COLORADO
Department of Revenue
Specialized Business Group—Marijuana

Colorado Department of Revenue
Marijuana Enforcement Division
2021 Rulemaking

COST-BENEFIT ANALYSIS

Submitted Pursuant to 24-1-103(2.5), C.R.S.

SOS Tracking No. 2021-00294

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Cost-Benefit Analysis

In performing a cost-benefit analysis, each rulemaking entity must provide the information requested for the cost-benefit analysis to be considered a good faith effort. The cost-benefit analysis must be submitted to the Office of Policy, Research and Regulatory Reform at least ten (10) days before the administrative hearing on the proposed rule and posted on your agency's web site. For all questions, please attach all underlying data that supports the statements or figures stated in this cost-benefit analysis.

Department: DEPARTMENT OF REVENUE **Agency**: MARIJUANA ENFORCEMENT DIVISION

CCR: Colorado Marijuana Rules, 1 CCR 212-3 **Date:** May 25, 2021

Rule Title or Subject:
Rule 2-205 - Fees

Per the provisions of 24-1-103(2.5)(a), Colorado Revised Statutes, the Colorado Department of Revenue, Marijuana Enforcement Division is submitting this Cost-Benefit Analysis as part of the Division's permanent rulemaking noticed April 30, 2021, Secretary of State Tracking Number 2021-00294.

1. The reason for the rule or amendment.

Marijuana Enforcement Division - Operations and Cash Fund

The Marijuana Enforcement Division ("Division") is responsible for licensing and regulating Colorado's commercial marijuana businesses and all owners and employees of such businesses. The Division consists of licensing, investigations, analysis, public health, policy, and administration sections. As of May 1, 2021, there are 1,151 medical marijuana businesses, 1,712 retail marijuana businesses, 2,005 licensed business owners, and 41,272 licensed employees.

The Division's operations are primarily fee funded. Fees and any other money collected by the State Licensing Authority must be transmitted to the marijuana cash fund established in section 44-10-801(1)(a), C.R.S. The fees collected by the Division fund its operations. The Division does not receive funds from the retail marijuana excise tax or the special retail marijuana sales tax, as those funds are deposited in a separate marijuana tax cash fund account and appropriated for uses other than the Division's operations. § 39-28.8-501, C.R.S.

The Colorado Marijuana Code, section 44-10-801, C.R.S., requires that the amount of fees collected reflect the actual direct and indirect costs of the State Licensing Authority in the administration and enforcement of the Marijuana Code. Further, at least annually, the State Licensing Authority is required to review fees and if necessary, adjust fees to reflect the direct and indirect costs. § 44-10-801(3)(b) and (d), C.R.S. The Marijuana Code also permits the State Licensing Authority to reduce fees if necessary to reduce uncommitted reserves and, once uncommitted reserves are sufficiently reduced, to increase fees as provided in section 24-75-402(4). § 44-10-801(2), C.R.S.

Reason for Proposed Rule Amendment

The proposed rule amendments seek to restore fees based on prior reductions implemented during the 2016 rulemaking session. In the spring of 2016, as required by the marijuana cash fund, the State Licensing Authority reviewed the balance in the marijuana cash fund and license fees in the Colorado Marijuana Rules and determined the uncommitted reserves exceeded the allowable amount. Accordingly, during the 2016 rulemaking, the State Licensing Authority adopted reduced licensee fees that became effective on January 1, 2017, to reduce the uncommitted reserves to appropriate levels. The reduced license fees averaged 22% across the various licenses. These reduced fees have been in place since January 1, 2017 and Licensees have received the benefits of these reduced fees ever since adoption.

In 2020, consistent with the marijuana cash fund requirement of annual review and recognizing that fees required a comprehensive analysis, the Division initiated an independent third-party fee analysis. However, the Division was unable to complete this work as a result of COVID-19 impacts. Even without completing the comprehensive fee analysis, it is clear that the Division is facing a cash flow shortfall in the 2021-2022 fiscal year which was only exacerbated by COVID-19. To reduce the cash flow shortfall and until a comprehensive fee analysis can be completed, the Division is proposing reinstatement of the 22% reduction that became effective January 1, 2017, as part of a necessary incremental measure. The proposed reinstatement is only one component to a larger financial management plan to identify potential cost savings and additional funding sources for Division's operating expenses.

Fees currently established by the State Licensing Authority do not reflect, and are in fact lower than, the direct and indirect costs to administer and enforce the Marijuana Code. As an example, the passage of HB19-1090, which permitted publicly traded companies to own Regulated Marijuana Businesses, greatly increased the number of applications submitted related to suitability of shareholders or investors in the regulated marijuana industry. The direct and indirect costs of processing these applications is significant and exceeds the processing time and resources required for an applicant who is a natural person. Although the proposed 22% reinstatement will not result in fees reflecting the actual direct and indirect cost of processing such applications, the Division has proposed such reinstatement as part of incremental efforts to align fees with direct and indirect costs and in response to the anticipated cash flow shortfall in the 2021-2022 fiscal year.

2. The anticipated economic benefits of the rule or amendment, which shall include economic growth, the creation of new jobs, and increased economic competitiveness.

