MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 12

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are found at the back of each register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Administrative Rules Bureau at (406) 444-2055.

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SPECIAL NOTICE AND TABLE SECTION

BEFORE THE BOARD OF ATHLETICS
DEPARTMENT OF COMMERCE
STATE OF MONTANA
(As of July 1, 2001, the Department of Labor and Industry)

In the matter of the proposed amendment of ARM 8.8.2802, 8.8.2804, 8.8.2805, 8.8.2806, 8.8.2901, 8.8.2903, 8.8.3301, and 8.8.3407 pertaining to definitions, licensing requirements, contracts and penalties, fees, boxing contestants, physical examination, promoter-match-maker and inspectors and the adoption of new rules pertaining to club boxing	) NOTICE OF PUBLIC HEARING) ON PROPOSED AMENDMENT) AND ADOPTION

TO: All Concerned Persons

1. On July 20, 2001, at 10:00 a.m., a public hearing will be held in the Business Standards Division, Department of Labor and Industry, conference room #487, 4th Floor, Federal Building, 301 South Park Avenue, Helena, Montana to consider the proposed amendment and adoption of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Athletics no later than 5:00 p.m., on July 13, 2001 to advise us of the nature of the accommodation that you need. Please contact Cheryl Smith, Board of Athletics, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2393; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail compolath@state.mt.us.

3. The proposed amendments will read as follows: (new matter underlined, deleted matter interlined)

8.8.2802 DEFINITIONS (1) will remain the same but be renumbered (4).

~~(2)~~ (3) "Contestant" means any participant in a semiprofessional or professional boxing, club boxing, kickboxing or wrestling bout or athletic event who receives remuneration directly or indirectly as consideration of their performance.

(3) will remain the same but be renumbered (2).

~~(4)~~ (1) "Bout or athletic event" means any semiprofessional or professional boxing, club boxing, kickboxing or wrestling match, exhibition, contest, show or tournament.

(5) "Club boxing" is distinct from amateur boxing, professional boxing and elimination-type events and is

conducted pursuant to the rules contained in this sub-chapter.

(5) will remain the same but be renumbered (8).
(6) will remain the same but be renumbered (9).
(7) will remain the same.
(8) will remain the same but be renumbered (6).

Auth: Sec. 23-3-405, MCA
IMP: Sec. 23-3-404, MCA

REASON: The Board is proposing the amendments to this rule to include club boxing. The definitions are being renumbered so that they are in alphabetical order.

8.8.2804 LICENSING REQUIREMENTS (1) and (2) will remain the same.

(3) Before holding any specific athletic event any club holding an annual license shall obtain a separate permit or sanction from the board at least 21 days prior to the event. This section shall not apply to club boxing events.

(a) through (9) will remain the same.

(10) The board must be notified of the names and weights of all contestants involved in an athletic event, at least 10 days before the athletic event. This section shall not apply to club boxing events.

(11) through (15) will remain the same.

Auth: Sec. 23-3-405, MCA
IMP: Sec. 23-3-404, 23-3-405, 23-3-501, 23-3-502, MCA

REASON: The Board is amending this rule to provide that club boxing events are exempt from the requirements of (3) and (10).

8.8.2805 CONTRACTS AND PENALTIES (1) Terms of all contracts between promoters, semiprofessional or professional boxing, club boxing, kickboxing and wrestling organizations and contestants shall be completed on forms approved by the board. The original or true copy of each contract shall be filed with the board at least 24 hours prior to the date of the event, unless specific, individual delay is approved by the board. Contestants must sign contracts with their legal names.

(2) through (7) will remain the same.

Auth: Sec. 23-3-405, MCA
IMP: Sec. 23-3-404, 23-3-405, 23-3-603, MCA

REASON: The Board is proposing the amendment to this rule to include club boxing.

8.8.2806 FEES

(1) through (9) will remain the same.

(10) Club boxing fees:

(a) boxer 20

(b)	seconds	20
(c)	referee	20
(d)	judge	20
(e)	timekeeper	20
(f)	manager/trainer	20
(g)	inspector	30

(fee to be included with sanction application if an inspector is required to be present at the event)

(h)	promoter's application	100
(i)	sanction application (per event)	25

Auth: Sec. 23-3-405, 37-1-134, MCA
IMP: Sec. 23-3-405, 23-3-501, 37-1-134, MCA

REASON: The Board is proposing the amendments to this rule to include the fees for club boxing. The total revenue generated from fees during the last fiscal year was $27,353.58. The Board anticipates that approximately 151 licensees/applicants will be affected by the proposed addition of fees for club boxing and that the fees will generate additional revenue of $3,320 per year. The Board has set the fees commensurate with the anticipated cost of licensing and maintaining club boxing as an additional licensure category for the Board of Athletics.

8.8.2901 BOXING CONTESTANTS (1) All boxing contestants, except amateur club boxers, must file an application with the board, including a photograph of the applicant. Contestants may also be required to file a birth certificate with the board.

(2) With the exception of club boxing, ~~N~~no contestant under the age of 18 or over the age of 35 will be licensed to participate in Montana unless an exemption is granted by the board.

(3) No contestant under the age of 21 shall be permitted to participate in more than six rounds until ~~he~~ the contestant has participated in 10 or more professional bouts involving boxing, unless special permission is granted by the board.

(4) through (7) remain the same.

(8) Any contestant who participates in a sham or fake bout shall be disqualified and shall not thereafter be permitted to contend in any bout in this state for a period of at least six months for the first offense. For the second offense ~~he~~ the contestant shall be disqualified from further admission or participation in any athletic event held or given in the state of Montana for a period of at least one year.

(9) All contestants must be in the building or wherever the contest is to be held at least one hour prior to the commencement of ~~his~~ the bout.

(10) remains the same.

(11) Whenever a contestant, because of injury or illness, is unable to take part in an athletic event for which ~~he~~ the contestant is under contract, ~~he~~ the contestant or ~~his~~

the contestant's manager shall immediately report the fact to the board or inspector. ~~He~~ The contestant must submit to an examination by a physician designated by the board, which examination must be made prior to the date set for the athletic event. The expense of the physician's examination is to be paid by the contestant.

(12) through (14) remain the same.

Auth: Sec. 23-3-405, MCA
IMP: Sec. 23-3-404, 23-3-405, 23-3-501, 23-3-603, MCA

REASON: The Board is proposing the amendments to this rule to include exceptions for club boxing and to eliminate gender specific references.

8.8.2903 PHYSICAL EXAMINATION (1) through (3)(m) will remain the same.

(n) exam performed by medical doctor (M.D.) or doctor of osteopathy (D.O.) only for professional boxing and wrestling events. Semiprofessional boxing and club boxing event examinations can be performed by a~~n~~ M.D., D.O., doctor of chiropractic (D.C.), doctor of podiatric medicine (D.P.M.), nurse practitioner~~s~~ (N.P.) ~~and~~ or physician's assistant~~s~~ (P.A.);

(o) through (8) will remain the same.

Auth: Sec. 23-3-405, MCA
IMP: Sec. 23-3-404, 23-3-405, MCA

REASON: The Board is proposing the amendments to this rule to include club boxing and to add podiatrists as a person who is authorized to perform physical examinations.

8.8.3301 PROMOTER-MATCHMAKER (1) through (9) will remain the same.

(10) A club boxing promoter's principal place of business must be located in Montana. The promoter must have, within the past three years, promoted two events in Montana in either semiprofessional or professional boxing.

(a) An application for the sanctioning of an event, together with the appropriate fee, must be submitted to the board at least 14 days prior to the date of the event on forms provided by the board.

(b) The maximum purse per event will be $500 per match and $2000 per tournament.

(c) The promoter must, prior to the event, enter into an agreement with the boxing officials as to the amount of compensation the officials will receive for officiating the event.

(d) If an inspector is to be appointed for a club boxing event, the promoter is required to pay an additional fee, as set by the board.

Auth: Sec. 23-3-405, MCA

IMP: Sec. 23-3-404, 23-3-405, 23-3-501, 23-3-601, MCA

REASON: The Board is proposing to amend this rule to require that a club boxing promoter have recent experience in promoting boxing events.

8.8.3407 INSPECTORS (1) and (2) will remain the same.

(3) A person who wishes to be appointed as an inspector shall submit to the board a resume indicating their boxing experience and the names of three references who can attest to their boxing experience and integrity.

(4) If an inspector is to be appointed for a club boxing event, the promoter will be required to pay an additional fee, as set by the board.

Auth: Sec. 23-3-405, MCA
IMP: Sec. 23-3-402, MCA

REASON: The Board is proposing to amend this rule to provide a procedure for persons wanting to be appointed as inspectors at boxing matches and to provide that promoters will be required to pay an additional fee for an inspector appointed for a club boxing event.

4. The proposed new rules provide as follows:

NEW RULE I INTRODUCTION (1) In addition to the rules set forth in this sub-chapter, promoters and contestants involved in club boxing shall be required to abide by the provisions of ARM 8.8.2802, 8.8.2804, 8.8.2805, 8.8.2806, 8.8.2903, 8.8.2905, 8.8.3102, 8.8.3103, 8.8.3105, 8.8.3106, 8.8.3107, 8.8.3108, 8.8.3201, 8.8.3204, 8.8.3301, 8.8.3401, 8.8.3402, 8.8.3403, 8.8.3404, 8.8.3405, 8.8.3506, and 8.8.3407.

Auth: Sec. 23-3-405, MCA
IMP: Sec. 23-3-405, MCA

NEW RULE II CLUB BOXING CONTESTANTS (1) All club boxing contestants, except amateur club boxers, must file an application with the board, including a photograph of the applicant. Contestants may also be required to file a birth certificate with the board.

(2) A contestant must be age 18 or over to enter and received prize money. The maximum age for a contestant is 45. Anyone over the age of 45 who wishes to compete must provide to the board a physician’s (M.D.'s) statement that the contestant is medically fit to participate in the event.

(3) In the event a boxer is registered with the United States amateur boxing, inc. as an amateur boxer, the promoter must provide the boxer a form which clearly explains that the boxer will lose amateur status with the United States amateur boxing, inc. by participating in a club boxing event. The boxer must sign the form acknowledging that the boxer

understands amateur status will be lost. The form must be submitted to the board with the fight results.

(4) A person age 16 or 17 can compete only as an amateur, but cannot receive any purse, remittance or monetary award.

(5) Contestants age 16 and 17 must provide the promoter a signed and notarized statement of permission from a parent or guardian.

(6) Each participant must provide proof of medical insurance coverage or sign a waiver of liability for any medical bills incurred as a result of lack of coverage.

(7) Contestants must wear proper athletic attire and appropriate protective devices, including mouthpiece and protective foul proof cup.

(8) Any contestant who has participated in an athletic event, unless specifically granted an exception by the board, shall be placed under temporary suspension for the health and safety of the contestant in the event of the following:

(a) physical injury or severe punishment, suspension shall be discretionary upon advice of the health care provider or emergency medical technician (EMT);

(b) a knockout (KO) a 60 day suspension is required; and

(c) a technical knockout (TKO), because of a head blow that requires the referee to stop the bout, a 30 day suspension is required.

(9) In any case when the referee decides that the contestants are not honestly competing, that the knockout is a "dive" or the foul a prearranged action, the athletic event shall be stopped and no decision rendered.

(10) Any contestant who participates in a sham or fake bout shall be disqualified and shall not be permitted to contend in any bout in this state for a period of at least six months for the first offense. For the second offense the contestant shall be disqualified from further admission or participation in any athletic event held or given in the state of Montana for a period of at least one year.

(11) All contestants must be in the building or wherever the contest is to be held at least one hour prior to the commencement of the bout.

(12) All contestants must be ready to enter the ring immediately upon the finish of the preceding bout or athletic event. The referee may disqualify a contestant breaking this rule. Should an emergency arise requiring a contestant to leave the ring during the 90 second intermission between rounds, permission must be secured from the referee. Failure to return before the gong sounds announcing the next round will result in disqualification.

(13) Whenever a contestant, because of injury or illness, is unable to take part in an athletic event for which the contestant is under contract, the contestant or the contestant’s manager shall immediately report the fact to the board or inspector. The contestant must submit to an examination by a physician designated by the board, which examination must be made prior to the date set for the

athletic event. The expense of the physician's examination is to be paid by the contestant.

(14) Before a license is issued to any contestant, the contestant shall satisfy the board that the contestant has the ability to compete and is fit to participate in an athletic event. If, in the opinion of the board, a contestant's ability to perform is questionable, whether from causes of illness, mental condition or loss of the ability to compete, the board may:

(a) refuse to permit the contestant to participate;

(b) retire the contestant from further competition; or

(c) suspend the contestant's license.

