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ATTORNEYS AT LAW

Lifting the Haze on Marijuana Legalization: Issues and Questions for Municipalities

Maine Municipal Association

February 28, 2017

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10. Questions and Answers

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Section I

Overview of National Trends

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A National Trend Toward Legalization

- 29 states with medical marijuana
- 8 with full “adult use,” i.e., recreational legalization (CO, OR, WA, AK, CA, MA, NE and ME)
- All New England states now have medical marijuana
- 14 additional states have “decriminalized” marijuana possession

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But….

- Marijuana is a Schedule 1 substance under U.S. Controlled Substances Act
- Obama Administration has issued policy guidance taking a cautious, wait and see, hands-off for now approach to states with medical or recreational marijuana, articulated in a series of memos from the Justice Department
- Trump Administration position unclear

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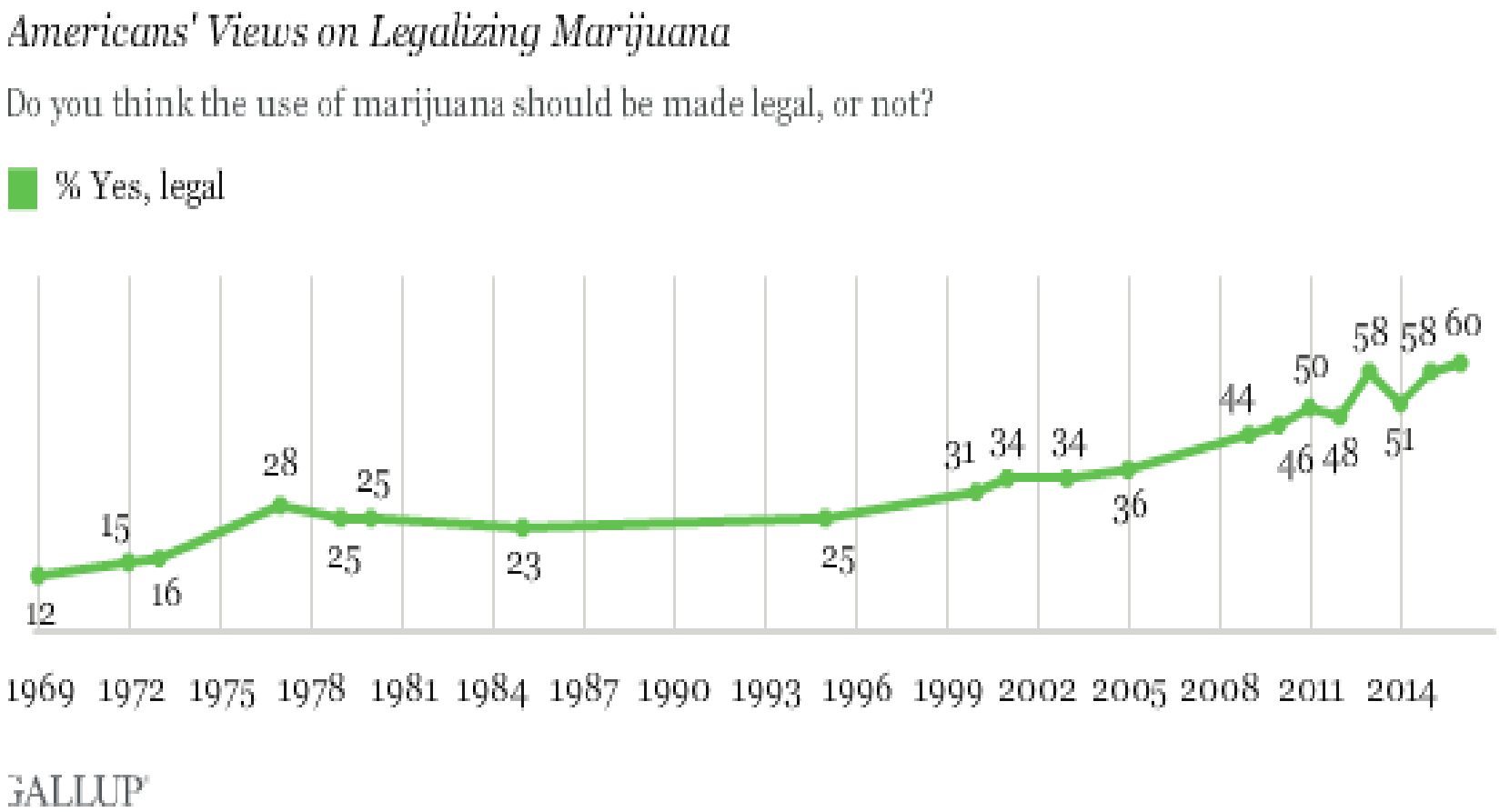
Changing Public Opinion

