

MAY 3, 2018

Children, Families, Health, and Human Services Interim Committee  
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# MEDICAL MARIJUANA ACT: RECENT DEVELOPMENTS

## Background

As the Department of Public Health and Human Services (DPHHS) geared up to implement new rules for the medical marijuana program this winter, legislators on two interim committees raised concerns about several aspects of the rules. The Revenue and Transportation Interim Committee decided in March to ask the Children, Families, Health, and Human Services Interim Committee (CFHHS) to object to the rules. CFHHS is the committee required by law to review DPHHS rules. CFHHS subsequently decided at its March meeting to consider a rules objection in May after seeing how the agency addressed the concerns through additional rules it planned to propose.

This briefing paper summarizes the proposed rule changes and other recent activity related to the medical marijuana program.

## Legislative Concerns

In its letter seeking an objection to the rules, the Revenue and Transportation Committee focused on concerns related to:

- the amount of space, or “canopy,” allowed for growing marijuana plants;
- testing standards;
- scientific standards for testing laboratories; and
- the phase-in of licenses for providers.

The rules had already been adopted by the time the two committees met and had an effective date of April 10. However, the agency told CFHHS that its new rules would — when adopted — be retroactively effective to April 10.

## New Rules: Canopy Limits and Testing Labs

DPHHS published new proposed rules on canopy allotments and testing laboratories on April 3, held a public hearing on the rules on May 3, and was accepting written public comment through May 11.

### Canopy Levels

The original rules allowed providers to have a canopy equal to 50 square feet for each registered cardholder for whom they were growing marijuana. Both interim committees questioned why the square footage was tied to the number of cardholders when the law didn't require that link. They also questioned whether the square footage was too large and could lead to overproduction and diversion of marijuana.

The new rules would reduce the square footage substantially and create a tiered canopy system, but still link canopy size to the number of cardholders. The square footage calculation also would include any space used for growing

marijuana, including any platforms or other “means of support or suspension” of the plants. That change takes into account vertical growing arrangements, as required by Senate Bill 333 in 2017. Finally, the rules would allow providers to ask for a canopy reassessment at any time and would allow DPHHS to reassess a provider’s canopy based on their current cardholder numbers.

The canopy for providers with 20 or fewer cardholders is limited to 20 square feet per cardholder and is known as Canopy 1. The table below shows the other tiers.

Tier	# of Cardholders	Square Feet
Canopy 2	21-30	420
Canopy 3	31-40	580
Canopy 4	41-50	780
Canopy 5	51-70	1,060
Canopy 6	71-100	1,420
Canopy 7	101-130	1,900
Canopy 8	131-170	2,540
Canopy 9	171-230	3,400
Canopy 10	231-300	4,540
Canopy 11	301-400	6,060
Canopy 12	401-540	8,100
Canopy 13	541-720	10,820
Canopy 14	721-960	14,440
Canopy 15	961-1,280	19,260
Canopy 16	1,281-1,710	25,700
Canopy 17	1,711-2,280	34,280
Canopy 18	2,281-3,050	45,720
Canopy 19	3,051-4,065	60,980
Canopy 20	4,066 or more	81,230

Of the 577 providers registered as of March 30, eight would have qualified for Canopy 12, one for Canopy 15, and one for Canopy 16, while 416 providers had 20 or fewer cardholders and would have qualified for Canopy 1. As of May 3, DPHHS did not have an accurate breakdown of the number of cardholders per provider in April.

## Testing Laboratories

SB 333 required DPHHS to set insurance and bonding requirements for testing labs in rule. The original rules adopted on Feb. 9 did not include requirements for either insurance or bonding. The proposed rules require labs to:

- maintain analytical testing laboratory professional liability insurance with an aggregate limit of \$1 million before a license is issued; and
- obtain and maintain a \$25,000 surety bond that names the department as a loss payee if the lab fails to follow the security plan approved by DPHHS or otherwise operates the lab in a way that allows for or results in theft, loss, or diversion of marijuana items.

The rules also adopt by reference the *METRC Testing Lab User Guide for Montana*. The department says the manual contains requirements for quality assurance testing and quality sampling protocols.

## Public Hearing

At the May 3 public hearing, several providers opposed the new canopy limits, saying the square-footage amounts were too low and were unfair to small providers. Some also questioned the basis for the new allotments. Concerns included:

- small growers, particularly organic growers, may not have enough space to grow the marijuana their cardholders need;
- the limits were too low to allow providers to experiment with growing new strains of marijuana;
- cardholders may be forced to buy in the black market if their providers can't grow enough marijuana;
- business costs may exceed revenues for small providers, forcing them to go out of business; and
- the medical marijuana system will consist primarily of large providers in the future.

Some speakers suggested that providers should be able to buy a license that allows them to have businesses of certain square-footage sizes, without regard to the number of cardholders they're serving. They said the inventory tracking system would ensure that overproduction doesn't occur.

## Tax Collections

SB 333 created a 4% tax on gross sales of marijuana and marijuana-infused products the first fiscal year of the current biennium. The tax will drop to 2% on July 1. The Department of Revenue has reported the following information on tax collections so far this fiscal year.

Filing Period	Time Period	Amount Collected	# of Returns
First Quarter	July 1-Sept. 30, 2017	\$410,064	609
Second Quarter	Oct. 1-Dec. 31, 2017	\$450,430	584
Third Quarter	Jan. 1-March 31, 2018	\$436,166*	N/A

\*Preliminary number; filings not final

Taxes for the third quarter of the year were due in mid-April. The third-quarter figure in the table above reflects initial collections for that period. The Department of Revenue said in late April it expects more returns to be filed. It did not provide a number of returns filed at the point, saying the number was non-meaningful.

## Registry Statistics

Preliminary registry statistics for April show that the number of cardholders has continued to grow since passage of Initiative 182 in November 2016 and SB 333 in 2017. The number of doctors providing written certification of debilitating medical conditions also has been increasing since November 2016. However, the number of providers began to decrease in March 2018 after holding relatively steady between 610 and 620 for nearly a year.

DPHHS statistics show that 26,098 people were registered to use medical marijuana as of April 30, compared with 7,785 right before passage of the initiative in 2016 and 15,563 in May 2017, the first month after the 2017 Legislature adjourned. Meanwhile, the number of physicians providing written certification increased from 172 in October 2016 and 205 in May 2017 to 243 at the end of last month.

The number of providers has dropped by about 10% since passage of SB 333, with most of the decline occurring in the last two months. DPHHS reported that there were 551 providers as of April 30, compared with 615 in May 2017 and 610 in February 2018.

The table below shows the change in the distribution of cardholders among providers from May 2017 to March 2018, the last month for which cardholder-per-provider data was available.

	May 2017	March 2018
Total Number of Providers	615	577
20 or Fewer Cardholders	505	416
251-500 Cardholders	6	14
501-1,000 Cardholders	1	5
More than 1,000 Cardholders	0	1
% with 20 or Fewer Cardholders	82%	72%