

Department of Legislative Services
 Maryland General Assembly
 2018 Session

FISCAL AND POLICY NOTE
 First Reader

House Bill 1348 (Delegate Valentino-Smith, *et al.*)
 Health and Government Operations

Medical Cannabis - Advertising - Restrictions

This bill institutes various restrictions relating to the advertisement of medical cannabis and medical cannabis products, including content, location, and merchandising restrictions. The bill requires the Natalie M. LaPrade Medical Cannabis Commission to review proposed advertisements for medical cannabis and medical cannabis products.

Fiscal Summary

State Effect: Special fund expenditures for the commission increase by \$67,500 in FY 2019 to hire staff; out-years reflect annualization and ongoing costs. The Office of the Attorney General, Consumer Protection Division, can handle the bill’s requirements with existing resources. Revenues are not affected as the bill’s imposition of existing penalty provisions does not have a material impact on State finances or operations.

(in dollars)	FY 2019	FY 2020	FY 2021	FY 2022	FY 2023
Revenues	\$0	\$0	\$0	\$0	\$0
SF Expenditure	67,500	83,800	86,400	89,500	92,700
Net Effect	(\$67,500)	(\$83,800)	(\$86,400)	(\$89,500)	(\$92,700)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: The bill’s imposition of existing penalty provisions does not have a material impact on local government finances or operations.

Small Business Effect: Meaningful.

Analysis

Bill Summary:

Advertising Restrictions – Content

An advertisement for medical cannabis or medical cannabis products may not contain specified information, including (1) statements that are false or misleading or otherwise violate the Maryland Consumer Protection Act (MCPA); (2) statements that falsely disparage a competitor; (3) statements, designs, representations, pictures, or illustrations that are obscene or indecent, encourage or represent the use of medical cannabis for conditions other than debilitating medical conditions, encourage or represent recreational cannabis use, or relate to the safety or efficacy of medical cannabis (unless supported by substantial evidence or clinical data); (4) an offer of a prize or award related to the purchase of or certification for medical cannabis; or (5) statements that imply the advertisement has been approved or endorsed by the commission, the Maryland Department of Health, the State, or any person or entity associated with the State.

An advertisement may not portray or contain an individual younger than age 18 or include objects suggestive of the presence of an individual younger than age 18, nor may it contain figures, symbols, or language that is customarily associated with an individual younger than age 18.

Any statements relating to side effects, contraindications, and effectiveness of medical cannabis or medical cannabis products must be true and must be included in the audio and/or video parts of advertisements that are broadcast through media.

An advertisement is considered false, lacking fair balance, or misleading if the advertisement includes specified information, including representations that are not supported by clinical evidence or that have been disproven. Further, an advertisement may not be disseminated if the submitter has received information regarding potential fatalities or serious damage from the medical cannabis product or strain and such information has not been widely publicized in medical literature.

Dispensaries – Advertising Location Restrictions

A dispensary must restrict external signage to a single sign of a certain size, as specified. Further, for medical cannabis or medical cannabis products, a dispensary may not (1) illuminate an advertisement sign; (2) advertise brand names or graphics on the exterior of the facility or building; or (3) display specified items in a manner that is clearly visible from the exterior of the dispensary. Additionally, a dispensary may not place an advertisement (1) within 1,000 feet of the perimeter of specified areas, including schools

and public parks, which are not restricted to individuals who are at least age 21; (2) on or in a public transit vehicle or shelter; or (3) on or in a publicly owned or operated property.

Other Restrictions

A certifying provider, dispensary, processor, or grower may not cooperate in any advertising if the advertising has the purpose or effect of steering or influencing patient or caregiver choice regarding the selection of a certifying provider or approved medical cannabis product.

A grower or processor may not advertise the price of medical cannabis but may make a price list available to a dispensary.

A grower, processor, or dispensary may not produce any items for sale or promotional gifts bearing a symbol or reference to cannabis, including T-shirts and novelty items; this restriction does not apply to paraphernalia sold to qualifying patients and caregivers.

Maryland Medical Cannabis Commission – Advertisement Review

Any advertisement for medical cannabis or medical cannabis products must be submitted to the commission before dissemination. Submissions must include specified information, including support for each claim made in the advertisement and verification that individuals in the advertisement who purport to be qualifying patients or health care practitioners are actually qualifying patients or health care practitioners. The commission must notify individuals of incomplete advertisement submissions. The commission may require that an advertisement contain specific disclosures and may recommend other changes, as specified.

Current Law: For general information on the State’s medical cannabis program, please refer to the **Appendix – Medical Cannabis**.