National support of legalization 60 % in October 2016



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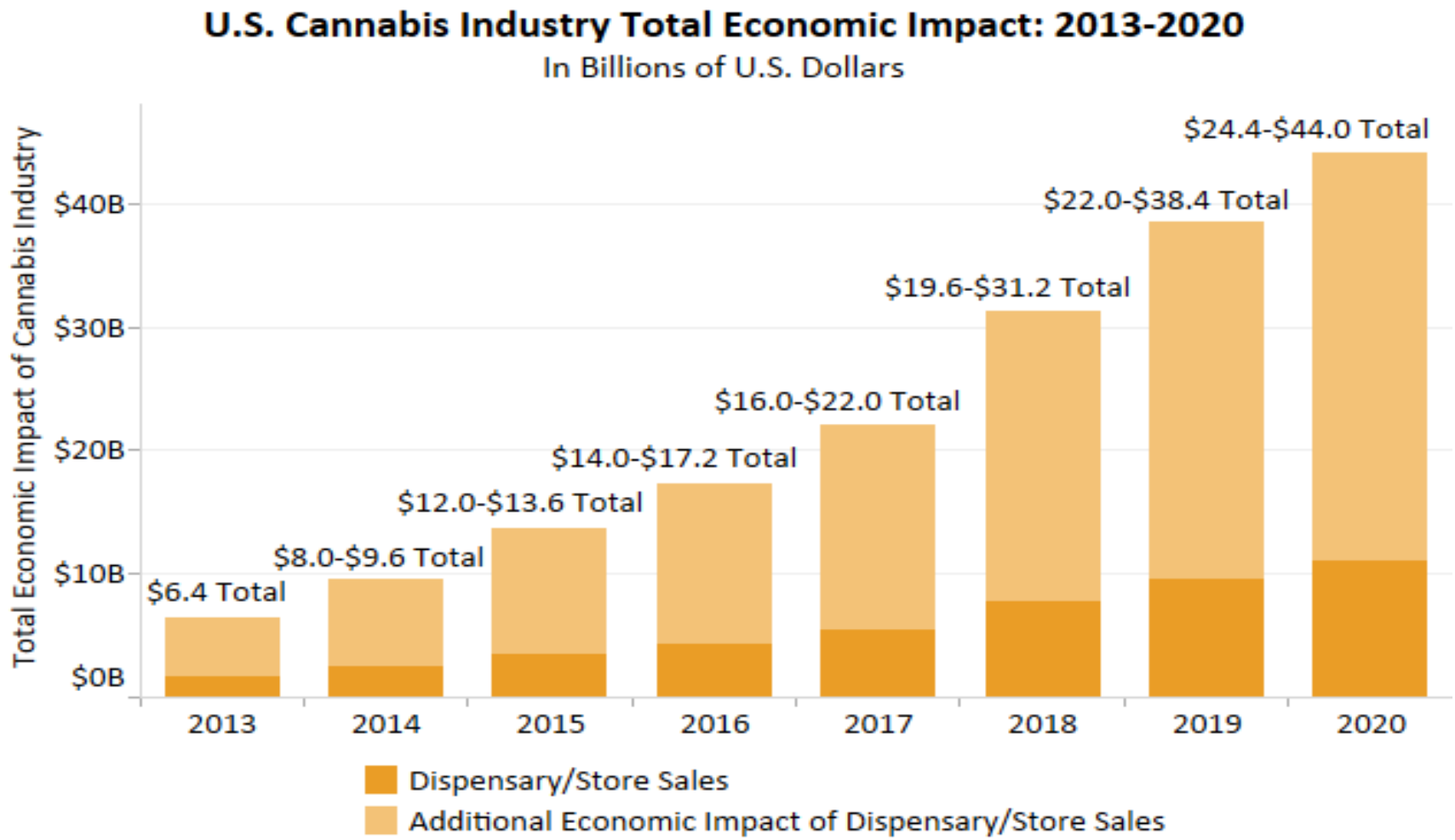
Business Opportunities in Cannabis



