

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New) AMENDED NOTICE OF PUBLIC
Rules I and II pertaining to marijuana) HEARING ON PROPOSED
provider canopy tier size increases) ADOPTION AND AMENDMENT
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. The department held the required public hearing on August 13, 2021, to consider the proposed adoption and amendment of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking or need an alternative accessible format of this notice. If you require an accommodation, please advise the department of the nature of the accommodation needed, no later than 5 p.m. on September 17, 2021. Please contact Todd Olson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or todd.olson@mt.gov.

3. Upon review of the comments and testimony provided in writing or at the August 13, 2021 administrative rules hearing, the department proposes changes to the amendments proposed to ARM 42.39.123 described in paragraph 4.

The adoption of New Rules I and II contained in the original MAR notice remains as proposed.

4. ARM 42.39.123 is being amended from the original proposal notice, new matter underlined, deleted matter interlined:

42.39.123 ADVERTISING (1) A licensee may promote its business and market its brand but may not advertise marijuana or marijuana products except in electronic advertising.

(2) "Advertise or advertising" means the publication, dissemination, solicitation, or circulation of visual, oral, or written communication to directly induce any person to purchase or consume marijuana or marijuana products. Advertising does not include branding, marketing, or packaging and labeling of marijuana and marijuana products.

(3) "Billboard" means a sign that directs attention to a business, commodity, service, entertainment, or attraction sold, offered, or existing elsewhere than upon the same premises where such sign is displayed.

(1) remains as proposed but is renumbered (4).

~~(2) (5) A licensee's advertising, including any outdoor signage, may not use colloquial terms for marijuana or marijuana products (e.g., pot, reefer, ganja, weed) or contain depictions, either in whole or in part, of marijuana plants, marijuana products, or marijuana paraphernalia. For purposes of this rule, "depiction" means:~~

~~(a) for marijuana plants: except as otherwise provided in (4), an image or visual representation of a cannabis leaf, plant, or the likeness thereof, that explicitly suggests or represents a cannabis leaf or plant.~~

~~(b) for marijuana products: and may not use an image or visual representation of useable marijuana, marijuana-infused products, marijuana concentrates, marijuana paraphernalia, or an image that indicates the presence of a product such as smoke, edibles, etc.~~

~~(3) All advertising must be in black font with white background and include in a type size at least ten percent of the largest type used in the advertisement:~~

~~(a) the phrase: "Licensed by the DOR Cannabis Control Division."~~

~~(b) text that states marijuana or marijuana products may be purchased or possessed only by persons 21 years of age or older.~~

~~(c) the following warnings:~~

~~(i) "This product has intoxicating effects and may become habit forming.";~~

~~(ii) "Marijuana can impair concentration, coordination, and judgment. Do not operate a vehicle or machinery under the influence of this drug.";~~

~~(iii) "There may be health risks associated with consumption of this product.";~~

and

~~(iv) "For use only by adults 21 years of age and older. Keep out of the reach of children."~~

~~(4) A licensee may use the department provided image of a green cross, denoting a medical marijuana provider, in its advertising. The department will make the image available to licensees via its website.~~

~~(5) A marijuana business may display outdoor signage, not to exceed more than two separate signs for the licensed premises. A marijuana business' signage may only be located on the grounds of the licensed premises. Double-sided signs or signs with text visible on opposite sides are permissible and count as a single sign provided the sign is contained in, or affixed to, a single structure.~~

~~(a) Outdoor signage:~~

~~(i) may only identify the retail outlet by the licensee's business name or trade name;~~

~~(ii) must be affixed to a building or permanent structure and each sign is limited to 1,600 square inches in size;~~

~~(iii) must include the warning language provided for in (3)(c);~~

~~(iv) may state the business's website address, hours of operation, or phone number; and~~

~~(v) may not advertise discounts or sale items.~~

~~(6) A sign affixed to the licensed premises or in the window of a licensed premises may indicate whether the licensee is open for business, closed for~~

~~business, the hours of operation, that the licensed premises has an ATM inside. Other informational signs not related to the products or services of the marijuana business are not considered advertising for the purposes of this rule.~~

~~(7) Advertising placed on outward-facing windows within the licensed premises must meet the requirements for outdoor advertising provided in this rule and does not count against the two-sign allowance.~~

(6) A licensee's outdoor signage must comply with any applicable local jurisdiction sign ordinances and regulations.

~~(8) (7) A marijuana business that ~~advertises via~~ maintains a webpage must utilize appropriate measures to verify that individuals visiting the webpage are ~~over~~ 21 years of age or older.~~

(8) Marijuana business social media accounts that advertise marijuana or marijuana products must be private and must contain a clearly visible notice on the main page stating that only persons 21 years of age or older may follow the account.

(9) A marijuana business may not:

(a) and (b) remain as proposed

~~(c) engage in advertising on social media platforms such as Facebook, Twitter, Instagram, YouTube, TikTok, or Snapchat;~~

(d) remains as proposed but is renumbered (c).

