

Responses from State and Local Agencies

Based on the proposed Constitutional Amendment for the 2016 Ballot

An email from the Florida Department of Revenue received on October 19, 2015.

Financial Impact Estimating Conference
Medical Marijuana (Constitutional Amendment 15-01)
Florida Department of Revenue Presentation

The following information is in response to a written request from FIEC dated October 1, 2015. The language in bold is taken directly from that request.

A Financial Impact Estimating Conference (FIEC) met on Wednesday, September 30, 2015, regarding the proposed constitutional amendment entitled *Use of Marijuana for Debilitating Medical Conditions, 15-01*.

During this conference, the principals discussed data needs and presentations that would be beneficial to the process. The Department of Revenue was identified as an entity that has necessary information for a more complete understanding of the proposed amendment.

The FIEC would like to request that DOR be available to present information on several issues with tax implications. In part, the FIEC was focusing on overall differences in language and the ramifications of those differences from DOR's perspective:

General note: This analysis assumes the constitutional amendment (15-01) passes and that no other additional legislation is passed. If additional implementing legislation is passed, that would affect the analysis.

Between the proposed constitutional amendment (15-01) and the previous constitutional amendment on this subject (13-02).

- No ramifications, from DOR perspective. The language changes do not affect the Department's analysis.

Between the proposed constitutional amendment (15-01) and CS/CS/SB 1030 from the 2014 Legislative session.

- No ramifications as to sale.
- Unclear whether production exemptions for agriculture apply to either or both.
- The Department has not reached an opinion with respect to 1030, as no specific facts have been provided and no requests have been made.

General Comment: It is not clear whether the cultivation of marijuana plants for medical purposes would be considered "agricultural production" under Florida law.

- The definition of “agriculture” found in s. 570.02, F.S., and of “agricultural production” in s. 212.02(32), F.S., both refer to the production of plants and animals “useful to humans.”
- Federal law continues to classify marijuana in all forms as a Schedule I drug, so it is unclear if it can be considered useful to humans. Florida law classifies all forms of cannabis as a Schedule I substance, except “low-THC cannabis” as defined in s. 381.986, F.S. A Schedule I drug is one that has “no currently accepted medical use.” (See s. 893.03(1)(c), F.S., and 21 U.S.C. 802).

1030/Low-THC:

- Thus far the Department has received no requests for guidance as to whether the cultivation of low-THC cannabis is considered agriculture. If requested, the Department will look at the facts provided by a dispensing organization and provide guidance in taxpayer-specific letter – either a Letter of Technical Advice or a Technical Assistance Advisement. This seems like the appropriate method, given the limited number of potentially affected taxpayers (5 dispensing organizations).
- The Department notes that CS/CS/SB 1030 removed “low-THC cannabis” from the statutory definition of “cannabis.” As such, low-THC cannabis may not be considered a Schedule I drug under state law. However, it remains a Schedule I drug under federal law. In order to qualify as “agriculture” or “agricultural production,” under Florida law (ss. 212.02(32), 570.02, F.S.), a plant must be “useful to humans.”

Proposed Amendment:

- The proposed amendment only provides that in certain circumstances some uses of marijuana will not be subject to liability or sanctions under Florida law. It does not specifically indicate that medical marijuana is therefore to be treated differently than other Schedule I drugs outside the four corners of the amendment.
- The amendment is silent as to whether medical marijuana is to be treated as an agricultural product. As the assumed “use” to humans would be medicinal, and both state and federal law on controlled substances continue to provide that there are no currently

accepted medical uses of marijuana, it does not appear that there is a viable “use to humans” which would clearly qualify the cultivation of marijuana for agricultural benefits.

- In addition, due to the restrictive nature of who can cultivate the plant (only licensed MMTCs), it is not clear whether the medical marijuana industry is to be accorded benefits associated with general agricultural production.

