SB 1197

Department of Legislative Services

Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 1197 (Senator Miller)
Finance

Public Health - Maryland Medical Cannabis Commission - Membership, Licensing, and Studies

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This bill alters the membership of the Natalie M. LaPrade Medical Cannabis Commission and requires the commission to take specified actions related to steps to achieve racial, ethnic, and geographic diversity when licensing medical cannabis entities. The State's "Certification Agency" (the Maryland Department of Transportation (MDOT)) must conduct a disparity study, as specified, and report to the General Assembly by December 1, 2017. Up to five more medical cannabis grower licenses must be issued, two immediately and three under a new process for scoring that focuses on minority business enterprises (MBEs) after the disparity study is completed. Any further increase in the number of grower licenses is delayed until June 1, 2021, at the earliest, and is contingent on results of a newly required study to determine the demand for medical cannabis by qualifying patients (which must be completed by December 1, 2020) and then legislation adopted by the General Assembly authorizing an expansion. A new fund, under the authority of the Department of Health and Mental Hygiene (DHMH) and intended to be capitalized by 1.0% of licensee gross annual sales, provides free or discounted medical cannabis to individuals enrolled in Medicaid or in the Veterans Administration Maryland Health Care System.

The bill takes effect June 1, 2017.

Fiscal Summary

State Effect: The timeframe to implement portions of the bill and related costs range considerably based largely on the required disparity study; Transportation Trust Fund (TTF) expenditures for MDOT to conduct the study increase by as much as $2.5 million over a two-year period (FY 2018 and 2019) and as little as $50,000 in FY 2018. MDOT's Office of Minority Business Enterprise likely requires additional staff based on the study findings. Special fund expenditures for the commission increase for outreach as well as consultant services, likely in FY 2019 and 2020, to award licenses and complete the required demand study. It is unclear when the new access fund may be capitalized and available to support consumers as intended; however, it is likely not before FY 2019 – at which time, special fund revenues and expenditures increase. Special fund revenues for the commission increase by $258,000 in FY 2017 for the award of two additional Stage One pre-approvals for a license and by $587,000 in the year that additional grower licenses are issued; future years reflect annual grower license fees.

Local Effect: The bill is not expected to materially affect local operations or finances.

Small Business Effect: Meaningful.

Analysis

Bill Summary:

Natalie M. LaPrade Medical Cannabis Commission Membership and Purpose

Total commission membership is decreased from 16 to 14 members and must include 2 new members (1 appointed by the President of the Senate and 1 appointed by the Speaker of the House) that represent an MBE and have no relationship to the medical cannabis industry. The bill eliminates 4 existing commission membership positions representing the Maryland State's Attorneys' Association, law enforcement, an attorney knowledgeable about medical cannabis laws in the United States, and the Office of the Comptroller. The Governor must appoint an executive director, with the advice and consent of the Senate.

The commission must actively seek, to the extent permitted by law, to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers, processors, and dispensaries. The commission must strongly encourage and conduct ongoing outreach to small, minority, and women business owners and entrepreneurs, including certified MBEs, to apply for a license as a medical cannabis grower by (1) establishing and using training programs in partnership with specified traditional minority-serving institutions; (2) disseminating information about the licensing process for growers through media that reaches large numbers of minority and women business owners and entrepreneurs; and (3) collaborating with the Governor's Office of Minority Affairs (GOMA), related trade associations, and other entities to ensure the outreach is appropriately targeted.

Natalie M. LaPrade Medical Cannabis Access Fund

The bill establishes the Natalie M. LaPrade Medical Cannabis Access Fund, a special nonlapsing fund that is administered by DHMH. The access fund is capitalized by 1.0% of the gross annual sales of each grower, processor, and dispensary licensed by the commission. (However, the bill is silent as to the mechanism for doing so.) The fund also consists of any money appropriated in the State budget, any other money from any other source accepted for the benefit of the fund, and any fees collected by the commission. (Even so, the bill does not change the current requirement for fees collected by the commission to capitalize the Natalie M. LaPrade Medical Cannabis Fund, which is used to fund commission operations.) The fund is subject to audit by the Office of Legislative Audits.

