

ARKANSAS REGISTER

Proposed Rule Cover Sheet



Secretary of State
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Name of Department _____

Agency or Division Name _____

Other Subdivision or Department, If Applicable Medical Marijuana Commission

Previous Agency Name, If Applicable _____

Contact Person _____

Contact E-mail _____

Contact Phone _____

Name of Rule _____

Newspaper Name _____

Date of Publishing _____

Final Date for Public Comment _____

Location and Time of Public Meeting _____

SECTION III.
DEFINITIONS

a. Management Contract

- i. “Management contract” means any contractual agreement between a licensee and a separate entity or person for services related to the management of the licensee’s functions. These functions include, but are not limited to, the management or supervision of:
 - 1. operations;
 - 2. technical assistance;
 - 3. consulting;
 - 4. hiring employees;
 - 5. accounting;
 - 6. financing;
 - 7. recordkeeping;
 - 8. leasing of equipment or real intellectual property; or,
 - 9. provision of goods or materials.

b. Management Company

- i. “Management company” means any entity or person a licensee contracts with for services related to the management of the licensee’s business functions. These functions may include, but are not limited to, the management or supervision of:
 - 1. operations;
 - 2. technical assistance;
 - 3. consulting;
 - 4. hiring employees;
 - 5. accounting;
 - 6. financing;
 - 7. recordkeeping;
 - 8. leasing of equipment or real or intellectual property; or
 - 9. provision of goods or materials.

c. Licensee

- i. "Licensee," as used in this section, refers to any entity licensed by the Medical Marijuana Commission including cultivation facilities, dispensaries, or processors.

d. Prohibited Foreign Party

- i. "Prohibited Foreign Party" means:

1. a citizen or resident of a country subject to International Traffic in Arms Regulations, 22 C.F.R § 126.1;
2. an Entity of Particular Concern designated by the United States Department of State; or
3. an agent, trustee, or other fiduciary of a person or entity enumerated in subdivisions (1)-(2) of this section.

e. Commercially Reasonable

- i. "Commercially reasonable" means a contractual arrangement furthers a legitimate business purpose of the parties to the arrangement and is sensible, considering the characteristics of the parties.

SECTION X.

MANAGEMENT CONTRACT RULES

2. Management Companies and Management Contracts

a. Disclosure of Management Contracts to the Commission

- i. All current and proposed management contracts between licensees and management companies must be disclosed to the commission at the following times:
 1. when the licensee applies for the renewal of their license;
 2. upon any change to the contract;
 3. upon request of the ABC Administration Director;
 4. when the licensee applies for a transfer of location; and
 5. when the licensee applies for a change of ownership.
- ii. Prior to the effective date of any management contract, a licensee shall submit to the commission:
 1. a copy of the management contract and any related agreements to the management contract that is between the parties;

2. information detailing any remuneration paid or to be paid to the management company by the licensee in exchange for the contracted services; and
 3. all submissions required from a management company pursuant to the commission rules.
- iii. Prior to the effective date of any management contract, a licensee shall submit sufficient proof that:
1. the management company has no owner, board member, or officer under the age of twenty-one (21);
 2. sixty percent (60%) of the equity ownership interest in the management company is held by individuals who have been residents of the state for at least seven (7) consecutive years prior to the application date;
 3. the management company has no owner, board member, or officer that has previously been an owner of a licensed facility that has had its license revoked;
 4. the management company has no owner, board member, or officer that has been convicted of a felony offense;
 5. if an owner, board member, or officer of the management company has or had a professional license, that the license is in good standing; and
 6. the management company has no owner, board member, or officer that owes delinquent taxes to the State of Arkansas or the federal government.
- b. Approval of Management Contracts by the Commission
- i. The commission has the responsibility to administer and regulate the licensing of dispensaries and cultivation facilities. The Commission has the responsibility in ensuring that management contracts are in compliance with the licensing regulations and approve or deny them in accordance with Amendment 98 to the Arkansas Constitution, the rules of the commission, and all other relevant Arkansas law.
- c. Approval to Changes to Management Contracts
- i. Prior to any change to a management contract, a licensee shall:
 1. submit to the commission a copy of any proposed changes to the management contract and any related agreements between the parties, any proposed changes to information detailing any remuneration paid, or to be paid, to the management company by the licensee; and any proposed changes to any previously required submissions; and
 2. the commission shall determine whether the management contract and any changes comply with Amendment 98 to the Arkansas Constitution, the rules of the commission, and all other relevant

Arkansas law; and shall notify the licensee of the commission's decision.

d. Requirements for Management Contracts

i. Requirement that terms of a management contract be commercially reasonable, under Amendment 98 to the Arkansas Constitution, the rules of the Commission, and all other relevant Arkansas Law.

