

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the adoption of New ) NOTICE OF ADOPTION AND  
Rules I and II pertaining to marijuana ) AMENDMENT  
provider canopy tier size increases )  
and the amendment of ARM )  
42.39.123 pertaining to limitations on )  
advertising )

TO: All Concerned Persons

1. On July 23, 2021, the Department of Revenue (department) published MAR Notice No. 42-1032 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 908 of the 2021 Montana Administrative Register, Issue Number 14.

2. On August 13, 2021, the department held a public hearing to consider the proposed adoption and amendment. There were no commenters present to provide testimony or commentary in support of the rulemaking. The following commenters appeared and provided oral testimony in opposition to the proposed rulemaking: Melissa Lewis; Kate Cholewa, Montana Cannabis Industry Association (MTCIA); Clyde Broughton, Starrbuds; Josh Gosney, Infinity Wellness; Christopher Young, Young Law Office; Tayln Lang, Heirloom Remedies; Joanna Barney, Sacred Sun Farms; Katrina Farnum, Garden Mother; Josh Vandewetering, Lionheart Caregiving Dispensary; Antonette Lininger, Sacred Sun Farms; Dave Lewis, Montana Cannabis Guild; Pepper Peterson, Montana Cannabis Guild; Elliot Lindsay, Grizzly Pine Dispensary; Evan Kajander, Apogee Gardens; Dan Metzger, Montana Reserve Dispensary; and Mariah Bond, Euphoria Wellness. The department received written comments from interested persons in support of the proposed restrictions on marijuana advertising, and also received written comments submitted by interested persons in opposition.

3. On September 10, 2021, the department published an amended notice of public hearing on the proposed adoption and amendment (amended proposal notice) of the above-stated rules at page 1127 of the 2021 Montana Administrative Register, Issue Number 17. The amended proposal notice contained the department's amendments to the original proposal notice described in paragraph 1. The amendments attempted to resolve the majority of the commenter's concerns, comments, and testimony, which were provided in writing or at the August 13, 2021 administrative rules hearing.

4. No additional public hearing was held to consider the amended proposal notice. The department extended the comment period for the proposed rulemaking in accordance with 2-4-305, MCA, until September 20, 2021.

5. The department has adopted NEW RULE I (42.39.109) and NEW RULE II (42.39.110) as proposed.

6. The department has amended ARM 42.39.123 as presented in the September 10, 2021 amended proposal notice.

7. 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 of the comments received on the proposed amendments to ARM 42.39.123 could be summarized as contentions that the department misconstrued or exceeded its rulemaking authority conferred to it under House Bill 249 (HB 249) or that the amendments are not consistent with legislative intent with HB 249.

Ms. Lewis offered relevant testimony that HB 249 allows the legal market a very small and discreet avenue to reach the legal consumers, and if state law did not allow the legal market a small advertising concession, consumers will be put at a disadvantage to determine the legal market from the illicit market. Technology is a central pillar of consumer practices in the 21st century, and cannabis policies should support these discreet customer-facing technologies in order to shift consumption from the illicit market to the legal market.

Ms. Cholewa concurred and commented that MAR Notice No. 42-1032 reaches far beyond anything discussed as the objective or the goal of HB 249 during the legislative hearings. The bill was sold on allowing for a directory that enables customers to be sure they are reaching the licensed and legal market. Keeping those businesses from being able to distinguish themselves in any manner we believe goes against that objective.

Mr. Peterson discussed legislative intent of HB 249 and commented that multiple meetings had been held between the industry and legislators since the end of the legislature and the amendments to ARM 42.39.123 do not reflect legislative intent of (HB) 701 or of HB 249. The law does not say industry cannot advertise; it says industry cannot advertise marijuana products. Mr. Peterson characterized the advertising restrictions as a ban on advertising, not a ban on advertising marijuana products. The intent was to make sure that industry was not advertising products that are not legally available for a certain age group to talk about, just like a liquor store. The law says you cannot advertise marijuana products; it does not say you cannot advertise marijuana businesses; it does not say you cannot say where you are; it does not say you cannot sponsor things.

Mr. Kajander commented that the intent of the legislature was that providers cannot advertise "marijuana products," but these new rules instead prevent providers from advertising their marijuana businesses (not the intent of the legislature).

Mr. Gosney commented that the rulemaking exceeded statutory authority and is contrary to the intent of the legislature as he witnessed as cannabis legislation was going through the legislature. He stated that signage restrictions are untenable,

that social media restrictions are not realistic, and that charitable donation restrictions are just wrong.

Mr. Young, Ms. Farnum, Mr. Lang, and self-represented commenters who provided written comments also concurred with the other commenters.

