

Cannabis in Maine: State of the Industry

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Cannabis: The Federal Landscape

- Most states currently have laws legalizing cannabis in some form
- Illegal under federal law
 - Under the Controlled Substances Act (CSA), cannabis is classified as a Schedule I drug, which means that the federal government views it as highly addictive and having no medicinal value

The National Shift in Public Opinion

- In 1995, the year before California became the first state to legalize medical cannabis, 25% of Americans polled in a Gallup survey favored nationwide legalization of cannabis.
- By comparison, in Gallup's 2021 survey, 68% of Americans polled favored legalization.

Maine Cannabis By the Numbers

- OCP December 2021 Survey Results:
 - 64% of cannabis from regulated sources
 - 36% from black market
 - 54% of consumers who purchase from home-based caregivers do not have med cards
 - 33% of consumers who purchase from dispensaries or caregiver retail stores do not have med cards
 - For every \$1 in demand for adult use cannabis in Maine, there is about \$2 in supply

Maine Medical Stats

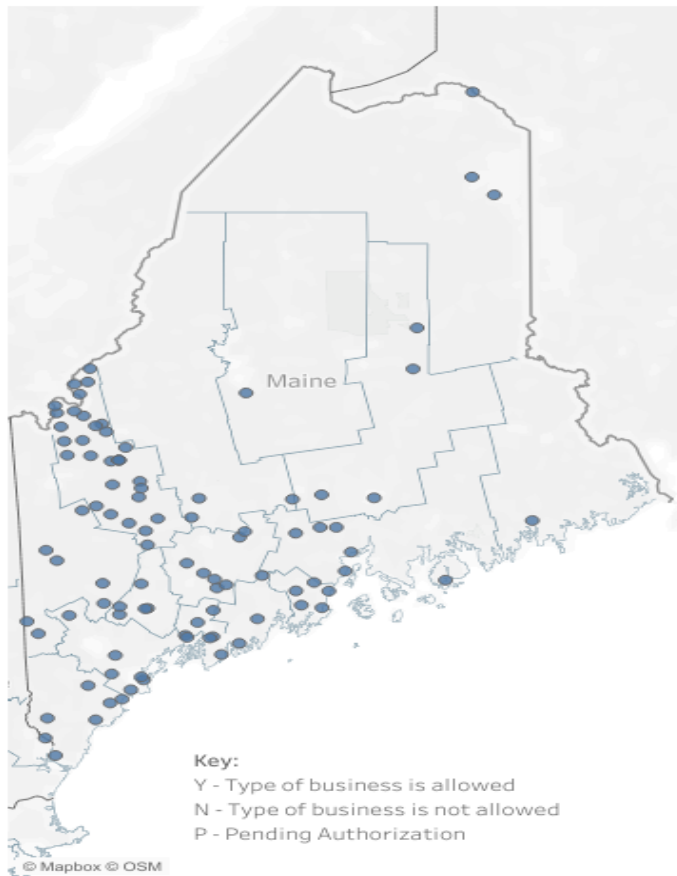
- OCP Adult Use Open Data
 - 2,614 registered caregivers as of August 31, 2022
 - This is down from a high of 3,257 registered caregivers in 2016
 - 28 active dispensary licenses
 - 14 pending dispensary licenses

Maine Adult Use Stats

- OCP Adult Use Open Data:
 - 83 active cultivation licenses
 - 50 active manufacturing licenses
 - 105 active store licenses
 - 3 active testing licenses

Cannabis as a Regulated Land Use

Adult Use Marijuana Opt-In by Municipality



Municipality	Retail	Growing	Manufacturing	Testing	
Alder Stream ..	N	Y	N	N	●
Anson	Y	Y	Y	Y	●
Auburn	Y	Y	Y	Y	●
Avon	Y	Y	Y	Y	●
Bangor	Y	Y	Y	Y	●
Bath	Y	Y	Y	Y	●
Beattie (No.2,..	N	Y	N	N	●
Berwick	Y	Y	Y	Y	●
Bethel	Y	Y	Y	Y	●
Biddeford	N	Y	Y	Y	●
Boothbay	Y	Y	Y	Y	●
Bowdoinham	Y	Y	Y	Y	●
Bridgton	Y	Y	Y	Y	●
Brownfield	N	Y	Y	Y	●
Brunswick	Y	Y	Y	Y	●
Byron	N	Y	N	N	●
Camden	N	Y	N	N	●
Chain of Pond..	N	Y	N	N	●
Chain of Pond..	N	Y	N	N	●
Chelsea	Y	Y	Y	Y	●
Coburn Gore	N	Y	N	N	●
Columbia	Y	Y	Y	Y	●
Damariscotta	Y	Y	Y	Y	●
Davis (No.3, R..	N	Y	N	N	●
Detroit	Y	Y	Y	Y	●
Eliot	Y	Y	Y	Y	●
Etna	N	Y	Y	Y	●
Eustis	Y	Y	Y	Y	●
Fairfield	Y	Y	Y	Y	●
Farmington	Y	Y	Y	Y	●
Freeman Twp	N	Y	N	N	●

What's happening now...

