BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of NEW RULES I through III and the amendment of ARM 42.39.104, 42.39.115, 42.39.401, 42.39.405, 42.39.409, 42.39.413, and 42.39.415 pertaining to implementation of House Bills 128, 903, and 948 (2023), and revising requirements applicable to chemical, infused product, and mechanical manufacturers of marijuana	)	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On December 22, 2023, the Department of Revenue (department) published MAR Notice No. 42-1072 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1817 of the 2023 Montana Administrative Register, Issue Number 24.

2. On January 18, 2024, the department held a public hearing to consider the proposed adoption and amendment. The following commenters appeared and provided oral testimony to the proposed rulemaking: Pepper Petersen, Montana Cannabis Guild (Guild); Antonette Lininger, Sacred Sun Farms; Kate Cholewa, Montana Cannabis Industry Association (MTCIA); Shanda Hayward and Tamara Hayward, Secured Canna T. The department received written comments from Anthony Saur, the Green Bee; Joanna Barney, Sacred Sun Farms; Jen Hensley, Hensley & Associates; and Kate Cholewa, MTCIA.

3. The department has adopted NEW RULE I (42.39.402) and amended ARM 42.39.115 and 42.39.415 as proposed.

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

NEW RULE II (42.39.403) MARIJUANA MANUFACTURER LICENSEE ~~–~~ INFUSED PRODUCTS (1) and (2) remain as proposed.

(3) A marijuana manufacturer licensee that engages in marijuana-infused product manufacturing may not:

(a) utilize a branded, commercially manufactured food product (e.g., Chex Mix, Nerds Ropes) as a marijuana-infused product except when commercially manufactured food products are used as ingredients in a marijuana-infused product in a way that renders them unrecognizable as the commercial food product in the final marijuana-infused product and the licensee does not state or advertise to the

consumer that the final marijuana-infused product contains the commercially manufactured food product except on the product's ingredient list;

(b) through (d) remain as proposed.

~~(4) A marijuana manufacturer licensee that produces marijuana-infused products must have current, written SOPs at the licensed premises available for inspection that detail the following:~~

~~(a) an employee illness policy that requires employees to report to the person in charge information about their health and activities as they relate to diseases that are transmissible through food; and~~

~~(b) procedures for monitoring and maintaining refrigeration and cold holding equipment, if applicable.~~

AUTH: 16-12-104, 16-12-112, 16-12-221, MCA
IMP: 16-12-104, 16-12-109, 16-12-112, 16-12-201, 16-12-203, 16-12-207, 16-12-208, 16-12-210, 16-12-221, 16-12-301, MCA

NEW RULE III (42.39.404) MARIJUANA MANUFACTURING LICENSE – MECHANICAL MANUFACTURING (1) remains as proposed.

~~(2) A marijuana manufacturer licensee must have current, written SOPs at the licensed premises available for inspection that details the procedures for the safe handling, maintenance, and storage of a hydraulic press.~~

AUTH: 16-12-104, 16-12-112, 16-12-221, MCA
IMP: 16-12-104, 16-12-109, 16-12-112, 16-12-201, 16-12-203, 16-12-207, 16-12-208, 16-12-210, 16-12-221, 16-12-301, MCA

42.39.104 LICENSE, APPLICATION, AND RENEWAL FEES (1) Initial licensure and renewal fees for the following license types and endorsements are:

(a) through (c) remain as proposed.

(d) Marijuana dispensary license: $5,000 per licensed premises.

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

~~(e)~~ (f) Manufacturer license:

(i) remains as proposed.

(ii) $10,000 for each manufacturing facility that produces, on a monthly basis, between ten and 15 pounds of concentrate; and

(iii) $20,000 for each manufacturing facility that produces, on a monthly basis, ~~between~~ 15 ~~and 20~~ pounds or more of concentrate~~;~~.

~~(iv) $30,000 for each manufacturing facility that produces, on a monthly basis, between 20 and 30 pounds of concentrate;~~

~~(v) $40,000 for each manufacturing facility that produces, on a monthly basis, between 30 and 40 pounds of concentrate;~~

~~(vi) $50,000 for each manufacturing facility that produces, on a monthly basis, between 40 and 50 pounds of concentrate;~~

~~(vii) $60,000 for each manufacturing facility that produces, on a monthly basis, over 50 pounds of concentrate.~~

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

(2) through (4) remain as proposed.

