

ARKANSAS REGISTER



Proposed Rule Cover Sheet

Secretary of State
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Little Rock, Arkansas 72201-1094
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Name of Department Department of Finance and Administration

Agency or Division Name Medical Marijuana Commission

Other Subdivision or Department, If Applicable _____

Previous Agency Name, If Applicable _____

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Contact Phone 501-682-1105

Name of Rule Rules Governing the Licensure of Medical Marijuana Cultivation Facilities, Processors, and Dispensaries (Section 26-Section 28)

Newspaper Name Arkansas Democrat Gazette

Date of Publishing September 4, 2022 through September 6, 2022

Final Date for Public Comment October 6, 2022

Location and Time of Public Meeting 1515 West 7th Street, 5th Floor, 4:30 p.m.

PUBLIC NOTICE

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

The Board will consider rules in the following areas: Operational oversight of cultivation, processors, and dispensary facilities – rule-making, declaratory orders and adjudicative hearings.

The public comment hearing will be held on October 6, 2022, at the hour of 4:30 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/medical-marijuana-commission>.

The Alcoholic Beverage Control Division will accept written comments on the proposed rule from September 4, 2022 to October 6, 2022. Please send comments to: The Alcoholic Beverage Control Division, 101 E. CAPITOL AVE, SUITE 401, LITTLE ROCK, AR 72201

All inquiries concerning the public comment hearing should be directed to Chip Lebovich, Staff Attorney, ABC-MMC Division, 101 E. Capitol Ave, Suite 401, Little Rock, Arkansas, 72201.



DORALEE CHANDLER, DIRECTOR
ALCOHOLIC BEVERAGE CONTROL DIVISION
DEPARTMENT OF FINANCE & ADMINISTRATION

RULES GOVERNING THE LICENSURE OF MEDICAL MARIJUANA CULTIVATION FACILITIES, PROCESSORS AND DISPENSARIES

SECTION 26. RULE-MAKING

26.1. AUTHORITY

- a) The Arkansas Medical Marijuana Commission (“MMC”) has been authorized by §§ 8 and 14 of the Arkansas Medical Marijuana Amendment of 2016 to promulgate rules.
- b) In rule-making, the MMC follows the procedural requirements of the Arkansas Administrative Procedure Act, specifically Ark. Code Ann. §§ 25-15-203, 25-15-204, and 25-15-218; Ark. Code Ann. § 10-3-309; and any Executive Order of the Governor applicable at the time that rule-making is initiated. The purpose of this rule is to inform the public how to initiate rule-making and how to comment on a proposed rule. This rule does not provide a comprehensive description of the entire rule-making process.

26.2. INITIATING RULE-MAKING

The process of adopting a new rule or amending or repealing an existing rule (hereinafter referred to “rule-making”) may be initiated:

- a) At the request of the governing body;
- b) By agency staff, who may request permission of the governing board to initiate rule-making; or
- c) By third persons outside the agency, who may petition for the issuance, amendment, or repeal of any rule in accordance with Ark. Code Ann. § 25-15-204. The petition must contain:
 - i. The name, address, telephone number, and facsimile number of the petitioner and the petitioner’s attorney, if represented by counsel;
 - ii. The specific rule or action requested;

- iii. The reasons for the rule or action requested;
- iv. Facts showing that the petitioner is regulated by the agency or has a substantial interest in the rule or action requested; and
- v. The date of the request.

26.3. PUBLIC COMMENT

- a) If the agency proceeds with the rule-making process, it will provide the public with a reasonable opportunity to comment on a proposed rule.
- b) The public comment period will last at least thirty (30) days.
- c) The agency will begin the public comment period by publishing notice of the proposed rule-making.
 - i. The notice will include the terms or substance of the proposed rule, or a description of the subjects and issues involved.
 - ii. The notice will include a description of the time, location, and manner in which interested parties may present their views.
 - iii. The notice will be published in compliance with Ark. Code Ann. § 25-15-204.
- d) If the agency chooses to or is required to hold a hearing at which the public may appear and comment on the proposed rule, such hearing will comply with the requirements of Ark. Code Ann. § 25-15-213.
- e) The agency shall accept and consider public comments as required by Ark. Code Ann. § 25-15-204.
- f) The agency shall track and respond to public comments as necessary to comply with Ark. Code Ann. § 25-15-204(a)(2) and the rules of the Administrative Rules and Regulations Subcommittee of Legislative Council (or Joint Budget.)

