



## DEPARTMENT OF REVENUE

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### NOTICE OF ADOPTION

#### MAR NOTICE NO. 2025-86.2

#### **Summary**

Amendment of tobacco-related rules to provide or revise definitions supportive of 16-11-102 and 16-12-103, MCA, and to clarify tobacco manufacturer requirements and department processes

#### **Previous Notice(s) and Hearing Information**

On October 10, 2025, the Department of Revenue published MAR Notice No. 2025-86.1 pertaining to the public hearing on the proposed amendment of rules in the 2025 Montana Administrative Register, Issue Number 19.

On November 3, 2025, the department held a public hearing on the proposed rulemaking. Brad Longcake, representing the Montana Petroleum Marketers and Convenience Store Association (MPMCSA), was the only attendee and provided testimony. The department also received written comments from Heidi Low, Director, U.S. Western Region Campaign for Tobacco-Free Kids (TFK); Nicole Aune, Section Supervisor, Montana Tobacco Use Prevention Section, Montana Department of Public Health and Human Services (DPHHS); Scott Pearce, President, Cigar Association of America (CAA); and Katherine Sutphen, Grassroots Manager, American Cancer Society Cancer Action Network (ACS CAN).

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#### **Final Rulemaking Action – Effective January 24, 2026**

#### **AMEND AS PROPOSED**

The agency has amended the following rules as proposed:

#### **42.31.201 DEFINITIONS**

## **42.31.206 A TOBACCO PRODUCT LABELED AS ANYTHING OTHER THAN A CIGARETTE**

## **42.31.207 DEPARTMENT DETERMINATIONS**

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### **Statement of Reasons**

The department has considered the comments and testimony received. A summary of the comments received, and the department's responses are as follows:

**COMMENT 1:** Mr. Longcake expressed MPMCSA's general support of the department's proposed rulemaking to clarify the term "characterizing nontobacco flavor" as it is integral to the legislature's intent to exclude premium cigars from the same tax treatment afforded non-premium cigars. Mr. Longcake also stated that the CAA would likely prepare more formal commentary, which would be supported by the MPMCSA.

**RESPONSE 1:** The department appreciates Mr. Longcake's attendance, support, and involvement in the rulemaking process.

**COMMENT 2:** Ms. Low and TFK expressed general support for the department's rulemaking but requested modification to the "characterizing nontobacco flavor" definition to exclude all flavors from the premium cigar definition and anything that would impart a cooling or numbing sensation during consumption of the tobacco product. Ms. Low states that flavor comes from a combination of taste, smell, and sensation, so the definition of "characterizing nontobacco flavor" must be comprehensive because the tobacco industry has introduced new products with synthetic coolants to evade restrictions.

Ms. Aune and DPHHS also expressed general support of the department's proposed definition for characterizing nontobacco flavor as it aligns broadly with language used in other jurisdictions. And like Ms. Low and TFK, DPHHS also recommended the department provide additional clarity in the definition around what DPHHS calls "sensation products" (those products that use specific terms like "cool," "chill," "ice," "fresh," "arctic," or "frost," which presumptively indicate a flavored product).

Ms. Sutphen and ACS CAN commented that the definition for characterizing nontobacco flavor should exclude all flavors from the premium cigar definition for tax purposes. Like the previous commenters, ACS CAN directed the department to "sensation products" and a 2024 Surgeon General's report which supports the conclusion that natural and synthetic cooling agents that have been found in some tobacco products can mimic the pharmacological and somatosensory effects of menthol but may not have a distinguishing taste or odor.

**RESPONSE 2:** The department appreciates Ms. Low's, Ms. Aune's, and Ms. Sutphen's comments and involvement in this rulemaking. The department believes the current definitions of premium cigar, provided in 16-11-102, MCA, and characterizing nontobacco

flavor, as adopted in ARM 42.31.201, are adequate for the department to enforce taxation and regulation of these products.