The purpose of the new access fund is to establish a program to allow eligible individuals enrolled in Medicaid or in the Veterans Administration Maryland Health Care System to obtain medical cannabis from a licensed dispensary free of charge or at a reduced cost. Accordingly, the access fund is used to reimburse a licensed dispensary for the cost of the medical cannabis dispensed to an eligible individual. DHMH must adopt implementing regulations for this program and the access fund.

Issuance of Additional Medical Cannabis Grower Licenses

The bill modifies the current cap on grower licenses that may be issued by establishing that the commission must award at least 15 and no more than 20 grower licenses.

- In addition to the 15 applicants granted Stage One pre-approval for a grower license by the commission in August 2016, uncodified language requires the commission, by July 1, 2017, to grant Stage One pre-approval to the 2 applicants for a grower license whose applications *initially* ranked in the top 15 of all grower applications by the Regional Economic Studies Institute (RESI) in July 2016 but did not receive Stage One pre-approval for a license. These two applicants must meet commission requirements for final approval of a grower license.

- The commission must also award up to three grower licenses to applicants that (1) meet specified standards and (2) if a scoring system is used to evaluate applicants, qualify as MBEs pending the outcome of a disparity study for at least 5% of the score. The commission may not review, evaluate, or rank an application for a grower license or award any of these additional licenses until the required disparity study is completed.

- Of the 20 total licenses that may be awarded under specified provisions, the total number awarded is to be decreased by the number of Stage One pre-approval

> licenses that do not meet the commission's requirements for final approval by August 15, 2017. (This provision applies to the 15 applicants already granted Stage One pre-approval. It is unclear whether it applies to the 2 applicants to be awarded by July 1, 2017; if so, these licenses must be finalized within 45 days of required Stage One pre-approval.)

The new cap on the number of grower licenses that may be issued remains in place until at least June 1, 2021, when the commission may issue the number of licenses necessary to meet the demand for medical cannabis in an affordable, accessible, secure, and efficient manner – subject to specified conditions. First, the commission must conduct a study to determine the demand for medical cannabis by qualifying patients in the State; that study must be completed by December 1, 2020. Second, based on the results of the demand study, the General Assembly must adopt legislation increasing the number of additional grower licenses that may be issued.

Disparity Study

Uncodified language requires MDOT (as the Certification Agency), in consultation with the General Assembly and the Office of the Attorney General, to initiate a study of the regulated medical cannabis industry to determine whether there is evidence to support racial preferences in the awarding of licenses or whether to provide other assistance to minority and women applicants and business owners seeking to participate in the medical cannabis industry. The study must also evaluate race-neutral programs and other methods that can be used to address the needs of minority businesses. The report must be submitted to the Legislative Policy Committee by December 1, 2017, so that the General Assembly may review the report prior to the 2018 session.

Prohibitions

An "owner" is defined as any type of owner or beneficiary of a business entity, including an officer, director, principal employee, partner, investor, stockholder, or beneficial owner of the business entity as well as a person having *any* ownership interest regardless of the percentage of ownership interest. A member of the General Assembly may not be an owner or an employee of any business entity that holds a grower, dispensary, or processor license.

Current Law/Background:

Maryland's Medical Cannabis Program

Chapter 403 of 2013 established, Chapters 240 and 256 of 2014 expanded, and Chapter 251 of 2015, and Chapter 474 of 2016 further modified the State's medical cannabis program. The Natalie M. LaPrade Medical Cannabis Commission currently allows for the licensure of growers, processors, and dispensaries and the registration of their agents. The program also establishes a framework to certify physicians, qualifying patients (including veterans), and their caregivers to provide qualifying patients with medical cannabis legally under State law via written certification. Effective June 1, 2017, dentists, podiatrists, nurse practitioners, and nurse midwives are authorized to be "certifying providers" – along with physicians – under the medical cannabis program. Specifically, a qualifying patient who has been provided with a written certification from an authorized certifying health care provider in accordance with a bona fide provider-patient relationship may obtain a 30-day supply of medical cannabis. Medical cannabis is defined in regulation as any product containing usable cannabis or medical cannabis finished product. A 30-day supply is defined as 120 grams of usable cannabis, unless a qualifying patient's certifying physician determines that this amount is inadequate to meet the medical needs of the patient. Regulations establish posttraumatic stress disorder as one of several debilitating medical conditions.