General notes:

- Exemptions are strictly construed against taxpayers, and the definition of agriculture does not extend to a restricted item that has no documented use at the state or federal level.
- If this amendment passes, it would be helpful to have implementing language. If that language specified that medical marijuana is an agricultural product (as we have seen in some hemp legislation), or is otherwise identified as distinct from other marijuana for controlled substance purposes, then the Department could potentially treat the production of medical marijuana as agriculture.
- In the absence of statutory guidance, an option may be for the Department to seek a declaratory judgment from circuit court on how the constitutional amendment is to be applied to state tax law.
- A summary of the various agricultural exemptions is provided below, in the event legislation or other guidance is provided and the exemptions will apply.

Between vertical and horizontal business structures. For example, between the seed-to-sale cycle envisioned by CS/CS/SB 1030 versus the language in the proposed constitutional amendment (15-01).

- The sole difference is the possibility of resale treatment under the constitutional amendment:
 - The seed to sale cycle in 1030: Does not allow for resale.
 - The proposed constitutional amendment may allow for more sales between MMTCs, as the language allows them to “acquire” as well as “sell” the product under certain conditions.

- However, the “sale” can only be to a qualified patient or caregiver, so it is not clear whether they can sell amongst themselves.
- If resale applies, the purchase by the second MMTC from the original MMTC would likely qualify as a sale for resale, and would not be taxed, assuming the MMTC was registered with the Department.

Within the confines of the proposed constitutional amendment, please be prepared to give an analysis of the differences in tax treatment for the various types of marijuana-related products envisioned by the proposal.

General Analysis

The sale of tangible personal property in Florida is subject to sales tax unless an exemption applies. Exemptions are strictly construed, and if an exemption does not clearly apply, the sale is presumed taxable. *Absent legislation or additional guidance from another agency or the judicial system*, the following analysis of potential exemptions would apply.

Prescription:

- All forms of medical marijuana under the proposed amendment would fail to qualify for an exemption based on language in s. 212.08(2), F.S., regarding “medical products and supplies or medicine dispensed according to an individual prescription or prescriptions.”
- The physician certification process contemplated in the Constitutional Amendment does not conform to the statutory definition of a prescription found in s. 212.08(2)(b)4., F.S.
- Medical marijuana cannot be intended to be “dispensed by a pharmacist,” as licensed pharmacists are prohibited from dispensing a Schedule I drug.

Common household remedy:

- As discussed during the FIEC in 2013 for a similar amendment, “common household remedies” are limited to those found on Form DR-46NT, which is a list statutorily

prescribed and approved by the Department of Business and Professional Regulation (“DBPR”).

- Items containing medical marijuana are distinguishable from all items currently on that list, as all current items are readily available without a third-party certifying the need for the item.
- This limitation would keep the DOR from treating medical marijuana items as a common household remedy, absent a change to the DR-46NT by DBPR or other legislative or judicial guidance

Form-based Analysis

Plant:

- A sales tax exemption could apply, if considered agriculture, if plant is sold directly by grower to patient, and if plant is unprocessed.
- If not considered agriculture, if not sold by grower, or if processed out of plant form, no exemption applies.

Food:

- Taxable if foods containing medical marijuana are not considered “food products” as provided in current statutes and rules. If not “food products,” then no exemptions would apply.
- If treated like other food products, then sales tax exemptions could apply.
- Food products are statutorily defined as **“edible commodities, whether processed, cooked, raw, canned, or in any other form, which are generally regarded as food.”**
- Assuming food products containing medical marijuana are to be treated under existing statutory and administrative provisions for “food products,” then the following analysis applies:

Section 212.08(1), F.S., and Rule 12A-1.011, F.A.C., apply to the taxability of food products.

- In general, food products for human consumption are exempt.

- However, **certain categories of food products are always taxable (e.g., soft drinks, ice cream and popsicle-type products, and candy, gum, and mints)**. Items in these categories which contained medical marijuana would be taxable.
- Prepared food is subject to tax, and has a separate analysis for taxability.

Prepared food analysis:

- **Prepared food, whether prepared on or off the seller's premises, which is sold for immediate consumption or is a "hot prepared food" is subject to tax.** This does not apply to food prepared off the seller's premises and sold in the original sealed container.
- Baked goods are taxable or exempt based on a series of factors found in Rule 12A-1.011, F.A.C.