~~(5) Application to change or update controlling beneficial owners, financial interest holders, sources of funding, or other business organization: $1,000, which is nonrefundable and must be paid in full before the department will begin processing the application.~~

(6) remains as proposed but is renumbered (5).

AUTH: 16-12-112, 16-12-202, 16-12-221,16-12-222, 16-12-226, 16-12-508, 16-12-533, MCA
IMP: 16-12-112, 16-12-221, 16-12-222, 16-12-226, 16-12-508, 16-12-533, MCA

42.39.401 MARIJUANA MANUFACTURER LICENSES – GENERAL PROVISIONS (1) through (9) remain as proposed.

(10) A marijuana manufacturer licensee must have current, written SOPs at the licensed premises and available for inspection for the following:

(a) each category and type of marijuana that it produces ~~for each final form product, the equipment, ingredients, and manufacturing process used, which shall be kept confidential by the department~~;

(b) remains as proposed.

(c) proper handling and storage of any solvent, gas, or other chemical used in processing or on the licensed premises; and

(d) proper disposal of any waste produced during processing in accordance with ARM 42.39.310~~;~~.

~~(e) how employees are trained in the use of all emergency equipment such as eye-wash stations, fire extinguishers, chemical spill kits, or any applicable safety concern; and~~

~~(f) precautions to ensure that employees with illnesses or open lesions be excluded from any operations which may be expected to result in contamination of marijuana products until their condition is corrected.~~

(11) A marijuana manufacturer licensee and an employee of a marijuana manufacturer licensee may only transport marijuana and marijuana products that are in the licensee's seed-to-sale tracking system inventory in accordance with 16-12-222(4), MCA, and ARM 42.39.413(3) through ~~(18)~~ (16) and may not transport the marijuana or marijuana products of other licensees without a marijuana transporter license.

AUTH: 16-12-112, MCA
IMP: 16-12-221, 16-12-222, MCA

42.39.405 MARIJUANA CULTIVATOR LICENSES (1) through (9) remain as proposed.

(10) A marijuana cultivator licensee must maintain a log of all pesticides, fertilizers, or other agricultural chemicals used in the production of marijuana in the seed-to-sale tracking system, which must be updated ~~weekly~~ monthly. The log shall be kept confidential by the department.

(11) remains as proposed.

(12) A marijuana cultivator licensee and an employee of a marijuana cultivator licensee may only transport marijuana and marijuana products that are in the licensee's seed-to-sale tracking system inventory in accordance with 16-12-222(4), MCA, and ARM 42.39.413(3) through ~~(18)~~ (16) and may not transport the marijuana or marijuana products of other licensees without a marijuana transporter license.

AUTH: 16-12-112, MCA
IMP: 16-12-112, 16-12-203, 16-12-210, 16-12-221, 16-12-222, 16-12-223, MCA

42.39.409 MARIJUANA DISPENSARY LICENSES (1) through (6) remain as proposed.

(7) A marijuana dispensary licensee may not sell a branded, commercially manufactured food product (e.g., Chex Mix, Nerds Ropes) as a marijuana-infused product except when commercially manufactured food products are used as ingredients in a marijuana-infused product in a way that renders them unrecognizable as the commercial food product in the final marijuana-infused product and the licensee does not state or advertise to the consumer that the final marijuana-infused product contains the commercially manufactured food product except on the product's ingredient list.

(8) through (15) remain as proposed.

(16) A marijuana dispensary licensee and an employee of a marijuana dispensary licensee may only transport marijuana and marijuana products that are in the licensee's seed-to-sale tracking system inventory in accordance with 16-12-222(4), MCA, and ARM 42.39.413(3) through ~~(18)~~ (16) and may not transport marijuana or marijuana products of other licensees without a marijuana transporter license.

(17) and (18) remain as proposed.

AUTH: 16-12-112, 16-12-222, MCA
IMP: 16-12-112, 16-12-201, 16-12-222, 16-12-224, MCA

42.39.413 TRANSPORTATION OF MARIJUANA AND MARIJUANA PRODUCTS; MARIJUANA TRANSPORTER LICENSES (1) and (2) remain as proposed.