(15) During the bout, it is prohibited for a contestant to drink anything but water. The use of drugs of any kind, before or during the bout, shall be cause for disqualification and/or other disciplinary action by the board. All contestants may be required to submit to a drug test before and after a bout in which the contestant is involved.

Auth: Sec. 23-3-405, MCA
IMP: Sec. 23-3-404, 23-3-405, 23-3-501, 23-3-603, MCA

NEW RULE III CLUB BOXING - FEMALE CONTESTANTS

(1) Female boxers shall use no facial cosmetics and have their hair secured with soft and non-abrasive material.

(2) The weight classes shall be the same as used by male club boxers.

(3) Female boxers shall wear breast protectors and groin protectors that are both properly fitted, and a mouth piece is also required.

(4) All female boxers must provide a negative pregnancy test prior to each event.

(5) Promoters will provide adequate, separate dressing room facilities.

Auth: Sec. 23-3-405, MCA
IMP: Sec. 23-3-405, MCA

NEW RULE IV CLUB BOXING - PHYSICIAN REQUIREMENTS

(1) A person who qualifies as an examining health care provider as set forth in ARM 8.8.2903 or an EMT shall be available at ringside. The promoter will compensate the health care provider or EMT. There will be no post-bout examination unless the health care provider or EMT determines one is necessary.

Auth: Sec. 23-3-405, MCA
IMP: Sec. 23-3-405, MCA

NEW RULE V CLUB BOXING - CONTEST REGULATIONS (1) In addition to the requirements of ARM 8.8.3101 the following shall apply to club boxing events:

(a) a match is limited to three rounds of no more than 90 seconds with a 90 second rest period between rounds;

(b) a match that the promoter has designated as a semi-main or main match is limited to three rounds of no more than 120 seconds, with a 90 second rest period;

(c) if the match results in a draw, an additional round of no more than 120 seconds may occur; or

(d) if the match still results in a draw, the judges will vote for one winner based on aggressiveness, ring generalship, and punches landed cleanly.

Auth: Sec. 23-3-405, MCA
IMP: Sec. 23-3-405, MCA

NEW RULE VI CLUB BOXING - WEIGHTS AND CLASSES (1) The weights and classes for club boxing events shall be as follows:

(a) between 100 and 130 pounds the maximum weight difference permitted between boxers is 10 pounds;

(b) between 130 and 185 pounds the maximum weight difference permitted between boxers is 15 pounds; and

(c) for 186 pounds and over there is no limitation on weight difference.

Auth: Sec. 23-3-405, MCA
IMP: Sec. 23-3-405, MCA

NEW RULE VII CLUB BOXING - REQUIRED EQUIPMENT (1) Club boxing contestants are required to use handwraps. Contestants may use handwraps pursuant to the provisions of ARM 8.8.3202 or use training wraps.

(2) Official boxing gloves for contestants weighing up to 150 pounds must be no less than 14 ounces and must have the thumbs attached. Gloves for contestants weighing 151 pounds and above must be no less than 16 ounces and must have the thumbs attached. If there are two contestants to a bout at different glove weights, they will be required to use the glove required for the heavier contestant.

(a) No breaking, roughing or twisting of gloves shall be permitted. Gloves shall be examined by the inspector. If padding is found to be misplaced or lumpy, or if gloves are found to be imperfect, other gloves shall be substituted.

(3) The use of protective headgear is mandatory for all contestants.

Auth: Sec. 23-3-405, MCA
IMP: Sec. 23-3-405, MCA

REASON: The Board has been requested to adopt rules for the regulation of club boxing events.

5. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Athletics, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-

mail to compolath@state.mt.us and must be received no later than 5:00 p.m., July 20, 2001. If comments are submitted in writing, the Board requests that the person submit five copies of their comments.

6. Bruce Spencer, attorney, has been designated to preside over and conduct this hearing.

7. The Board of Athletics maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this Board. Persons who wish to have their name added to the list shall make a written request to the board which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Athletics administrative rulemaking or other administrative proceedings. Such written request may be mailed or delivered to the Board of Athletics, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to compolath@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

BOARD OF ATHLETICS
GARY LANGLEY, CHAIRMAN

By: /s/ Richard M. Weddle
Staff Attorney
Department of Commerce

By: /s/ Richard M. Weddle
Rule Reviewer

Certified to the Secretary of State, June 11, 2001.

BEFORE THE BOARD OF BARBERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA
(As of July 1, 2001 the Department of Labor and Industry)

In the matter of the proposed amendment of ARM 8.10.414 pertaining to prohibition of animals in barbershops	) NOTICE OF PUBLIC HEARING) ON PROPOSED AMENDMENT))

TO: All Concerned Persons

1. On August 6, 2001, at 8:30 a.m., a public hearing will be held in the Business Standards Division, Department of Labor and Industry, conference room #487, 4th Floor, Federal Building, 301 South Park Avenue, Helena, Montana to consider the proposed amendment of the above-stated rule.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Barbers no later than 5:00 p.m., on July 16, 2001, to advise us of the nature of the accommodation that you need. Please contact Jeannie Worsech, Board of Barbers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2333; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail compolbar@state.mt.us.

3. The proposed amendment will read as follows: (new matter underlined, deleted matter interlined)

8.10.414 GENERAL REQUIREMENTS (1) through (7) will remain the same.

~~(8) Animals shall not be permitted on the premises at any time except for animals trained to assist individuals with special physical, visual or hearing needs.~~

(9) will remain the same but be renumbered (8).

Auth: Sec. 37-30-203, 37-30-422, MCA
IMP: Sec. 37-30-403, 37-30-422, MCA

REASON: The Board of Barbers received a petition on March 7, 2001, signed by 37 persons from Flathead County requesting that "legislation be passed that will limit the State of Montana's ability to regulate the occurrence of dogs in barbershops." The Board also received four written requests with regard to the same issue. Due to the fact that the restriction against animals in barbershops is a rule promulgated by the Board of Barbers under its rulemaking authority contained in 37-30-203, MCA, the Board is publishing this notice to invite public comment on this issue for Board consideration.

4. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Barbers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to compolbar@state.mt.us and must be received no later than 5:00 p.m. on August 6, 2001. If comments are submitted in writing, the Board requests that the person submit six copies of their comments.

5. Bruce Spencer, attorney, has been designated to preside over and conduct this hearing.

6. The Board of Barbers maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this Board. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Barbers administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Barbers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to compolbar@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

7. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

BOARD OF BARBERS
MAX DeMARS, CHAIRMAN

By: /s/ Richard M. Weddle
Staff Attorney
Department of Commerce

By: /s/ Richard M. Weddle
Rule Reviewer

Certified to the Secretary of State, June 11, 2001.

BEFORE THE BOARD OF PUBLIC ACCOUNTANTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA
(As of July 1, 2001, the Department of Labor and Industry)

In the matter of the proposed amendment of ARM 8.54.410 pertaining to fees	) NOTICE OF PUBLIC HEARING) ON PROPOSED AMENDMENT)

TO: All Concerned Persons

1. On July 24, 2001, at 9:00 a.m., a public hearing will be held in the Business Standards Division, Department of Labor and Industry, conference room #487, 4th Floor, Federal Building, 301 South Park Avenue, Helena, Montana to consider the proposed amendment of the above-stated rule.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Public Accountants no later than 5:00 p.m., on July 16, 2001, to advise us of the nature of the accommodation that you need. Please contact Susanne Criswell, Board of Public Accountants, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2389; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail compolpac@state.mt.us.

3. The proposed amendment will read as follows: (new matter underlined, deleted matter interlined)

8.54.410 FEE SCHEDULE

(1) and (2) will remain the same.

(3) Annual fee for non-permit holder	~~35~~ **45**
(4) Annual fee for permit to practice	~~70~~ **90**

(5) through (12) will remain the same.

(13) Late fee for failure to timely file quarterly reports by practice units under pre-issuance review. 100

Auth: Sec. 37-1-134, 37-50-203, MCA
IMP: Sec. 37-1-134, 37-50-204, 37-50-314, 37-50-317, MCA

REASON: The Board is proposing the amendments to this rule to set fees commensurate with costs of administering the program.

The Board has not raised the annual fee for non-permit holders or the annual fee for a permit to practice for ten years. Factors contributing to the Board's proposed fee increases include: the hiring of an additional staff person due to increased work load including tasks related to the exam and other board programs, the purchase and continual upgrading of a new computer database, the move of the Board office from the Arcade Building to the Federal Building, and to help offset the increase in general Board expenses over the past

ten years. The fee increase will help defray these extra costs. The beginning cash balance for FY 2001 was $208,170. Projected revenue under the current fee schedule is $255,175 and the budget for FY 2001 is $285,430. This will result in an ending cash balance of $177,915. Increased renewal fees will bring in an estimated $49,140 of additional revenue. The Board will continually monitor the anticipated budgetary expenditures and historical cost of operations. These fee increases will affect approximately 3,300 licensees.

Under the Board's monitoring program practice units that have received three unacceptable ratings over the most recent five-year period generally fall under pre-issuance review. As part of this mandate, practice units must submit quarterly reports reflecting the number and type of reports issued in each quarter along with verification by its reviewer that all reports issued were in compliance with professional standards. The Board has found that many practice units under pre-issuance review are not submitting the quarterly reports in a timely manner. This requires additional administrative time and effort by the Board and staff. In the process the Board loses its ability to effectively monitor the work performed by the practice units. Imposition of a late fee will help defray administrative costs and allow the Board to more effectively protect the public. Projected revenue from this new fee is $1,600 and will affect approximately 16 practice units per year.

4. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Public Accountants, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to compolpac@state.mt.us and must be received no later than the close of the hearing on July 24, 2001. If comments are submitted in writing, the Board requests that the person submit seven copies of their comments.

5. F. Lon Mitchell, attorney, has been designated to preside over and conduct this hearing.

6. The Board of Public Accountants maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this Board. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Public Accountants administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Public Accountants, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to compolpac@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

7. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

BOARD OF PUBLIC ACCOUNTANTS
BERYL ARGALL STOVER, CPA
CHAIRMAN

By: /s/ Richard M. Weddle
Staff Attorney
Department of Commerce

By: /s/ Richard M. Weddle
Rule Reviewer

Certified to the Secretary of State, June 11, 2001.

**BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 23.5.101, 23.5.102, and 23.5.105 regarding motor carrier safety	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

To: All Concerned Persons

1. On July 20, 2001 at 9:15 a.m., a public hearing will be held in the auditorium of the Scott Hart Building, 303 North Roberts, Helena, Montana, to consider the proposed amendment of ARM 23.5.101, 23.5.102, and 23.5.105 pertaining to motor carrier safety.

2. The Department of Justice will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Justice no later than 5:00 p.m. on July 16, 2001, to advise us of the nature of the accommodation that you need. Please contact Department of Justice, Montana Highway Patrol, Attn: Curt Rissman, 2550 Prospect Avenue, Helena, MT 59620-1419; 406-444-3300; TDD 406-444-1205; FAX 406-444-4169.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

23.5.101 TRANSPORTATION OF HAZARDOUS MATERIALS - DEFINITIONS (1) A commercial motor vehicle or motor carrier subject to regulation by the department under 44-1-1005, MCA, shall comply with and the department does hereby adopt, by reference, the following federal regulations of the department of transportation which concern the transportation of hazardous materials. The regulations adopted by reference are 49 CFR part 107, 49 CFR part 171, 49 CFR part 172, 49 CFR part 173, ~~subject to the exception provided in (2) below,~~ 49 CFR part 177, 49 CFR part 178, and 49 CFR part 180. The regulations adopted may be found in the Code of Federal Regulations, Title 49, chapter I, subchapters B and C, as updated through ~~July 24, 1998~~ June 1, 2001; they may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

~~(2) Notwithstanding requirements for specification packagings in subpart F of part 173 and parts 178 and 180 of subchapter C of Title 49, CFR, non-specification packagings used in intrastate transportation of hazardous material may continue to be used for such purpose through June 30, 2000, provided:~~

~~(a) the material is offered for transportation and transported in conformance with all other applicable requirements of this rule;~~

~~(b) the packaging is not used to transport a flammable cryogenic liquid, hazardous substance, hazardous waste, or~~

~~marine pollutant (except for gasoline); and~~

~~(c) if a flammable liquid petroleum product is being transported, the capacity of a non- specification cargo tank must be less than 3,500 pounds (13,250 liters) and the capacity of a non-specification metal tank permanently secured to a transport vehicle must be less than 119 gallons (450 liters) and the tank must be protected against leakage or damage in the event of a turnover.~~

(3) remains the same but is renumbered (2).