RESPONSE 1: The department thanks all commenters for their comments. Based on the commentary and testimony received on the original proposal notice, the department proposed several additional amendments which were published in the amended proposal notice. To briefly summarize the amended proposal notice, new subsections were added to ARM 42.39.123 which affirm that a licensee may market its brand but may not advertise marijuana or marijuana products except in electronic advertising; clearly defines advertising; and defines billboards for the later-stated purpose in (9) that licensees may not use billboards to advertise. The amended proposal notice also removes provisions regarding outdoor sign restrictions and imagery; restrictions on the use of internet websites and social media accounts if they only permit persons 21 years of age or older to follow the account; former signage and external advertising requirements; former restrictions to sponsor a charitable, sports, or similar event; promotional items' restrictions; and former restrictions on placement of flyers for a marijuana business.

COMMENT 2: Several commenters commented on the original proposal notice that the proposed restrictions in the rule were unduly burdensome.

Ms. Cholewa commented that 16-12-112, MCA, provides that the department may not adopt any rule or regulation that is unduly burdensome or undermines the purpose of this chapter, and many of these advertising restrictions do just that.

Ms. Lewis commented similarly that there is no need for advertising limits. She agreed that there is a need for advertising limits to reduce public nuisance and to ensure that such advertising is not false, or misleading, or attempting to target children. However, the proposed rulemaking goes so far that it is difficult for consumers to find or differentiate between licensed and unlicensed operators.

Mr. Broughton commented that the proposed advertising restrictions completely take away the ability to brand our businesses and set ourselves apart from one another. Every dispensary in the state is different and unique, just like the people that visit them. Mr. Broughton also provided a mockup of a sign with the original proposed signage requirements. He commented that the sign is more offensive than any sign he had ever seen currently advertising cannabis.

Mr. Young submitted a detailed letter, commented at the hearing, and provided a form letter to individuals, who in turn, forwarded the letter as comments that the proposed changes in ARM 42.39.123 are overly burdensome. Both Mr. Young and the letter writers allege the proposed amendments may violate constitutional First Amendment protections for commercial free speech under *Central Hudson Gas & Elec. v. PSC*, 447 U.S. 557 (1980). Mr. Young and the commenters provide some suggested changes.

Another commenter stated that the proposed curtailments and regulations regarding the ability of cannabis businesses to advertise are an unacceptable burden on their freedom of speech and on free enterprise in this state. This

proposed regulation will seriously impede business' ability to attract customers and compete in the marketplace.

Ms. Farnum commented that the proposed rule changes are a very obvious ban on advertising which industry has been dealing with for a long time. She also commented on the inability to show any sort of cannabis symbol on anything that is visible to the public even if they are of legal age, so to have it be pushed even further out is very challenging.

The department also received several comments from individuals regarding the department's proposed sign restrictions, including size, color, and the proposed required warnings or disclaimers as being overly burdensome.

RESPONSE 2: The department appreciates the comments and directs the commenters to Response 1, which the department believes adequately responds to the comments.

As to Mr. Young's concerns regarding advertising restrictions' impact on corporate free speech and his contentions about the *Central Hudson* test, should federal law regarding cannabis or a substantive development in case law change, then the department will review the change in authority and respond accordingly in the administrative rules.

COMMENT 3: Several commenters commented via telephone, email, and at the August 13 hearing that the proposed advertising restrictions on charitable donations was not supported in HB 249 and urged the department to discontinue the proposed amendment and allow licensed marijuana dispensaries to continue to give back to their communities and allow them to support charitable causes.

RESPONSE 3: The department appreciates the comments and directs the commenters to Response 1, which the department believes adequately responds to the comments.

COMMENT 4: The department received several comments from individuals contending that marijuana advertising should contain the same restrictions as alcohol advertising. Several commenters are under the impression that alcoholic beverage advertising is less restrictive than the proposal for ARM 42.39.123.

RESPONSE 4: The department disagrees that the advertising restrictions placed on alcoholic beverage purveyors are substantively less restrictive than that for marijuana businesses. Advertising restrictions on alcoholic beverages are considerable and are administered on the federal level through the Alcohol and Tobacco Tax and Trade Bureau (TTB), a bureau under the federal Department of the Treasury, and fall under the authority of each state, and even local governments.

ARM 42.39.123, as adopted, makes a clear distinction between permissible advertising of marijuana businesses and impermissible advertising of marijuana or marijuana products. The department also refers these commenters to Response 1, which describes in greater detail the changes made throughout this rulemaking process.

Until such time as there is federal authority acceptance of cannabis, the Montana Legislature provides additional public policy guidance in the area of permissible advertising, or the department is granted additional authority by the legislature to promulgate different advertising guidelines, options for the advertising of marijuana and marijuana products will be limited.

COMMENT 5: The department received several comments from individuals in writing who support strict restrictions for marijuana advertising. Many commenters stated the belief that marijuana businesses will not be impacted by not being able to advertise and strict advertising restrictions are justifiable. Other comments received stated beliefs that allowing advertising for marijuana businesses would have negative societal impacts.

RESPONSE 5: The department appreciates the comments and directs the commenters to Response 1, which the department believes adequately responds to the comments as to why changes were made from the original proposal notice and why marijuana advertising will continue under ARM 42.39.123, as adopted. Changes like the commenters propose would require an act of the legislature to change what is permissible, what is restricted, and/or what authority the department has implementing any future legislation.

