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Economic Affairs Interim Committee

67th Montana Legislature

February 18, 2022

Brendan Beatty
Director, Cannabis Control Division
Montana Department of Revenue
P.O. Box 6308
Helena, MT 59604-6308

Dear Director Beatty,

On February 9, 2022, the Economic Affairs Interim Committee (EAIC) considered issues relating to the Department of Revenue, Cannabis Control Division's interpretation of the "tier up" statute, 16-12-223, MCA. Specifically, the EAIC considered the department's position whether the statute requires certain cultivator licensees to increase tier levels only when the license is up for its annual renewal. In sum, the EAIC maintains that 16-12-223, MCA, allows certain cultivators to increase tiers at their discretion. This letter formalizes the EAIC's position.

In crafting House Bill 701, the Legislature determined to make special exceptions for entities with existing licensees. This was done in order to transition between the existing Medical Marijuana Program and provisions approved by the electorate in Initiative I-190.[1] Thus, the Legislature afforded certain considerations for licensees that meet these requirements (from now on referred to as "existing licensees").

One of these considerations is that while 16-12-223(1)(e)(i) and (ii), MCA, would normally require a licensee to apply to the department to increase tiers one at a time, the Legislature created an exception for these existing licensees. Specifically, 16-12-223(1)(e)(iii), MCA, provides that "[b]etween January 1, 2022, and June 30, 2023, *a cultivator may increase* its licensure level by more than one tier at a time, up to a tier 5 canopy license, without meeting the requirements of subsections (1)(e)(i)(A) [requiring the cultivator to be using the full amount of

[1] *See* 16-12-201, MCA: "Between January 1, 2022, and June 30, 2023, the department may only accept applications from and issue licenses to former medical marijuana licensees that were licensed by or had an application pending with the department of public health and human services on November 3, 2020, and are in good standing with the department and in compliance with this chapter, rules adopted by the department, and any applicable local regulations or ordinances as of January 1, 2022."

canopy] and (1)(e)(i)(B) [requiring the cultivator to be selling at least 80% of the marijuana produced]." Indeed, the Legislature wrote the language to affirmatively allow the existing licensee to elect to increase tier level. Compare this language to 16-12-223(1)(e)(i), MCA,[2] which requires a cultivator to "*apply to advance* to the next licensing tier." The use of different operative language was intentional: at least between January 1, 2022, and June 30, 2023, the Legislature intended existing licensees to increase tiers at their discretion.

Indeed, the exception in16-12-223(1)(e)(iii), MCA, appears self-sufficient: existing licensee cultivators may elect to increase tiers by more than one level at a time anytime between January 1, 2022, and June 30, 2023; the increase is at the existing licensee's discretion; the existing licensee need not show that it is at capacity; the existing licensee need not show that it is currently selling 80% of the marijuana produced. Clearly, the Legislature intended to allow existing licensees wide latitude in the administration of their licenses.

Moreover, the EAIC maintains that the Legislature provided a distinct and narrow timeframe for when an existing licensee may, at their discretion, increase tiers: "[b]etween January 1, 2022, and June 30, 2023." Put simply, this year and a half is a slender period crafted to allow existing licensees to increase tiers with the utmost efficiency. Requiring an existing licensee to wait for their arbitrary annual renewal date—some of these deadlines having recently passed without the existing licensee knowing of the department's position on this matter—wastes large amounts of this critical timeframe. It simply does not meet the Legislature's goals of ensuring an effective implementation of HB 701.

It bears noting that, for several reasons, the EAIC disagrees with the department's hyper-technical interpretation that 16-12-223(1)(e)(i), MCA, requires all licensees, including existing licensees, to increase tiers only "in conjunction with a regular renewal application." Firstly, the annual renewal language in 16-12-223(1)(e)(i), MCA, applies after June 30, 2023. Secondly, the specific and limited year-and-a-half timeframe provided in 16-12-223(1)(e)(iii), MCA, supersedes the more general annual renewal timeframe in 16-12-223(1)(e)(i), MCA. Thirdly, applying the annual renewal requirement in 16-12-223(1)(e)(i), MCA, to existing licensees simply would not make sense.

Relating to the third point, if 16-12-223(1)(e) were to apply to existing licensees as the department suggests, at least half of the subsection would be inapplicable to existing licensees. As noted earlier, existing licensees need not show that they are using the full amount of the canopy under 16-12-223(1)(e)(i)(A), MCA. Therefore, the italicized language in 16-12-223(1)(e)(i), MCA, is wholly inapplicable to existing licenses:

> (e) (i) Except as provided in subsection (1)(e)(iii), *a cultivator who has reached capacity under the existing license may apply to advance to the next licensing tier* in conjunction with a regular renewal application . . . .

Here, the clause relating to the "regular renewal application" is specifically linked with a "cultivator who has reached existing capacity under the license." Thus, the sentence is entirely

[2] This subsection will apply after June 30, 2023, to all licensees.

inapplicable to certain existing licensees—including the language requiring the tier increase to be in conjunction with a regular renewal application.

Finally, the EAIC notes that the department's interpretation of the statute should be made readily available to the public, potentially through rulemaking. The EAIC heard testimony from various interested parties, many of whom were unaware as to how the department was construing the statute. Section 2-4-102(11), MCA, defines "rule" as "each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency." The EAIC maintains that the department's interpretation of 16-12-223(1)(e), MCA, qualifies as an agency interpretation of general applicability that would potentially require rulemaking under the Montana Administrative Procedure Act.

Thank you for your attention in this matter.

Sincerely,

/s/

Sen. Kenneth Bogner, presiding officer