Statute dictates that medical cannabis may only be obtained from a grower or dispensary licensed by the commission and that the commission may license no more than 15 growers initially. 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. Section 13-3306 of the Health-General Article requires the commission to "actively seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers" and to "encourage applicants who qualify as an MBE."

There is no established limit on the number of processor licenses in statute or regulation. While there is no statutory limit on the number of dispensary licenses either, regulations establish a limit of 2 dispensary licenses per senatorial district, or up to 94 statewide. There is also no requirement for the commission to seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis 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 is authorized to set fees to cover its operating costs; these fees were established by regulations promulgated in September 2015. Any fees collected by the commission are deposited in the Natalie M. LaPrade Medical Cannabis Commission Fund, which is used to fund the costs of the commission and implementation of the State's medical cannabis program. Grower application fees are paid in two stages: Stage One is $2,000; and Stage Two is $4,000. There is also an annual license fee of $125,000. Dispensary application fees are also paid in two stages: Stage One is $1,000; and Stage Two is $4,000. There is also an annual license fee of $40,000. An individual may apply for a grower-dispensary license with the applicable fee structure simply being a combination of grower and dispensary fees. The number of growers is still capped at

15, even if some licenses are combined grower-dispensary licenses. Processor application fees are also paid in two stages: Stage One is $2,000; and Stage Two is $4,000. There is also an annual license fee of $40,000.

The commission opened applications for grower, processor, and dispensary licenses in September 2015. The application forms included instructions and a description of the scoring process for evaluating the applications. The commission received 145 grower applications, 124 processor applications, and 811 dispensary license applications. Towson University's RESI was commissioned to review the grower and processor applications through a double-blind review process in which all identifying information was redacted. The scoring system contained six main categories, including additional factors, which stated that, for scoring purposes, the commission may take into account the geographic location of the growing operation to ensure there is geographic diversity in the award of licenses. 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.

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. Although the applications did not require applicants to include information related to location, in June 2016, the commission subsequently asked applicants for the locations of their prospective operations. In July 2016, a subcommittee of the commission unanimously voted to preliminarily approve the top 15 growers based on RESI's scoring, which did not include a consideration of location. Afterward, three members of the subcommittee reversed their 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.

On October 28, 2016, DHMH published regulations revising existing regulations concerning the Natalie M. LaPrade Medical Cannabis Commission. Among other provisions, the regulations require the commission to promptly issue a refund of the annual license fee paid for a grower, processor, or dispensary license in the event that the commission does not issue a license. The period within which the Joint Committee on Administrative, Executive, and Legislative Review may review the regulations expired on December 13, 2016, and DHMH is free to adopt the regulations. However, to date, the department has not taken final action on the regulations.

Maryland's Minority Business Enterprise Program

The State's MBE program requires that a statewide goal for MBE contract participation be established biennially through the regulatory process under the Administrative Procedure Act. The biennial statewide MBE goal is established by the Special Secretary for GOMA, in consultation with the Secretary of Transportation and the Attorney General. Generally, prior to each reauthorization of the State's MBE program, the State conducts a disparity study to determine whether there is continued evidence that MBEs are underutilized in State contracting.

The most recent disparity study was published in February 2017 and serves as the basis for the reauthorization of the MBE program proposed under Senate Bill 4 of the 2017 session. It found, among other things, that there are substantial and statistically significant disparities that are consistent with discrimination against minorities and nonminority women in State procurement. It also establishes that the MBE program is consistent with the study data and is narrowly tailored to the compelling interests of the State.

An MBE is a legal entity, other than a joint venture, that is:

- organized to engage in commercial transactions;
- at least 51% owned and controlled by one or more individuals who are socially and economically disadvantaged; and
- managed by, and the daily business operations of which are controlled by, one or more of the socially and economically disadvantaged individuals who own it.