- From the perspective of a cannabis lawyer:
 - Lots of product available in the market / prices are dropping
 - Energy prices are going up
 - Partnership disputes
 - Importance of dispute resolution mechanisms in owner agreements
 - Importance of inventory tracking and membership interest forfeiture provisions in owner agreements
 - Uptick in mergers and acquisitions and consolidation
 - Uptick in failed cannabis businesses

Maine's Residency Debacle

- In August of 2022, the First Circuit Court of Appeals struck down the Maine law that requires owners of medical cannabis businesses to be Maine residents, finding Maine's residency requirement to be unconstitutional.
- The First Circuit is the first federal appeals court to wrestle with cannabis and the dormant commerce clause, and it is unlikely to be the last.
- The panel relied on the Rohrabacher-Farr amendment, a spending bill rider that forbids the U.S. Department of Justice (DOJ) from using its funds to interfere in state-legal cannabis markets, as evidence that Congress has "acknowledged the existence of a market" in medical cannabis.
- A Maine-based trade group of caregivers has appealed the First Circuit's decision.
- Residency-based preferences in Detroit and Missouri were similarly struck down on DCC grounds last year. And Maine's adult use market is already open to non-residents.

Culture Clash

- Industry pioneers
 - Cowboy and/or “can’t we all just get along” personality types
 - Varying levels of sophistication
 - Varying levels of access to capital
- Business community
 - Sophisticated but little hands-on cannabis experience
 - Frustrated by industry pioneers
 - Greater access to capital

Important Contract Provisions

- **The federal illegality problem**
 - Some federal judges have refused to enforce state-law compliant cannabis contracts on the basis that cannabis is still illegal under federal law
- **Arbitration clauses**
 - Maine courts and judges may be reluctant to enforce contracts between cannabis businesses they consider illegal
 - Arbitration helps temper federal illegality defenses
 - Include provision that parties may mutually agree upon a cannabis friendly arbitrator
 - Include provision that parties agree not to raise any federal illegality defense

Important Lease Provisions

- Municipal licensing can be uncertain. Negotiate for a walk right if you are not successful in obtaining all necessary licenses and permits.
- Fixtures and equipment – make sure to get clarity on who will own the lights, irrigation systems, fans, etc. at end of lease term
- Live/work arrangements. Resident cultivators often reluctant to leave. Negotiate for a purchase option at end of lease term.
- Make sure to find out if the landlord has third party bank financing and REQUIRE landlord to obtain written consent from its lender to the cannabis use.
- Beware of leases that include hidden profit shares.
- Make sure landlord is aware and it is clearly spelled out in the lease the types of use the tenant will make of the property (adult use cultivation, caregiver retail store, medical manufacturing, etc.)

Don't forget about securities law compliance

- Cannabis business owners face a high monetary barrier to entry, forcing many to raise money through investors.
- Taking investment money without giving voting rights (i.e. passive investments) is a “security.”
- Must follow federal and state securities laws, which requires involvement of an experienced securities lawyer.

Don't poach the IP of established brands

- Well-known candy companies are increasingly asserting IP rights against cannabis companies selling look-alike edibles and products that play on well-known brand names
- Last year, the maker of Skittles sued a California edibles company selling Zkittlez-branded cannabis products for trademark infringement. The case is still pending.

What can Efficiency Maine Trust do for you?

- In late 2020 Efficiency Maine Trust (EMT) voted to allow cannabis businesses to use their programs.
- EMT is a ratepayer-funded agency that oversees state programs designed to reduce costs associated with energy efficiency upgrades.
- EMT can provide energy-efficiency grant dollars for LED lighting, advanced HVAC systems, and standalone dehumidifiers.
- In 2021, EMT's annual report notes that it saw considerable interest and program participation from cannabis cultivation facilities.

Cannabis and Bankruptcy

- Bankruptcy can be an effective tool for struggling businesses to obtain “breathing room” from creditors, restructure debts, and escape certain litigation and collection efforts.
 - BUT cannabis businesses have historically not been able to use bankruptcy courts
 - Bankruptcy relief is unavailable to businesses whose activities are illegal under federal law
- State law receivership may be an option but it’s expensive
- Other options include:
 - out-of-court workout with individual creditors
 - Assignment for the benefit of creditors
 - Uniform Commercial Code foreclosure

Cannabis Banking: Why do cannabis businesses have so much trouble accessing banking services and payment systems?

- There is no safe harbor from federal prosecution concerning cannabis enforcement under the CSA.
- As a matter of policy and practice, prosecutors and regulators have focused attention on prosecutorial priorities outlined in Cole Memo, despite the Sessions Memo.
- But the policy and practice of no or limited federal enforcement could change at any time. And financial institutions are responsible to regulators who are independent from the DOJ and the executive branch.
- **Banking certainty won't come until a federal fix is adopted.**
- **Even with a federal fix, the compliance burden will be largely the same or even more highly regulated.**

Questions

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