House Bill 14-1366 Work Group
Legislative Report Recommendation Form

1. **Work Group Sponsor (s):** Gina Carbone, Smart Colorado

2. **Describe the Recommendation:**

   HB 1366 directs MED to promulgate rules requiring edible marijuana products to be clearly identifiable, when practicable, with a standard symbol.

   Should MED interpret this mandate to allow a product's labeling/packaging to serve as the product's identifying agent, the Division will violate several fundamental rules of statutory construction, fail to satisfy the directive promulgated in HB 1366, and defy the General Assembly's intent behind enacting the bill.

3. **Which portion or portions of House Bill 14-1366 does this recommendation address (underline all those that apply)?**
   a. Protect people from the unintentional ingestion of edible retail marijuana products.
   b. Ensure that edible retail marijuana products are readily identifiable by the general public.
   c. Makes it clear that the product is not for consumption by children.
   d. Makes it clear that the product is safe for consumers.
   e. Utilize a universal symbol.

4. **Please summarize the rationale for the recommendation – why is it important?**

   The attached comment simply says that in fulfilling its obligations under HB 1366, MED must abide by the clear language of the bill and the legislative intent behind it. The Division is "without power to act contrary to law or clear legislative intent or to exceed authority conferred upon [it] by statute." *Colorado Div. of Employment and Training, Dept. of Labor and Employment v. Industrial Com'n of State of Colo.*, 665 P.2d 631 (Colo. App. 1983). In other words, MED may not substitute its judgment for that of the General Assembly.

   As such, when it is possible to apply a symbol to an edible marijuana product, MED must require manufacturers to do so.

   The attached comment is important because if MED does not follow it, the Division will have failed to fulfill its obligation under HB 1366 and will have violated the clear legislative intent behind the bill.

5. **Describe how your recommendation addresses the rulemaking guiding principles of being transparent, operable, defensible and systematic for the licensees as well as the Marijuana Enforcement Division.**

   The attached comment merely describes what MED must do to comply with the legislative directive promulgated in HB 1366. In other words, the comment articulates the starting point from which MED must begin.

   Simply put, MED must require manufacturers to apply a symbol to edible products when doing so is possible. When it is impossible to apply a symbol to an edible product, MED can fall back on the existing labeling/packaging requirement in *1 CCR 212-2 Rule 1004.5(C)(1)(h)* and *1 CCR 212-2 Rule 1006.5(C)(1)(f).*

6. **What stakeholders, other than licensees and the Marijuana Enforcement Division, would be positively or negatively impacted by this recommendation? Please explain the impact.**

   Children, parents, grandparents, guardians, principals, teachers, school resource officers, law enforcement officers, and others, will be provided the tools they need to determine when a food product contains marijuana.

7. **What issue or issues does your recommendation resolve?** (Please identify the issues)

   The attached comment merely establishes that the plain language of HB 1366 and the legislative intent behind the bill require that when it is possible to apply a symbol to an edible product, MED must require manufacturers to do so.

8. **Is there a dissenting voice on the working group concerning this recommendation? If yes, please provide a summary of the minority opinion about this recommendation.**

   Yes, marijuana industry representatives have argued that MED can fulfill its obligation under HB 1366 by simply requiring that a symbol be placed on an edible marijuana product's packaging, even in instances where it is possible to apply a symbol to the product itself.

   As set out above, should MED accept the industry's recommendation, the Division will have failed to satisfy the directive promulgated in HB 1366, and will have violated the General Assembly's intent behind enacting the bill.

9. **Are you aware of any statutory authority or regulation that supports the basis of this recommendation? If yes, please include it here.**

   Yes, there are existing statutory and regulatory provisions that support the attached comment.

   Colo. Rev. Stat. § 12-43.4-202(3)(a)(vii)(O) directs MED to promulgate labeling requirements including "a universal symbol indicating [a] package contains marijuana."

   Pursuant to the legislative directive in *CRS § 12-43.4-202(3)(a)(vii)(O),* MED promulgated rules requiring that every package holding an edible marijuana product have affixed to it, a universal

symbol indicating that the package contains marijuana. *See 1 CCR 212-2 Rule 1004.5(C)(1)(h); 1 CCR 212-2 Rule 1006.5(C)(1)(f).*

Should MED interpret HB 1366 as merely requiring that a symbol be placed on a product's packaging, (even in instances where it is possible to apply a symbol the product itself), it would reduce the bill to a mere reiteration of *CRS § 12-43.4-202(3)(a)(vii)(O)*. Additionally, MED would be taking the position that it satisfied HB 1366's mandate when it promulgated Rule 1004.5(C)(1)(h) and Rule 1006.5(C)(1)(f).