Source: Marijuana Business Factbook 2016

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Size of the Maine cannabis markets:

- Maine Medical Marijuana, 2015: $40.5 million
- Projected 2016: $49.3 million
- Projected recreational market size:
  - 2018 $60 million
  - 2020 $210 million
- Utilization rate: 12.9%

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Section II

Federal Law Issues

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State and Federal Disconnect

- Production, processing and sale of marijuana is completely illegal under federal law; everyone producing, processing and selling marijuana – even in a state where it's legal for medical or recreational purposes -- is committing a federal crime
- Marijuana is a Schedule I substance under the U.S. Controlled Substances Act, grouped with the most dangerous drugs, including LSD and heroin
- Some bi-partisan bills to change legal status, but so far few changes to federal law; DEA recently declined to re-schedule

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State and Federal Disconnect, cont'd

- Obama Administration took a cautious, hands-off approach to states that have legalized at the state level
- Trump Administration position unclear
- AG Sessions has made very critical statements about marijuana use, but was non-committal in his confirmation hearing.
- Then-candidate Trump made a variety of statements some of which were inconsistent

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How do we deal with federal law issues?

- Obama Administration issued policy guidance which took a cautious, wait and see, hands-off for now approach to states with medical or recreational marijuana, articulated in a series of memos from the Justice Department
- This policy is still in effect (for now)

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Cole Memo

August 29. 2013, Justice Department Memo tells prosecutors not to prioritize enforcement against cannabis operations in states with well-regulated medical or recreational regimes, unless certain federal areas of interest are involved.

- Distribution to minors
- Revenue flowing to gangs or organized crime
- Diversion into states where marijuana is illegal
- Using state-authorized activities as a cover for criminal operations
- Use firearms or violence
- Impaired driving
- Growing on public lands
- Growing on federal lands

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What the Cole Memo doesn't do:

- does not change the law; only articulates a set of enforcement priorities; marijuana is still 100% illegal under federal law
- subject to change by this or a future administration, or even this administration
- put a premium on strong regulatory structures for states

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What's next?

- Will Cole Memo stay in place?
- Will Congress legislate a fix?
- Along lines of "Rohrabacher-Farr Amendment?"
- Amendment to DOJ Appropriations bill:
  - "None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of ….Maine... to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."
- Some debate over scope and impact of amendment

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Section III

Medical Marijuana in Maine

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Medical Marijuana in Maine - Patients

- "Qualifying patients" with one of several enumerated conditions can get a "certification" for marijuana use:
  - Cancer
  - Glaucoma
  - HIV
  - AIDS
  - Hepatitis C
  - Amyptrophic lateral sclerosis
  - Chrohns Disease
  - Agitation of Alzheimer's
  - Nail-patella syndrome
  - A chronic or debilitating disease or medical condition or its treatment that produces intractable pain, which is pain that has not responded to ordinary medical or surgical measures for more than 6 months

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Medical Marijuana in Maine - Sources

