

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT AND  
ARM 42.2.613, 42.2.621, 42.39.102, ) REPEAL  
42.39.106, 42.39.108, 42.39.117, )  
42.39.119, 42.39.310 and the repeal )  
of ARM 42.39.101 pertaining to the )  
Montana Medical Marijuana Program )  
(MMP) )

TO: All Concerned Persons

1. On July 23, 2021, the Department of Revenue published MAR Notice No. 42-1031 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 899 of the 2021 Montana Administrative Register, Issue Number 14.

2. On August 13, 2021, a public hearing was held to consider the proposed amendment and repeal. The following commenters appeared and provided oral testimony: Kate Cholewa, Montana Cannabis Industry Association (MTCIA); Antonette Lininger, Sacred Sun Farms; Josh Gosney, Infinity Wellness; Joanna Barney, Sacred Sun Farms; Pepper Peterson, Montana Cannabis Guild; and Katrina Farnum, Garden Mother. The department also received written comments submitted by other interested persons.

3. The department has amended ARM 42.2.613, 42.2.621, 42.39.102, 42.39.108, 42.39.117, 42.39.310 and repealed ARM 42.39.101 as proposed.

4. The department has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

42.39.106 REGISTERED CARDHOLDER APPLICATION PROCESS

(1) through (7) remain as proposed.

~~(8) An applicant must designate either a licensed provider or licensed marijuana infused products provider, unless the registered cardholder intends to cultivate or manufacture marijuana for their own use under 50-46-303, MCA. If the registered cardholder intends to cultivate or manufacture marijuana for their own use, a property owner permission form must also be submitted, if applicable.~~

AUTH: 50-46-344, MCA

IMP: 50-46-303, 50-46-307, 50-46-310, 50-46-344, MCA

42.39.119 DENIAL OR REVOCATION OF APPLICATION, LICENSE, OR ENDORSEMENT (1) The department, after written notice to the applicant or licensee, may deny or revoke an application, license, or endorsement if:

(a) through (l) remain as proposed.

~~(m) the provider or a provider's employee sells, or attempts to sell, marijuana or marijuana items in excess of the allowable purchase limits provided in 50-46-319, MCA,~~

~~(n) (m) the provider or a provider's employee sells, or attempts to sell, marijuana or marijuana items to a person who does not possess a valid registry identification card at the time of sale; or~~

(o) remains as proposed but is renumbered (n).

(2) and (3) remain as proposed.

AUTH: 50-46-344, MCA

IMP: 50-46-303, 50-46-308, 50-46-312, 50-46-329, 50-46-330, MCA

5. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT 1: Several comments were received regarding the department's proposed amendments to ARM 42.39.119(1)(m) and (n).

Ms. Cholewa commented that the department's amendments are extending liability to licensed licensees beyond the point of sale. The tracking system will tell them how much has been purchased that day, or how much is left on a monthly allowance, and that information enables the licensee to make, or not make, a legal sale within those parameters. How would a licensee know whether that cardholder was abusing purchase amounts or limits based on that information or if somebody was reselling their cannabis?

Ms. Linger echoed Ms. Cholewa's comments on licensee liability and setting up licensees for revoking licenses/business livelihood.

Mr. Gosney commented that the amendments to 42.39.119(1)(m) and (n) need clarification.

Mr. Peterson commented on the proposed changes and asked whether there would be a 30-day window to cure after a violation. There is no mention of due process and opportunity to cure a violation. Mr. Peterson believes (1)(m) needs to be clear on what is a revocable offense because revocation of licenses is severe. Mr. Peterson also asked the department for clarification of what is "possession of valid registry card?" Is a physical card necessary? Is a digital form acceptable? What if a registered cardholder possessed online registration information from Compla? Mr. Peterson believes this additional guidance should be in rule.

Ms. Farnum echoed comments that aspects of revocable offense conduct in rules need to be very clear. Mistakes do happen at the point of sale and responsibility for system or employee errors should not be on licensee and the potential for license revocation.

Some commenters asked the department to clarify what the term "attempts to sell" means in ARM 42.39.119(1)(n).

RESPONSE 1: The department thanks all commenters for their comments. The department disagrees that the proposed amendments in ARM 42.39.119(1)(m)

and (n) extend liability to licensees beyond the point of sale or that the proposed regulations are being implemented to "set up" the revocation of licenses. House Bill 701 (HB 701) includes this enforcement authority which will be implemented by the department. But based on an additional review of HB 701 and the comments provided, the department has amended ARM 42.39.119 upon adoption to remove (1)(m). The department will present these license compliance considerations under future rulemaking to implement HB 701.

As to Ms. Farnum's comment about employee mistakes, the department agrees that tracking system failures which are not the licensee's fault are generally not a basis for adverse license action, but the department cannot speculate on what constitutes a "mistake." Licensees may hold responsibility and potential liability for circumstances such as mistakes by untrained employees or negligence by the licensee or their employee in the sale of marijuana or marijuana-infused products to persons not lawfully permitted to possess such products. Whether the department pursues revocation of any license is a fact-dependent decision based on underlying allegations substantiated after an investigation by the department, all of which is subject to due process and contested case proceedings under the Montana Administrative Procedure Act. This is also the department's response to Mr. Peterson regarding licensee due process and granting an opportunity to cure minor violations. The department is preparing more detailed procedural guidelines of this nature which are not a part of this rulemaking and will be presented under a separate rulemaking notice to implement HB 701.