10. Is the implementation of your recommendation dependent on another decision or action? If yes, specifically what actions or decisions are required before this recommendation can be implemented?

No

11. Will the recommendation have a cost to implement? If yes, please explain the reason for the cost and provide an estimate.

Again, the attached comment simply says MED must follow the plain language of HB 1366, and the legislative intent behind enacting the bill. As such, the attached comment will not result in any costs beyond those anticipated by the General Assembly.

12. Provide an estimate of how long it would take to implement the recommendation.

The attached comment simply furthers the General Assembly's original intent in enacting HB 1366, and will therefore have no effect on the mandated rulemaking deadline of January 1, 2016.

Packaging as a method of identifying edible retail marijuana products violates the explicit language of HB 1366 and the General Assembly's intent behind enacting the legislation

The Marijuana Enforcement Division ("MED" or the "Division"), like all Colorado administrative agencies, derives its powers and duties from statute enacted by the General Assembly.

Earlier this year, the General Assembly, through HB 1366, directed MED to promulgate rules "requiring that edible retail marijuana products be clearly identifiable, when practicable with a standard symbol indicating that it contains marijuana and is not for consumption by children." *Codified at Colo. Rev. Stat. § 12-43.4-202(3)(C.5)(I)* (emphasis added).

In fulfilling this obligation, MED is "without power to act contrary to law or clear legislative intent or to exceed authority conferred upon [it] by statute." *Colorado Div. of Employment and Training, Dept. of Labor and Employment v. Industrial Com'n of State of Colo.,* 665 P.2d 631 (Colo. App. 1983). In other words, MED may not substitute its judgment for that of the General Assembly.

During the two HB 1366 Working Group meetings held to date, marijuana industry representatives have argued that MED can fulfill its obligation under HB 1366 by simply requiring that a symbol be placed on an edible marijuana product's packaging, even in instances where it is possible to apply a symbol to the product itself.

As set out below, MED cannot adopt the industry's interpretation and allow packaging to serve as an edible product's identifying agent when it is possible to apply a symbol to the product itself. Doing so would fail to satisfy the directive promulgated in HB 1366, and would be a clear violation of the General Assembly's intent behind enacting the bill.

I. The Plain Language of HB 1366

If the language of a statute is plain and its meaning clear, it must be applied as written. *People v. Nara*, 964 P.2d 578 (Colo. App. 1998).

In describing what must be "clearly identifiable...with a standard symbol," the plain language of HB 1366 refers explicitly to "edible retail marijuana products." The bill contains no reference to labeling or packaging, and to interpret these concepts into the bill would be a forced construction, which is disfavored. *Martin v. Montezuma-Cortez Sch. Dist. RE-1*, 841 P.2d 237, 246 (Colo. 1992).

The concept that HB 1366 requires edible products, and not the products' packaging, to be marked with a symbol is reinforced in the bill's legislative declaration. The legislative declaration states that it is the intent of the General Assembly to ensure that "edible retail marijuana products are readily identifiable" by the general public. Again, the reference is made explicitly to edible marijuana products, and not the product's labeling or packaging.

Importantly, MED cannot interpret the term "edible retail marijuana product" to include the product's packaging. We need look no further than the constitutional definition of "marijuana products" to determine that a product's packaging is not considered part of the product itself. The constitution defines "marijuana products" as products that "are comprised of marijuana and other ingredients and are intended for use or consumption..." *Colo Const. art. 18 § 16(2)(k).* Again, there is no mention of labeling or packaging, and the definition contemplates items "comprised of marijuana." Of course marijuana packaging does not meet that criterion, and therefore cannot be considered an edible product.

Again, when the language of a statute is plain, it must be applied as written. *People v. Nara*, 964 P.2d 578 (Colo. App. 1998). Here, HB 1366 says explicitly that, when practicable, edible marijuana products must be clearly identifiable with a symbol. Allowing labeling or packaging to serve as a product's identifying agent in instances where it is possible to mark the product itself would violate the legislative intent behind HB 1366 and fall short of satisfying the General Assembly's directive.