AUTH: ~~44-1-1005(1), 69-12-201,~~ 44-1-1005, MCA
IMP: 44-1-1005, MCA

23.5.102 FEDERAL MOTOR CARRIER SAFETY RULES AND STATE MODIFICATIONS (1) Any commercial motor vehicle or motor carrier subject to regulation by the department under 44-1-1005, MCA, shall comply with and the department does hereby adopt, by reference, the following portions of the federal motor carrier safety regulations of the department of transportation, subject to the provisions of (2) below. The regulations adopted are 49 CFR part 382, 49 CFR part 385, 49 CFR part 387, 49 CFR parts 390 through 399 and Appendix G to subchapter B of chapter III, Title 49 of the Code of Federal Regulations, as updated through ~~July 24, 1998~~ June 1, 2001. Copies of the regulations may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

(2) The federal regulations incorporated herein by reference are subject to the following modifications:

(a) remains the same.

(b) With respect to 49 CFR 385.13, the prohibitions on transportation only apply to commercial motor vehicles or motor carriers operating in interstate commerce.

~~(b)~~(c) With respect to 49 CFR 385.21, a ~~"Motor Vehicle Inspection Application"~~ "Motor Carrier Identification Report" (form MC805) prescribed by the department shall be used by all intrastate carriers instead of a "Motor Carrier Identification Report, Form MCS-150"; this report may be obtained from the Montana Highway Patrol/Motor Vehicle Inspection Bureau, 2550 Prospect, P.O. Box 201419, Helena, MT 59620-1419.

(d) For purpose of 49 CFR 390.21, the department will assign a motor vehicle identification (MVI) number to each intrastate motor carrier and that number, in addition to the name or trade name of the motor carrier, must be marked on each self-propelled commercial motor vehicle operated by the carrier in the same manner as is required of a federally issued DOT number.

(c) through (e) remain the same but are renumbered (e) through (g).

AUTH: ~~44-1-1005(1), 69-12-101, 69-12-103 and 69-12-201,~~ 44-1-1005, MCA
IMP: 44-1-1005, MCA

23.5.105 SAFETY INSPECTION PROGRAM; PURPOSE AND OUT-OF-SERVICE CRITERIA (1) remains the same.

(2) In addition to the federal regulations adopted in ARM 23.5.102, the safety inspection program will follow ~~Commercial Vehicle Safety Alliance (CVSA), Memorandum of Understanding, Appendix A,~~ the most recent North American Standard ~~Uniform~~ Out-of-Service Criteria, published by the Commercial Vehicle Safety Alliance (CVSA), incorporated herein by reference. A copy of the most recent North ~~America Uniform~~ American Standard Out-of-Service Criteria may be obtained from the Commercial Vehicle Safety Alliance, 5430 Grosvenor Lane, Suite 130, Bethesda, MD 20814 or ordered online at http://www.cvsa.org.

(3) For purposes of this program, inspection may be waived for any vehicle subject to inspection and bearing a CVSA inspection decal issued by state or province ~~using CVSA out-of-service criteria~~ within the preceding 90 days, as identified by color code and corner trimming.

AUTH: 44-1-1005, MCA
IMP: 44-1-1005, MCA

4. The Department proposes the amendment of ARM 23.5.101 and 23.5.102 to ensure compliance and coordination with federal rules. Since these rules were last amended, several of the incorporated federal regulations have been amended by the federal department of transportation, federal motor carrier safety administration (formerly the federal highway administration) or federal research and special programs administration, office of hazardous material standards. Incorporation of the subsequent amendments is required under 2-4-307, MCA, and is necessary to assure ongoing compliance by the Department with the requirements of 49 CFR parts 350 and 355.

In addition, the exception for non-specification packaging used in intrastate transportation of hazardous materials has expired and therefore is deleted from ARM 23.5.101.

ARM 23.5.102 amendments propose a specification that would apply prohibitions on transportation requirements only to carriers or vehicles operating in interstate commerce, in the absence of express legislative directive sanctioning such a prohibition on carriers or vehicles operating solely in intrastate commerce.

Additionally, ARM 23.5.102 incorrectly identifies the form used in lieu of a federal motor carrier identification report, form MCS-150. The correct reference is to the "motor carrier identification report, form MC805."

Further amendment to ARM 23.5.102 is proposed to codify the current practice of issuing motor vehicle inspection numbers to intrastate motor carriers. Under this rule, the MVI number would be used in the place of a DOT number for marking of intrastate carriers.

ARM 23.5.105 is amended to incorporate the most current version of the commercial vehicle safety alliance standards and to delete an extraneous reference to the out-of-service criteria in (3).

5. Concerned persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Brenda Nordlund, Assistant Attorney General, Attorney General's Office, P.O. Box 201401, Helena, MT 59620-1401, FAX 406-444-3549, by surface mail, or be submitted electronically to contactdoj@state.mt.us and must be received no later than July 20, 2001.

6. Brenda Nordlund, Assistant Attorney General, P.O. Box 201401, Helena, MT 59620-1401 has been designated to preside over and conduct the hearing.

7. The Department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding motor carrier safety rules. Such written request may be mailed or delivered to the Attorney General's Office, Attn: Interested Party List, P.O. Box 201401, Helena, MT 59620, faxed to the office at (406) 444-3549, e-mailed to contactdoj@state.mt.us or may be made by completing a request form at any rules hearing held by the Department.

8. The bill sponsor notice requirements of 2-4-302, MCA do not apply.

By: /s/ MIKE McGRATH
MIKE McGRATH, Attorney General
Department of Justice

/s/ ALI SHEPPARD
ALI SHEPPARD, Rule Reviewer

Certified to the Secretary of State June 6, 2001.

**BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 23.17.311 regarding Montana Law Enforcement Academy student academic performance requirements for the the basic course	))))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

To: All Concerned Persons

1. On July 23, 2001, the Department of Justice proposes to amend ARM 23.17.311 which sets forth the Montana Law Enforcement Academy student academic performance requirements for the basic course.

2. The Department of Justice will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Justice no later than 5:00 p.m. on July 14, 2001, to advise us of the nature of the accommodation that you need. Please contact Ali Sheppard, Department of Justice, Office of the Attorney General, P.O. Box 201401, Helena, MT 59620-1401; (406) 444-2026; FAX (406) 444-3549.

3. The rule as proposed to be amended provides as follows, stricken matter interlined, new matter underlined:

23.17.311 STUDENT ACADEMIC PERFORMANCE REQUIREMENTS FOR THE BASIC COURSE (1) A student must achieve a final grade score of ~~seventy (70) percent~~ 75% of a total possible 100 ~~percent~~ % as required by ARM 23.14.~~3~~413 to pass the course. The total possible score is based on the following criteria:

(a) through (e) remain the same.

AUTH: 44-10-202, MCA
IMP: 44-10-202, MCA

4. The amendment is necessary to clarify that a final grade score of 75% is required in order for a student to successfully complete the performance requirements for the basic course. ARM 23.14.413 states that a student must achieve a score of 75%, while ARM 23.17.311 currently states that a student must achieve a score of 70%. This amendment eliminates the inconsistency between the two rules and clarifies the intent that a student achieve a score of 75% in order to pass.

5. Concerned persons may submit their data, views or arguments concerning the proposed amendment in writing to Ali

Sheppard, Assistant Attorney General, Attorney General's Office, P.O. Box 201401, Helena, MT 59620-1401, FAX (406) 444-3549, by surface mail, or electronically to asheppard@state.mt.us. Comments must be received no later than July 20, 2001.

6. If persons who are directly affected by the proposed amendment wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Ali Sheppard, Assistant Attorney General, Office of the Attorney General, P.O. Box 201401, Helena, MT 59620-1401. A written request for hearing must be received no later than July 20, 2001.

7. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 13 persons based on the 130 students per year who attend the basic course.

8. The Department of Justice maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding Montana peace officer's standards and training. Such written request may be mailed or delivered to the Office of the Attorney General, Attn: Interested Party List, P.O. Box 201401, Helena, MT 59620-1401, faxed to the office at (406) 444-3549, e-mailed to asheppard@state.mt.us, or may be made by completing a request form at any rules hearing held by the Department.

9. The bill sponsor notice requirements of 2-4-302, MCA do not apply.

By: /s/ MIKE McGRATH
MIKE McGRATH, Attorney General
Department of Justice

/s/ ALI SHEPPARD
ALI SHEPPARD, Rule Reviewer

Certified to the Secretary of State June 8, 2001.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.40.905, 37.83.802, 37.83.811, 37.83.812, 37.83.825, 37.85.406, 37.86.105, 37.86.610, 37.86.705, 37.86.1406, 37.86.1706, 37.86.1806, 37.86.1807, 37.86.2005, 37.86.2207, 37.86.2605, 37.86.4413, 37.88.206, 37.88.306, 37.88.606 and 37.88.907 pertaining to medicaid cross-over pricing	)	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On July 21, 2001, the Department of Public Health and Human Services proposes to amend the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you need to request an accommodation, contact the department no later than 5:00 p.m. on July 10, 2001, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rules as proposed to be amended provide as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.40.905 HOME DIALYSIS FOR END STAGE RENAL DISEASE, REIMBURSEMENT (1) Reimbursement for equipment shall be the lesser of the following:

(a) the provider's usual and customary charges which are reasonable; or~~, or the amount allowable by medicare.~~

(b) the medicaid established fee for that service.

(2) remains the same.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-141, MCA

37.83.802 QUALIFIED MEDICARE BENEFICIARIES, DEFINITIONS

(1) through (11) remain the same.

(12) "Medicare allowable rate" means the reasonable charge for the medical service reimbursable under medicare Part B. ~~and is the lowest of:~~

~~(a) the provider's customary charge;~~
~~(b) the medicare prevailing charge; or~~
~~(c) the provider's actual or billed charge.~~
(13) through (19) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-131, MCA

37.83.811 QUALIFIED MEDICARE BENEFICIARIES, COVERAGE ~~AND REIMBURSEMENT~~ OF DEDUCTIBLES AND COINSURANCE FOR MEDICARE SERVICES ALSO COVERED BY FULL MEDICAID (1) through (2) remain the same.

~~(3) Reimbursement for services of:~~
~~(a) Subsections (1)(a) through (e) above is the medicare deductibles and coinsurance.~~
~~(b) Subsections (1)(f) through (k) above is the lowest of:~~
~~(i) the provider's submitted charge;~~
~~(ii) the medicare allowed rate; or~~
~~(iii) the medicaid fee or rate.~~
~~(4) Reimbursement from medicaid may not exceed an amount which would cause total payment to the provider from both medicare and other third party payors and medicaid to be greater than the medicare allowable charge or rate.~~

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-131, MCA

37.83.812 QUALIFIED MEDICARE BENEFICIARIES, PAYMENT FOR CHIROPRACTIC SERVICES AS MEDICARE SERVICES NOT COVERED BY FULL MEDICAID (1) remains the same.

(2) Reimbursement for chiropractic services is the lowest of:

(a) the provider's submitted charge; or
~~(b) the medicare allowed rate; or~~
~~(c)~~ (b) the medicaid fee for the service.
~~(3) The medicaid fee for this service is the medicare prevailing fee effective on July 1, 1989.~~
(4) remains the same in text but is renumbered (3).

AUTH: Sec. 53-6-101 and 53-6-131, MCA
IMP: Sec. 53-6-101 and 53-6-131, MCA

37.83.825 QUALIFIED MEDICARE BENEFICIARIES, PAYMENTS TO PROVIDERS (1) and (1)(a) remain the same.

(2) Payment in full, except as otherwise provided in (2)(a) below, for services provided to medicaid qualified medicare beneficiaries, is the medicaid payment as determined under ARM 37.83.811, ~~and~~ 37.83.812 and 37.85.406 plus the qualified medicare beneficiary's copayment as provided for in ARM 37.83.826. A provider may not collect any amount from the person which is in excess of payment in full even if that payment is less than the medicare insurance deductibles and coinsurance. Where a person is eligible for medicaid under both medicaid qualified medicare beneficiary and another medicaid

category, a provider must accept the medicaid payment as payment in full.

(a) remains the same.

(3) Subject to the requirements of this rule, the Montana medicaid program pays the lowest of the following for qualified medicare beneficiary services:

(a) the provider's usual and customary charge for the service; or

(b) the appropriate medicaid allowed amount as provided in ARM 37.85.406(18).