- A qualifying patient can get marijuana from 3 sources:
  - Grow it themselves,
  - Registered Dispensaries - 8 dispensaries
  - Primary Caregivers (“caregivers”)
- Considered one of the more liberal systems in the country, expansive list of qualifying conditions, reciprocity

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Caregivers

- Can have up to five (5) qualifying patients
- Can cultivate up to six (6) mature female flowering marijuana plants per qualifying patient (marijuana plants are gendered)
- Can grow a total of 30 plants, plus 6 more if the caregiver is also a qualifying patient
- Must grow in an “enclosed, locked facility”
- Two household members can share an enclosed locked facility (maximum of 72 plants)
- Prohibition on operating as a “collective”

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Issues with Caregivers

- Officially regulated by DHHS, but little actual supervision or monitoring
- Allowed to grow more than they can legally sell; creates socially undesirable incentives
- Operational concerns:
  - Odor of marijuana cultivation
  - Security issues (cash, theft)
  - Traffic and parking
  - Safety issues from high-powered lights
- At the same time, it is important to recognize that many caregivers are earnest, dedicated, compliant with rules and are striving to provide medicine they regard as effective—and that for many patients is safe and highly effective—in a safe and responsible manner

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Local Control of Caregivers

- Medical Use of Marijuana Act expressly allows:
  - Limits on number of registered dispensaries within the geographic boundary of the municipality
  - Reasonable local regulations to govern registered dispensaries
- The Act expressly prohibits:
  - Local ordinances that are “duplicative of or more restrictive than” the provisions of the Act
- Preemption by implication
  - Ask: Would the local action frustrate the purposes of the Act?

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Things a town probably can do regarding caregivers:

- Apply existing site plan review and zoning ordinance provisions to commercial cultivation, processing, and distribution of medical marijuana
- Identify the category of use—residential, commercial, industrial, manufacturing, agricultural, etc.—of Primary Caregiver operations
  - Treat Primary Caregiver home-growing operations as home occupations or accessory uses
  - Treat cultivation and processing by Primary Caregivers as a commercial, industrial or manufacturing use, subject to traditional permitting and zoning ordinance requirements.

    See Briggs v. Town of York, York County Super. Ct., AP-14-028 (May 15, 2015, O'Neil, J.) (holding that Town of York ZBA did not err in concluding that caregiver operation is a "manufacturing use"; ZBA has discretion to characterize the nature of a proposed use and is afforded "substantial deference" in determining whether a proposed use falls within a definition)
- Treat conversion of existing warehouse space/facilities associated with Primary Caregiver operations as a change of use

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Things a town probably can't do:

- Ban possession, cultivation, or distribution of medical marijuana by Primary Caregiver operations
- Restrict the number of Primary Caregivers in the municipality
- Ban possession or cultivation of medical marijuana by Qualifying Patients
- Enact any ordinance provisions that are "duplicative of or more restrictive than" the provisions of the Act

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Section IV

The Maine Marijuana Legalization Act

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Marijuana Legalization Act

- Legalizes cultivation, production, and possession of marijuana for retail sale to individuals 21 year of age and older.
- Effective January 30, 2017: possession and use in private is legal, and growing marijuana for personal use is legal
- Legalization Act contemplates creation of state-wide, licensed commercial system of cultivation, processing and retail sale of marijuana
- This will come after issuance of regulations and licenses

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Five License Classes

- Cultivation – grow marijuana for wholesale sale of flower, two tiered system of licenses
- Manufacturing – convert cannabis flower into edible products, topicals, concentrates, etc.
- Testing – perform lab tests on cannabis flower to test for purity, potency, heavy metals, etc.
- Retail sales – sell marijuana products to the public
- Social clubs – sell marijuana and marijuana products for purposes of on-premises consumption only

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Marijuana Legalization Act Highlights

- Tax rate set at 10% (low by national standards)
- Regulated by Department of Agriculture (but effectively will be BABLO)
- Strong element of local control
  - Municipalities may ban all commercial marijuana activity
  - Must approve any license issued by state
- 800,000 square foot statewide limit on canopy
- No limit on number of retail sales, processing or social clubs
- Extensive labeling requirements

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Marijuana Legalization Act Highlights, cont'd.