II. Construction of HB 1366's directive.

Even if MED believes the legislative directive in HB 1366 is ambiguous or unclear, application of fundamental rules of statutory construction establishes that the bill was intended to require that edible products themselves, and not the products' packaging, be marked with a symbol.

In interpreting statutory language, the entire statute must be read and considered as a whole, so as to ascertain the intent of the General Assembly in enacting it. The several parts of a statute reflect light upon each other. *People ex rel. Dunbar v. Gym of Am., Inc.*, 493 P.2d 660 (1972).

What follows is an analysis of CRS § 12-43.4-202, the statute in which HB 1366 is codified. When basic rules of statutory construction are applied to the statute, it is clear that the General Assembly did not intend HB 1366 to allow packaging to serve as an edible product's identifying agent when it is possible to apply a symbol to the product itself.

A. Colorado's retail marijuana code already contains a requirement that packaging bear a symbol indicating that it contains marijuana.

In 2013, just one year before HB 1366 was enacted, the General Assembly passed HB 13-1317. Section 5 of HB 1317 directed MED to promulgate labeling requirements including "a universal symbol indicating [a] package contains marijuana." *Codified at Colo. Rev. Stat. § 12-43.4-202(3)(a)(vii)(O).*

Pursuant to that mandate, MED promulgated rules requiring that every package holding an edible marijuana product have affixed to it, a universal symbol indicating that it contains marijuana. *See 1 CCR 212-2 Rule 1004.5(C)(1)(h); 1 CCR 212-2 Rule 1006.5(C)(1)(f).*

If, in fulfilling the legislative directive handed down in HB 1366, MED merely requires that a symbol be placed on product packaging, even in instances where it is possible to apply a symbol to the product itself, the Division would be interpreting HB 1366 as a mere restatement of the labeling/packaging requirement set forth in CRS § 12-43.4-202(3)(a)(vii)(O). Additionally, MED would be taking the position that it satisfied HB 1366's mandate when it promulgated Rule 1004.5(C)(1)(h) and Rule 1006.5(C)(1)(f).

HB 1366 and the existing labeling/packaging requirement can be read harmoniously if MED interprets HB 1366 to require that the products themselves be marked with a symbol when possible.

B. Interpretations that render statutory provisions redundant should be avoided.

A statute must be interpreted to give effect to all its parts. The Colorado Supreme Court has repeatedly held that, "interpretations that render statutory provisions redundant and superfluous should be avoided." *Colorado Compensation Ins. Authority v. Jorgensen*, 992 P.2d 1156 (Colo. 2000); *Leaffer v. Zarlengo*, 44 P.3d 1072 (Colo. 2002); *Wolford v. Pinnacol Assurance*, 107 P.3d 947 (Colo. 2005).

Simply put, a requirement that MED promulgate rules mandating that marijuana packaging be marked with a symbol existed in statute prior to the enactment of HB 1366, and MED has already written such rules. *See Colo. Rev. Stat. § 12-43.4-202(3)(a)(vii)(O); 1 CCR 212-2 Rule 1004.5(C)(1)(h); 1 CCR 212-2 Rule 1006.5(C)(1)(f).*

Now, industry is asking MED to interpret HB 1366 as merely requiring that a symbol be placed on an edible product's packaging.

Should MED adopt industry's interpretation, and allow labeling/packaging to serve as an edible products identifying agent (even in instances where it is possible to apply a symbol the product itself), it would reduce HB 1366 to a mere reiteration of CRS § 12-43.4-202(3)(a)(vii)(O).

Colorado's rules of statutory construction preclude MED from adopting such an interpretation. As previously indicated, "interpretations that render statutory provisions redundant and superfluous should be avoided."

Furthermore the industry's interpretation suggests that the General Assembly enacted a labeling/packaging requirement in 2013, then returned one year later to simply restate that requirement. Such an interpretation would be absurd.

The plain language of HB 1366 must be applied—when it is possible, a symbol must be placed on the product itself.

C. When the General Assembly amends a statute, it intends to change the law

"As an interpretive aid to determine legislative intent, [it must be] presume[d] that when the General Assembly makes a substantive amendment to a statute,... it intends to change the law." *See Montez v. People*, 269 P.3d 1228, 1230–31 (Colo. 2012); *see also People v. McCullough,* 6 P.3d 774, 778 (Colo. 2000); *People v. Hale,* 654 P.2d 849, 851 (Colo.1982).