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-131, MCA

37.85.406 BILLING, REIMBURSEMENT, CLAIMS PROCESSING, AND PAYMENT (1) through (1)(c) remain the same.

(2) For purposes of this ~~section~~ rule:

(a) through (17) remain the same.

(18) Except as otherwise provided in the rules of the department which pertain to the method of determining payment rates for claims of recipients who have medicare and medicaid coverage (cross-over claims), the medicaid allowed amount for medicare covered services is:

(a) for facility based providers who generally bill on the UB-92 billing form, for covered medical services the full medicare co-insurance and deductible as defined by the medicare carrier;

(i) there is an exception for inpatient ancillary services with medicare Part B coverage only (no medicare Part A) or FQHCs. Medicare payments for these services are treated as third party payments and are offset against the medicaid payment;

(b) for medical providers who generally bill on the HCFA-1500 billing form, for covered medical services the lower of:

(i) the medicare co-insurance and deductible (if not met); or

(ii) the medicaid fee less the amount paid by medicare for the same service, not to exceed the medicaid fee for that service;

(c) for mental health services that are subject to the medicare psychiatric reduction, the lower of:

(i) the medicaid allowed amount; or

(ii) the medicare allowed amount, less the medicare paid amount;

(d) for services to recipients eligible to receive both medicare and medicaid benefits, an amount not to exceed the medicare allowed amount in instances where the medicaid fee is higher than the medicare allowable.

(19) For all purposes of this rule, the amount of the provider's usual and customary charge may not exceed the reasonable charge usually and customarily charged to all payers.

(20) Reimbursement from medicaid may not exceed an amount which would cause total payment to the provider from both medicaid and all other payers to exceed the medicaid fee.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-131 and 53-6-141, MCA

37.86.105 PHYSICIAN SERVICES, REIMBURSEMENT/GENERAL REQUIREMENTS AND MODIFIERS (1) through (2)(b) remain the same.

~~(c) for services provided to persons who are eligible for both medicare and medicaid, reimbursement is made for the medicare deductible and coinsurance. However, total reimbursement from medicare and medicaid shall not exceed the medicaid fee for the service.~~

(3) remain through (3)(b) remain the same.

(4) Reimbursement to physicians for physician-administered drugs which are billed under HCPCS "J" and "Q" codes is either according to a fee schedule established by the department and updated at least annually based upon the Montana estimated acquisition cost or maximum allowable cost, as defined in ARM ~~37.82.102~~ 37.86.1101 or the provider's usual and customary charge, whichever is lower. No dispensing fee is paid to physicians.

(a) The maximum allowable cost limitation shall not apply in those cases where the physician certifies in their own handwriting that in their medical judgment a specific brand name drug is medically necessary for a particular patient. Acceptable certification statements are "brand necessary" or "brand required~~.~~". A check-off box on a form or a rubber stamp is not acceptable.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101, 53-6-113 and 53-6-141, MCA

37.86.610 THERAPIES, REIMBURSEMENT (1) remains the same.

(2) Subject to the requirements of this rule, the Montana medicaid program pays the following for therapy services:

(a) through (a)(ii) remain the same.

~~(b) For patients who are eligible for both medicare and medicaid, reimbursement is made for the medicare deductible and coinsurance. However, total reimbursement from medicare and medicaid shall not exceed the medicaid fee for the service.~~

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

37.86.705 AUDIOLOGY SERVICES, REIMBURSEMENT (1) remains the same.

(2) Subject to the requirements of this rule, the Montana medicaid program pays the following for audiology services:

(a) through (a)(ii) remain the same.

~~(b) For patients who are eligible for both medicare and medicaid, reimbursement is made for the medicare deductible and coinsurance. However, total reimbursement from medicare and medicaid shall not exceed the medicaid fee for the service.~~

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

37.86.1406 CLINIC SERVICES, REIMBURSEMENT (1) through (2) remain the same.

(3) Public health department services are reimbursed at the lowest of the following:

~~(a) the medicare maximum allowable rates as determined by the medicare explanation of benefits;~~

~~(b)~~ (a) the fees established by the ~~public health~~ department; or

~~(c)~~ (b) reimbursement for either physician services, provided in accordance with the methodologies described in ARM 37.85.212 and 37.86.105, or mid-level practitioner services, provided in accordance with the methodologies described in ARM 37.85.212 and 37.86.205.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-141, MCA

37.86.1706 FAMILY PLANNING SERVICES, REIMBURSEMENT

(1) Reimbursement for family planning services is as follows:

(a) and (b) remain the same.

(c) for local delegate agencies the lowest of ~~the following medicare fee,~~ the provider's usual and customary charge for this service or the department's fee schedule.

(2) The fees in the department's fee schedule for the local delegate agencies are for each item or procedure the average of the charges for that item or procedure submitted by the delegate agencies during the preceding fiscal year. The adjustments to the fee schedule based upon the annual averaging may not exceed the adjustment for family planning services authorized by the legislature for that fiscal year. The fees in the fee schedule for services provided by physicians or mid-level practitioners may not exceed the fees available for those services set forth in ARM 37.86.105 or 37.86.205 and 37.86.212.

(3) remains the same.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-141, MCA

37.86.1806 PROSTHETIC DEVICES, DURABLE MEDICAL EQUIPMENT, AND MEDICAL SUPPLIES, REIMBURSEMENT REQUIREMENTS

(1) Requirements for the purchase or rental of prosthetic devices, durable medical equipment, medical supplies and related maintenance, repair and services are as follows:

(a) Subject to the requirements of this rule, the department will pay the lowest of the following for prosthetic devices, durable medical equipment, medical supplies and related maintenance, repair and services ~~not also covered by medicare for the recipient~~:

(i) and (ii) remain the same.

~~(b) Subject to the requirements of this rule, the~~

~~department will pay the lowest of the following for prosthetic devices, durable medical equipment, medical supplies and related maintenance, repair and services which are also covered by medicare for the recipient:~~

~~(i) the provider's usual and customary charge for the item;~~

~~(ii) the department's fee schedule maintained in accordance with the methodology described in ARM 37.86.1807(2); or~~

~~(iii) the amount allowable for the same item under medicare.~~

(c) through (f) remain the same in text but are renumbered (b) through (e).

(2) through (7) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111, 53-6-113 and 53-6-141, MCA

37.86.1807 PROSTHETIC DEVICES, DURABLE MEDICAL EQUIPMENT, AND MEDICAL SUPPLIES, FEE SCHEDULE (1) remains the same.

(2) The department's fee schedule, referred to in ARM 37.86.1806(1), for items other than wheelchairs and wheelchair accessories, shall include fees set and maintained according to the following methodology:

(a) remains the same.

(b) Upon review of the aggregate number of billings as provided in (2)(a), the department will establish a fee for each item which has been billed at least 50 times by all providers in the aggregate during the previous 12-month period. The department shall set each such fee at 90% of the average charge billed by all providers in the aggregate for such item during such previous 12-month period. For purposes of determining the number of billings and the average charge, the department will consider only those billings that comply with ARM 37.86.1806(1)~~(c)~~(b).

(b)(i) through (4)(b) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111, 53-6-113 and 53-6-141, MCA

37.86.2005 OPTOMETRIC SERVICES, REIMBURSEMENT

(1) Subject to the requirements of this rule, the Montana medicaid program pays the following for optometric services:

(a) through (a)(ii) remain the same.

~~(b) For patients who are eligible for both medicare and medicaid, reimbursement is made for the medicare deductible and coinsurance. However, total reimbursement for medicare and medicaid shall not exceed the medicaid fee for the service.~~

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101, 53-6-113 and 53-6-141, MCA

37.86.2207 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), REIMBURSEMENT (1) Reimbursement for an EPSDT service, except as otherwise provided in this rule, is the lowest of the following:

(a) the provider's usual and customary charge for the service; or

~~(b) the amount allowable for the same service under medicare if the service is also covered by medicare for the recipient; or~~

~~(c)~~ (b) the reimbursement determined in accordance with the methodologies provided in ARM 37.85.212 and 37.86.105 except for the by-report method.

(2) through (10) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

37.86.2605 AMBULANCE SERVICES, REIMBURSEMENT (1) Except as provided in (3), the department pays the lowest of the following for ambulance services:

(a) the provider's usual and customary charge for the service; or

~~(b) the amount allowable for the same service under medicare; or~~

~~(c)~~ (b) the amount listed in the department's fee schedule.

(2) through (4) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101, 53-6-113 and 53-6-141, MCA

37.86.4413 RURAL HEALTH CLINICS AND FEDERALLY QUALIFIED HEALTH CENTERS, REIMBURSEMENT FOR OTHER PROVIDER-BASED ENTITIES AND FOR INDEPENDENT ENTITIES (1) through (9) remain the same.

~~(10) For crossover claims, the medicaid payment will be:~~

~~(a) for RHC crossover claims, up to the full amount of the medicare allowable charge, including applicable medicare deductibles and coinsurance, less any applicable medicaid copayment amount and any other third party payments in addition to medicare; and~~

~~(b) for FQHC crossover claims, the difference between the medicare payments for the visit and the FQHC's medicaid all-inclusive rate per visit applicable to the service determined in accordance with (2) through (9), less any applicable medicaid copayment amount and any other third party payments in addition to medicare.~~

(11) through (12)(b)(iii) remain the same in text but are renumbered (10) through (11)(b)(iii).

(c) The interim rates determined under this rule are temporary rates and are subject to adjustment and settlement as provided in ~~(12)~~ (11)(b) and ARM 37.86.4420 upon retrospective determination of the provider's all-inclusive core and other ambulatory service rates per visit as provided in (2) through (9).

(12)(d) through (13) remain the same in text but are renumbered (11)(d) through (12).

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

37.88.206 LICENSED CLINICAL SOCIAL WORK SERVICES, REIMBURSEMENT (1) remains the same.

(2) Subject to the requirements of this rule, the Montana medicaid program pays the following for licensed clinical social worker services:

(a) through (a)(ii) remain the same.

~~(b) For patients who are eligible for both medicare and medicaid, reimbursement is made for the medicare deductible and coinsurance. However, total reimbursement from medicare and medicaid shall not exceed the medicaid fee for the service.~~

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-113, MCA

37.88.306 LICENSED PROFESSIONAL COUNSELOR SERVICES, REIMBURSEMENT (1) remains the same.

(2) Subject to the requirements of this rule, the Montana medicaid program pays the following for licensed professional counselor services:

(a) through (a)(ii) remain the same.

~~(b) For patients who are eligible for both medicare and medicaid, reimbursement is made for the medicare deductible and coinsurance. However, total reimbursement from medicare and medicaid shall not exceed the medicaid fee for the service.~~

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-113, MCA

37.88.606 LICENSED PSYCHOLOGIST SERVICES, REIMBURSEMENT

(1) remains the same.

(2) Subject to the requirements of this rule, the Montana medicaid program pays the following for licensed psychologist services:

(a) through (a)(ii) remain the same.

~~(b) For patients who are eligible for both medicare and medicaid, reimbursement is made for the medicare deductible and coinsurance. However, total reimbursement from medicare and medicaid shall not exceed the medicaid fee for the service.~~

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-113, MCA

37.88.907 MENTAL HEALTH CENTER SERVICES, REIMBURSEMENT

(1) Medicaid reimbursement for mental health center services shall be the lowest of:

(a) the provider's actual (submitted) charge for the service;

~~(b) the amount of medicare deductible and coinsurance for~~

~~services provided to persons who are eligible for both medicare and medicaid. However, total reimbursement from medicare and medicaid shall not exceed the medicaid fee for the service;~~

~~(c)~~ (b) the department's medicaid fee for the service as specified in the department's medicaid mental health fee schedule.

(2) through (2)(h) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-113, MCA

3. The Department is publishing this notice again because copies of the April 5, 2001 notice were not mailed to interested persons within three days of publication as required by 2-4-302, MCA of the Montana Administrative Procedure Act (MAPA). That notice is withdrawn and this notice is substituted in its place, with a minor clarification of the number of persons affected.

4. In these rules, the Department is proposing revision of the Medicare cross-over pricing methodology. In general, the proposed amendments only affect claims for mental health services and claims with Medicare deductibles. The Department's current methodology is acceptable for claims that have Medicare coinsurance because the reimbursement amounts result in the same payment. Therefore, the proposed rules would not affect those claims.