State Revenues: The bill establishes the new Natalie M. LaPrade Medical Cannabis Access Fund and directs *any fees collected by the commission* into the fund. However, current law that also directs any fees collected by the commission into the existing Natalie M. LaPrade Medical Cannabis Commission Fund is unchanged. Thus, under the bill, it is unclear which fund takes priority and receives fees collected by the commission. Since fees currently accrue to the existing fund and the new access fund has another source of funding (namely 1.0% of gross sales revenues from licensees), this analysis assumes that fees continue to accrue to the existing fund. Otherwise the commission has no funding to maintain operations and fees accrue to the new access fund, which cannot be used until medical cannabis is available to patients.

Special Fund Revenues from Additional Grower Application and License Fees

The bill requires two sets of grower licenses to be issued in addition to the 15 Stage One license pre-approvals already awarded by the commission in August 2016.

First, by July 1, 2017, the commission must grant Stage One pre-approval to the two applicants whose applications were initially ranked in the top 15 of all grower license applications by RESI but did not receive Stage One pre-approval at that time. Thus, special fund revenues related to these two awards increase by an estimated $258,000 in fiscal 2017 from the two applicants paying Stage Two application fees ($4,000 each) and annual license fees ($125,000 each). Special fund revenues for these two licenses increase by $250,000 annually thereafter from annual license fees (two licensees paying the $125,000 annual license fee).

Second, the commission must issue up to three additional grower licenses; however, given requirements related to such issuance, the timing for doing so is likely delayed by at least one year, if not considerably longer. The commission is prohibited from reviewing, evaluating, or ranking an application, much less awarding these licenses, until the required disparity study is completed. Depending on whether available data can be used for the study, the study will take between 8 and 24 months to complete. After its completion, the commission must contract with an outside consultant to reopen applications and issue the additional licenses. Thus, the additional three licenses are likely not awarded until fiscal 2019 at the earliest, and possibly later. Based on the interest in obtaining a grower license, it is likely that 100 applicants apply. Accordingly, special fund revenues increase by an estimated $587,000 in the year in which applications are opened and additional grower licenses are issued (100 applicants paying the $2,000 Stage One application fee, and 3 applicants paying the $4,000 Stage Two application fee and the first-year license fee of $125,000). The same three licensees continue to pay the annual license fee of $125,000, resulting in $375,000 being collected annually.

Special fund revenues attributable to grower agent registration fees also increase, but the Department of Legislative Services (DLS) does not have a reliable estimate for the number of grower agents hired by each licensed grower. Growers pay a $200 registration fee for each agent. Previously, the commission has advised that, although regulations require grower agent identification cards to be renewed every two years, the commission only plans to charge the fee initially.

Capitalization of the Natalie M. LaPrade Medical Cannabis Access Fund

The bill specifies that the fund receives 1.0% of the gross annual sales of each grower, processor, and dispensary licensed by the commission; however, there is no mechanism for collecting these revenues from the licensees. Further, as discussed above, the bill directs all fees collected by the commission into the new access fund. Although the fund could be capitalized immediately if *all* commission fees are paid into it, the commission could not operate and money would be collected in a fund that cannot be used until medical cannabis is available for qualifying patients and caregivers. Thus, this analysis assumes that the new access fund is funded by 1.0% of gross annual sales for licensees and fee revenues continue to accrue to the existing fund.

DLS notes that these licensees are private businesses and, at least for the entities that have already received Stage One pre-approval for a license, the requirement that 1.0% of gross annual sales be deposited into the fund did not exist and, as such, their business models do not account for this expenditure. Further, because there are no medical cannabis entities currently in operation, the timing and magnitude of any revenues to the access fund are unknown. When the medical cannabis program is operational, the access fund may be capitalized. *For illustrative purposes only*, based on reported medical cannabis tax revenue in Colorado and adjustments to reflect that Maryland's population is about 92% of Colorado's, revenues for the new access fund could increase by $4.7 million in the first year that the program is operational.