(3) All distribution and delivery of marijuana and marijuana products must:

(a) and (b) remain as proposed.

(c) be accompanied by a transport manifest derived from the seed-to-sale tracking system that contains the following information and remains with the product the entire time in transit:

(i) and (ii) remain as proposed.

~~(iii) the most direct route to be traveled to complete the transport;~~

(iv) through (vi) remain as proposed but are renumbered (iii) through (v).

~~(vii)~~ (vi) name and signature of each licensee or its employee accompanying the transport; and

~~(viii)~~ (vii) a complete description of the marijuana or marijuana product being transported. The description must include:

(A) through (C) remain as proposed.

(d) be accomplished within ~~72 hours~~ seven days from the date and time of departure.

(4) If the transport requires an overnight stay during the planned direct route to complete the transfer, the transporting licensee must:

(a) and (b) remain as proposed.

(c) store the in-transit product in ~~the~~ a licensee's licensed premises.

(5) The transporter of the marijuana or marijuana product must record in the seed-to-sale tracking system:

(i) and (ii) remain as proposed but are renumbered (a) and (b).

(6) through (8) remain as proposed.

~~(9) A receiving licensed premises may not accept any marijuana or marijuana products from a transporter that does not match the description and/or quantity shipped on the transport manifest.~~

(10) and (11) remain as proposed but are renumbered (9) and (10).

~~(12) Except as provided in (b), a receiving licensed premises must reject a transport that contains marijuana or marijuana products that do not match the description and/or quantity shipped on the transport manifest.~~

~~(a) Transport manifest discrepancies must be reconciled by the originating licensee at the originating licensed premises prior to transport.~~

~~(b) A receiving licensed premises may accept packages on a transfer manifest with a +/- of 0.9 grams per pound for scale variance and -5 to -7 grams per pound for drying.~~

(13) through (18) remain as proposed but are renumbered (11) through (16).

AUTH: 16-12-112, 16-12-222, MCA
IMP: 16-12-112, 16-12-222, 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: Ms. Lininger commented about manufacturer licenses that amounted to a request to the department to authorize a manufacturing "site license" under NEW RULES I through III that would allow a manufacturer to engage in its various types of manufacturing at more than one designated site.

Ms. Barney similarly commented that manufacturers should be licensed like cultivators. Ms. Barney questioned whether rules for cultivators may be applied to manufacturers and attempted to validate similar licensing standards because both cultivators and manufacturers are described as having "tiered" licensing in administrative rule and in department publications.

RESPONSE 1: Manufacturing facilities are licensed per the requirements of 16-12-221, MCA, and unlike a cultivator and cultivation tiers who may have multiple facilities under the license (i.e., sites), a manufacturer licensee can only obtain one

license for one facility. While a manufacturer licensee may engage in more than one type of manufacturing, as is supported by (1) in each of NEW RULES I through III, any combination of manufacturing activities are still conducted at one licensed facility. Any change to manufacturing facility licensing would require an act of the Legislature to amend 16-12-221, MCA.

As to Ms. Barney's comments about "tiers," the department uses the same word to describe both cultivator and manufacturer production thresholds for license fees, but the term is not vague or inconsistently applied, nor does it create a conflict elsewhere.

COMMENT 2: Ms. Lininger requested additional clarity in NEW RULE II(3)(a) and ARM 42.39.409(7), which transfers the commercially manufactured food product restrictions from ARM 42.39.401(12), to reflect the allowance of food product description in an ingredients list for a marijuana food product.

RESPONSE 2: The department agrees that disclosure of a commercial food product by its popular name on a marijuana product's ingredients list is permissible. Based on the comment, the department has amended NEW RULE II(3)(a) and ARM 42.39.409(7) to reflect the allowance.

COMMENT 3: Ms. Lininger commented that the department's proposals in NEW RULE I(4) are burdensome requirements that, potentially, require the disclosure of an individual's protected health information beyond the applicable laws which protect that information. Ms. Lininger requested amendment of the rule to remove the requirement.

RESPONSE 3: Based on the comments provided, the department concurs and has removed NEW RULE I(4) upon adoption.

COMMENT 4: Similar to Comment 3, Ms. Lininger questions the need for the department's proposals for an additional SOP in NEW RULE III(2) on the basis of it placing an unnecessary burden upon a licensee which is outside the scope of the department's regulatory purview.