The proposed amendments would conform Medicare cross-over pricing methodology to regulations promulgated by the Health Care Financing Administration (HCFA) at 42 CFR 447.15, which limit participation in the Medicaid program to providers who accept, as payment in full, the amounts paid by the Department plus any deductible, coinsurance or copayment required by the State Medicaid Plan. The proposed rule changes are necessary to preserve federal financial participation in the Montana Medicaid programs under the Balanced Budget Act of 1997 (Pub. Law No. 105-33) and sections 1902(n) and 3909 of the Social Security Act.

Medicare and Medicaid cross-over claims are claims for medical services in which both the Medicare and Medicaid programs are potentially liable because the recipient of medical services is entitled to Medicare and is also (a) eligible for Medicaid; (b) eligible for the Qualified Medicare Beneficiary program (QMB); or (c) eligible for both QMB and Medicaid. QMB is a program under which Medicaid pays the recipient's Medicare premiums, coinsurance and deductibles. A Medicaid recipient may be required to pay a Medicaid copayment as provided in ARM 37.85.204.

The proposed amendments are necessary to accommodate the processing of claims for mental health services by the Department for dates of service beginning July 1, 1999. On that date, the Department's contract with Montana Community Partners

for Mental Health Managed Care terminated and the duty to process claims for mental health services for Medicaid recipients and certain other eligible low-income individuals returned to the Department.

Under current rules, when a recipient is eligible for both Medicare and Medicaid, Montana Medicaid reimburses the lowest of: (a) the provider's actual submitted charge for the service; (b) the amount payable by Medicare for the same service (which is generally less than the Medicare allowable amount); or (c) the Department's Medicaid fee for the specific service. To meet HCFA compliance criteria, the Department must reimburse up to the provider's charge or the Medicare or Medicaid maximum allowable limit (rate), as defined at ARM 37.83.802(12), whichever is less.

The alternative to the proposed amendments would be to ignore HCFA compliance criteria and risk loss of federal financial participation. Maintenance of disparate Medicaid and Medicare rates for mental health services and claims with Medicare deductibles could possibly risk loss of provider participation. The Department finds this alternative unacceptable.

The Department estimates the fiscal effect of these rule amendments will be an increase of $57,000.00 per annum in overall Medicaid expenditures. This is not a significant rate increase, and the Department anticipates no measurable change in provider participation as a result of these rules. Approximately 3,143 Montana Medicaid recipients are affected by this amendment in that they are dually eligible for Medicare and Medicaid and also receive mental health services.

5. Interested persons may submit their data, views or arguments concerning the proposed action in writing to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on July 19, 2001. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

6. If a person who is directly affected by the proposed action wishes to express data, views and arguments orally or in writing at a public hearing, that person must make a written request for a public hearing and submit such request, along with any written comments to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on July 19, 2001.

7. If the Department of Public Health and Human Services receives requests for a public hearing on the proposed action

from either 10% or 25, whichever is less, of those who are directly affected by the proposed action, from the Administrative Rule Review Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who are directly affected, a hearing will be held at a later date and a notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 32 based on the 3,143 individuals covered by Medicaid and Medicare or who are QMBs also covered by Medicaid.

/s/ Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State June 11, 2001.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the amendment ARM 37.89.114 pertaining to mental health services plan, covered services	)	NOTICE OF PROPOSED AMENDMENT
	)	NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On July 21, 2001, the Department of Public Health and Human Services proposes to amend the above-stated rule.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you need to request an accommodation, contact the department no later than 5:00 p.m. on July 5, 2001, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.89.114 MENTAL HEALTH SERVICES PLAN, COVERED SERVICES

(1) remains the same.

(2) Covered services include:

(a) evaluation and assessment of psychiatric conditions by licensed and enrolled mental health providers;

~~(b) psychiatric partial hospitalization services;~~

~~(c)~~ (b) residential treatment facility services for children and adolescents who are also covered by the children's health insurance program (CHIP);

~~(d)~~ (c) primary care providers, as defined in ARM 37.86.5001(18), for screening and identifying psychiatric conditions and for medication management;

~~(e)~~ (d) a psychotropic drug formulary, as specified in (6);

~~(f)~~ (e) medication management, including lab services necessary for management of prescribed medications medically necessary with respect to a covered diagnosis;

~~(g)~~ (f) psychological assessments, treatment planning, individual, group and family therapy, and consultations performed by licensed psychologists, licensed clinical social workers, and licensed professional counselors for treatment of specified diagnoses in private practice or in mental health centers;

~~(h)~~ (g) case management services for adults with severe

disabling mental illness ~~and for youths with serious emotional disturbance~~;

~~(i)~~ (h) the therapeutic component of therapeutic youth group home care and therapeutic family care services for children and adolescents ~~and for members and medicaid eligible individuals,~~ who are also covered by CHIP. ~~r~~Room and board in therapeutic youth group homes and therapeutic youth family care is covered if the therapeutic component is covered and if funding for room and board is not available from any other source; and

~~(j)~~ (i) mental health center services.

(3) through (11)(a)(ii) remain the same.

AUTH: Sec. 41-3-1103, 52-1-103, 53-2-201, 53-6-113, 53-6-131 and 53-6-706, MCA

IMP: Sec. 41-3-1103, 52-1-103, 53-1-405, 53-1-601, 53-1-602, 53-2-201, 53-6-101, 53-6-113, 53-6-116, 53-6-701, 53-6-705, 53-6-706, 53-21-139 and 53-21-202, MCA

3. The proposed amendments are necessary to allow the Department to implement essential cost saving measures proposed to the legislature as part of a plan required by 17-7-301, MCA to reduce current fiscal year expenditures in order to obtain a supplemental appropriation request by the Governor's budget office. These changes will eliminate coverage of psychiatric partial hospitalization services for all Mental Health Services Plan (MHSP) members and case management services for MHSP children and adolescents. The proposed amendments would also limit coverage of residential treatment facility services, therapeutic youth group home services and therapeutic family care services to children who are also enrolled in the Children's Health Insurance Plan (CHIP). The services to be eliminated are high-cost services for which coverage can be eliminated with the least detrimental effect on MHSP members. The anticipated savings resulting from these rules is $1.3 million annually. As of May 1, 2001, 144 children were receiving these services.

The program changes were implemented on March 1, 2001 through temporary emergency rule. No additional individuals will be impacted by this rule amendment. The 2001 Legislature designated a separate appropriation for children and adolescents with serious emotional disturbance who had been determined ineligible for enrollment in CHIP. See 2001 Laws of Montana, Chapter 572. The appropriation is intended to provide reimbursement for mental health services for up to 125 children and adolescents.

Psychiatric partial hospitalization is a high-cost service that serves a small proportion of child, adolescent and adult MHSP beneficiaries. Alternate services, including day treatment and comprehensive school and community services, are more widely available to provide for integration in mainstream school and community life. Consequently, the Department is proposing

elimination of psychiatric partial hospitalization as an MHSP covered service.

Case management is a relatively high cost service of uneven quality and undemonstrated results. Children are more likely than adults to have other support systems, including family, case workers and educational staff, that can perform much of the linkage work case management is supposed to accomplish. Consequently, the proposed amendment would eliminate case management services for MHSP children.

The proposed amendments would eliminate coverage of residential treatment facility, therapeutic youth group home and therapeutic family care services for children who are not also enrolled in the CHIP program. The services specified are high-cost services and those for which coverage can be eliminated with the least detrimental effect on children. The services retained as part of the benefits package are those which are most commonly accessed by MHSP children and those which the Department judges to be the most cost effective treatments. The retention of residential treatment center services, therapeutic youth group home services and therapeutic family care services for children who are also enrolled in CHIP adds minimal cost, since 80% of the cost of the services not covered by CHIP will be paid with federal funds. This promotes the Department's policy of covering services for the greatest number of persons at the least cost.

The Department considered a number of other approaches to reduce current expenditures. The primary alternative capable of achieving the required level of cost reduction would have been to eliminate all services for children not enrolled in CHIP. The Department has determined that level of reduction neither necessary nor advisable. Other alternatives would have involved elimination of coverage for other services which would likely have had a more deleterious effect on the mental health of MHSP members. Another alternative, decreased enrollment through reductions in the maximum qualifying family income would have produced equivalent savings by completely eliminating services to now-eligible children and adults.

The Department considered and rejected reductions in addition to partial hospitalization to adult services or eligibility as an alternative to the reductions adopted in the proposed amendments. Reductions to adult services or adult eligibility under the MHSP sufficient to achieve the same level of cost reduction would likely have resulted in substantial increases in the number of individuals committed to Montana State Hospital, substantially offsetting any benefits to the Department's budget.

4. Interested persons may submit their data, views or arguments concerning the proposed action in writing to Dawn Sliva, Office of Legal Affairs, Department of Public Health and

Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on July 19, 2001. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

5. If a person who is directly affected by the proposed action wishes to express data, views and arguments orally or in writing at a public hearing, that person must make a written request for a public hearing and submit such request, along with any written comments to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us no later than 5:00 p.m. on July 19, 2001.

6. If the Department of Public Health and Human Services receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of those who are directly affected by the proposed action, from the Administrative Rule Review Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who are directly affected, a hearing will be held at a later date and a notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 2 based on the 19 individuals who will be affected by rules covering the elimination of medicaid coverage for certain children receiving residential treatment facility therapeutic family care and therapeutic youth group home services.

/s/ Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State June 11, 2001.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.86.2207 pertaining to medicaid mental health services	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Interested Persons

1. On July 11, 2001, at 10:00 a.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed amendment of the above-stated rule.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on June 29, 2001, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

<u>37.86.2207 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), REIMBURSEMENT</u> (1) through (1)(c) remain the same.

(2) Reimbursement for outpatient chemical dependency treatment, nutrition, and private duty nursing services is specified in the department's EPSDT fee schedule. The department hereby adopts and incorporates herein by reference the department's EPSDT fee schedule effective ~~July 2000~~ <u>April 27, 2001</u>. A copy of the fee schedule may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, Medicaid Services Bureau, ~~1400 Broadway~~ <u>555 Fuller</u>, P.O. Box 202951, Helena, MT 59620-2951.

(3) through (10) remain the same.

AUTH: Sec. 53-2-201 and <u>53-6-113</u>, MCA
IMP: Sec. 53-2-201, 53-6-101, <u>53-6-111</u> and 53-6-113, MCA

3. The proposed amendments are necessary to comply with an order of the Montana First Judicial District Court, Lewis and Clark County entered February 26, 2001 in cause number BDV-01-18 requiring the Department to make new rules totally eliminating the sub-acute partial hospitalization program or revising the rate of reimbursement for that service. The Department

considered and rejected the option of eliminating the service. The proposed amendments will allow the Department to continue Medicaid implementation of reimbursement of sub-acute partial hospitalization (SAP) and intensive day treatment (IDT) services for children with serious emotional disturbances.

The Department is proposing adoption of a rate for SAP and IDT services of $93.37 per full day or $70.03 per half day. The Department developed this rate in consultation with providers of SAP services and potential providers of IDT services. Proposed rules are currently pending to allow reimbursement of IDT services that would be similar to SAP services but would be provided under a residential treatment facility license rather than a hospital license. Reimbursement rates will be the same for either service.

The Department gathered cost data from three providers and adapted cost data from Montana State Hospital. It provided the cost data to a work group made up of two members of the public from the statutorily established Mental Health Oversight Advisory Council, one Department staff member from another division who is experienced in Medicaid rate setting for hospitals, and a representative of the department's Office of Legal Affairs. The work group recommended the rate adopted in the proposed amendment. The rate proposed in this notice is based on the assumption that the average facility would be able to serve up to 20 children simultaneously. The rate was computed to allow for a 90% occupancy rate, 250 days per year.

The proposed rate includes a 15% allowance for administrative overhead. The 15% overhead allowance exceeds the Department's experience at Montana State Hospital and is greater than typical federal grant allowances.

Consistent with the Department's practice for other Medicaid services, the proposed rate does not include an allowance for transportation of consumers. Transportation is reimbursed separately.

The Department estimates the proposed amendments will reduce Medicaid and MHSP reimbursement to all SAP and IDT providers by a total of $113,940 annually. The number of persons potentially affected would include approximately 30 seriously emotionally disturbed children and two providers.

4. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on July 19, 2001. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of

administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

5. The Office of Legal Affairs, Department of Public Health and Human Services has been designated to preside over and conduct the hearing.