Tinctures:

- Tinctures are generally prepared by combining and cooking marijuana and alcohol. The resulting product is then taken in liquid or pill form, which is consumed orally.
- Despite the oral consumption of these products, tinctures would not be considered "food." Accordingly, there is no exemption that would apply to this item.

Aerosols:

- Aerosols are generally consumed orally (under the tongue), but would not be considered a food product. Accordingly, there is no exemption that would apply to this item.

Oils:

- Oils may be subject to tax, depending on the type and intended use of the oil. It is unclear from the amendment whether the type of oil is meant to be edible (e.g., cooking oil or butter) or topical.
- As an edible, the oil would likely be subject to the standard rules regarding food, and would likely be exempt.

- As a topical item, the oil would be taxable. The only potential exemption for a medicated topical item would be as a common household remedy, which would not apply, as discussed above.

In addition, the FIEC would like DOR to address whether there have been any Tip Sheets or tax-related guidance prepared to assist businesses or consumers in regard to the implementation of CS/CS/SB 1030 from the 2014 Legislative session.

- There have been no requests for information or assistance from the public or other agencies, so no written guidance has been prepared on this topic.

Similarly, please discuss whether there has been any communication or discussion with property appraisers regarding the appropriate valuation of property under CS/CS/SB 1030.

- There have been no conversations with or requests for information from property appraisers.

Agricultural Benefits

Note: The Department of Revenue does not believe these benefits will apply under the proposed constitutional amendment without additional statutory or judicial guidance. This information is being provided because it was discussed at a prior estimating conference on a similar amendment.

Production Exemptions: Chapter 212, F.S., provides several exemptions for items used in the production of agricultural products. Each of these exemptions could apply to the agricultural production of medical marijuana by licensed facilities, if medical marijuana is considered an agricultural product.

1. Section 212.08(3), F.S., provides an exemption from sales and use tax for power farm equipment and irrigation equipment used exclusively on a farm in the agricultural production of crops. This would include equipment used in the preparation, planting, cultivating, harvesting, and storage of the raw products.
2. This section also provides a tax exemption for the portion of the sales price below \$20,000 on a trailer weighing 12,000 pounds or less which is purchased by a farmer for agricultural production or the transportation of agricultural products.
3. Section 212.08(5), F.S., provides an exemption from sales and use tax for butane gas, propane gas, natural gas, and all other forms of liquefied petroleum gases used in farm equipment used exclusively on a farm or for processing farm products on the farm.
4. Section 212.08(3), F.S., also provides an exemption for certain items used in producing agricultural products, including:
 - a. disinfectants, fertilizers, insecticides, pesticides, herbicides, fungicides, and weed killers;
 - b. portable containers or movable receptacles used for processing farm products;
 - c. nursery stock, seedlings, cuttings, or other propagative material purchased for growing stock;
 - d. cloth, plastic, and other similar materials used for shade, mulch, or protection from frost or insects on a farm;
 - e. stakes used to support plants during production; and
 - f. cellophane wrappers, shipping cases, and window cartons when used by a farmer to contain, produce, or process an agricultural commodity.
5. Section 212.08(5), F.S., provides an exemption for electricity used directly or indirectly for production, packing, or processing of agricultural products on the farm.

Sales of Final Product Treatment: Section 212.07(5), F.S., provides an exemption from sales and use tax for the sale of farm products made directly by the producer from the farm. This exemption does not apply when sales of farm products are made by any person other than a producer. When a registered farm sells unprocessed medical marijuana directly to a consumer, the sale could be considered a tax-exempt sale of an agricultural product.

If the plants are processed into other forms (e.g. food, tinctures, aerosols, oils, or ointments), then they lose their identity as an agricultural product and become taxable, unless otherwise exempt.

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Based on the proposed Constitutional Amendment for the 2016 Ballot

An email from the Florida Police Chiefs Association received on October 20, 2015.