The implementation of the 22% fee reinstatement will enable the Division to continue its operations. The proposed reinstatement will support the Division's ability to timely investigate and process business, owner, and employee applications and will allow the Division to comply with statutory deadlines to complete certain licensing investigations. Further, the proposed reinstatement will enable the Division to continue to comprehensively regulate the Colorado marijuana industry and will support the Division's ability to employ a range of intervention strategies to support industry compliance with the Colorado Marijuana Code and Rules, including but not limited to outreach and engagement initiatives, risk-based investigations, underage compliance investigations, and enforcement actions.

Absent implementation of the proposed reinstatement, the Division will not be able to acquire or maintain resources necessary to ensure timely processing of applications and comprehensive regulation of marijuana licensees. In addition, where identified budget constraints have the potential to affect the Division's ability to fill current open vacancies, this will affect its administration of newer licensing programs, including but not limited to delivery, hospitality, and social equity programs.

Finally, if the oversight and regulation of marijuana is reduced due to an inability to fund the administration and enforcement of the Marijuana Code, there is a risk that the federal government will no longer view the industry as sufficiently regulated by the State. Any such determination could result in negative consequences to the entire licensed, regulated marijuana industry in Colorado.

3. The anticipated costs of the rule or amendment, which shall include the direct costs to the government to administer the rule or amendment and the direct and indirect costs to business and other entities required to comply with the rule or amendment.

There is no anticipated increase in costs to the Division and the State Licensing Authority to administer the reinstated fees. All of these fees currently exist in Rule and are administered by the Division and the State Licensing Authority. The proposed rules reinstate the fee amounts that existed prior to the fee reduction that was effective January 1, 2017. The estimated cost to industry is a 22% adjustment in license fees applicants will be required to submit when submitting applications.

4. Any adverse effects on the economy, consumers, private markets, small businesses, job creation, and economic competitiveness.

The adverse effects on the economy are likely to be minimal as fees are relatively insignificant as a percentage of industry revenue. Since January of 2014 marijuana sales have increased each year.

https://cdor.colorado.gov/data-and-reports/marijuana-data/marijuana-sales-reports.

In 2020, Regulated Marijuana Businesses were deemed critical businesses during the economic and public health crisis caused by the COVID-19 pandemic. (Public Health Order 20-24). During that time, the marijuana industry did not suffer sales losses and actually saw sales continue to increase at an accelerated rate.

A review of Colorado's budget analysis reveals that marijuana sales for 2020 totaled $2,191,091,679. This is approximately five hundred thousand dollars more in sales than the prior year. It is, in fact, the most money from marijuana sales in any calendar year since commercial marijuana sales began in 2014. The first quarter of 2021 appears to be continuing this trend with the first three months of the year seeing sales higher than in previous years.

Since the licensing fee reduction in 2017, median marijuana sales per business license has increased by 37% from 2017 to 2020, while fees in 2020 continued to be 22% below 2016 levels.

As a percentage of revenue, the median fees of approximately $1,800 in 2020 per business license is less than one-quarter of one percent (i.e., below 0.25%) of the median annual revenue of approximately $850,000. While not retroactive, after giving effect to the 22% reinstatement, the proforma fees in 2020 would have been 0.26% of 2020 median revenue.

5. At least two alternatives to the proposed rule or amendment that can be identified by the submitting agency or a member of the public, including the costs and benefits of pursuing each of the alternatives identified.

Alternatives to the proposed reinstated fees include:

1. The Division could reduce or eliminate certain Division services and initiatives, including but not limited to licensing services, technology enhancement projects, and technical assistance and compliance training initiatives. This alternative is also likely to involve the Division reviewing all rule allowances that are based on discretionary rulemaking authority to evaluate the extent to which any such rule allowances should be eliminated to conserve resources.
    a) The operations and programs most likely to be impacted include the Division's licensing processes, social equity program, the delivery program, and the hospitality program. These programs are all relatively new to the regulated market and also require significant management and oversight by Division staff to successfully administer.
    b) This approach could result in increased compliance issues, extended application processing timelines, and reactive regulatory compliance measures instead of a proactive education and outreach approach to regulatory compliance.
    c) Further, if the oversight and regulation of marijuana operations in the state is reduced due to an inability to fund the administration and enforcement of the Marijuana Code, there is a risk that the federal government will no longer view the industry as sufficiently regulated by the State. Any such determination could result in negative consequences to the entire licensed, regulated marijuana industry in Colorado.

2. The Division could work to identify other funding sources for its operations, such as the general fund or marijuana tax cash fund. This alternative approach would require action by the Colorado General Assembly.
   a) In order to ensure the Division's cash fund constraints do not result in statutory non-compliance issues, this alternative approach may also warrant a request to the General Assembly to eliminate certain statutory timelines established in the Colorado Marijuana Code, including requirements for the Division to complete suitability investigations within 120 days from application.
   b) Such an approach could delay the immediate need to engage in fee setting rulemaking. However, because section 44-10-801, C.R.S., requires fees to reflect the actual direct and indirect costs of administration and enforcement of the Marijuana Code, the Division anticipates an eventual need to engage in fee rulemaking and resulting increase in fees will be necessary to comply with this statutory provision.

For additional information regarding the Department of Revenue, Marijuana Enforcement Division's rulemaking process, please visit the 2021 Rulemaking Page of the Division's website.