RESPONSE 4: Montana businesses, including manufacturing licensees, should implement self-directed, safe manufacturing practices, but many do not. However, manufacturer licensees are also subjected to other regulatory requirements in the operation of their businesses, such as building, health, and fire code compliance. With this understanding, the department agrees to withdraw the SOP requirement in NEW RULE III(2) and will defer to a jurisdiction's respective code enforcement officials to determine safe manufacturing practice compliance.

COMMENT 5: The department's proposal to strike current ARM 42.39.104(1)(d) was proposed as an anticipatory response for dispensary licensees based on litigation that was pending at that time in the Montana First Judicial District Court for Lewis and Clark County which challenged dispensary license fee increases enacted under House Bill 903 (2023).

RESPONSE 5: By its Order dated January 5, 2024, the Court requires the state to return to the dispensary license fee structure reflected in ARM 42.39.104(1)(d) prior to the department's proposal to strike. Accordingly, the department has reinstated ARM 42.39.104(1)(d).

COMMENT 6: Mr. Petersen provided extensive commentary about the department's new marijuana manufacturing production tier revisions proposed in ARM 42.39.401. While much of the commentary was outside the scope of this rulemaking, Mr. Petersen commented the Guild's disagreement with the structuring of the proposed tiers and corresponding license fees. Mr. Petersen commented that the increased license fees were burdensome on small businesses yet penalized larger businesses for achieving economies of scale, and do not align with the legislative directive in 16-12-112, MCA, that fees may not exceed the amount necessary to cover department costs implementing marijuana regulation. Mr. Petersen requested a return to status quo or, in the alternative, that the department revise manufacturing to two tiers: one for small manufacturers and one for large manufacturers.

Ms. Lininger commented similar to Mr. Petersen regarding the number of proposed manufacturing tiers and suggested three tiers that cover zero to ten pounds, 11 to 20 pounds, and 21 to 30 pounds of average monthly manufactured concentrate.

Ms. Cholewa commented the reality that business owners (i.e., licensees) will always want lower license fees and that MTCIA seeks survival of variety in Montana's marketplace which includes a balance of fee structures. Ms. Cholewa commented that two tiers would only result in an inexpensive license tier and an expensive license tier. She commented MTCIA's support of a more stratified tier schedule like the proposed model but also one agreeable to businesses. Ms. Cholewa and the MTCIA believe, however, that additional discussion – and likely legislation – is necessary to strike a balance across all manufacturing licensees. Ms. Cholewa also requested the department provide clarity regarding how manufacturing production is measured and how consistency is applied from inspector to inspector.

Ms. Barney commented that there is inconsistency in the language of the manufacturing license fee in rule relative to the pound amount of concentrate manufactured by a licensee. Ms. Barney directs attention to the term "on a monthly basis" in the existing and proposed tiers and that the overage calculation is supposed to be the average production on a monthly basis over a twelve-month period. For example, a tier 3 licensee can produce up to 180 pounds of concentrate per year, which is an average monthly production of 15 pounds of concentrate, even if the volume of production varies from month to month within the twelve-month license period. Ms. Barney suggests clarifying definitions for (1) the calculation period (calendar year, license year, fiscal year); (2) "monthly basis"; (3) "shall pay an additional $1,000 per pound"; and (4) what concentrate is counted towards the amount of pounds-produced for tier designation (or overage). Is this the point of conversion from plant into extracted oil, infused fatty medium, or refined final product?

RESPONSE 6: The department appreciates the various points of view expressed by the commenters.

The department disagrees with Mr. Petersen that the proposed production-related license fees conflict with the intent of 16-12-112, MCA. The department also contends that a manufacturer license fee schedule tiered on production is the most equitable and penalizes neither small nor large licensees if the fee increases are proportional with production.

The department appreciates Ms. Cholewa's comments concurring in tiered license fee structures and agrees that additional policy guidance from the Legislature regarding manufacturing tiers is likely necessary.

Based on the comments received and weighing the department's duty and ability to provide an equitable and predictable tier structure, the department has removed the proposed multi-tier structure and expanded the existing third manufacturing license tier in (1)(f)(iii) to reflect a monthly average over the prior 12 months of 15 pounds or more of finalized concentrate. This is somewhat similar to Ms. Lininger's suggestion but without a stated cap at tier 3.