Marijuana Industry Advertising

Maryland does not have advertising restrictions specific to marijuana or the medical cannabis industry. According to a 2017 *Boston Globe* article, most social media sites, online advertising networks, broadcasters, and print publications impose partial or full bans on marijuana content due to concerns about promoting illicit products under federal law; states that have legalized marijuana usually limit advertising by licensed dispensaries, such as by prohibiting advertising on billboards or running commercials on outlets where children may see them.

Maryland Consumer Protection Act

An unfair or deceptive trade practice under MCPA includes, among other acts, any false, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers. The prohibition against engaging in any unfair or deceptive trade practice encompasses the offer for or actual sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services; the extension of consumer credit; the collection of consumer debt; or the offer for or actual purchase of consumer goods or consumer realty from a consumer by a merchant whose business includes paying off consumer debt in connection with the purchase of any consumer goods or consumer realty from a consumer.

The Consumer Protection Division is responsible for enforcing MCPA and investigating the complaints of aggrieved consumers. The division may attempt to conciliate the matter, issue a cease and desist order, or file a civil action in court. A merchant who violates MCPA is subject to a fine of up to \$1,000 for the first violation and up to \$5,000 for each subsequent violation. In addition to any civil penalties that may be imposed, any person who violates MCPA is guilty of a misdemeanor and, on conviction, is subject to a fine of up to \$1,000 and/or imprisonment for up to one year.

Federal Restrictions on Tobacco Advertising

The bill's proposed advertising restrictions are somewhat similar to federal tobacco product advertising restrictions. The federal Family Smoking Prevention and Tobacco Control Act of 2009 instituted numerous advertising restrictions for cigarettes and smokeless tobacco. Specifically, the Act:

- bans outdoor advertising within 1,000 feet of schools and playgrounds;
- bans brand sponsorships of sports and entertainment events;
- limits outdoor and point-of-sale tobacco advertising to black text on white background (except in adult-only facilities);
- limits advertising in publications with significant teen readership to black text on white background; and
- limits audio-visual advertising (at point of sale) to black text on white background visuals and spoken words (*i.e.*, no music or moving images).

In 2016, the U.S. Food and Drug Administration finalized a rule extending its regulatory authority over other tobacco products (such as cigars and e-cigarettes) and components or parts of regulated tobacco products (*e.g.*, e-liquid) and instituted additional advertising

requirements. Specifically, by August 10, 2018, advertisements for these products must include certain warning statements.

State Expenditures: The commission was unable to provide a specific estimate of the costs to implement the bill’s requirements. However, it is assumed that at least one staff person is required. Thus, special fund expenditures for the commission increase by at least \$67,536 in fiscal 2019, which accounts for the bill’s October 1, 2018 effective date. This estimate reflects the cost of hiring one enforcement official to review and evaluate advertising submissions, notify the person submitting the advertisement if the submission is incomplete, require specified language, make specified recommendations, and recommend certain statements for inclusion. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	1
Salary and Fringe Benefits	\$62,177
Operating Expenses	<u>5,359</u>
Total FY 2019 State Expenditures	\$67,536

Future year expenditures reflect a full salary with annual increases and employee turnover and ongoing operating expenses.

Small Business Effect: The bill meaningfully affects medical cannabis entities’ ability to advertise in the State and likely increases advertising costs. Many medical cannabis entities are small businesses. In addition to requiring all advertisements to go through commission review, which adds time to the process, a medical cannabis business is limited in the format and location of allowed advertisement as a result of the bill. Ultimately these entities are subject to new advertising requirements that may negatively affect business operations and finances.

Additional Information

Prior Introductions: None.

Cross File: SB 1078 (Senator Benson) - Finance.

Information Source(s): *Boston Globe*; Maryland Department of Health; U.S. Food and Drug Administration; Department of Legislative Services

Fiscal Note History: First Reader - March 4, 2018
mm/jc

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Appendix – Medical Cannabis

Natalie M. LaPrade Medical Cannabis Commission

The Natalie M. LaPrade Medical Cannabis Commission is responsible for implementation of the State’s medical cannabis program, which is intended to make medical cannabis available to qualifying patients in a safe and effective manner. The program allows for the licensure of growers, processors, and dispensaries and the registration of their agents, as well as registration of independent testing laboratories and their agents. There is a framework to certify health care providers (including physicians, dentists, podiatrists, nurse practitioners, and nurse midwives), qualifying patients, and their caregivers to provide qualifying patients with medical cannabis legally under State law via written certification.