State Expenditures:

Expenditures to Complete Disparity Study and Related Certifications

TTF expenditures for MDOT increase to conduct the required disparity study. MDOT advises that this type of study is similar to the disparity study that it must complete periodically for the State's MBE program; the study analyzes the availability and utilization of firms in Maryland's geographic and product markets by analyzing data in specific industry categories. Each industry is composed of specific industry classifications defined by U.S. Census North American Industry Classification System (NAICS) codes.

Medical cannabis is a new industry to Maryland, so the most recent study, published in February 2017, did not analyze NAICS codes specific to the industry. However, MDOT advises that existing codes *may* be able to be used to complete the study, similar to the approach taken to evaluate the Off-shore Wind and Video Lottery/Casino industries. If this approach is viable, expenditures for MDOT increase by approximately $50,000, likely in fiscal 2018, to hire a consultant to conduct the analysis. This process will take approximately eight months: four months to procure a contractor through the request for proposal process and four months to complete the study.

However, if an entirely new study must be completed, TTF expenditures for MDOT increase by between $1.5 million and $2.0 million, over fiscal 2018 and 2019 as completion of a new study will take up to two years. Under either scenario, the timeframe established under the bill is likely not met.

The bill requires that, if a scoring system is used to evaluate applicants for medical cannabis growers and pending the results of the disparity study, then qualification as an MBE counts for at least 5% of the score. To the extent that MDOT's Office of Minority Business

Enterprise must certify medical cannabis growers for the grower license application process, at least one additional staff is needed at that time.

Additional Administrative Costs for the Commission

Special fund expenditures for the commission increase by at least $400,000 in the fiscal year in which the commission issues the 3 additional grower licenses (likely not before fiscal 2019) to hire a consultant to assist the commission in awarding the three additional grower licenses. The commission based this estimate on the costs to conduct the initial scoring of grower licenses through RESI. Any costs associated with required outreach have not been factored into this estimate. The commission can award Stage One pre-approval to the two applicants whose applications were initially ranked in the top 15 of all grower license applications by RESI with existing budgeted staff and resources.

Special fund expenditures also increase by an estimated $250,000 in fiscal 2020 for the commission to hire a consultant to conduct the required study to determine the demand for medical cannabis by qualifying patients by December 1, 2020.

The bill decreases the commission membership by a net of two members. Thus, the commission realizes minimal savings from a reduction in reimbursement and travel costs for these two commission members.

The bill establishes that the total number of licenses that may be awarded is to be decreased by the number of Stage One pre-approval licensees that do not meet the commission's requirements for final approval by August 15, 2017. To the extent that any do not meet those requirements, special fund expenditures increase in fiscal 2018 to refund the annual license fee paid by these entities, assuming the commission adopts the regulations noted above.

Administrative Costs Related to the Natalie M. LaPrade Medical Cannabis Access Fund

Concurrent with program implementation, DHMH may need additional staff to reimburse licensed dispensaries for the cost of medical cannabis dispensed to eligible individuals under the program. Although there is no specific authorization to use either the new access fund or the existing fund for administrative costs, this analysis assumes that special funds from one of the funds are used to cover any administrative costs for DHMH related to administering the new program; otherwise, general fund support is needed.

The Comptroller can administer the access fund, as directed by DHMH, with existing budgeted staff and resources. The Office of Legislative Audits can conduct the required audit with existing budgeted staff and resources.

Small Business Effect: The bill reduces profits of licensed growers, processors, and dispensaries through the Natalie M. LaPrade Medical Cannabis Access Fund receiving 1.0% of their *gross* annual sales – to provide free or reduced-cost medical cannabis to specified qualifying individuals in Maryland. Meaningful benefit to any small business that is able to obtain a grower license under the bill's provisions sooner than it otherwise would. However, it is unknown whether any of the new applicants will be small businesses.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Colorado Department of Revenue; Governor's Office of Minority Affairs; Office of the Attorney General; Comptroller's Office; Department of Budget and Management; Department of Health and Mental Hygiene; Board of Public Works; Maryland Department of Transportation; Department of Veterans Affairs; Department Legislative Services (Office of Legislative Audits); Department of Legislative Services

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