From: Bell.Stephanie
Sent: Tuesday, October 20, 2015 1:56 PM
To: McAlarney, Vesselka
Subject: FW: Request Feedback for Financial Impact Estimating Conference entitled "Use of Marijuana for Debilitating Medical Conditions"

From: Bernadette Howard [mailto:bhoward@fpca.com]
Sent: Tuesday, October 20, 2015 1:52 PM
To: Bell.Stephanie <Bell.Stephanie@leg.state.fl.us>
Cc: Amy Mercer <amercer@fpca.com>; Brett C Railey <Brailey@cityofwinterpark.org>; Chief Frank Fabrizio <ffabrizio@ponce-inlet.org>; Tim Stanfield <timothy.stanfield@bipc.com>; Deputy Chief Robert Pigman <robert.pigman@cityoforlando.net>
Subject: RE: Request Feedback for Financial Impact Estimating Conference entitled "Use of Marijuana for Debilitating Medical Conditions"

Dear Stephanie:

Thank you for your email inviting The Florida Police Chiefs Association to review our position for the Financial Impact Estimating Conference. We apologize for the delay in sending our comments to you.

State / Local Agency	Date Info Provided	Result
Florida Police Chiefs Association	10/25/2013	Email indicating additional enforcement costs based on the experience from other states that have similar amendments, but they were unable to quantify these costs at this time.

Recommended edits: *Email indicating additional enforcement and training costs based on the experience from other states that have similar amendments, but they were unable to quantify these costs at this time.*

Thank you again for the opportunity to participate.

Sincerely,
Bernadette

Bernadette Howard
Government Affairs Coordinator
The Florida Police Chiefs Association
P.O. Box 14038
Tallahassee, FL 32317
Phone: 850-219-3631
Fax: 850-219-3640
Email: bhoward@fpca.com

Email: bhoward@fpca.com

From: Bell.Stephanie [<mailto:bell.stephanie@leg.state.fl.us>]

Sent: Wednesday, October 14, 2015 12:00 PM

To: Bernadette Howard

Cc: Baker, Amy; Langston, Don; Diez-Arguelles, Jose; Weiss, Christian

Subject: Request Feedback for Financial Impact Estimating Conference entitled "Use of Marijuana for Debilitating Medical Conditions"

A Financial Impact Estimating Conference (FIEC) is meeting to adopt the constitutionally required materials related to the [proposed amendment](#) entitled "**Use of Marijuana for Debilitating Medical Conditions**" serial number 15-01. A description of the process is included at the end of this email for your reference.

A FIEC was held for a [similar amendment](#) in 2013. Your agency participated in the 2013 FIEC and we included the information provided immediately below to represent your agency's position at that time. The principals have requested that you review this statement to see if it is an accurate representation of the new amendment, assuming it were to pass. They would like to include it in the Financial Information Statement. Please feel free to modify it as needed and return it to me as soon as possible, copying the four principals:

- EDR - Amy Baker - baker.amy@leg.state.fl.us
- House - Don Langston - don.langston@laspbs.state.fl.us
- Senate - Jose Diez-Arguelles - jose.diez-arguelles@laspbs.state.fl.us
- Governor - Christian Weiss - christian.weiss@laspbs.state.fl.us

State / Local Agency	Date Info Provided	Result
Florida Police Chiefs Association	10/25/2013	Email indicating additional enforcement costs based on the experience from other states that have similar amendments, but they were unable to quantify these costs at this time.

The FIEC's next meeting is scheduled for Monday, October 19th at 12:30 pm. Please let us know prior to then if the above information is okay as written or provide us with a revised statement regarding [15-01](#).

Thank you for your assistance and please contact us if you have any questions regarding this request.

Stephanie Bell
Legislative Research Assistant
Office of Economic and Demographic Research
850-717-0458

To provide you with some background regarding the work of the Financial Impact Estimating Conference (FIEC):

In 2004, a constitutional amendment passed that requires initiative petitions be filed with the Secretary of State by February 1st of each general election year in order to be eligible for ballot consideration. This has been interpreted to mean that all signatures have been certified by the local supervisors of election and that the other requirements for geographic distribution have been met. For 2016, the required number of valid signatures is 683,149.