Medical cannabis may only be obtained from a grower or dispensary licensed by the commission, and the commission may license no more than 15 growers. However, beginning June 1, 2018, the commission may issue the number of grower licenses necessary to meet demand for medical cannabis by qualifying patients and caregivers in an affordable, accessible, secure, and efficient manner. There is no established limit on the number of processor licenses in statute or regulation, but the commission [chose](#) to limit the initial number to 15. While there is no specific restriction on the number of dispensaries in statute, regulations set a limit of 2 dispensary licenses per senatorial district or up to 94 dispensary licenses statewide.

License Application Process

The commission is required to actively seek to achieve racial, ethnic, and geographic diversity when licensing growers and to encourage such applicants who qualify as a minority business enterprise (MBE). There is no requirement for the commission to seek to achieve racial, ethnic, and geographic diversity when licensing processors, but there is such a statutory requirement for dispensaries. There is no requirement to encourage applicants who qualify as an MBE for either processor or dispensary licenses.

The commission opened applications for grower, processor, and dispensary licenses in September 2015. Towson University’s Regional Economic Studies Institute (RESI) was commissioned to review grower and processor applications through a double-blind review process in which all identifying information was redacted. The scoring system authorized the commission to take into account the geographic location of the growing operation to ensure geographic diversity in the award of licenses. The scoring system did not include a consideration of race, based on a letter from the Office of the Attorney General stating that

constitutional limits prohibited the consideration of race or ethnicity for licensing when there is no disparity study that indicates past discrimination in similar programs.

In August 2016, the commission announced the 15 growers and 15 processors who were awarded Stage One license pre-approvals. The evaluation procedures to be used in the award of dispensary licenses were adopted by the commission in November 2016, and the commission announced 102 dispensaries who were awarded Stage One license pre-approvals in December 2016 (this number included 10 pre-approvals issued to applicants who also received grower license pre-approvals). All of the Stage One pre-approvals awarded in 2016 have 365 days from the date of pre-approval notification to complete all necessary steps to obtain final licensure. Should an awardee fail to do so, the commission has the authority to not issue a final license.

Controversy Over Geographic, Racial, and Ethnic Diversity

Since the award announcements, there has been significant controversy surrounding two main issues: the decision to include geographic diversity as a final factor in choosing the grower finalists; and the fact that none of the 15 Stage One approved grower finalists is led by minorities.

Geographic diversity became an issue when two companies among the top 15 ranked growers did not receive pre-approval after being replaced by other companies in order to provide geographic representation throughout the State. In July 2016, a subcommittee of the commission unanimously voted to preliminarily approve the top 15 growers based on the RESI scoring, which did not include a consideration of location. Afterward, the subcommittee reversed its vote, which resulted in two lower-ranked firms being moved into the top 15 growers in order to achieve geographic diversity. The two companies that were initially included in the top 15 growers but later removed are suing the commission, claiming that the determination of how geographic diversity was to be considered was unclear to applicants. In addition, none of the top 15 growers is minority owned, which prompted a lawsuit by an African American-owned company that was denied a grower license seeking to halt the medical cannabis program until the commission takes action to ensure racial and ethnic diversity among licensed growers.

A number of bills relating to the composition of the commission and the number of grower and processor licenses, as well as licensing criteria and the approval process, were introduced during the 2017 legislative session. However, none of these bills passed.

In April 2017, Governor Lawrence J. Hogan directed the then Governor's Office of Minority Affairs to initiate a disparity study of Maryland's regulated medical cannabis industry to be conducted by the Maryland Department of Transportation (MDOT) in cooperation with the commission. According to MDOT, the study is underway, and will

be completed by early 2018. Additionally, in July 2017, Governor Hogan announced nine new appointments to the commission; of these, three appointments filled vacancies, and six replaced commissioners whose terms had expired. As a result of these appointments, minority representation on the commission doubled.

The chair of the commission has stated that the commission is committed to seeking and promoting racial diversity and minority inclusion and will continue to work with the legislature to help solve these complex problems, but it does not want to further delay the program. At its October 3, 2017 meeting, the commission announced that, as a result of discussions with the Legislative Black Caucus, it intended to form a minority affairs subcommittee to help address some caucus concerns; this committee has since been formed.

Status of Medical Cannabis Implementation

As detailed in its annual report, the commission had issued final licenses for 14 growers, 12 processors, and 22 dispensaries by year-end 2017. Additionally, the commission had approved one-year provisional registrations for four independent testing laboratories. The commission maintains a list of licensees on its website, which can be found at <http://mmcc.maryland.gov/Pages/industry.aspx>. The first medical cannabis in the State was available for sale in late 2017, and at least seven dispensaries planned to be open for business by January 2018.