- Mandatory testing
- Relatively low license fees compared to national averages
- Licenses can be transferred, but requires state and local approval
- Home growing permitted (up to six plants)
- Medical marijuana system is not changed by Marijuana Legalization Act and will continue as a separate system

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Section V

Timelines and Legislative Update

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Timelines

- Marijuana Legalization Act is now effective
- Legislature is considering dozens of bills to change various aspects of the Act.
- Leadership has formed Joint Select Committee on Marijuana Legalization Implementation (Sen. Katz/Rep. Pierce) to hear all bills
- Engaging in a methodical process.

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Timelines, cont'd.

- LD 88 was passed and signed by the Governor on January 27 (Public Law Chapter 1)
- Imposes moratorium on commencement of commercial activities until February 1, 2018
- Instructs Department of Agriculture to begin rulemaking; allows them to delegate some rulemaking to BABLO (Executive Order made this clearer)
- Clarifies that minors may not possess, use, transport marijuana

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Timelines, cont'd.

- BABLO needs to issue a large number of major substantive regulations and then accept and process license applications. Takes approximately 4 months to grow marijuana from clone or seedling to mature flowering plant
- Probably means retail sales starting in early 2018 at the earliest, probably more likely mid- to late 2018

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Other proposed legislative changes

- Raise tax rate
- “Early roll-out”
- Renewed scrutiny of medical marijuana
- Many constituencies looking at changes

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Section VI

What does the marijuana industry look like?

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Clone Room

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Vegetative

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Flower

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Plants Ready for Harvest

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Drying Room

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Trim Room

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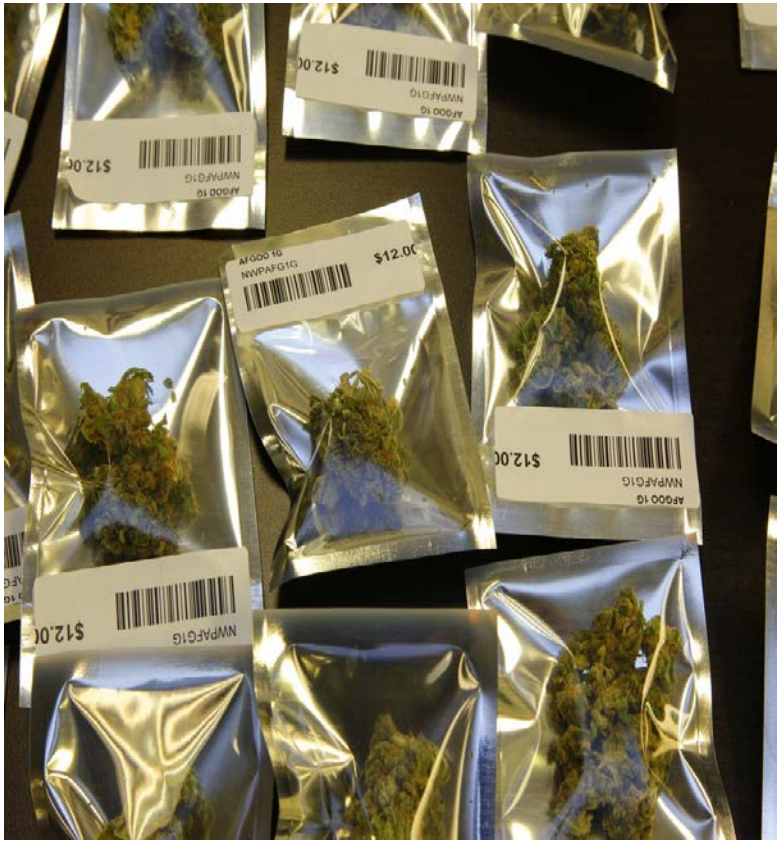
Packaging