/s/ Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State June 11, 2001.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the adoption of Rule I pertaining to child support enforcement reasonable cost of health insurance	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Interested Persons

1. On July 11, 2001, at 1:30 p.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed adoption of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on July 3, 2001, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rule as proposed to be adopted provides as follows:

[RULE I] REASONABLE COST OF HEALTH INSURANCE (1) An individual insurance or a health benefit plan is presumed to be available to a parent at a reasonable cost if:

(a) the amount payable for individual insurance or health benefit plan premiums does not exceed 25% of that parent's total parental child support obligation when calculated under the child support guidelines without credit for the medical support obligation; or

(b) a health benefit plan is available through an employer or other group organization for which the premium is partially or entirely paid by the employer or other group organization.

(2) The presumption under (1) may be rebutted by clear and convincing evidence, and the tribunal has the discretion to:

(a) order individual insurance or health benefit plan coverage when the amount of the premium may be greater than the presumptive amount; or

(b) not order coverage when the amount of the premium is less than the presumptive amount.

AUTH: Sec. 40-5-806, MCA
IMP: Sec. 40-5-806, MCA

3. Proposed Rule I, Reasonable Cost of Health Insurance, provides the definition of reasonableness with regard to the cost of health insurance which is borne by parents in child support cases. The language of the proposed rule was formerly incorporated into 40-5-806, MCA, Contents of Medical Support Order, under subsections (8)(a) and (b). The 2001 Montana Legislature removed subsections (8)(a) and (b) from 40-5-806, MCA, at the request of the Department so that the Department could, by rule, adopt the new federal standard when it is adopted. The 2001 Montana Legislature gave authority to the Department to propose a new rule incorporating subsections (8)(a) and (b) into the Administrative Rules of Montana. See 2001 Laws of Montana, Chapter 211 (SB 38). The Child Support Enforcement Division (CSED) intends to keep the proposed rule in place until the federal Department of Health and Human Services issues new rules regarding the reasonable cost of health insurance. The CSED proposes Rule I, Reasonable Cost of Health Insurance, to define what the reasonable cost of an individual insurance or a health benefit plan should be for a parent subject to a child support order. The language of subsections (8)(a) and (b) of 40-5-806, MCA, are paraphrased as Rule I.

The new rule is necessary to define what the "reasonable" cost of individual insurance or a health benefit plan would be for a parent subject to a child support order. Without the proposed rule, the definition of "reasonable" would be ambiguous and subject to costly dispute. The 2001 Montana State Legislature gave authority to the Department to propose this rule. 45 CFR 303.31(a)(1) provides that health insurance is considered reasonable in cost if it is employment related or other group health insurance. The CSED intends to keep the proposed rule in place until the Federal Department of Health and Human Services issues new rules regarding the reasonable cost of health insurance.

4. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on July 19, 2001. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

5. The Office of Legal Affairs, Department of Public Health and Human Services has been designated to preside over and conduct the hearing.

/s/ Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State June 11, 2001.

**BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA**

In the matter of the proposed adoption of New Rules I through XII; amendment of ARM 42.17.101, 42.17.103, 42.17.105, 42.17.113, 42.17.114, 42.17.131, 42.17.134 and 42.17.136; transfer and amendment of ARM 24.11.606, 24.11.607, 24.11.608, 24.11.609, 24.11.610, 24.11.708, 24.11.801, 24.11.803, 24.11.804, 24.11.805, 24.11.835, 42.17.112, and 42.17.118; and repeal of ARM 42.17.121, 42.17.132, 42.17.145, 42.17.147, 42.17.148, 42.17.149, 42.17.401, 42.17.402, and 42.17.403 relating to withholding and unemployment insurance tax rules	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION, AMENDMENT, TRANSFER AND AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On July 16, 2001, at 1:00 p.m., a public hearing will be held in Fourth Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the adoption of New Rules I through XII; amendment of ARM 42.17.101, 42.17.103, 42.17.105, 42.17.113, 42.17.114, 42.17.131, 42.17.134, and 42.17.136; transfer and amendment of ARM 24.11.606, 24.11.607, 24.11.608, 24.11.609, 24.11.610, 24.11.708, 24.11.801, 24.11.803, 24.11.804, 24.11.805, 24.11.835, 42.17.112, and 42.17.118; and repeal of ARM 42.17.121, 42.17.132, 42.17.145, 42.17.147, 42.17.148, 42.17.149, 42.17.401, 42.17.402, and 42.17.403 relating to withholding and unemployment insurance tax rules.

Individuals planning to attend the hearing shall enter the building through the east doors of the Sam W. Mitchell Building, 125 North Roberts, Helena, Montana.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Revenue not later than 5:00 p.m., July 2, 2001, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 5805, Helena, Montana 59604-5805; telephone (406) 444-2855; fax (406) 444-3696; or e-mail canderson@state.mt.us.

3. The proposed new rules do not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rules shown below will be placed in Chapter 17, sub-chapter 2, which applies to both withholding and unemployment insurance taxes, and provide as follows:

NEW RULE I RECORDS TO BE KEPT BY EMPLOYER (1) As required by ARM 42.2.305, employers must keep employment records for each employee for five years. Such records must show:

(a) For each pay period:

(i) the beginning and ending dates;

(ii) the total wages, as defined in 39-51-201 and 15-30-201, MCA, for employment in such pay period; and

(iii) the number and date of weeks in which there were one or more employees.

(b) For each employee:

(i) employee's full name;

(ii) social security number;

(iii) wages for each pay period, showing separately:

(A) money wages payable including special payments or constructive payment of wages;

(B) reasonable cash value of remuneration by the employer in any medium other than cash;

(C) estimated or actual amount of gratuities received from persons other than employer; and

(D) special payments of any kind, including annual bonuses, gifts, prizes, etc.

(iv) the date on which the employee was hired, rehired, or returned to work after a temporary layoff;

(v) the date employment was terminated by layoff, quit, discharge, or death;

(vi) the cause of any termination;

(vii) the method of payment:

(A) whether the employee is paid a salary or commission, or paid on an hourly, or by-piece basis; and

(B) if the employee is paid on a fixed daily basis, the employee's daily rate and the customarily scheduled days per week prevailing in the establishment for his occupation; and

(C) if the employee is paid on a piece rate or other variable pay basis.

(viii) documents supporting employee expense reimbursements.

(2) Evidence of business ownership including, but not limited to, partnership agreements and documents issued or acknowledgments by the secretary of state.

(3) The department is authorized to examine any and all records necessary for the administration of the unemployment insurance law (Title 39, chapter 51, MCA), and the withholding and estimated tax law (Title 15, chapter 30, part 2, MCA). These records include, but are not limited to:

(a) payroll records;

(b) disbursement records;

(c) tax returns;

(d) personnel records;

(e) minutes of meetings;

(f) loan documentation; and

(g) any other records which might be necessary to determine claimant eligibility and employer liability.

(4) These records and reports must be maintained by the employer for a period of five years and are open to periodic

review by authorized representatives as provided in ARM 42.2.305.

AUTH: Sec. 15-30-305, 39-51-301, and 39-51-302, MCA
IMP: Sec. 15-30-204 and 39-51-603, MCA

REASONABLE NECESSITY: There is reasonable necessity to adopt New Rule I because 15-30-204 and 39-51-603, MCA, require employers to keep records and maintain reports. This rule clarifies what type of reports must be filed with the department, and where and when these reports are due. The rule identifies various documents that must be retained by employers for tax purposes. The Department of Revenue staff, when verifying employee status, will review the documents identified in this rule when they conduct audits and other inspections.

NEW RULE II QUARTERLY REPORTS BY EMPLOYERS (1) Every employer must report information to the department on an approved quarterly report form, except those who qualify and elect to file annually as provided in 15-30-204, MCA. The department may request any information from the employer necessary for the collection of the tax.

(2) All employers must complete and return this form even if the employer did not pay any wages during the calendar quarter.

(3) Wages become subject to tax when they are actually or constructively paid. Wages must be reported in the calendar quarter in which they are actually or constructively paid. Wages are constructively paid if they are credited to the employee's account and set apart for an employee so that they may be withdrawn at the employee's discretion.

(4) The quarterly reports must be postmarked by the following dates:

Quarter	Months Covered	Due Date
First:	January, February, March	April 30
Second:	April, May, June	July 31
Third:	July, August, September	October 31
Fourth:	October, November, December	January 31

(5) If a due date falls on a weekend or holiday, the next business day becomes the due date for which the quarterly reports must be postmarked.

AUTH: Sec. 15-30-305, 39-51-301, and 39-51-302, MCA
IMP: Sec. 15-30-204 and 39-51-603, MCA

REASONABLE NECESSITY: There is reasonable necessity to adopt New Rule II for the same reasons stated in the first sentence of the reasonable necessity for New Rule I.

NEW RULE III IDENTIFICATION OF EMPLOYEES (1) Each employer must ascertain the social security number of each employee, and refer to such account number, as well as the employee's name, whenever referencing such employee in any:

(a) letter;

(b) report form;
(c) claim for benefits; or
(d) other communication addressed to the department.
AUTH: Sec. 15-30-305, 39-51-301, and 39-51-302, MCA
IMP: Sec. 15-30-204, 15-30-207, 15-30-257, and 39-51-603, MCA

REASONABLE NECESSITY: There is reasonable necessity to adopt New Rule III because it clarifies the responsibility of employees to obtain a social security number and that this number must be used in the course of employment. Employers are required by statute to report the wages earned by each employee and this information is provided to the department through a listing of employee social security numbers. The rule also clarifies documents where this information will be required.

NEW RULE IV WAGES (1) The term wages, as defined in 15-30-201 and 39-51-201, MCA, for purposes of reporting and paying withholding and unemployment insurance taxes, includes but is not limited to, the following types of remuneration for services:

(a) Holiday and vacation pay, or payments in lieu of vacation pay, are wages.

(b) Back pay awards are wages to the extent such awards are based on services performed or services that would have been performed if the worker had not been wrongfully terminated.

(c) The cash value of board and room is considered to be wages. Room and board provided for the convenience of the employer is not subject to withholding tax as provided in 26 USC 119. The department determines the cash value of room and board, unless the employment contract sets the value at an amount equal to or greater than the amounts established in this rule.

(i) Room and board has at least the following cash value:

Full room and board weekly.	$ 130
Meals, per week	$ 60
Meals, per meal	$ 3
Room, per week	$ 70

(d) Payments distributed to corporate officers or shareholders in lieu of reasonable compensation for services performed are wages, even though designated as profits or dividends.

(e) Payments for termination, severance, separation, or other similar payments are wages.

(f) Advances or draws against future earnings are wages when paid. Payments designated as loans in the employer's records are considered wages unless the loan is to be repaid under a written schedule agreed upon by the employee and the employer.

(g) Wages may also include payments identified in ARM 42.17.103 and [New Rule XII].

AUTH: Sec. 15-30-305, 39-51-301, and 39-51-302, MCA

IMP: Sec. 15-30-201 and 39-51-1103, MCA

REASONABLE NECESSITY: There is reasonable necessity to adopt New Rule IV because the laws do not clarify the different type of wage components used by the agency when determining if income will be considered wages. The rule further explains how the employer should report these components to the department for unemployment insurance and withholding tax purposes.

NEW RULE V RENTAL OF CAPITAL ASSETS - NOT WAGES

(1) Payments made to the employee for rental of equipment or other capital assets owned by the employee are not wages if:

(a) the rented equipment is necessary for the employee to perform the job;

(b) employment contract or corporate records provides for such payments;

(c) the amount of each employee's reimbursement is entered separately in the employer's records; and

(d) reimbursement does not replace the customary wage for the occupation.

(2) The actual expenses incurred by the employee may be considered reasonable rental fees if the employer's records show the following:

(a) initial cost;

(b) depreciation; and

(c) maintenance and operational costs in connection with the services performed for the employer.

(3) With respect to equipment or other capital assets, other than vehicles, the employer may pay an allowance not greater than the reasonable rental value for that asset.

(4) For individuals involved in timber falling, the reasonable rental value may not exceed $22.50 per working day for chain saw and related timber falling expense.

(5) With respect to heavy equipment, including but not limited to semi-tractors or bulldozers, the reasonable rental value may not exceed 75% of the employee's gross remuneration.

(6) Passenger vehicle expenses may be reimbursed either on the basis of actual receipts or upon mileage, at a rate no greater than that allowed by the IRS for the preceding year, provided that the individual actually furnishes the vehicle.

(7) For purposes of this rule, hand tools customarily used in the employee's trade have no rental value. Any rental payments made with respect to these items are considered wages.

