



June 29, 2020

Representative Sharon Stewart Peregoy, Chairperson
Representative Vince Ricci, Vice-Chairperson
Economic Affairs Interim Committee
P.O. Box 201706
Helena, MT 59620

RE: Department of Public Health and Human Services Proposed Vaping Rule

Dear Chairperson Peregoy, Vice-Chairperson Ricci and Members of the Committee:

As the Executive Director and Legal Counsel of the National Association of Tobacco Outlets (NATO), a national retail trade association that represents more than 60,000 retail stores throughout the country including retail store members located in Montana, I am writing to submit our comments and concerns regarding the Montana Department of Public Health and Human Services' proposed rule prohibiting the sale of flavored electronic smoking devices.

Background on Proposed Rule: On June 16, 2020, the Montana Department of Public Health and Human Services (Department) filed a proposed rule notice that would prohibit the sale of flavored electronic smoking devices in Montana. The proposed rule is in response to the use of e-cigarette products by youth in Montana. However, it is important to note that this rule is different from the prior emergency rule banning the sale of flavored e-cigarettes to anyone of any age which went into effect on October 22, 2019 and expired on February 19, 2020. That emergency rule was only temporary in nature and was issued under 2-4-303, MCA, which allows an agency to adopt a rule lasting 120 days only in circumstances that constitute an existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any other administrative act.

Proposed Rule: The proposed rule would prohibit any person from selling, offering for sale, giving, marketing, advertising, or otherwise distributing flavored electronic smoking devices to any person within this state. Flavored electronic smoking devices include all flavors except those products with tobacco flavor. The proposed rule also prohibits transporting flavored electronic smoking devices intended for sale or distribution within Montana. The Department has scheduled a public hearing to be held via remote conferencing to consider the proposed rule on Thursday, July 16, 2020.

Legal Analysis: The Montana legislature specifies the roles and responsibilities of the Department through the Montana Code Annotated (MCA). According to the proposed rule, the department is proposing the rule pursuant to its authority under section 50-2-102, MCA, to adopt and enforce rules

regarding conditions of public health importance. However, that section of the Montana Code has been repealed. This citation may be in error as the proposed rule also appears to rely on the Department's general powers and duties under 50-1-202, MCA. To the extent that the Department is relying on its general authority to adopt and enforce rules, that authority only applies to the following situations:

1. The reporting and control of communicable diseases and other conditions of public health importance; (emphasis added)
2. The imposition of fees for testing, screening, and other services performed by the state laboratory;
3. The transportation of dead human bodies;
4. The issuance of licenses to laboratories that conduct analysis of public water supply systems; and
5. Public health requirements for school sites, including water supply and quality, sewage and waste disposal, and any other matters pertinent to the health and physical well-being of pupils, teachers, and others.

It is highly unlikely that the legislature intended the phrase "other conditions of public health importance" to be a broad blanket for anything the Department considers to be a public health issue. More likely, that phrase is tied directly to conditions related to communicable diseases, such as Covid-19, not the sale of flavored e-cigarettes. Further, the Legislature has already considered and addressed youth access to e-cigarettes in the "The Youth Access to Tobacco Products Control Act" (16-11-301, et seq, MCA), which imposes restrictions on the sale of e-cigarettes. If it had wanted to also restrict the sale of flavored e-cigarettes, the Legislature could have done that in 2019 when the increase in youth usage of electronic cigarettes was well-known. Moreover, the Legislature has the ability to consider other restrictions in the upcoming 2021 legislative session.

It does not appear that the Department has the authority to promulgate a rule banning the sale of a lawful product to legal age adults if doing so does not pose an imminent threat to public health. If the Department believes that the use of electronic cigarettes by legal-age adults is a matter of critical public health importance, then why did it take the Department four months after the temporary rule expired on February 19, 2020 to propose an across the board ban of flavored electronic cigarette products? Further, the Legislature has legislative authority to restrict the sales tobacco products, including flavored e-cigarettes, and has not delegated this authority to the Department. However, without invoking its temporary emergency rulemaking authority, the Department is attempting to do that which is specifically reserved to the Legislature, namely restricting the sale of electronic cigarette products. *See* Article V, MT Constitution. Moreover, the citizens of Montana have the power to enact laws by ballot initiative, and, to date, have chosen not to do so with regard to prohibiting flavored e-cigarettes. *Id.*

For these reasons, the proposed rule is vulnerable to a challenge on both statutory (Department does not have the authority) and constitutional (power to legislate lies with the Legislature and the people) grounds. The threat of lung injuries associated with electronic vaping products that was the reason for the adoption of emergency rule banning flavored vapor products is no longer a justification for banning flavored e-cigarettes as state emergency rules and action by the U.S. Food and Drug Administration have responded to that public health issue. For these reasons, it is unlikely that a court will give the Department the same deference to address youth usage of electronic cigarettes, particularly when the

authority to do so lies with the Legislature and since the FDA has taken steps on restricting the sale of certain flavored electronic cigarette products.

Thank you for your consideration of NATO's concerns.

Sincerely,

Thomas A. Briant

NATO Executive Director