COMMENT 3: Ms. Aune and DPHHS recommended that the department also adopt an “ordinary consumer” test into the definition of characterizing nontobacco flavor. According to DPHHS, the Public Health Law Center (PHLC) Model Language uses phrasing like: “a taste or odor, distinguishable by an ordinary consumer either prior to or during the consumption of a tobacco product, other than the taste or odor of tobacco . . . .” DPHHS contends that establishing that the taste or smell can be “distinguishable by an ordinary consumer” is highly recommended by the PHLC because it makes clear this is a reasonable person test and requires no special technical ability to be able to enforce. DPHHS also provided an alternative to the ordinary person test in a proposed amendment to ARM 42.31.207(3) should the department opt against the expanded definition.

Ms. Sutphen and ACS CAN provided substantively identical comments to that of Ms. Aune and DPHHS regarding the incorporation of the ordinary consumer test into the definition of characterizing nontobacco flavor.

RESPONSE 3: The department believes the implementation of an “ordinary consumer” test would overstep the purpose of these rule changes (i.e., taxation) and directly opposes Governor Gianforte’s Red Tape Relief Initiative to relieve administrative burdens and simplify rule content.

COMMENT 4: Ms. Low and TFK also recommended the department adopt stronger language in ARM 42.31.201(1)(b) regarding the proposed product presumption standard based on alleged experience and legal challenges within the tobacco industry. TFK opines that a rebuttable presumption would provide a clearer evidentiary framework by presuming the existence of a characterizing nontobacco flavor based on manufacturer statements and advertising claims, unless and until someone presents evidence to the contrary. Presumptive evidence, however, only permits the inference without requiring that it be made.

Ms. Aune and DPHHS and Ms. Sutphen and ACS CAN also provided substantively identical commentary regarding a stronger rebuttable presumption standard in ARM 42.31.201(1)(b) and recommended text for the department’s consideration.

RESPONSE 4: The department directs the commenters to Response 2 as its response to Comment 4.

COMMENT 5: Mr. Pearce and the CAA expressed their overall support for the department’s rulemaking and commended the department for its clear efforts to simplify and harmonize various aspects of Montana’s tobacco tax code through the rulemaking, which appropriately aims to clarify definitions and processes for manufacturers, retailers, and the department alike, which is of significant value to the regulated community.

**RESPONSE 5:** The department appreciates the CAA's comments and involvement in this rulemaking.

**COMMENT 6:** Mr. Pearce expressed CAA's concern that the proposed definition language for characterizing nontobacco flavor is overly broad and risks unintended application to traditional premium cigars that do not contain added flavoring of any kind. The CAA believes that the definition, as proposed, applies to any additive, compound, or ingredient that imparts a specific taste and includes a long, non-exhaustive list of examples. It also allows the department to presume a product is flavored if a manufacturer suggests—explicitly or implicitly—that the product has a particular taste. The CAA contends this structure may lead to confusion, as many premium cigars naturally develop subtle aromatic or flavor characteristics through traditional processes like fermentation, barrel aging, or blending, without any flavor “additive” being introduced.

Further, premium cigar marketing often highlights these natural taste and flavor elements and could somehow be deemed to be “implicitly” presumed to have a “characterizing non-tobacco flavor” simply because of the elements of flavor the tobaccos within a cigar contain. This in turn could result in cigars being classified as flavored based on naturally occurring qualities, depriving them of the tax treatment intended by the legislature and potentially imposing new burdens on manufacturers and retailers.

CAA is also concerned that definitional ambiguity will complicate enforcement as department staff may interpret the definition differently over time, which undermines the goal of regulatory simplicity that Senate Bill 122 (2023) and the rules proposal advances.

To preserve the purpose of the tax cap framework, the CAA suggests a clearer, more targeted standard: treat a cigar as flavored only when the manufacturer expressly describes it as having a characterizing flavor in its labeling or marketing materials. Products not described this way should be presumed unflavored unless the department has clear evidence to the contrary. This approach offers clarity and fairness while aligning regulation with manufacturer intent and consumer expectations.

**RESPONSE 6:** The department believes the current definitions of premium cigar, provided in 16-11-102, MCA, and characterizing nontobacco flavor, ARM 42.31.201, are adequate. The department is confident that additional descriptions are not necessary to enforce the taxation and regulation of these products, and the additional changes directly oppose Governor Gianforte's Red Tape Relief Initiative to relieve administrative burdens and simplify rule content.

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## Contact

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**Rule Reviewer**

Todd Olson

**Approval**

Brendan Beatty, Director of Revenue