AUTH: Sec. 15-30-305, 39-51-301, and 39-51-302, MCA

IMP: Sec. 15-30-201, 39-51-201, and 39-51-1103, MCA

REASONABLE NECESSITY: There is reasonable necessity to adopt New Rule V because it identifies certain payments which are made to employees that may not be considered wages. The rule specifically addresses rental of capital assets and how this cost is handled when certain circumstances exist. The rule addresses areas such as timber falling, heavy equipment, passenger vehicle expenses and hand tools and that reimbursement for the use of these items is not considered wages. Section (4)

provides that the $22.50 rate for timber falling resulted from negotiations between the Department of Labor and Industry and the timber industry after the courts disallowed a previous amount of 25% in a workers' compensation case. Section (5) addresses the fact that a reasonable rental amount may not exceed 75% of the employee's gross remuneration. This amount was established by the Department of Labor and Industry and has been acceptable to the industry for over 27 years. Therefore, the Department of Revenue believes this limitation should be included in its new rules for consistency and treatment.

NEW RULE VI EMPLOYEE EXPENSES - NOT WAGES (1) Payments made to an employee to reimburse the employee for ordinary and necessary expenses incurred during the course and scope of employment are not wages if all of the following are met:

(a) the amount of each employee's reimbursement is entered separately in the employer's records;

(b) the employer has documentation that the employee incurred the expenses in conducting business for the employer;

(c) the reimbursement is not deducted from or based on a percentage of the employee's wage;

(d) the reimbursement does not replace the customary wage for the occupation; and

(e) if applicable, the reimbursement may be based on any of the following:

(i) actual expenses incurred by the employee which are supported by receipts;

(ii) a flat rate for meals and lodging, no greater than the amount allowed to employees of the state of Montana under 2-18-501, MCA, for meals and lodging, unless, through documentation, the employer can substantiate a higher rate;

(iii) for drivers utilized or employed by a motor carrier with intrastate operating authority, meal and lodging expenses may be reimbursed by either of the methods provided in (1)(e)(i) or (ii) above for each calendar day the driver is on travel status;

(iv) for drivers utilized or employed by a motor carrier with interstate operating authority, meal and lodging expenses may be reimbursed by the methods provided in (1)(e)(i) or (ii) above, or by a flat rate not to exceed $30 for each calendar day the driver is on travel status; or

(v) for mileage, at a rate no greater than that allowed by the IRS for that year, provided that the individual actually furnishes the vehicle.

AUTH: Sec. 15-30-305, 39-51-301, and 39-51-302, MCA
IMP: Sec. 15-30-201, 39-51-201, and 39-51-1103, MCA

REASONABLE NECESSITY: There is reasonable necessity to adopt New Rule VI because it clarifies that certain payments made to employees are not considered wages. The rule specifically addresses reimbursement of employee expenses not being considered wages if certain criteria are met and can be documented. It is necessary to have this rule to provide for the consistency between the Department of Labor and Industry's

benefits program and the Department of Revenue's tax processing. The flat rate for meals and lodging as shown in (1)(e)(ii) was originally adopted with the workers' compensation rules by the Department of Labor and Industry. The reference to $30 per day as shown in (1)(e)(iv) is the result a of workers' compensation case that was ultimately decided by the Montana Supreme Court. The trucking industry tried to use a portion of their mileage as per diem and the Montana Supreme Court disallowed it. This amount is also reflected in the Department of Labor and Industry rule, ARM 24.11.814.

NEW RULE VII JUROR FEES, INSURANCE PREMIUMS, ANNUITIES, DIRECTOR AND PARTNERSHIP FEES - NOT WAGES (1) Expense reimbursements, fees, meals, or other payments provided through a court to a juror are not wages.

(2) Insurance premiums or other regular payments paid by the employer into a fund for costs arising from employee sickness, disability, medical or hospital expenses are not wages if it is a qualified plan under the IRC.

(3) Annuities, insurance premiums or other regular payments made by the employer into a fund for costs arising upon retirement or death are not wages, if the plan is a qualified plan under the IRC.

(4) Customary and reasonable director's fees for attending meetings of the board of directors of a corporation are not wages, if the fees are not paid in lieu of reasonable compensation for services performed.

AUTH: Sec. 15-30-305, 39-51-301, 39-51-302, and 39-51-2407, MCA

IMP: Sec. 39-51-201 and 39-51-1103, MCA

REASONABLE NECESSITY: There is reasonable necessity to adopt New Rule VII because it clarifies a specific list of expense reimbursements that are not wages. The rule addresses juror expenses, insurance premiums paid for the benefit of the employee, annuities and death benefits that qualify under the Internal Revenue Code. The rule also clarifies when reasonable director's fees for attending a corporate board meeting will not be considered wages. Juror fees are not considered "wages" since the juror is not "employed" not under the direction and/or control of the court. The rule supports the provisions found in 39-51-201(20)(b)(ii), MCA, which states: "employee expense reimbursement or allowances for meals, lodging, travel, subsistence, or other expenses, as set forth in department rules" are not considered wages.

NEW RULE VIII DETERMINATION OF INDEPENDENT CONTRACTOR

(1) To determine whether an employment relationship or independent contractor situation exists, the department may:

(a) review written contracts between the individual and the employing unit;

(b) interview the individual, co-workers, or the employing unit;

(c) obtain statements from third parties;

(d) examine the books and records of the employing unit;

(e) review filing status on income tax returns; and

(f) make any other investigation necessary to determine if an independent contractor relationship exists.

(2) After investigation, the department may issue an initial written determination on whether an individual is an independent contractor. Any person or employing unit aggrieved by this initial determination may request investigation and a determination by the department of labor and industry's independent contractor central unit (ICCU) pursuant to ARM Title 24, chapter 35, sub-chapters 2 and 3, within ten days of notice of the initial determination.

(a) A party is considered to have been given notice on the date a written notice is personally delivered or three days after a written notice is mailed to the party.

(b) The time limits set forth above may be extended for good cause as provided in 39-51-2402, MCA.

(3) Thereafter, the process set out in ARM Title 24, chapter 35, sub-chapters 2 and 3, controls.

AUTH: Sec. 15-30-305, 39-51-301, and 39-51-302, MCA

IMP: Sec. 15-30-201, 15-30-248, 39-51-201, and 39-51-1103, MCA

REASONABLE NECESSITY: There is reasonable necessity to adopt New Rule VIII because the law is not clear on the procedure used in determining an individual's employment status. The rule defines the process for arriving at a determination. It further addresses the appeal process being handled through the Department of Labor and Industry regarding a dispute over a classification determination.

NEW RULE IX STATUS OF CERTAIN PERSONAL ASSISTANTS

(1) A person with a disability who receives services of a personal assistant or an immediately involved representative of the disabled person, such as a parent or guardian, is not the employer of the personal service assistant despite the exercise of control over the selection, management and supervision of the personal assistant if:

(a) the personal assistant is providing services to the disabled person pursuant to 53-6-145, MCA, and rules adopted by the department of public health and human services implementing that statute; and

(b) the personal assistant is the employee of another person or entity that has the right to exercise an employer's control over the personal assistant, including the right to discipline and terminate employment.

AUTH: Sec. 15-30-305, 39-51-301, 39-51-302, and 53-6-145, MCA

IMP: Sec. 53-6-145, MCA

REASONABLE NECESSITY: There is reasonable necessity to adopt New Rule IX because it is necessary to clarify when certain personal assistants are liable for unemployment insurance. This rule was originally proposed at the request of the Department of

Public Health and Human Services to help clarify whom the actual employer is in cases of home health care. The Department of Public Health and Human Services may hire a home health care provider to care for an individual. The individual receiving the care or a member of their family or personal representative may give direction and instruction regarding the specific care and they may also dismiss the health care provider from the services. This instruction or action does not make that person the employer. The placing or hiring agent or agency is the employer and therefore liable for all tax related matters. The Department of Labor and Industry adopted ARM 24.11.833 in 1995 to address this issue. This rule is necessary for the tax side of unemployment insurance as well as the benefits area.

4. The following proposed new rules do not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rules shown below will be placed in Chapter 17, sub-chapter 5, which applies only to unemployment insurance taxes and provide as follows:

NEW RULE X BENEFIT OVERPAYMENTS - CREDITING EMPLOYER ACCOUNTS (1) The department of labor and industry immediately credits an experience-rated employer's account if a benefit overpayment occurs. The employer is informed of the credit on the statement of benefits charged to the account.

(2) The employer's account is credited for the amount the account was previously charged for benefits. For example, if the employer was charged for 50% of the benefits, the employer would be credited for 50% of the overpayment.

(3) A governmental entity or an employer electing to reimburse the fund is credited for an overpayment when the overpayment is recovered from the claimant or when the overpayment is waived. However, pursuant to ARM 24.11.616, charges to the accounts of governmental entities and employers electing to reimburse the fund will be credited for benefit overpayments in the same manner as experience-rated employers.

AUTH: Sec. 15-30-305, 39-51-301, and 39-51-302, MCA

IMP: Sec. 39-51-1125, 39-51-1212, 39-51-1213, 39-51-1214, and 39-51-1215, MCA

REASONABLE NECESSITY: There is reasonable necessity to adopt New Rule X because the department is required to administer the unemployment insurance tax laws with regard to benefit charging and experience rating for employers. The new rule is necessary because the rule previously used by both the benefit and tax areas of the Department of Labor and Industry will be retained by that agency for benefit purposes. Therefore, a new rule will be necessary for the Department of Revenue to assist in administering the tax portion of the law. This new rule is identical to ARM 24.11.616 (Department of Labor and Industry). It is necessary to coordinate the benefit and tax requirements for both agencies.

NEW RULE XI POSTING NOTICE TO WORKERS (1) Every employer

must post and maintain a printed notice provided by the department showing that the employer is subject to Montana unemployment insurance law, and has been registered by the department. This notice must be posted in conspicuous places near the locations where services are performed.

AUTH: Sec. 15-30-305, 39-51-301, and 39-51-302, MCA
IMP: Sec. 15-30-257 and 39-51-1110, MCA

REASONABLE NECESSITY: There is reasonable necessity to adopt New Rule XI for the same reasons the department is proposing New Rule X.

NEW RULE XII OTHER PAYMENTS (1) The term wages, as defined in 39-51-201, MCA, for purposes of reporting and paying unemployment insurance taxes, includes:

(a) Payments made from an employee's gross remuneration into deferred compensation or cafeteria plans and other similar plans are wages reportable for the period in which the compensation was earned.

(b) Payments for sick leave and accident disability even if not paid directly by the employer, but by a third party such as an insurance agent. For example, if the employer pays premiums to the third party to cover sick leave or accident disability costs, the payments paid by the third party to the employee are wages. If the employee pays the premiums for such coverage, the sick leave or accident disability payments are not wages.

(2) The employer is responsible for tax payments attributable to sick leave or accident disability payments made to, or on behalf of, an employee for six months after the last calendar month in which the employee worked for such employer. The third party assumes responsibility for the payments if the third party fails to give the following information to the employer within 15 days of the end of the calendar quarter in which the payments were made:

(a) name and social security number of the employee who received the sick leave payments; and

(b) total amount of the payments.

AUTH: Sec. 15-30-305, 39-51-301, and 39-51-302, MCA
IMP: Sec. 15-30-201 and 39-51-1103, MCA

REASONABLE NECESSITY: There is reasonable necessity to adopt New Rule XII because the law does not clarify the different type of wage components and how the employer, for unemployment insurance tax purposes, reports these items to the department. The rule identifies the various components and when they apply in an unemployment insurance situation. Timely quarterly reports from the employer are required by law. The requirement shown in (2), to have the necessary information to the employer within 15 days of the end of the calendar quarter, ensures that the quarterly reports can be timely filed by the employer.

5. The rules proposed to be amended provide as follows:

42.17.101 DEFINITIONS The following terms pertain to this chapter: (1) ~~The term "employee" means:~~

~~(a) Any individual who performs services for another individual or organization having the right to control the employee as to the services to be performed and as to the manner of performance. The power to control, rather than the actual exercise of control, is the important factor. Designation of an individual as, or determination by an appropriate authority that an individual is, an employee for purposes of industrial accident insurance (workers' compensation), unemployment compensation, federal social security, or federal withholding tax will establish that person as an employee.~~

~~(b) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, other supervisory personnel, and corporate officers are employees~~ "Contribution rate schedule" is the schedule setting the range of contribution rates that may be assigned to employers in each calendar year. The contribution rate schedule is the ratio of the unemployment insurance trust fund balance as of October 31 to the total wages in employment for each year, ending June 30. See 39-51-1218, MCA.