26.4. THE DECISION TO ADOPT A RULE

- a) The agency will not finalize language of the rule or decide whether to adopt a rule until the period for public comment has expired.

- b) Prior to adoption, the agency will consider the factors described in Ark. Code Ann. § 25-15-204.
- c) The agency may use its own experience, specialized knowledge, and judgment in the adoption of a rule.

26.5. LEGISLATIVE APPROVAL, FINAL FILINGS, AND EFFECTIVE DATE

- a) After the necessary legislative approvals are obtained, the agency will file the final rule with the Secretary of State.
- b) The final rule will be effective ten (10) days after filing with the Secretary of State unless a later date is specified in the rule itself or by law.

26.6. PUBLIC INSPECTION AND RECORDS

- a) After the expiration of the thirty (30) day public comment period and before the effective date of the rule, the agency shall take appropriate measures to make the final rule known to the persons who may be affected by the rule, pursuant to the specifications in Ark. Code Ann. § 25-15-204.
- b) The agency's rules shall be available for public inspection.
- c) The agency shall maintain copies of all filings and documentation associated with rule-making as necessary to comply with the Arkansas General Record Retention Schedule.

26.7. NEED FOR EMERGENCY RULE

An agency may enact an emergency rule if it finds that an imminent peril to the public health, safety, or welfare, or that compliance with a federal law or regulations, requires the adoption of a rule on less than thirty (30) days' notice. The agency shall state in writing its reasons for that finding.

- a) Filings and effective date of emergency rule
 - i) The agency will follow the process required by Ark. Code Ann. § 25-15-204 and any applicable Executive Order of the Governor to enact an emergency rule.
 - ii) After receiving gubernatorial approval and legislative approval, an emergency rule may become effective immediately upon filing with the

- Secretary of State or at a stated time less than ten (10) days after filing if the agency finds that such effective date is necessary due to imminent peril to the public health, safety, or welfare.
- iii) The agency will take appropriate measures to notify those who may be affected by the Emergency Rule.

SECTION 27. DECLARATORY ORDERS

27.1 PURPOSE AND USE OF DECLARATORY ORDERS

A declaratory order is a means of resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory order may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory order is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency. A petition or declaratory order must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

27.2 THE PETITION

The process to obtain a declaratory order is begun by filing with the MMC a petition that provides the following information:

- a) The name, address, telephone number, and facsimile number of the petitioner;
- b) The name, address, telephone number, and facsimile number of the attorney of the petitioner;
- c) The statutory provision(s), agency rule(s), or agency order(s) on which the declaratory order is sought;
- d) A description of how the statutes, rules, or orders may substantially affect the petitioner and the petitioner's particular set of circumstances, and the question or issue on which petitioner seeks a declaratory order;
- e) The signature of the petitioner or petitioner's attorney;
- f) The date; and
- g) Request for a hearing, if desired.

27.3 AGENCY DISPOSITION

- a) The agency may hold a hearing to consider a petition for declaratory order. If a hearing is held, it shall be conducted in accordance with Ark. Code Ann. § 25-15-208 and § 25-15-213, and the agency's rules for adjudicatory hearings.
- b) The agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts. Within ninety (90) days of the filing of the petition, the agency will render a final order denying the petition or issuing a declaratory order.

SECTION 28. ADJUDICATIVE HEARINGS

28.1 SCOPE OF THIS CHAPTER

This rule applies in all administrative adjudications conducted by the MMC. This rule describes the process by which the agency formulates orders.