Section 15.21, Florida Statutes, further requires the Secretary of State to "immediately submit an initiative petition to the Attorney General and to the Financial Impact Estimating Conference" once the certified forms "equal...10 percent of

the number of electors statewide and in at least one-fourth of the congressional districts required by s. 3, Art XI of the State Constitution.” For 2016, this means that there are at least 68,314 valid and qualifying signatures. Upon receipt, the Financial Impact Estimating Conference (FIEC) has 45 days to complete an analysis and financial impact statement to be placed on the ballot (s.100.371, Florida Statutes). In practice, the 45-day window has begun when the Legislative Office of Economic and Demographic Research (EDR) received the official transmittal letter.

Florida law requires that the FIEC consist of four principals: one person from the Executive Office of the Governor; the coordinator of the Office of Economic and Demographic Research (EDR); one person from the professional staff of the Senate; and one person from the professional staff of the House of Representatives. The law further states that “each principal shall have appropriate fiscal expertise in the subject matter of the initiative.” A separate FIEC with different principals (other than EDR) can be convened for each initiative.

Each FIEC is responsible for the development of two products: (1) a ballot impact statement of no more than 75 words to be included after the ballot summary; and, (2) a detailed financial information statement, including a summary of not more than 500 words. Each of the documents must solely relate to the estimated increase or decrease in revenues or costs to state or local governments. In remanding several ballot impact statements to FIEC for redrafting in 2004, the Supreme Court further clarified that the statements must reflect only the “probable financial impact” of the amendment.

Responses from State and Local Agencies

Based on the proposed Constitutional Amendment for the 2016 Ballot

An e-mail from the Florida Department of Agriculture and Consumer Services, addressing the question whether marijuana will be considered an agricultural product, received on October 20, 2015.

From: Lovett, Grace <grace.lovett@freshfromflorida.com>
Sent: Tuesday, October 20, 2015 2:29 PM
To: Baker, Amy
Cc: Langston, Don; Diez-Arguelles, Jose; Weiss, Christian; Holley, Lorena; Joyner, Michael; Bell.Stephanie; Schenker, Pamela; McAlarney, Vesselka
Subject: RE: Request Feedback for Financial Impact Estimating Conference entitled "Use of Marijuana for Debilitating Medical Conditions"

Ms. Baker—

There are a number of definitions of “agricultural product” in Florida’s statutes; however, in the context of the proposed medical marijuana constitutional amendment, the department has neither opined nor been asked to opine whether “marijuana” as defined by the amendment would qualify as an “agricultural product.” Similarly, the department has neither opined nor been asked to opine as to whether “Low-THC cannabis” as used in the context of SB 1030 or the resulting Section 381.986, Florida Statutes is an “agricultural product.”

Therefore, based on the very limited detail in the proposed medical marijuana constitutional amendment, we are not able to provide clarity on that particular issue.

Regards,
Grace

Grace P. Lovett
Director
Office of Legislative Affairs
Florida Department of Agriculture and Consumer Services

(850) 617-7700
Grace.Lovett@FreshFromFlorida.com

The Capitol, PL-10
400 South Monroe Street
Tallahassee, Florida 32399-0800

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Please note that Florida has a broad public records law (Chapter 119, F.S.). Most written communications to or from state employees are public records obtainable by the public upon request. Emails sent to me at this email address may be considered public and will only be withheld from disclosure if deemed confidential pursuant to the laws of the State of Florida.

From: Baker, Amy [mailto:BAKER.AMY@leg.state.fl.us]
Sent: Tuesday, October 20, 2015 9:16 AM
To: Lovett, Grace
Cc: Langston, Don; Diez-Arguelles, Jose; Weiss, Christian; Holley, Lorena; Joyner, Michael; Bell.Stephanie; Schenker, Pamela; McAlarney, Vesselka
Subject: RE: Request Feedback for Financial Impact Estimating Conference entitled "Use of Marijuana for Debilitating Medical Conditions"

Grace...