As to the comments regarding ARM 42.39.119(1)(n), the department has removed the phrase "or attempts to sell" from the subsection to improve clarity of the requirement of an actual sale.

The department also responds to Mr. Peterson that statute - and now the administrative rule - are clear that possession of a valid registry identification card at the time of sale means that the purchaser must possess and present their actual valid registry identification card or temporary registry card at the time of sale. Other information or documentation such as electronic documents, pictures, and Complaia system printouts are not acceptable substitutes.

COMMENT 2: Several commenters commented on sale to seed tracking system and point of sale (POS) system reliability issues as they may be relied upon for the sales violations discussed in Comment and Response 1.

Mr. Gosney says that the METRC system is often shut down or has other technical glitches that cause POS information to not be available or to present invalid information. Based on these complications, the proposed violations seem unlawful. If purchase amount data does not work, he has to shut his business down; this happened in May of this year.

Ms. Barney also shared Mr. Gosney's concerns regarding METRC and shared her observation that on August 12, between 12:45 and 1:38 p.m., the METRC server was down and they were unable to process sale or record purchase amounts for daily sales.

Mr. Peterson comments that daily allotment information in POS systems are relied upon, and are complex systems that involve a lot of math (i.e., calculations). System glitches are present and advice from software vendors is often to push sales

through because of the glitches. Would this be an "attempt to sell" in ARM 42.39.119(1)(n)?

RESPONSE 2: The department appreciates the comments and directs the commenters to Response 1, which the department believes adequately responds to the comments. Notwithstanding, the department agrees that system outages or other technical difficulties may impact operations and may not process sales data as accurately as is necessary. The department pledges to continue to work with system developers, and for stakeholders, with the goal of having a very reliable and accurate industry platform. The department encourages and appreciates any constructive input.

COMMENT 3: Several commenters commented via telephone, email, and at the August 13 hearing regarding amendments proposed as ARM 42.39.106(8), which historically provided for the concept of provider and registered cardholder "tethering." Most commented that the tethering requirement, which restricted patients' access to medicine, was obsolete because Senate Bill 265 (2019) (SB 265) eliminated it.

RESPONSE 3: The tethering provision in ARM 42.39.106 was already in the rule because ARM 37.107.111 was transferred to the department from the Department of Public Health and Human Services, effective July 2, 2021, and the rule had not yet implemented SB 265.

The department agrees with the commenters and has removed the proposed section in response to these comments and to implement SB 265.

COMMENT 4: Mr. Gosney commented that self-growers will grow to whatever canopy area they have set up and will not limit themselves to plant number. Mr. Gosney recommends the department adopt canopy sizes for self-growers.

RESPONSE 4: The department is unsure of the relevancy of Mr. Gosney's comment to this rulemaking. However, in an attempt to answer, the department responds that statute clearly provides that personal use limits are based on the number of plants and seedlings, not on canopy size. Any change of this requirement would require an act of the legislature.

COMMENT 5: At the August 13 rules hearing, Mr. Peterson commented that the department's Office of Dispute Resolution (ODR), which is the quasi-judicial venue for contested marijuana matters, is a part of the department's Alcoholic Beverage Control Division (ABCD), and he speculated how marijuana matters would be handled there.

RESPONSE 5: The department thanks Mr. Peterson for the comments and would like to formally clarify that the ODR is defined in ARM 42.2.613(15), but that provision of the rule was not amended in this rulemaking notice and remains the same. ODR is not a part of the ABCD; it is a statutorily mandated office under 15-1-

211, MCA, to resolve disputes between the department and persons or other entities. The authority for ODR to hear marijuana matters and issue final agency decisions regarding the same is proposed - and now adopted - in the department's proposals for ARM 42.2.613 and 42.2.621 under this rulemaking.

COMMENT 6: Ms. Lininger and Mr. Peterson both commented their respective opinions that steps appear to have been taken - through additional administrative rules - to slim down the medical marijuana program.

RESPONSE 6: These comments fall outside the scope of this rulemaking and are so speculative in nature that the department cannot accurately respond. The department implements legislation enacted by the Montana Legislature and any rulemaking supports the programs or public policy direction provided to the department through such legislation. Any rulemaking to the contrary would exceed the department's rulemaking authority.

COMMENT 7: The department also received written comments from interested persons which the department can best describe as additional suggestions for the MMP rules located in ARM Title 42, chapter 39, which were not included as a part of the department's proposals under MAR Notice No. 42-1031.

RESPONSE 7: While the department appreciates the comments and suggestions, it is unable to add those suggestions during the course of this specific rulemaking because of procedural constraints within the Montana Administrative Procedure Act. The department will consider all suggestions for inclusion in future rulemaking for the chapter.

/s/ Todd Olson  
Todd Olson  
Rule Reviewer

/s/ Brendan Beatty  
Brendan Beatty  
Director of Revenue

Certified to the Secretary of State August 31, 2021.