



GOVERNOR GREG GIANFORTE  
DIRECTOR BRENDAN BEATTY

July 7, 2022

Economic Affairs Interim Committee  
Montana State Legislature  
PO Box 201706  
Helena, Montana 59620-1706

**RE: Response to Objection to MAR Notice No. 42-1048**

Chair Bogner and EAIC Committee Members,

I'm writing in response to your written objection, received by the Department on June 24, 2022, and to clarify the Department's position as we strive to work collaboratively with the Committee in adopting administrative rules in a manner that adheres to statute and captures legislative intent. Regarding EAIC's objection to MAR Notice No. 42-1048, which consisted of one proposed rule, now codified at ARM 42.39.320, the Department respectfully requests the Committee withdraw its objection because ARM 42.39.320 was adopted in substantial compliance with the Montana Administrative Procedures Act.

This Committee maintains that ARM 42.39.320 is not within the scope of authority conferred by the Legislature and is inconsistent with the enabling legislation. Specifically, this Committee asserts that ARM 42.39.320 will require "redundant approval of the same product label at the wholesale and retail levels." We maintain that this assertion is inaccurate.

Neither ARM 42.39.320 nor its enabling legislation require that product packaging or labeling be approved at the wholesale level. Section 16-12-208(8)(a), MCA, provides that "[p]rior to selling, offering for sale, or transferring marijuana or marijuana product that is for ultimate sale to a consumer or registered cardholder, a licensee or license applicant shall submit both a package and a label application, in a form prescribed by the department, to receive approval from the department." The Department interprets this provision to place the burden of securing package and label approval on dispensary licensees, as they are the only licensees that make product available for ultimate sale to a consumer or registered cardholder. Wholesalers, regardless of license type, do not need to apply for package or label approval before selling products to a dispensary

licensee. Thus, without a requirement that wholesalers submit package or label approval, there will be no redundant approval in this regard.

The Department recognizes, however, that there may be redundant approval for multiple dispensaries that sell pre-labeled or pre-packaged product purchased from the same wholesaler. As we learned from public comment at the June 14, 2022, EAIC meeting, in these instances, dispensaries will often place a sticker on the product indicating where it was sold. That sticker becomes part of the product packaging. The Legislature has tasked the Department with ensuring packaging compliance, including whatever is on a sticker added by a dispensary. For example, a sticker may say "sold by ABC Dispensary" without more and would be acceptable. However, another sticker may say "sold by ABC Dispensary" and include a cartoon character which primarily appeals to children in violation of ARM 42.39.319(1)(c); or it may say "sold by ABC Dispensary – Certified Organic Marijuana" in violation of ARM 42.39.314(5). The sticker could obscure other labeling information in violation of ARM 42.39.314(2). These examples illustrate that, in order to ensure compliance and to meet the mandates of § 16-12-208(8), MCA, the Department must review and approve each product package, even when the only distinction is the addition of a sticker.

ARM 42.39.320 seeks to reduce the number of packages that must be applied for, when possible. ARM 42.39.320(2) defines a "unique marijuana product package" to mean "a custom package that contains variations in graphic or design elements including logos." ARM 42.39.320(3) further provides that a "unique marijuana product package does not mean a package with variations in language, such as product information or instructions, or package that depicts flavor variation without an accompanying change in graphic or design, or a different size, shape or color." The result is a reduction in applications. For instance, mylar bags used for marijuana flower with different colors for indica, sativa, or hybrid used in various sizes are not unique marijuana product packages and would require only one submission. This process reduces the cost and burden on licensees while still affording the Department with the ability to adhere to the Legislative mandate in § 16-12-208(8), MCA.

This Committee also maintains that ARM 42.39.320 places burdensome costs on licensees. In response to public comment concerning fees, the Department amended the proposed rule to include a \$0 option for generic packaging and labeling. If licensees choose to sell products with unique product packaging or labeling, the cost is only \$10 per product package. For labels, the cost is only \$25, and a licensee would have a maximum of 8 total labels to submit for approval (one for each of the four product categories in ARM 42.39.315 through .318, for both medical and adult use). These fees comply with § 16-12-112(1)(q), MCA, which provides that any fee established by the

Department "must be sufficient to offset the expenses of administering this chapter but may not exceed the amount necessary to cover the costs to the department of implementing and enforcing this chapter." The fees from ARM 42.39.320 cover, but do not exceed, the costs of administering the package and label review process, which included software development for the online application process.

The process contemplated by § 16-12-208(8), MCA, and the Legislative mandate that every product package, every label, and every exit package be applied for and approved is inherently burdensome for both licensees and the Department. ARM 42.39.320 recognizes that burden and seeks to minimize it, both in terms of fees and by seeking to minimize applications through its definition of "unique marijuana product package."

Hopefully, this addresses your concerns—concerns that we appreciate and have taken seriously. As detailed above, we believe we have fairly and thoroughly addressed the Committee's issues. Accordingly, the Department respectfully urges the Committee to withdraw its objection.



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