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Hydro-Carbon Extractor

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Retail Store

Edible Display

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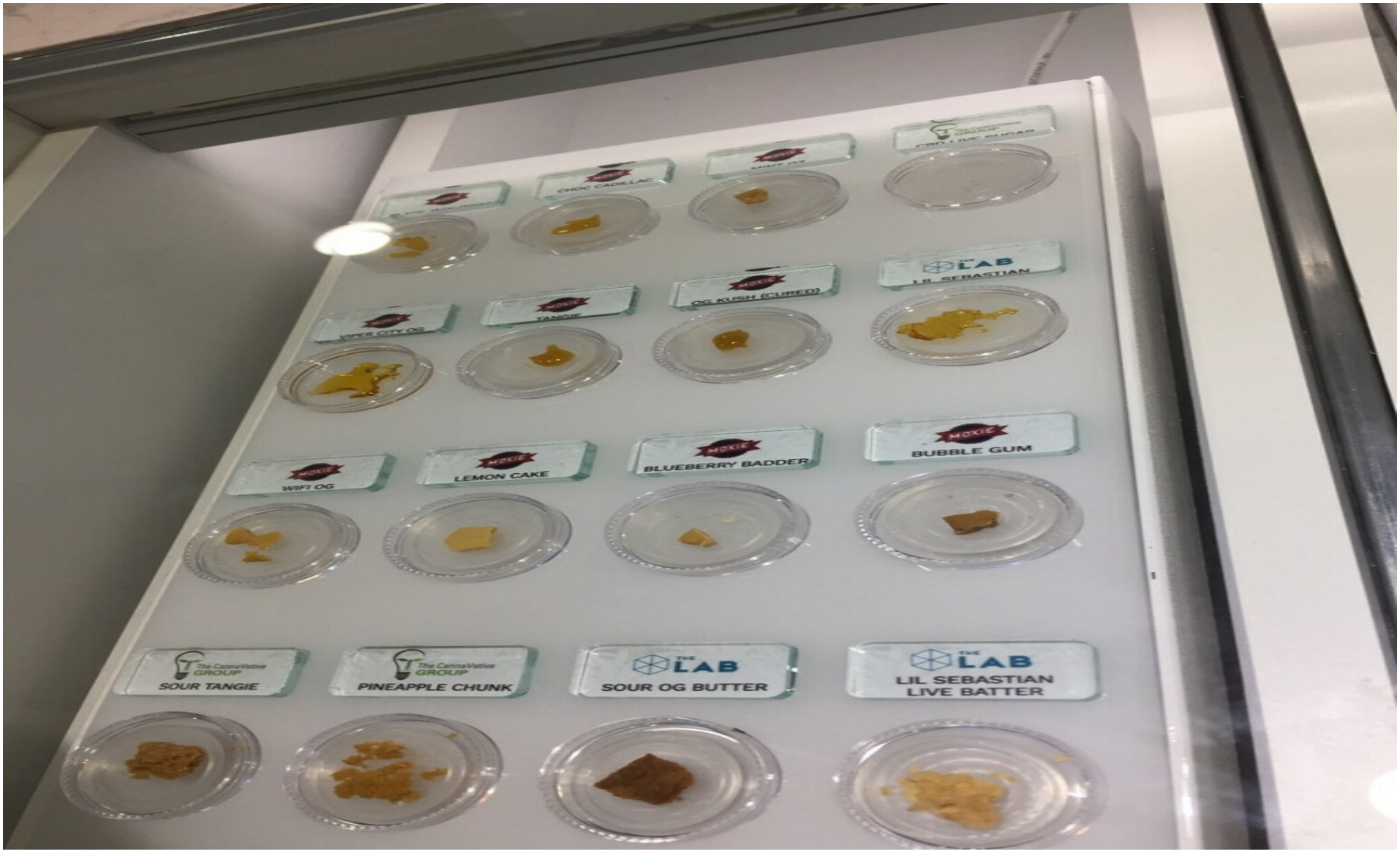
Flower Display