1. The terms of a management contract, including terms related to interest rates, returns, and fees, shall be commercially reasonable and consistent with the fair market value for the terms generally applicable to agreements of a comparable nature as it relates to the Commission's responsibility to ensure compliance with licensing regulations

2. Commission's duty to determine if terms of a management contract are commercially reasonable as it relates to the Commission's responsibility to ensure compliance with licensing regulations.

a. The commission may determine whether a term is commercially reasonable or consistent with the fair market value generally applicable for the services to be provided and may consider:

i. the current valuation of a similar interest, service, or product in the Arkansas medical marijuana market and in other states with legal medical or adult-use marijuana markets; and

ii. the current valuation of a similar interest, service, or product in an industry with operations similar to the medical marijuana industry, including, but not limited to, horticulture or agriculture, pharmaceutical drug manufacturing, or sale of pharmaceutical drugs and alcohol in Arkansas and in other states with such industries.

ii. Arms-length transaction

1. A management contract shall be bargained for between the parties in an arms-length transaction and shall include the ability for either party to terminate the contract with reasonable notice.

iii. Prohibition of unfair provisions

1. A management contract shall not include any provision that provides the management company with an unfair advantage over the licensee that would cause the licensee to be in violation of any provision of Amendment 98 to the Arkansas Constitution or the rules of the commission including but not limited to. This includes, but is not limited to:

a. General prohibition

- i. any term of the contract that is not commercially reasonable or consistent with the fair market value generally applicable to the services to be provided;
 - b. Profit-sharing
 - i. where a management company receives a percentage of the net profits that is not commercially reasonable or exceeds the percentage of the net profits received by the owners of the license;
 - c. Fees
 - i. where the amount of a fee or price charged by the management company for a service, product, intellectual property, lease, or brand provided is not commercially reasonable;
 - d. Shelf space
 - i. where the percentage of the licensee's retail "shelf space" guaranteed for the display of products of the management company or another entity designated by the management company is not commercially reasonable or is excessive, including, but not limited to, a "shelf space" guarantee exceeding fifty percent (50%) of the licensee's total "shelf space";
 - e. Promise to purchase
 - i. a promise by the licensee to buy a percentage of its products or materials from the management company or an entity designated by the management company where the percentage is not commercially reasonable and is excessive, including, but not limited to, a promise exceeding ten percent (10%); or
 - f. Penalties for contractual noncompliance
 - i. Where a penalty upon a licensee for noncompliance with the contract is not commercially reasonable or is excessive relative to the degree of harm caused by the noncompliance, including the surrender of personal assets of the licensee's owners or principals.
- 2. Provisions that may create an unfair interference over a licensee not party to the management contract and are prohibited pursuant to this subsection include, but are not limited to:
 - a. a promise by the licensee not to purchase medical marijuana, medical marijuana products, or other products or materials from or sell medical marijuana, medical marijuana products, or other products or materials to specifically identified licensees or other businesses;

- b. a promise by the licensee of non-competition with other licensees; and
 - c. a promise by the licensee to sell medical marijuana, medical marijuana products, or other products or materials for a specified price either at the wholesale or retail level.
 - iv. Supervision of management company by owner
 - 1. A management contract shall provide that the management company and its owners, principals, and staff who are engaged, directly or indirectly, in operating the licensed medical marijuana business, are supervised in such operations by the licensee and its owners and principals.
 - 2. Licensee prohibited from ceding control to management company
 - a. Management contracts shall not contain any provisions that grant the management company control over the licensee such that it may overrule the licensee's owners and principals over the most fundamental decisions of the licensee, including its strategic plan, or any decision regarding the transfer of an ownership interest.
 - b. "Control" is defined as the following:
 - i. the decision-making authority over the management, operations, or policies that guide a business; or
 - ii. authority over the operation of the technical aspects of a business.
 - c. "Control" includes:
 - i. the right to veto significant events;
 - ii. the right or authority to make or veto decisions regarding operations and strategic planning, capital allocations, acquisitions, and divestments;
 - iii. the right or authority to appoint or remove directors, corporate-level officers, or their equivalent;
 - iv. the right or authority to make major marketing, production, and financial decisions; and
 - v. the right or authority to execute contracts in the aggregate of \$30,000 or greater on behalf of the licensee. Inventory orders of medical marijuana products purchased from another licensee in the ordinary course of business are specifically exempted from this provision.
 - v. Security and ownership interests
 - 1. A management contract shall not grant:
 - a. a security interest in the licensee or in any of the assets of the licensee; or

- b. an ownership interest or any right, including a future or contingent right, to obtain an ownership interest in the medical marijuana business being operated.
- vi. Term of management contract
 - 1. The term of a management contract shall not exceed three years without an opportunity for the parties to renegotiate the contract at arms-length.
- e. General Rules Governing Licensees' Contractual Relationships with Management Companies
 - i. Licensee shall retain authority to audit management company
 - 1. The licensee shall retain authority to audit, or authorize another person or entity to audit, the management company's records relating to its performance under the management contract.
 - ii. Licensees are prohibited from contracting with management companies that do not meet the following criteria:
 - 1. sixty percent (60%) of the equity ownership interests in a management company contracting with a licensee must be held by individuals who have been residents of the state for at least seven (7) consecutive years prior to the application date;
 - 2. a Prohibited Foreign Party shall not acquire by grant, purchase, devise, descent, or otherwise any interest in a management company contracting with a licensee; and
 - 3. an Entity of Particular Concern shall not acquire by grant, purchase, devise, descent, or otherwise any interest in a management company contracting with a licensee.
 - iii. Licensees are prohibited from contracting with management companies that contract with more than five (5) licensees.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY.