In response to Ms. Cholewa's request to improve clarity and application of department processes regarding measurement of production to its inspectors, the department responds that it is not the inspectors who analyze and determine concentrate production and the role of an inspector is generally limited to the delivery of a concentrate production report to a licensee. The Cannabis Control Division (CCD) utilizes a dedicated business analyst who has developed a detailed and verifiable procedural model for the estimation of concentrate manufacturing based on concentrate production information that manufacturing licensees input into METRC. Should Ms. Cholewa desire a copy of the model process for production estimation, she may request it directly from the CCD.

In response to Ms. Barney, the phrase "on a monthly basis" in ARM 42.39.104 mirrors what the Legislature provides in 16-12-221(6), MCA, and the consistency in rule is necessary. As to additional clarity of the calculation period, the department has already provided it in ARM 42.39.401(5): "In determining whether a marijuana manufacturer licensee has manufactured above its licensure level, the department will determine the average amount of concentrate produced each month over the previous 12 months." The department contends this level of clarity is sufficient. In response to the $1,000 per pound license fee for concentrate manufacturing overage, the department directs Ms. Barney to the amendments in the rule which removed the per pound fee and adjusted the manufacturing tiers upon adoption of this rulemaking.

Regarding Ms. Barney's question about what concentrate is counted towards production, or overage, the department refers Ms. Barney to its response about the restructured tiers, to its response to Ms. Cholewa about its model process for production reporting, and that the department's production calculation policy is based on a finalized concentrate model that seeks to exclude intermediate crude from consideration when calculating the appropriate manufacturing tier level, or any potential production overages. Similar to the department's offer to Ms. Cholewa, should Ms. Barney desire a copy of the concentrate production model process, she may request it directly from the CCD.

COMMENT 7: The department received testimony at the public hearing from Mr. Petersen and Ms. Lininger that the application fees proposed in ARM 42.39.104(5) and the existing change of location fee transferred from ARM 42.39.104(6) to (1)(g) are excessive. Mr. Petersen believes the application fees proposed in (5) exceed the amount of any additional work expended by the department in the review and approval of the listed transactions. Ms. Lininger offered the suggestion that the department allow license changes such as those listed in proposed (5) to be done for minimal cost or for free at the annual renewal of a license.

Mr. Saur commented similarly to Mr. Petersen and Ms. Lininger regarding the application fee proposed in ARM 42.39.104(5).

RESPONSE 7: The Legislature authorized the department to designate certain fees sufficient to administer and enforce the Montana Marijuana Regulation and Taxation Act (Act) (see 16-12-112(1)(q), MCA).

The department appreciates the comments regarding the location change fee transferred to ARM 42.39.104(1)(g), but this is not a new fee, and it reflects a substantial transaction requiring a substantial amount of department time and resources to process and approve, which the department stated in the fee's adoption under MAR Notice No. 42-1033 (effective January 1, 2022). The department continues to believe the fee is appropriate and declines to change it at this time.

In response to comments about the application fee in proposed ARM 42.39.104(5), the department has withdrawn consideration of the fee, and removed proposed (5), while more data is collected regarding the amount of department time and resources that is expended on processing the types of transactions associated with the proposed fee.

In response to Ms. Lininger's comments about no-fee changes, the department affirms its previous response that most current license change transactions require department time and resources to process and approve and that commensurate application processing fees to the transaction are justifiable. However, the department believes it is foreseeable that certain license changes become rudimentary and warrant no-fee processing as licensing systems progress and increase in efficiency.

COMMENT 8: Similar to Comment 4, Ms. Lininger commented on the department's amendments proposed in ARM 42.39.401(10)(e) and (f) on the basis of placing an unnecessary burden upon a licensee which is outside the scope of the department's regulatory purview. Ms. Lininger also commented that the amendments in (10)(a) appeared unnecessary and the desired effect could be reached replacing the word "marijuana" in the existing text with "product."

RESPONSE 8: The department has removed ARM 42.39.401(10)(e) and (f) for the same reasons provided in Response 4. As for the proposed amendment in (10)(a), upon further consideration, the department has removed the amendment and reinstated the prior text upon adoption.

