protections for those engaging in the personal use of Natural Medicines. Permitted personal use alone cannot constitute abuse

or neglect of a child, absent other factors, restrict a parent's parenting time, punish or penalize persons on parole or probation, be the basis for detention, search or arrest, or disqualify a person from being eligible for public assistance, medical care or medical assistance. These provisions wisely address the challenges and lessons learned from Colorado's cannabis regulatory journey over the past decade. However, there remains one large elephant in the room...

### **The specter of the feds**

While lawmakers in other states (including California, Connecticut, Illinois, Missouri, Minnesota, New York and New Jersey) are pondering similar psychedelics legislation to study, decriminalize, or legalize "magic mushrooms" we must acknowledge that much remains unknown, including the federal government's thoughts on legalizing additional Schedule I Controlled Substances beyond cannabis.

Is Colorado's passage of Prop. 122 a bridge too far for federal law enforcement? Bear in mind Oregon legalized magic mushrooms in 2020 with the passage of Oregon Measure 109. But Oregon Psilocybin Services just began accepting applications for licensure on Jan. 2, 2023. We have yet to see what the federal government's enforcement position will be with regard to legalizing magic mushrooms, much less DMT or Mescaline.

Will the Department of Justice sit back and allow states to continue to legalize other Schedule 1 Controlled Substances without some federal interference? That's unlikely as the DOJ is restricted from using federal funds only as written in what is commonly known as the Rohrabacher-Farr Amendment, prohibiting the DOJ from spending federal funds to interfere in states' medical marijuana laws and programs (H.Amdt.332 to H.R.2578).

Alternatively, will Merrick Garland's Department of Justice issue a "mushroom memorandum" akin to the now-rescinded Cole Memorandum of 2013 for cannabis? As they say, history is often bound to be repeated. Recall in the early years of Colorado's cannabis licensing program there was much fear of federal law enforcement. With the Ogden (<https://bit.ly/3ZwVqvV>) and Cole Memorandums, license applicants could at least breathe a small sigh of relief, understanding the U.S. Attorney's eight "law enforcement priorities" (Department of Justice).

The Cole Memo also warned that states needed to create strong regulatory frameworks and enforcement mechanisms. Although Attorney General Jeff Sessions rescinded Cole in 2018 in another DOJ memorandum, the lack of enforcement action by most U.S. attorneys indicates the DOJ is still adhering to its principles. However, with changing leadership and congressional control often comes changing law enforcement policies.

### **Now what?**

For years, cannabis has been on the precipice of federal legalization. Numerous federal cannabis legalization bills have been drafted and proposed by members of Congress on both sides of the aisle (albeit with

little success). The cannabis industry is robust and has a strong federal lobby. But the reality is mushrooms are a different animal (fungi, actually). While there is much excitement about the possible benefits of mushrooms as far as mental health and other treatments go, we cannot say there is similar congressional support to legalize Psilocybin federally...yet.

While Psilocybin may have a faster federal legalization trajectory than cannabis has, Colorado is wise to create a robust regulatory framework to stave off possible federal enforcement of the Controlled Substances Act. Industry participants need to understand the potential risks, and armed with a hefty dose of risk tolerance, seriously address compliance with state law.

Newly licensed businesses operating under Prop. 122 should also be aware of the significant federal tax consequences. The IRS is likely to apply punitive federal tax provision 280E to Colorado's and Oregon's licensed mushroom businesses as it has to cannabis businesses. Is it too soon for a mushroom boom? We will have to wait and see.

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