Concentrate Display



Section VII

Local Control:

Prohibition, License Limits, Zoning, Local Licensing and Local Regulation

(Plus Moratoria)

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Local Control of Marijuana

- Marijuana Legalization Act contains provisions giving municipalities substantial control over commercial marijuana activities
- However, the Act provides little guidance about how municipalities should make decisions
- Municipalities will need to make substantive decisions about marijuana commercial activities and potentially establish processes to deal with licensure and oversight
- Some provisions of the Act are unclear or inconsistent

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Local Control of Marijuana, cont'd

- Voters retain right to call for for a vote on any regulation adopted by a municipality.

  7 MRSA § 2447(1)
- Act contains a variety of inconsistent internal timelines.

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Local control viewed broadly

- Five classes of local powers
  - Prohibition
  - Numerical license limitation
  - Zoning
  - Local Licensure
  - Local Regulation

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Prohibition

- Do you want to prohibit commercial marijuana operations entirely? The “dry town” option. 7 MRSA § 2447(4)
- Ends the discussion, no need to consider the other issues.
- Cannot prohibit personal use and personal cultivation

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Numerical Limitations

- Do you want to limit the number of licenses available in the town in any of the license categories? 7 MRSA § 2447(4)
- What are the numerical limits on licenses?
- What are the criteria for selecting licensees if you limit the number of licenses? 7 MRSA § 2447 (3)(D)

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Thoughts on Numerical Limitations

- For retail stores, consider what the demand for marijuana in your town might be before setting a limit.
  - Surveys
  - Demand analysis
- Possible methods for allocating limited licenses:
  - Queue
  - Lottery
  - Request for Proposals

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How might an RFP process work?

- RFP might contain threshold requirements:
  - Evidence of tax and legal compliance
  - Capital reserves to fund start-up
  - Criminal background check
  - Security and safety plans
- Then use a scoring process that scores:
  - Management experience
  - Technical capacity
  - Plans for: traffic, odor mitigation, environmental protection, other similar issues
  - Local support
  - “Give backs” to community

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How might an RFP process work, cont'd?

- This issue carries risks for town; licenses are valuable and losing applicants will have spent money trying to get a license, and may look for ways to litigate
- Consider using outside consultants to shape and administer the selection process
- Fees can be recovered through local application fees (state license application fees are shared with towns, but the fees are very low)

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Zoning

- If you allow marijuana operations, where can they be? I.e., how will you zone for marijuana operations? 7 MRSA § 2449(1)
- Grant of power is broad but is subject to 30-A M.R.S.A. § § 4351-4361 (home rule limitations on zoning)
  - Public hearing and proper process
  - Consistent with comprehensive plan
  - Potentially subject to discriminatory zoning and selective enforcement claims

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Local licensure

- Will you impose local licensing requirements? 7 MRSA § 2449(4)
- Can you impose local licensing fees? (Unclear)
- No question that if a municipality has general business licenses, requirement can clearly be applied to marijuana businesses
- Decision to impose a marijuana-specific license requirement will turn on:
  - Selection process town uses initially
  - Quality of state regulations

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Local Regulation

- Will you impose any local regulations on marijuana businesses? 7 MRSA § 2449(1)
- Local regulations can be “at least as restrictive as” state regulations.
- What aspects of marijuana operations will you regulate? Some areas of concern: Fire code, life safety, security, advertising & signage, banning sales of certain products, access to premises and records by local officials.

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Substantive questions for towns, cont'd:

- If you allow marijuana operations, where can they be? i.e., how will you zone for marijuana operations? 7 MRSA § 2449(1)
- Will you impose local licensing requirements? 7 MRSA § 2449(4)
- Can you impose local licensing fees? (Unclear)
- What aspects of marijuana operations will you regulate? Some areas of concern: Fire code, life safety, security, advertising & signage, banning sales of certain products, access to premises and records by local officials.