COMMENT 9: The department received testimony at the public hearing from Mr. Petersen and Ms. Lininger regarding the department's proposals in ARM 42.39.405(10) regarding the frequency of logging pesticides, fertilizers, and other agricultural chemicals into the seed-to-sale tracking system. While the commenters were appreciative of the extension of data entry time from daily to weekly, they requested the period of time to be monthly.

RESPONSE 9: The department responds that the current rule section provided no logging frequency and the proposed amendment sought clarity and sought to lessen the current daily requirement interpretation.

The department appreciates the feedback and has amended the frequency of logging in ARM 42.39.405(10) to the suggested monthly basis.

COMMENT 10: Ms. Lininger provided testimony at the public hearing which amounted to a recitation of Governor Gianforte's Executive Order 2021-01 (Red Tape Relief Initiative)(Initiative)), and suggested that the department is not weighing Initiative directives in its promulgation of administrative rules or procedures that she deems administratively burdensome. Ms. Lininger also requested the department provide data points and adopt measurable results that support proposed rulemaking.

RESPONSE 10: The department prepares all proposed rulemaking in compliance with the Montana Administrative Procedure Act (MAPA), such as the inclusion of fiscal impact and small business impact statements and bill sponsor notifications, and attempts to implement goals of the Initiative for less administrative regulation, where possible. The department also receives rulemaking approval from the Governor's office on policy matters and for meeting Initiative goals, where available, prior to proposal. Notwithstanding, MAPA and the Initiative do not supersede the department's regulatory duties under the Montana Marijuana Regulation and Taxation Act which emphasize compliance and strict liability in the interest of public health and safety.

The department appreciates Ms. Lininger's suggestion for results-oriented metrics and agrees that data-driven decisions are a best practice where regulatory structures support them, and the goals of the metrics are specified. The department contends that public policy, statute, and administrative rules regarding cannabis are still very new and inclusion of results-oriented metrics in the adoption of rules would need to reflect clarified policy goals established by the Legislature.

COMMENT 11: Mr. Petersen is critical of the department's proposed amendments to ARM 42.39.413 because wholesale deliveries are often completed by budtenders, not management of the licensee; that additional business related to wholesaling is being conducted that does not technically relate to the transport of product but adversely impacts proposed transport deadlines; and that the administrative burden associated with compliance of the proposed requirements does not solve any problem stated by the department.

RESPONSE 11: The department disagrees that the transport of marijuana and marijuana products across the state should be compared to common freight or

parcel delivery services as Mr. Petersen suggests, and that position does not correspond with the duty the Legislature delegated to the department in 16-12-222, MCA, to protect public health and safety through strict inventory and transport reporting controls. Many of Mr. Petersen's comments fall outside the scope of the rulemaking, excepting transport deadlines and administrative burdens, and the department contends the justification for the amendments to ARM 42.39.413 remains accurate and reliable.

Based on cumulative commenter feedback, the department has amended or removed certain proposals in ARM 42.39.413 upon adoption which should address Mr. Petersen's concerns regarding transport deadlines and administrative burdens.

COMMENT 12: Mr. Petersen, Ms. Lininger, Ms. Hensley, and Mss. Hayward also commented opposition to the proposed reconciliation of transported inventory, schedule variances, reasonable variance in the product received, and requested detailed clarification about transport logistics for layovers, rejection of product by the receiving licensee, logistics, human error, and placement of liability on shortages and "ownership" of product logged into METRC during a layover. Ms. Cholewa echoed the comment that human error is a real thing for which the rule does not adequately account.

RESPONSE 12: The department appreciates the constructive comments relative to transport logistics and the acceptance/rejection of inventory by a receiving licensee and the impacts on the transporter.

Based on the feedback received and the commentary at the public hearing, the department agrees that the proposals in ARM 42.39.413(9) and (12) may create unintended logistical impediments for the efficient transport of product between licensed premises. The department has removed those rule sections upon adoption. The department has also amended ARM 42.39.413(3)(d) upon adoption to extend the amount of time to complete transport from 72 hours to seven days.

