

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

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

NOTICE OF PUBLIC HEARING ON
PROPOSED ADOPTION AND
AMENDMENT

TO: All Concerned Persons

1. On August 13, 2021, at 10:30 a.m., the Department of Revenue (department) will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana 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 public hearing 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 July 30, 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. The rules as proposed to be adopted provide as follows:

NEW RULE I PROVIDER AND MARIJUANA-INFUSED PRODUCTS PROVIDER TIER 10 THROUGH TIER 12 CANOPY LICENSE AND REGISTERED PREMISES REQUIREMENTS (1) Pursuant to 50-46-305, MCA, the department is authorized to create additional tiered canopy licenses for providers and marijuana-infused products providers that meet the statutory criteria. The additional tiered canopy licenses are as follows:

(a) A tier 10 canopy license that allows for a canopy of up to 30,000 square feet at up to seven registered premises. A minimum of 24,000 square feet must be equipped for cultivation.

(b) A tier 11 canopy license that allows for a canopy of up to 40,000 square feet at up to eight registered premises. A minimum of 31,000 square feet must be equipped for cultivation.

(c) A tier 12 canopy license that allows for a canopy of up to 50,000 square feet at up to nine registered premises. A minimum of 39,000 square feet must be equipped for cultivation.

AUTH: 50-46-305, MCA

IMP: 50-46-305, MCA

REASONABLE NECESSITY: The department proposes to adopt New Rule I to establish the square footage and premises requirements for the tiers 10 through 12 canopy licenses. The additional tiers and New Rule I are necessary because the department has been petitioned by a provider meeting the criteria under 50-46-305, MCA, to create the additional tiers by rule. The department also contends it is in the best interests of providers to create the additional tiers now to reduce administrative issues the department may confront once the majority of House Bill 701 (2021) (HB 701) amendments to the Montana Medical Marijuana Act, 50-46-301, et. seq., MCA, (Act) become effective on January 1, 2022. The department proposes to allow providers to apply to increase their canopy license upon adoption of the new rules which will be prior to January 1, 2022. The department proposes the stated canopy sizes because they are the same sizes established for cultivator canopy licenses under section 4, HB 701, and consistent canopy sizes are good for the department's administration of the Act.

NEW RULE II PROVIDER AND MARIJUANA-INFUSED PRODUCTS PROVIDER TIER 10 THROUGH TIER 12 CANOPY LICENSE ANNUAL FEE REQUIREMENTS

(1) Annual fees for providers and marijuana-infused products providers for canopy license tiers 10 through 12 are:

- (a) \$27,000 for a tier 10 canopy license;
- (b) \$32,000 for a tier 11 canopy license; and
- (c) \$37,000 for a tier 12 canopy license.

AUTH: 50-46-344, MCA

IMP: 50-46-305, MCA

REASONABLE NECESSITY: The department proposes to adopt New Rule II which is necessary to support the creation of the new tiers 10 through 12 canopy licenses in New Rule I. The department proposes the stated canopy license fees because they are the same as the amounts established for cultivator canopy licenses under section 4, HB 701, and consistent license fee structures are good for the department's administration of the Act.

FISCAL IMPACT

Based on New Rules I and II, and in accordance with 2-4-302(1)(c), MCA, the department's proposed annual fee will have a fiscal impact, but that impact is somewhat indeterminable because the fiscal impact applies only to those providers and marijuana-infused products providers who meet the operational criteria and apply to upgrade to a higher canopy license. As of the date of this notice, the department is aware of fewer than five providers that have expressed an interest in upgrading their canopy tier.

4. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

42.39.123 ADVERTISING ~~(1) Prohibited activities include:~~

~~(a) the use of any written or verbal statements, photos, symbols, or depictions of marijuana or marijuana products, on any medium accessible to the general public; or~~

~~(b) the use of vocabulary or prices on any medium accessible to the general public that leads a reasonable person to believe that the term or prices used identifies or describes marijuana or marijuana products.~~

~~(2) A licensee may use the phrase "DPHHS Montana Medical Marijuana Program Licensed Provider" in its signage, on a website homepage, or on its promotional materials.~~

(1) A licensee may use the phrase "marijuana" or "cannabis" in its signage or in its electronic advertising.

(2) 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: 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.

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

(9) A marijuana business may not:

(a) engage in advertising via marketing directed towards location-based devices, including, but not limited to cellular phones, unless users affirmatively opt in to receiving push notifications related to marijuana or marijuana-related products;

(b) utilize unsolicited pop-up or push-to advertising on the internet;

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

(d) advertise on television, radio, or in print such as newspapers, magazines, flyers, and mailers;

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

(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) use objects such as toys or inflatables, movie or cartoon characters, or any other depiction or image likely to be appealing to youth, where the objects, images, or depictions indicate an intent to cause youth to become interested in the purchase or consumption of marijuana products; or

(k) use or employ a commercial mascot outside of, and in proximity to, a licensed marijuana business. A "commercial mascot" means a live human being, animal, or mechanical device used for attracting the attention of motorists and passersby so as to make them aware of marijuana products or the presence of a marijuana business. Commercial mascots include, but are not limited to, inflatable

tube displays, persons in costume, or wearing, holding, or spinning a sign with a marijuana-related commercial message or image, where the intent is to draw attention to a marijuana business or its products.

(10) The department's enforcement of the advertising restrictions provided under this rule shall begin on January 1, 2022.

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

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), (2), and (3) to list the specific criteria that all medical marijuana businesses must follow when engaging in the types of 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) identify the 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) requires a business that utilizes a website 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 (c) to identify and specify the types of electronic advertising restrictions that remain in place, and (9)(d) through (k) to identify and specify the types of advertising activities that are prohibited.

Finally, the department proposes to include a provision in (10) 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.

5. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted 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 August 23, 2021.

6. Todd Olson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

7. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notice regarding particular subject matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. A written request may be mailed or delivered to the person in number 5 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

8. An electronic copy of this notice is available on the department's web site at www.mtrevenue.gov, or through the Secretary of State's web site at sosmt.gov/ARM/register.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor for HB 249, Representative Matt Regier, was contacted by email on June 7, 2021, and on July 9, 2021.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the proposed adoption of New Rules I and II will not significantly and directly impact small businesses.

With regard to the requirements of 2-4-111, MCA, the department has determined that the proposed amendment of ARM 42.39.123 may significantly and directly impact small businesses, but any such significant or direct small business impact is attributable to the department through the implementation of the statutory advertising requirements of HB 249.

/s/ Todd Olson
Todd Olson
Rule Reviewer

/s/ Scott Mendenhall
Scott Mendenhall
Deputy Director of Revenue

Certified to the Secretary of State July 13, 2021.