28.2 PRESIDING OFFICER

The MMC shall preside at the hearing or may designate one or more members of the MMC or one or more examiners, referees, or hearing officers to preside at a hearing.

28.3 APPEARANCES

- a) Any party appearing in any agency proceeding has the right, at his or her own expense, to be represented by counsel. Alternatively, the respondent may appear on his or her own behalf.
- b) Any attorney representing a party to an adjudicatory proceeding must file notice of appearance as soon as possible.
- c) Service on counsel of record is the equivalent of service on the party represented.
- d) On written motion served on the party represented and all other parties of record, the presiding officer may grant counsel of record leave to withdraw for good cause shown.

28.4. CONSOLIDATION

If there are separate matters that involve similar issues of law or fact, or identical parties, the matters may be consolidated if it appears that consolidation would promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party.

28.5. NOTICE TO INTERESTED PARTIES

If it appears that the determination of the rights of parties in a proceeding will necessarily involve a determination of the substantial interests of persons who are not parties, the presiding officer may enter an order requiring that an absent person be notified of the proceeding and be given an opportunity to be joined as a party of record.

28.6. SERVICE OF PAPERS

Unless the presiding officer otherwise orders, every pleading and every other paper filed for the proceeding, except applications for witness subpoenas and the subpoenas, shall be served on each party or the party's representative at the last address of record.

28.7. INITIATION & NOTICE OF HEARING

- a) An administrative adjudication is initiated when the agency issues a notice of hearing.
- b) The notice of hearing will be sent to the respondent by U.S. Mail, return receipt requested, delivery restricted to the named recipient or his agent. Notice shall be sufficient when it is so mailed to the respondent's latest address on file with the agency.
- c) Notice will be mailed at least twenty days before the scheduled hearing unless otherwise agreed by the parties.
- d) The notice will include:
 - i. Statement of the time, place, and nature of the hearing;
 - ii. A statement of the legal authority and jurisdiction under which the hearing is to be held; and
 - iii. A short and plain statement of the matters of fact and law asserted.

28.8 MOTIONS

All requests for relief will be by motion. Motions must be in writing or made on the record during a hearing. A motion must fully state the action requested and the grounds relied upon. The original written motion will be filed with the agency. When time allows, the other parties may, within seven (7) days of the service of the written motion, file a response in opposition. The presiding officer may conduct such proceedings and enter such orders as are deemed necessary to address issues raised by the motion. However, a presiding officer, other than the MMC, will not enter a dispositive order unless expressly authorized in writing to do so.

28.9 ANSWER

A respondent may file an answer to the notice of hearing.

28.10 INFORMATION PROVIDED UPON REQUEST

- a) Upon written request, the agency will provide the information designated in Ark. Code Ann. § 25-15-208(a)(3).
- b) Such requests should be received by the agency at least 10 days before the scheduled hearing.

28.11 CONTINUANCES

- a) The hearing officer may grant a continuance of hearing for good cause shown. Requests for continuances will be made in writing. The request must state the grounds to be considered and be made as soon as practicable and, except in cases of emergencies, no later than five (5) days prior to the date noticed for the hearing. In determining whether to grant a continuance, the hearing officer may consider:
 - i. Prior continuances;
 - ii. The interests of all parties;
 - iii. The likelihood of informal settlements;
 - iv. The existence of an emergency;
 - v. Any objection;
 - vi. Any applicable time requirement;
 - vii. the existence of a conflict of the schedules of counsel, parties, or witnesses;
 - viii. The time limits of the request; and Other relevant factors.
- b) The hearing officer may require documentation of any grounds for continuance.

28.12 HEARING PROCEDURES

- a) The presiding officer presides at the hearing and may rule on motions, require briefs, and issue such orders as will ensure the orderly conduct of the proceedings; provided, however, any presiding officer other than the MMC shall not enter a

dispositive order or proposed decision unless expressly authorized in writing to do so.