As to Mss. Haywards' comments about ownership of inventory during layovers and the requirement that marijuana or marijuana products stay within a licensed premises, the department directs them to current ARM 42.39.413(11) (renumbered as (12) with this rulemaking), which provides that a transport licensee's vehicle is a licensed premises for administration of the rule; or to (15) (renumbered as (16)) which provides for an optional storage facility endorsement which a transport licensee may incorporate into its operation.

While the department appreciates Ms. Cholewa's comments regarding human error in inventory acceptance and processing, the department cannot provide a thorough response based on lack of specificity. The department directs Ms. Cholewa to ARM 42.39.203(8) which provides that "All on-premises and in-transit marijuana item inventories must be reconciled in the seed-to-sale tracking system at the close of business each day." The department believes any discrepancies in shipped inventory and the received inventory, whether due to human error or not, should be discoverable when reconciled in METRC.

COMMENT 13: Mss. Hayward both commented several instances that they believe ARM 42.39.413 requires clarity because the stated requirements apply more

to a licensee conducting an internal transfer of marijuana than a third-party transporter. They asked, "how does third party transport work in the department's eyes?" They asked further, "what is the expectation for a third-party transporter versus an internal transporter?"

RESPONSE 13: The question "how does third party transport work?" is too vague and outside the scope of the rulemaking for the department to provide a thorough response in this notice.

The department contends that ARM 42.39.413 implements what the Legislature enacted under 16-12-222, MCA, allowing the transport of marijuana or marijuana products within the state, whether that transport occurs through an independent marijuana transporter licensee (i.e., third-party transport - 16-12-222(1), MCA) or as a part of an existing licensee's operation (i.e., internal transfer - 16-12-222(4), MCA). The department concedes that transport logistics differ between third-party transport licensees and other licensees like cultivators, manufacturers, dispensaries that engage in the transport of their own product, or testing laboratories that transport sample batches for quality assurance testing. But until such time as the Legislature provides additional statutory guidance that directs specified treatment of third-party transporters from other licensees, the department is limited to proposing what it believes are prudent regulations and being open to revision based on feedback to clarify the regulatory environment for transport licensees.

COMMENT 14: Mss. Hayward indicate that proposed ARM 42.39.413(3)(c)(iii) which requires "the most direct route" as an example that applies to internal transport because planning transport routes for third-party transporters is dependent on the needs and locations of the licensees being serviced and may not be the "most direct route" if strictly construed by the department. Similar to other comments about the department's proposed 72-hour product transport deadline in (3)(d), Mss. Hayward also asked whether third-party transporters were subject to the same deadline, because many licensees want management only to accept and process deliveries, and management often does not work on weekends.

RESPONSE 14: Based the comments and feedback received, the department has removed proposed (3)(c)(iii) from ARM 42.39.413 upon adoption. As to Mss. Haywards' comments regarding the 72-hour transport deadline, the department directs them to the second paragraph of Response 12.

COMMENT 15: Mss. Hayward commented to proposed (9) through (12) that carriers/transporters should not be responsible for the contents of a transported package as long as the package is delivered intact because the third-party transporters receive packages that are locked and sealed. Whether a licensee has a discrepancy in the amount of product received, or desires to reject a shipment, should not have any bearing on the transporter and should be resolved between the shipper and recipient. Mss. Hayward also ask what is a transporter supposed to do if the receiving licensee rejects the shipment, especially if the transporter is in mid-route across the state.

RESPONSE 15: The department directs Mss. Hayward to Responses 12 and 13.

COMMENT 16: Ms. Hensley commented that proposed ARM 42.39.413(3)(c)(iv) and (v) appear to be overly complicated and conflict with proposed (5)(i). The first requires actual date but estimated times of departure and arrival; the second requires actual time. Further, does the department suggest that the transporter adjust the manifest at departure or arrival? If (5) through (7) are renumbered (6) through (8) but remain the same, then may it be interpreted to be adjustment at departure, and if that is the case, what is the point of estimate language in (iv) and (v)?

RESPONSE 16: As discussed in Response 13, ARM 42.39.413 implements what the Legislature enacted under 16-12-222, MCA. Further the department does not see the provisions in conflict because (3)(c)(iv) and (v) specify the requirements for a transport manifest that is printed from METRC, and may not be modified, whereas the requirements in (5) pertain to the transporter's entry of information into METRC upon arrival to the destination.