As previously stated, CRS § 12-43.4-202 already requires MED to promulgate rules mandating that marijuana packaging be marked with a symbol.

Prior to the 2014 legislative session, CRS § 12-43.4-202 contained no requirement that edible products themselves bear a symbol. HB 1366 amended CRS § 12-43.4-202 to include such a requirement.

Should MED interpret HB 1366 as merely another labeling/packaging requirement, it would mean the General Assembly did not change the law when it passed HB 1366, it simply restated it. However, should MED interpret HB 1366 as it was intended—as a requirement that, when possible, edible products bear a symbol—it would represent a change in the law. As stated by the Colorado Supreme Court in *Montez, McCullough* and *Hale*, MED must adopt the interpretation that represents a change in the law, not a restatement of it.

D. Differing terminology in the existing packaging/labeling statute and HB 1366 indicates the General Assembly's intent to afford those provisions different meanings

The General Assembly used different terms in describing the respective tasks it assigned MED in CRS § 12-43.4-202(3)(a)(vii)(O) and in HB 1366. MED should presume that "the use of different terms signals an intent on the part of the General Assembly to afford those terms different meanings". *Carlson v. Ferris*, 85 P.3d 504 (Colo.2003).

The existing labeling/packaging requirement in CRS § 12-43.4-202(3)(a)(vii)(O) says MED must promulgate labeling requirements that include "a universal symbol indicating [a] package contains marijuana."

HB 1366, on the other hand, says MED must promulgate rules requiring that edible retail marijuana products be clearly identifiable, when practicable, with "a standard symbol indicating that it contains marijuana."

Central to understanding the intent behind HB 1366 is understanding the meaning of the term "it."

Pursuant to the doctrine of *Noscitur a Sociis*, "the meaning of an ambiguous statutory term may be ascertained by reference to...words associated with it." *Young v. Brighton School District 27J*, 325 P.3d 571 (Colo.,2014)

Here, there can be no question that the term "it," as used in HB 1366, references the term "edible retail marijuana product." For example, one purpose of the standard symbol is to indicate that the item, or "it," is "not for consumption by children."

The fact that the General Assembly used the phrase "a universal symbol indicating the package contains marijuana," in the existing labeling/packaging statute, and used the phrase "a standard symbol indicating that it [i.e. the edible retail marijuana product] contains marijuana" in HB 1366 suggests that the body intended to afford those provisions different meaning.

The two statutory provisions can be read harmoniously by interpreting HB 1366 to require that the products themselves be marked with a symbol when possible.

E. Statement of legislators

Legislative history, including comments by legislators and others during discussions of proposed legislation, may be used to construe statute. *Hurst Const. Co. v. Ramey*, 821 P.2d 858 (Colo. App. 1991).

During Senate floor debate on HB 1366, Senator Owen Hill, the chief negotiator of the amendment that led to the final version of the bill, explained the amendment he negotiated to his Senate colleagues as follows:

"The goal in wordsmithing this was... our desire is that you can tell outside the packaging. That our kids can tell the difference between marijuana infused M&Ms and regular M&Ms; that our kids can tell the difference, just by looking at them, between marijuana infused Lemon Drops and regular Lemon Drops."

The Senate then passed the bill 31-4 and the House adopted the Senate's amendments and passed the bill unanimously.

Senator Hill, again, the primary legislative negotiator of the final bill, states explicitly that it is the General Assembly's "desire" that people can tell the difference between marijuana infused food products and regular food products "outside the packaging." Senator Hill goes on to say that kids must be able to tell the difference between marijuana infused M&Ms and regular M&Ms and marijuana infused Lemon Drops and regular Lemon Drops "just by looking at them." He does not say that kids should be able to tell the difference by looking at the products' labeling or packaging.

Senator Hill's statements are further evidence that the General Assembly intended the products themselves to bear a symbol when possible.

III. Conclusion

Allowing packaging as a product's identifying agent when the product itself can be marked would violate the legislative intent behind HB 1366 and fall short of satisfying the General Assembly's directive. As such, MED must interpret HB 1366 to not permit labeling/packaging as an identifying agent when it is possible to apply a symbol to the product itself.