~~(e) (d) engage in advertising or utilize signage that asserts its products are safe because they are tested by a licensed testing laboratory;~~

(e) utilize a billboard;

~~(f) sponsor a charitable, sports, or similar event;~~

~~(g) offer promotional items such as giveaways, coupons, and distribution of branded or unbranded merchandise;~~

~~(h) place or maintain, or cause to be placed or maintained, any sign or other advertisement or flyer for a marijuana business or marijuana product in a publicly accessible bathroom or on or in a private vehicle, public transit vehicle, public transit shelter, bus stop, taxi stand, transportation waiting area, airport, or any similar transit-related location;~~

~~(i) except as provided in (5), deploy outdoor signage, including billboards, flags, or banners;~~

(j) and (k) remain as proposed but are renumbered (f) and (g).

(10) The prohibition in (9)(c) does not prohibit the use of informational pamphlets for dissemination at marijuana trade conferences or the use or distribution of business cards.

(11) The prohibition in (9)(d) does not prohibit a marijuana business from asserting that its products have been tested by a licensed marijuana testing laboratory.

(10) remains as proposed but is renumbered (12).

AUTH: Section 3, Ch. 505, L. 2021; 50-46-341, 50-46-344, MCA

IMP: 50-46-341, MCA

5. The statement of reasonable necessity is being amended as follows, new matter underlined, deleted matter interlined:

REASONABLE NECESSITY: The department proposes to amend ARM 42.39.123 which is necessary for the department to implement the provisions of House Bill 249 (2021)(HB 249) and its amendments to 50-46-341, MCA.

As an initial point, the existing rule implements advertising prohibitions found in 50-46-341, MCA, which apply to the Montana Medical Marijuana Act (Act). Prior to the passage of HB 249, the Act and this rule do not adequately address those activities that constitute prohibited advertising. For instance, HB 249 now allows medical marijuana businesses to engage in some electronic advertising activity which was previously prohibited. ~~HB 249 also confirms the legislature's desire to severely curtail forms of advertising pertaining to the sale, cultivation, or manufacture of marijuana.~~

Because the department is now responsible for administering the entirety of Montana's marijuana regulatory framework for both medical and recreational use, as passed under the provisions of Initiative No. 190 (Nov. 3, 2020), House Bill 701 (2021), HB 249, and other relevant legislation, it is necessary for the department to strike the content in current (1) and (2) and propose medical marijuana advertising requirements which are consistent with the intent of the legislature and the Act, as amended.

Section 50-46-341(4), MCA, instructs the department to adopt rules to "clearly identify the activities that constitute advertising that are prohibited..." To implement these directives, the department proposes (1); through (4) (2), ~~and (3)~~ to list the specific criteria that all medical marijuana businesses must follow when engaging in the types of electronic or outdoor advertising that is allowed. ~~The department believes the proposed restrictions address many of the areas authorized under HB 249. Section (3) specifically addresses circumstances in licensee advertising where required billboard or signage phrasing has been intentionally obscured through font and background color combinations.~~

Proposed ~~(4) through (7)~~ (5) and (6) identify the outdoor signage requirements and allowances that will be permitted. The department believes these proposed advertising guidelines, ~~including the use of the department approved image~~, are necessary and fall within the department's authority and discretion delegated to it by the legislature under HB 249 and 50-46-341, MCA.

Proposed ~~(8)~~ (7) and (8) requires a business that utilizes a website or social media accounts to verify that a person under the age of 21 does not access its contents, which is necessary and consistent with the other age-appropriate restrictions expressed throughout the Act. The department proposes ~~(9)(a) through (e)~~ and (b) to identify and specify the types of electronic advertising restrictions that remain in place, and ~~(9)(d)~~ (c) through ~~(k)~~ (g) to identify and specify the types of advertising activities that are prohibited. The department also proposes (10) and (11) to add exemptions to the advertising prohibitions in (9)(c) and (d) for necessary clarity of purpose.

Finally, the department proposes to include a provision in ~~(10)~~ (12) that all marijuana businesses must be in compliance with the requirements of the rule by January 1, 2022. The department contends this accommodation is necessary and is advisable because it allows a reasonable period of transition for the industry to modify or terminate non-compliant advertising or wind down contractual advertising obligations with third-party advertising sources.

6. No additional public hearing will be held to consider this amended proposal notice.

7. The department is extending the comment period for this proposed rulemaking in accordance with 2-4-305, MCA, as described in paragraph 8.

8. Concerned persons may submit their data, views, or arguments in writing to Todd Olson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or e-mail todd.olson@mt.gov and must be received no later than 5:00 p.m., September 20, 2021.

/s/ Todd Olson
Todd Olson
Rule Reviewer

/s/ Brendan Beatty
Brendan Beatty
Director of Revenue

Certified to the Secretary of State August 31, 2021.