As to Ms. Hensley's comments about when it is appropriate for the transporter to adjust time on the manifest, the department responds that adjustment should not be necessary because time of arrival at the destination is actual time. Actual time of departure and actual time of arrival can be recorded in METRC without changing the physical transport manifest.

The department also refers Ms. Hensley to Response 12 (which describes the removal of logistical impediments to lessen certain administrative burdens), but the department declines to revise (3)(c)(iv) or (v) although the department remains open to future amendment of the rule as necessity dictates.

COMMENT 17: Ms. Hensley requests clarity whether ARM 42.39.413(9) applies to testing laboratories using their own employees; it appears to not apply. For (10), the language is unclear whether this is only applicable to the wholesale system meant for large quantities of marijuana, and not to testing laboratory samples. Transfer stations are not controlled environments and allow for the opportunity for sample contamination. Lab samples are tamper-proof, sealed after pickup, and a transfer station would have to break that seal, which is a burdensome and unreasonable requirement.

RESPONSE 17: ARM 42.39.417 applies to testing laboratories and (5) of the rule provides that marijuana testing laboratories may transport samples of marijuana and marijuana products for testing in accordance with 16-12-222(4), MCA, and ARM 42.39.413(4) through (15). With the amendment and renumbering of rule sections in ARM 42.39.413, the reference of applicable transporter regulation for marijuana testing laboratories upon adoption will be ARM 42.39.413(3) through (16).

COMMENT 18: Ms. Hensley commented that testing laboratories often receive manifests with 30 test samples directly from a licensee and have been

known to reach 250 test samples. This proposed language seems to require for the entire order to be rejected if one has a discrepancy.

RESPONSE 18: The department directs Ms. Hensley to Response 12 and the removal of proposed ARM 42.39.413(9) and (12) upon adoption which address the rejection of transported product.

COMMENT 19: Ms. Hensley requests clarification, in statute and rule, that laboratory testing facilities are not able to return test samples; and further questions if this proposed rule were to be adopted as written, what is the testing laboratory facility then required to do with the entire rejected order? How can samples be destroyed after rejecting a manifest if the samples are returned to the licensee?

Additionally, the "submitted for testing" status does not change when rejecting a test sample. The samples in METRC still say "submitted for testing" and are locked for all purposes. As a result, in the described scenario, we would see 249 samples in limbo because of one insistent sample.

Finally, for (12)(b), "-5 to -7 grams per pound for drying" is not rational with the amounts that testing laboratories use. If the transfer amount is only 3 grams, it would not be able to be accepted, although it would be within scientific boundaries for quality testing. Many of the testing laboratory samples are only 3-10 grams in total, and we would have to refuse packages for being under the weight limit, even though we could test them adequately.

RESPONSE 19: Similar to Response 18, the department directs Ms. Hensley to Response 12 and the removal of proposed ARM 42.39.413(9) and (12) upon adoption which address the rejection of transported product and also the reconciliation of actual product weight versus the entry on a transport manifest.

As to Ms. Hensley's request for clarification of statute, that would require an act of the Legislature amending 16-12-222, MCA, to add, remove, or clarify any of the stated requirements or public policy goals regarding the transport of marijuana or marijuana products.

COMMENT 20: Mr. Saur commented that current wording of ARM 42.29.413(10) mandates the immediate verification of product received against the transport manifest by count or weight. While compliance is of utmost importance, the practicality of this requirement is concerning, especially for large shipments. Given that businesses have a 72-hour window to complete related paperwork in METRC, it would be helpful to clarify if this timeframe also applies to the physical verification of shipments. This is particularly relevant for shipments that travel long distances, as immediate verification upon receipt can be challenging and may not always be feasible.

RESPONSE 20: The department refers Mr. Saur to the second paragraph of Response 12 and the amendment, upon adoption, of the transport completion deadline. Regarding the "immediate" recording of transported inventory into METRC, the department's expectation is that the receiving licensee enters receipt into METRC without any delay from the time an order is received and accepted, but

in accordance with ARM 42.39.203(8) "All on-premises and in-transit marijuana item inventories must be reconciled in the seed-to-sale tracking system at the close of business each day."

/s/ Todd Olson	/s/ Brendan Beatty
Todd Olson	Brendan Beatty
Rule Reviewer	Director of Revenue

Certified to the Secretary of State March 12, 2024.