COMMENT 6: Based on the version of ARM 42.39.123 in the amended proposal notice, the department received written comments regarding the restriction of marijuana advertising on billboards. Currently, marijuana businesses are actively advertising on billboards, and the commenters contend that advertising on billboards should continue to be permitted.

Paul Dennehy and Seth Rogers from Lamar, Inc. commented that the billboard advertising their company provides has been compliant with the marijuana laws because no colloquial terms of the industry or objectionable imagery has been used. Messrs. Dennehy and Rogers submit that over 90 percent of the ads in place are on the interstate, and function as directional boards. Mr. Dennehy commented that he struggles with the department deciding what avenues of advertising a legal and legitimate business can use.

Stephanie Martino, owner of 710 Montana, comments that her business utilizes billboard advertising, that the billboards promote the business only, and she has entered into long-term contracts with billboard companies for advertising. If adopted as proposed, Ms. Martino's business will incur financial losses based on the required cancellation of advertising contracts.

The department did receive comments in favor of the billboard advertising restriction in the amended proposed notice.

RESPONSE 6: The department appreciates the comments provided and understands that the discontinuation of billboard advertising has impacts on the billboard companies and those marijuana businesses that have chosen to advertise in that medium, which is why ARM 42.39.123 has included a delayed enforcement date of January 1, 2022, notwithstanding the October 1 effective date of HB 249 and the October 9 effective date of this rulemaking.

HB 249 clearly does not permit the advertising of marijuana or marijuana products except for the limited exception of electronic advertising provided in 16-12-211(3), and 50-46-341(3), MCA. And in response to Mr. Dennehy's comments about the department's authority to regulate legal and legitimate businesses, the department counters that the issue is not about legitimacy of the businesses in Montana. The department was granted authority by the legislature to administer the marijuana laws of the state as a statutorily regulated industry, and advertising restrictions are an extension of that regulatory purview.

As to Messrs. Dennehy and Rogers, and Ms. Martino's input that their billboards only advertise the business and are directional in nature, the department appreciates the distinction. However, if the legislature wanted to permit billboard advertising in any context, it would have provided that in HB 249. The department has accommodated marijuana businesses' general advertising and brand marketing in ARM 42.39.123, as adopted. If the department were to amend the rule as the commenters suggest, industry compliance and the department's enforcement of billboard advertising would become untenable because so many marijuana businesses have opted for marijuana-centric or colloquially derived business names. The mere advertising of the business on a billboard constitutes advertising of marijuana or marijuana products, and the department lacks the resources to investigate complaints or licensee compliance absent the restriction.

If the marijuana industry and the legislature come together and a statutory amendment to the advertising restrictions is enacted, the department is prepared to perform its duty and implement that legislation. Until such time as the legislature provides additional clear direction regarding billboard advertising to the department, this advertising restriction will be sustained.

COMMENT 7: The department received a comment from Robert Hunt, publisher of the Montana Senior News, who believes the department is ruling against newspapers by restricting advertising from legal medical and recreational marijuana companies. Mr. Hunt asks, "Doesn't that eliminate traditional media unfairly?"

RESPONSE 7: The department appreciates the comments provided and understands Mr. Hunt's inquiry. As has been stated in similar context in the department's other responses, 16-12-211 and 50-46-341, MCA, as amended by HB 249, prohibit the advertising of marijuana or marijuana products except via select online means. Newspaper advertising, under HB 249 - whether in traditional print or through a newspaper's online version - is not a permissible activity.

The department also refers Mr. Hunt to Response 6 where the department describes advertising restrictions that also impact billboard advertising, which the department believes are analogous to newspaper advertising and adequately responds to the comments.

COMMENT 8: The department received comments from Reagan Mecham, Frenchtown Community Coalition Coordinator; Faith Price, Healthy Missoula Youth Coalition; and another individual expressing concern over the removal of the advertising restrictions in ARM 42.39.123 from its original proposed version to the

amended proposed - and adopted - version. The commenters believe children are at risk from the advertising exposure they will be subjected to without more restriction.

RESPONSE 8: The department appreciates and understands the commenters' concerns. The department amended its original proposal based on additional legal review of the issues and the legislative intent behind HB 249. HB 249 clearly does not permit the advertising of marijuana or marijuana products except for the limited exception of electronic advertising provided in 16-12-211(3) and 50-46-341(3), MCA. What HB 249 lacks in its text, but is present in legislative intent, is that the bill does not say industry cannot advertise; it only says they cannot advertise marijuana or marijuana products.

As the department stated in Response 6, until such time as the legislature provides additional direction regarding billboard advertising to the department, the advertising allowances in the rule, as adopted, will be sustained.

COMMENT 9: The department also received written comments from interested persons which the department can best describe as additional suggestions for the rules located in ARM Title 42, chapter 39, which were not included as a part of the department's proposals under MAR Notice No. 42-1032.

RESPONSE 9: 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 September 28, 2021.