- b) All objections must be made in a timely manner and stated on the record.
- c) Parties have the right to participate or to be represented by counsel in all hearings or pre-hearing conferences related to their case.
- d) Subject to terms and conditions prescribed by the Administrative Procedure Act, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and, upon request by the agency, may submit briefs and engage in oral argument.
- e) The presiding officer is charged with maintaining the decorum of the hearing and may refuse to admit, or may expel, anyone whose conduct is disorderly.

28.13 ORDER OF PROCEEDINGS

The presiding officer will conduct the hearing in the following manner:

- a) The presiding officer will give an opening statement, briefly describing the nature of the proceedings.
- b) The parties will be given the opportunity to present opening statements.
- c) The parties will be allowed to present their cases in the sequence determined by the presiding officer.
- d) Each witness must be sworn or affirmed by the presiding officer and be subject to examination and cross-examination as well as questioning by the MMC. The presiding officer may limit questioning in a manner consistent with the law.
- e) When all parties and witnesses have been heard, parties will be given the opportunity to present final arguments.

28.14 EVIDENCE

- a) The presiding officer shall rule on the admissibility of evidence and may, when appropriate, take official notice of facts in accordance with all applicable requirements of law.
- b) Stipulation of facts is encouraged. The agency may make a decision based on stipulated facts.

- c) Evidence in the proceeding must be confined to the issues set forth in the hearing notice, unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence outside the scope of the notice, over the objection of a party who did not have actual notice of those issues, that party, upon timely request, may receive a continuance sufficient to prepare for the additional issue and to permit amendment of pleadings.
- d) A party seeking admission of an exhibit must provide thirteen copies of each exhibit at the hearing. The presiding officer must provide the opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. All exhibits admitted into evidence must be appropriately marked and be made part of the record.
- e) Any party may object to specific evidence or may request limits on the scope of the examination or cross-examination. A brief statement of the grounds upon which it is based shall accompany such an objection. The objection, the ruling on the objection, and the reasons for the ruling will be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve the ruling until the written decision.
- f) Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony will briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.
- g) Irrelevant, immaterial, and unduly repetitive evidence will be excluded. Any other oral or documentary evidence, not privileged, may be received if it is of a type commonly relied upon by reasonably prudent men and women in the conduct of their affairs.

The finder of fact may base its findings of fact upon reasonable inferences derived from other evidence received.

28.15 DEFAULT

If a party fails to appear or participate in an administrative adjudication after proper service of notice, the agency may proceed with the hearing and render a decision in the absence of the party.

28.16 RECORDING THE PROCEEDINGS

The agency will record the testimony heard at a hearing. Upon the filing of a petition for judicial review, the agency will provide a verbatim transcript of testimony taken before the agency.

28.17 FINAL ORDER

The agency will serve on the respondent a written order that reflects the action taken by the agency. The order will include a recitation of facts found based on testimony and other evidence presented and reasonable inferences derived from the evidence pertinent to the issues of the case. It will also state conclusions of law and directives or other disposition entered against or in favor of the respondent.

The order will be served personally or by mail on the respondent. If counsel represents respondent, service of the order on respondent's counsel shall be deemed service on the respondent.

SUMMARY OF SUBSTANTIVE CHANGES

Amendment 98 of the Arkansas Constitution provides authority for the Arkansas Medical Marijuana Commission to promulgate rules pursuant to §§8 and 14. The Medical Marijuana Commission must follow the procedural requirements of the Arkansas Administrative Procedure Act and those applicable requirements are set out in these proposed rules to the Rules Governing the Licensure of Medical Marijuana Cultivation Facilities, Processors, and Dispensaries. These changes provide guidance to the public as to rule-making procedures, declaratory orders, and adjudicative hearings.