During the FIEC’s Formal Conference yesterday, we had extensive discussion about whether medical marijuana as defined in the amendment will be deemed to be an agricultural product. Would it be possible to have a representative from the Department of Agriculture and Consumer Services at tomorrow’s meeting to present the Department’s

position and answer questions? I know it's short notice, but we are approaching our deadline for submitting the required materials to the Supreme Court.

The meeting starts at 9:00 AM in Room 117 of the Knott Building.

Thanks!

Amy

From: Lovett, Grace [<mailto:grace.lovett@freshfromflorida.com>]
Sent: Thursday, October 15, 2015 5:23 PM
To: Bell.Stephanie <[Bell.Stephanie@leg.state.fl.us](mailto:bell.stephanie@leg.state.fl.us)>
Cc: Baker, Amy <BAKER.AMY@leg.state.fl.us>; Langston, Don <Don.Langston@LASPBS.STATE.FL.US>; Diez-Arguelles, Jose <Jose.Diez-Arguelles@LASPBS.STATE.FL.US>; Weiss, Christian <Christian.Weiss@LASPBS.STATE.FL.US>; Holley, Lorena <lorena.holley@freshfromflorida.com>; Joyner, Michael <Mike.Joyner@freshfromflorida.com>
Subject: RE: Request Feedback for Financial Impact Estimating Conference entitled "Use of Marijuana for Debilitating Medical Conditions"

Stephanie—our team reviewed the 2016 proposed constitutional amendment and because it is nearly the same as the 2014 amendment, we are comfortable with the “result” dated 10/28/13 provided below also representing FDACS’ position on the 2016 proposed amendment.

Regards,
Grace

Grace P. Lovett
Director
Office of Legislative Affairs
Florida Department of Agriculture and Consumer Services

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From: Joyner, Michael
Sent: Thursday, October 15, 2015 11:55 AM
To: 'Bell.Stephanie'
Cc: 'Baker, Amy'; 'Langston, Don'; 'Diez-Arguelles, Jose'; 'Weiss, Christian'; Holley, Lorena; Lovett, Grace
Subject: RE: Request Feedback for Financial Impact Estimating Conference entitled "Use of Marijuana for Debilitating Medical Conditions"

Thank you Stephanie. We will review and provide feedback very soon. Mike

Lorena. Please review and comment directly to Stephanie. Thanks. Mike

Responses from State and Local Agencies

Based on the proposed Constitutional Amendment for the 2016 Ballot

An email from the Florida Sheriffs Association received on October 20, 2015.

From: Bell.Stephanie
Sent: Tuesday, October 20, 2015 4:28 PM
To: Schenker, Pamela
Subject: FW: Any changes for FIEC

From: Tabitha McDonald [mailto:tmcdonald@flsheriffs.org]
Sent: Tuesday, October 20, 2015 4:27 PM
To: Bell.Stephanie <Bell.Stephanie@leg.state.fl.us>
Subject: RE: Any changes for FIEC

Hi Stephanie,

Yes, please keep that as our position. We are regrouping tomorrow after a big day of committees and I'll let you know if we need any modifications.

Thanks again,

Tabitha McDonald, Government Affairs Coordinator

(850) 877-2165 x. 216
Cell (850) 339-3536

FLORIDA SHERIFFS ASSOCIATION | Protecting, Leading & Uniting Since 1893.



From: Bell.Stephanie [mailto:bell.stephanie@leg.state.fl.us]
Sent: Tuesday, October 20, 2015 4:12 PM
To: Tabitha McDonald
Subject: Any changes for FIEC

Hi Tabitha! Just wanted to touch base and make sure we were still using this for our FIEC on the proposed amendment entitled "Use of Marijuana for Debilitating Medical Conditions".

No changes right?

State / Local Agency	Date Info Provided	Result
Florida Sheriffs Association	10/21/2013 10/27/2013	Presentation and email indicating additional enforcement costs based on the experience from other states that have similar amendments, but they were unable to quantify these costs at this time.

Thanks!

Stephanie Bell
Legislative Research Assistant
Office of Economic and Demographic Research
850-717-0458