DEPARTMENT Department of Finance and Administration
BOARD/COMMISSION Alcoholic Beverage Control
PERSON COMPLETING THIS STATEMENT Trent Minner
TELEPHONE NO. (501) 339-3001 **EMAIL** trent.minner@arkansas.gov

To comply with Ark. Code Ann. § 25-15-204(e), please complete the Financial Impact Statement and email it with the questionnaire, summary, markup and clean copy of the rule, and other documents. Please attach additional pages, if necessary.

TITLE OF THIS RULE Management Contract Rules

1. Does this proposed, amended, or repealed rule have a financial impact?
Yes No ☒
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule?
Yes ☒ No
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes ☒ No

If no, please explain:

(a) how the additional benefits of the more costly rule justify its additional cost;

(b) the reason for adoption of the more costly rule;

(c) whether the reason for adoption of the more costly rule is based on the interests of public health, safety, or welfare, and if so, how; and

(d) whether the reason for adoption of the more costly rule is within the scope of the agency's statutory authority, and if so, how.

4. If the purpose of this rule is to implement a *federal* rule or regulation, please state the following:
 - (a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

General Revenue _____
 Federal Funds _____
 Cash Funds _____
 Special Revenue _____
 Other (Identify) _____

Total _____

Next Fiscal Year

General Revenue _____
 Federal Funds _____
 Cash Funds _____
 Special Revenue _____
 Other (Identify) _____

Total _____

(b) What is the additional cost of the state rule?

Current Fiscal Year

General Revenue _____
 Federal Funds _____
 Cash Funds _____
 Special Revenue _____
 Other (Identify) _____

Total _____

Next Fiscal Year

General Revenue _____
 Federal Funds _____
 Cash Funds _____
 Special Revenue _____
 Other (Identify) _____

Total _____

5. What is the total estimated cost by fiscal year to any private individual, private entity, or private business subject to the proposed, amended, or repealed rule? Please identify those subject to the rule, and explain how they are affected.

Current Fiscal Year

\$ _____

Next Fiscal Year

\$ _____

6. What is the total estimated cost by fiscal year to a state, county, or municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

Current Fiscal Year

\$ _____

Next Fiscal Year

\$ _____

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes No ■

If yes, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
 - (a) justifies the agency's need for the proposed rule; and
 - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
 - (a) the rule is achieving the statutory objectives;
 - (b) the benefits of the rule continue to justify its costs; and
 - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

PUBLIC NOTICE

In compliance with the Administrative Procedure Act of the State of Arkansas (Act 434 of 1967), notice is hereby given that the Medical Marijuana Commission proposes to promulgate rules concerning the medical marijuana industry in the state of Arkansas.

The Board will consider the rules regarding the Medical Marijuana licensee's use of management companies.

The public comment hearing will be held on November 21, 2024, at the hour of 3:00 p.m., in the fifth floor conference room, 1515 West Seventh Street, Little Rock, Arkansas. All interested parties will be afforded an opportunity to present their views at the hearing. The proposed rule is available on our website at: <https://www.dfa.arkansas.gov/office/alcohol-beverage-control/>

The Alcoholic Beverage Control Division will accept written comments on the proposed rule from October 20, 2024, to November 20, 2024. Please send comments to: The Alcoholic Beverage Control Division, 101 W CAPITOL AVE, SUITE 401, LITTLE ROCK, AR 72201, or email to abcadmin@dfa.arkansas.gov.

All inquiries concerning the public comment hearing should be directed to Holly Spear, Staff Attorney, ABC Division, 101 W. Capitol Ave, Suite 401, Little Rock, Arkansas, 72201.



CHRISTY BJORNSON, DIRECTOR

ALCOHOLIC BEVERAGE CONTROL DIVISION
DEPARTMENT OF FINANCE & ADMINISTRATION

Statement of Reason

The proposed rules seek to address regulatory gaps concerning management companies in the Arkansas Medical Marijuana industry, which have undermined the state's ability to enforce Amendment 98's ownership restrictions. The proposed rules aim to establish a framework for reviewing and approving management contracts to ensure compliance with Amendment 98, thereby enhancing transparency, preventing unfair market practices, and reinforcing the state's regulatory oversight.

Summary of Proposed Rules

The proposed rules establish ownership and vetting requirements, mandate the review and approval of management contracts, and sets criteria to prevent management companies from controlling licensed entities or bypassing ownership requirements set by Amendment 98. The rules enhance transparency and curb unfair market practices within the medical marijuana industry.