CLEAN COPY

RULES GOVERNING THE LICENSURE OF MEDICAL MARIJUANA CULTIVATION FACILITIES, PROCESSORS AND DISPENSARIES

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- ix. Prior continuances;
 - x. The interests of all parties;
 - xi. The likelihood of informal settlements;
 - xii. The existence of an emergency;
 - xiii. Any objection;
 - xiv. Any applicable time requirement;
 - xv. The existence of a conflict of the schedules of counsel, parties, or witnesses;
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28.12 HEARING PROCEDURES

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- c) Parties have the right to participate or to be represented by counsel in all hearings or pre-hearing conferences related to their case.
- d) Subject to terms and conditions prescribed by the Administrative Procedure Act, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and, upon request by the agency, may submit briefs and engage in oral argument.
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- a) The presiding officer shall rule on the admissibility of evidence and may, when appropriate, take official notice of facts in accordance with all applicable requirements of law.
- b) Stipulation of facts is encouraged. The agency may make a decision based on stipulated facts.
- c) Evidence in the proceeding must be confined to the issues set forth in the hearing notice, unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence outside the scope of the notice, over the objection of a party who did not have actual notice of those issues, that party, upon timely request, may receive a continuance sufficient to prepare for the additional issue and to permit amendment of pleadings.
- d) A party seeking admission of an exhibit must provide thirteen copies of each exhibit at the hearing. The presiding officer must provide the opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. All exhibits admitted into evidence must be appropriately marked and be made part of the record.
- e) Any party may object to specific evidence or may request limits on the scope of the examination or cross-examination. A brief statement of the grounds upon which it is based shall accompany such an objection. The objection, the ruling on the objection, and the reasons for the ruling will be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve the ruling until the written decision.

- f) Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony will briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.
- g) Irrelevant, immaterial, and unduly repetitive evidence will be excluded. Any other oral or documentary evidence, not privileged, may be received if it is of a type commonly relied upon by reasonably prudent men and women in the conduct of their affairs.

The finder of fact may base its findings of fact upon reasonable inferences derived from other evidence received.

28.15 DEFAULT

If a party fails to appear or participate in an administrative adjudication after proper service of notice, the agency may proceed with the hearing and render a decision in the absence of the party.

28.16 RECORDING THE PROCEEDINGS

The agency will record the testimony heard at a hearing. Upon the filing of a petition for judicial review, the agency will provide a verbatim transcript of testimony taken before the agency.

28.17 FINAL ORDER

The agency will serve on the respondent a written order that reflects the action taken by the agency. The order will include a recitation of facts found based on testimony and other evidence presented and reasonable inferences derived from the evidence pertinent to the issues of the case. It will also state conclusions of law and directives or other disposition entered against or in favor of the respondent.

The order will be served personally or by mail on the respondent. If counsel represents respondent, service of the order on respondent's counsel shall be deemed service on the respondent.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT DFA

DIVISION Medical Marijuana Commission

PERSON COMPLETING THIS STATEMENT Doralee Chandler

TELEPHONE 501-682-1105 FAX 501-682-2221 EMAIL: Doralee.Chandler@dfa.arkansas.gov

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

SHORT TITLE OF THIS RULE Rules Governing the Licensure of Medical Marijuana Cultivation Facilities, Processors, and Dispensaries (Section 26-28)

- | | | |
|---|-------|--|
| 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 x | 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 x | No ☐ |

If an agency is proposing a more costly rule, please state the following:

(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 more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and;

(d) Whether the reason is within the scope of the agency's statutory authority; and if so, please explain.

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following: N/A

(a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____

Special Revenue _____
 Other (Identify) _____
 Total 0

Special Revenue _____
 Other (Identify) _____
 Total 0

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

Current Fiscal Year

General Revenue _____
 Federal Funds _____
 Cash Funds _____
 Special Revenue _____
 Other (Identify) _____
 Total 0

Next Fiscal Year

General Revenue _____
 Federal Funds _____
 Cash Funds _____
 Special Revenue _____
 Other (Identify) _____
 Total 0

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

Current Fiscal Year

\$ 0

Next Fiscal Year

\$ 0

6. What is the total estimated cost by fiscal year to state, county, and 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

\$ 0

Next Fiscal Year

\$ 0

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 x

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