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Process questions for towns

- How will you process and approve license applications? State approves license applications first, then forwards them to town for approval. Town can hold public hearing. Act has some confusing provisions on timelines, but seems to require municipal action within 14 days of receiving application from State. No provisions on what happens if this timeframe is not met. 7 MRSA § 2449(4)
- Who will be point person for these issues?

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Process issues, cont'd

- How to handle inquiries and "applications"?
- Need to have a clear method for dealing with residents that attempt to seek town permission to start a marijuana business before 2/1/18.
- Moratoria (to be discussed later) are one tool
- Need to educate staff – don't want people to be able to take position that they have a pending application and have accrued appeal or other rights

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Process questions for towns, cont'd

- Will you impose moratoria? Pros and cons:
  - Technically, licenses won't be issued for many months, so no clear legal need to impose moratorium now – retail sale of marijuana is illegal without a license
  - However, few people have read the Marijuana Legalization Act, or understand the regulatory and licensing process about to unfold
  - So a moratorium is a way to send a public message that the town is considering what its marijuana policy will be, and a freeze on activity is in place until final decisions are made
  - Emerging issues with retroactive moratoria

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Section VIII

Public Sector Employment Law Issues in the Age of Marijuana

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Legalization Act Provisions

- No effect on employment policies
  - Act "may not be construed to require an employer to permit or accommodate the use, consumption, possession, trade, display, transportation, sale or growing of cannabis in the workplace. [Act] does not affect the ability of employers to enact and enforce workplace policies restricting the use of marijuana by employees or to discipline employees who are under the influence of marijuana in the workplace." 7 M.R.S.A. § 2454 (2)
- Anti-discrimination:
  - "[E]mployer … may not refuse to … employ or … or otherwise penalize a person 21 years of age or older solely for that person's consuming marijuana outside of the … employer's … property." 7 M.R.S.A. § 2454 (3)
  - Maine Medical Marijuana Act also has anti-discrimination provision but makes exception for violations of federal law and loss of funding/federal contract.

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What Does This Mean for Employers?

- Can ban possession at work
- Can ban use of marijuana at work
- Can prohibit reporting to work under the influence of marijuana
- Can discipline employees for any of the above
- Issue is the regulation of off-hours use of marijuana which may present problems for employers who conduct pre-employment screening and drug testing (NOTE: Public employers who drug test need to comply with Maine state drug testing laws; 4th amendment issues)

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What Does This Mean for Employers?

- Collision between anti-discrimination provisions and drug testing
  - Pre-employment screening: Anti-discrimination provisions; labor shortage problems;
  - During employment (i.e. probable cause and random testing): limits to what a urinalysis can tell you about a person's level of impairment at the time of testing; blood testing is the only reliable measure of current impairment
- Don't need to drug test to find impairment

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Dealing with Special Cases

- Employees that are required to be tested under federal rules
  - Commercial Driver's License holders
  - Aviation employees
- Other employees have special statuses relating to legal compliance or access to pharmaceuticals
  - Law enforcement
  - EMS
- Non CDL drivers

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Considerations

- How do you assess workplace impairment?
- Does your current drug/alcohol policy cover “marijuana” now that it is not an “illegal drug”?
- How do we harmonize the anti-discrimination provisions in the Medical Use Act versus the fact that marijuana use is still illegal under federal law? Potential for constitutional issues.
- The language of the Legalization Act is not tested

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Section IX

Impaired Driving

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Impaired Driving Issues and Approaches

- No reliable breath or urine test to assess marijuana impairment
- Only a blood test can determine the amount of active THC in a person's system
- Two possibilities: zero tolerance, or a per se level of active THC in a blood sample
- States seem to be converging on a per se standard of 5 ng/mL of THC as threshold for impairment.
- Need to tailor field sobriety tests to marijuana impairment
- Still no marijuana-specific legislation in Maine

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Section X

Questions and (Hopefully) Answers

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