(2) ~~The term "employer" means any person or organization for whom an individual performs any service as an employee. However, if the person or organization for whom an individual performs services does not have control of the wage payments, the term employer means the person or organization having control of the payment of such wages. State income tax and old fund liability tax withheld, or that should have been withheld, and old fund liability tax due will be collected from the person or organization having control of the payment of such wages.~~

~~(a) An employer may be an individual, corporation, limited liability company, partnership, estate, trust, association, joint venture, or other unincorporated group or entity. The term employer also includes all religious, educational, charitable, and social organizations or societies and all governmental agencies at the federal, state, and local level, including school districts, towns, counties, and other political subdivisions~~ "Employer's agent" with regard to state withholding means a third party that bears no insurance risk and is reimbursed on a cost-plus-fee basis for payment of sick pay and similar amounts.

(3) ~~The term "fees" is referring to authorized fees paid to notaries public, clerks of court, sheriffs, etc., for services rendered in performance of their official duties~~ "Individual" means a worker who renders service in the course of an occupation.

(4) ~~The term~~ "~~r~~Reporting forms" includes, but is not limited to: ~~the QR quarterly reconciliation for accelerated filers, the YR yearly payment reconciliation for monthly filers, the AR annual reconciliation for annual filers, the MW3 transmittal document and the W2 wage statements for all filer types~~

(a) PC - payment coupon;

(b) MTQ - Montana Employer's Quarterly Tax Report;

(c) MTQ Coupon - MTQ quarterly coupon;

(d) MW3 - state income tax withholding transmittal document (W-2);

(e) MW3/AR - state income tax withholding transmittal document (W-2) and reconciliation for annual remitters; and

(f) W-2 - wage and tax statement.

(5) ~~The term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for an employer, including the fair value of all remuneration paid in any medium or form other than money. Thus, salaries, wages, bonuses, fees, commissions, and other payments are wages subject to withholding if paid as compensation for services rendered by an employee for his employer. Wages do not lose their identity even though payment may be deferred.~~

~~(a) The name by which compensation is designated is immaterial~~ "Sole proprietor," as used in 15-30-256 and 39-51-204, MCA, may include a husband and wife partnership for the purpose of withholding and unemployment insurance.

AUTH: Sec. 15-30-305, 39-51-301, and 39-51-302, MCA

IMP: Sec. 15-30-105, 15-30-201, 15-30-256, 39-51-401, 39-51-1103, 39-51-1213, and 39-51-1218 ~~and 39-71-2501~~, MCA

REASONABLE NECESSITY: There is reasonable necessity to amend ARM 42.17.101 to clarify the terms used throughout this chapter. The term "contribution rate schedule" is necessary to clarify how the term is used in ARM 42.17.501. A definition for "individual" was added to clarify the term in New Rule VIII. A definition of "employer's agent" was added to ARM 42.17.103. The term "reporting forms" was further defined to include certain forms used by the department but not intended to be all inclusive of the forms, which may be required. The term "sole proprietor" is now extended to include a husband and wife partnership. Some of the prior rule definitions are now included in statute so those definitions are being deleted. Other general definitions were more appropriately moved to chapter 2 of this title because the definitions are broad and apply to other areas administered by the department.

42.17.103 WAGES, TIPS AND OTHER PAYMENTS (1) ~~Tip income received by an employee for services rendered within the premises of a licensed food, beverage, or lodging establishment is exempt from Montana withholding after December 31, 1982. However, the exemption is subject to change on the date the president approves legislation passed by Congress that removes the tip requirements of section 6053(c)(3) of the Internal Revenue Code of 1954. Service charges, sometimes called gratuities, are collected by the establishment through mandatory charges added to a customer's bill. Service charges are exempt from Montana withholding after December 31, 1994. Tips received from other services, e.g., hairdressing, driving taxis, delivering goods, etc., remain subject to withholding.~~

~~(2)(a)~~ Employee contributions to pension, profit sharing, stock bonus, or annuity plans, deferred compensation and

cafeteria plans where the payments are not otherwise considered wages, an IRA, or a commercial annuity contract ~~(whether or not the contract was purchased under an employer's plan for employees)~~ are exempt from withholding to the extent that the contributions are not includable in the employee's adjusted gross income for federal income tax purposes.

~~(b) The recipient of any distribution made up in whole or in part of contributions made pursuant to subsection (a) or solely of employer contributions may elect to have the payor withhold.~~

(2) Third party sick pay, paid by an employer's agent, is subject to withholding tax if requested in writing by the employee.

(a) A third party may be an employer's agent even if the third party is responsible for determining which employees are eligible to receive payments. Whether an insurance company or the other third party is the employer's agent depends on the terms of the agreement.

(b) A third party that makes payments of sick pay as the employer's agent is not considered the employer and generally has no responsibility for withholding taxes. This responsibility remains with the employer. However, under an exception to this rule, the parties may enter into an agreement that makes the third party agent responsible for reporting and payment of these taxes. In this situation, the third party agent should use its own name and customer identification number rather than the employer's name and customer identification number for the responsibility it has assumed.

(3) Payment of sick pay by a third party, other than an employer's agent, is not subject to withholding tax unless requested in writing by the recipient of the sick pay, or as described in (2)(b) above.

~~(c)(i)~~(4) A recipient of any designated distribution may elect to have the payor withhold state income tax from such payments by filing a written election with the payor. Such tax withholding election shall specify a flat dollar amount of income tax to be withheld by the payor from each designated distribution. Such election shall also specify the name, current address, and taxpayer identification number of the recipient. Any change or revocation of a previously filed election shall include the same information as required in this ~~paragraph~~ section for an initial election except the ~~payee~~ recipient should indicate whether a change or revocation of a previously filed election is being made. In this case, the payor shall remit the withholding tax to the department as required in ARM 42.17.113.

~~(ii)~~(5) The payor has the option to ~~chose~~ choose not to withhold from any designated distribution if the amount to be deducted and withheld is less than ~~ten dollars~~ $10. Additionally, income tax withholding by the payor from any designated distribution shall not be required if the amount to be withheld would reduce the net amount of such distribution to less than $10.

~~(iii) If the recipient elects withholding the payor shall~~

~~remit to the department as provided in ARM 42.17.112 through 42.17.116~~.

~~(3)~~(6) The payor of distributions, made up in whole or in part of contributions made pursuant to ~~(2)(a)~~ (1) above or solely of employer contributions, shall notify the recipients of the availability to state withholding~~,~~ and the requirements for the payment to state income tax on the taxable portion of a distribution.

(a) Payors shall notify ~~payees~~ recipients of the state requirements at the same time ~~payees~~ recipients are notified of the federal election requirements under IRC 3405(d)(10)(B) ~~IRC~~.

~~(b) Sample notification and election forms:~~

~~(i)~~(b) ~~Notification - payor to~~ Payors shall notify recipients at the time of distribution and yearly thereafter~~:~~.

~~You may be liable for payment of state income tax on the taxable portion of your pension payment. You must contact the state(s) where you earned income for specific information.~~

~~The following are states you may need to contact:~~

~~Montana - You may elect to have withholding by filing a state election form (enclosed, attached).~~

~~(ii) State election form - must contain the following information:~~

~~Name~~

~~Current address~~

~~Social Security number~~

~~Flat dollar amount to be withheld per payment~~

~~(iii) The department will provide payees with a telephone number and address that recipients can use to contact the department concerning Montana tax questions.~~

AUTH: Sec. 15-30-305, MCA
IMP: Sec. 15-30-201, MCA

REASONABLE NECESSITY: There is reasonable necessity to amend ARM 42.17.103 to delete the reference to wages and tips because this language is now in law and would be redundant in the rule. The new language found in (2) and (3) refers to third party sick pay and how it must be handled. Section 15-30-201, MCA, addresses following the federal law regarding "payments that may not be taxed under federal law." This rule gives guidance regarding the withholding responsibility for parties who act as a third party agent.

42.17.105 COMPUTATION OF WITHHOLDING ~~(1) The amount of state income tax withheld shall be calculated according to the following annual formula:~~

~~Definitions:~~

~~G = Annual gross earnings.~~
~~N = Number of withholding allowances claimed.~~
~~T = Net taxable earnings for the period.~~
~~W = Withholding tax for the period.~~

~~$2,710 = The exemption value.~~

~~Note: There is a two-step calculation involved in the annual formula; to adjust the formula for specific pay periods, i.e., monthly (12), semimonthly (24), biweekly (26) or weekly (52), divide the product of Step 2 by the number of pay periods per year:~~

~~Step 1: The net taxable earnings "T" must be computed. Net taxable earnings is based on the level of gross earnings, the amount of standard deduction, and the number of withholding allowances claimed.~~

~~Step 2: The actual tax to be withheld "W" is calculated. The actual tax withheld is calculated by taking a percentage of the net taxable earnings.~~

~~SINGLE PERSONS AND MARRIED PERSONS USING SINGLE RATE~~

~~Step 1: Calculate Taxable Earnings "T":~~

~~T = (0.60 X G) - (2,710 X N), whenever G is less than or equal to 12,500;~~

~~T = G - 5,000 - (2,710 X N), whenever G is greater than 12,500.~~

~~Step 2: Calculate Withholding Tax "W":~~

~~W = 0.0737 X T~~

~~MARRIED~~

~~Step 1: Calculate Taxable Earnings "T":~~

~~T = (0.60 X G) - (2,710 X N), whenever G is less than or equal to 25,000;~~

~~T = G - 10,000 - (2,710 X N), whenever G is greater than 25,000.~~

~~Step 2: Calculate Withholding Tax "W":~~

~~W = 0.0703 X T~~

~~(2) This rule is effective for tax periods beginning July 1, 1993.~~

(1) Employers shall calculate the state income tax amount according to the "Montana State Withholding Tax Guide Withholding Tax Tables," effective April 1, 1994, as revised May 2000, which is adopted by reference in this rule.

(2) The referenced tax guide in (1) above may be obtained by telephoning the department at its customer service center (406) 444-6900 or by writing to Montana Department of Revenue, P.O. Box 5835, Helena, Montana 59604-5835.

AUTH: Sec. 15-30-305, MCA

IMP: Sec. 15-30-103, 15-30-199, and 15-30-202, MCA

REASONABLE NECESSITY: There is reasonable necessity to amend ARM 42.17.105 because the formulas shown in the rule are confusing and the department now provides a booklet that explains the withholding formulas with specific instructions and examples.

42.17.113 ~~REPORTS AND~~ PAYMENTS (1) ~~Every employer is required to make a report to the department of revenue, in accordance with the schedule determined by the previous lookback period, summarizing the state income tax withheld from employee's wages in the reporting period. In addition, the old fund liability tax must be summarized on this report. The reporting forms are: QR (quarterly reconciliation for accelerated filers), the YR (yearly payment reconciliation for monthly filers), and AR (annual reconciliation for annual filers), MW3 (transmittal document) and W2 (wage statements for all filer types).~~

~~(a) The old fund liability tax is imposed on employers and employees at the statutory rate.~~

~~(b) No extension of time for remittance of the required tax amounts can be granted by the department.~~

~~(2) Reports must be submitted for each reporting period. If no tax was withheld on wages paid or no wages were paid for a reporting period, the report must still be submitted.~~

~~(3) Every employer is required to make payments to the department of revenue in accordance with the schedule determined by the previous lookback period for the previous pay day, month, or year. The department will provide payment coupons to accompany payments. Coupon forms used are: P26 for accelerated payments, P12 for monthly payments, and P1 for annual payments.~~

~~(4)~~ Failure to pay withheld amounts within the time provided and the use thereof by the employer in forwarding ~~his~~ its own business, is considered to be an illegal conversion of trust money. The employer will not regard withheld wages as being equivalent to ~~his~~ its own personal income tax indebtedness. Penalties provided in 15-30-321, MCA, apply to any violation of the requirement to collect, truthfully account for, and pay amounts required to be deducted from employee wages. ~~The penalties also apply to the old fund liability tax.~~

~~(5) All payments will be applied to state income tax withholding liability first, then to old fund liability tax. Insufficient payments will be applied in accordance with ARM 42.2.501.~~

~~(6) The department may require immediate payment of any tax it has reason to believe is in jeopardy, as provided by 15-30-312, MCA.~~

~~(7) The following chart is an overview of employer reporting and payment requirements~~.

~~Employer~~	~~Thresholds*~~	~~Report Name/ Date Due~~	~~Payments Due/ Form Name~~
~~Accelerated~~	~~$12,000 >~~	~~QR/Quarterly April 30, July 31, October 31, Jan 31 MW3 & W2's/ Feb 28~~	~~Federal Schedule/ Form P26~~
~~Monthly~~	~~$1,200-11,999~~	~~YR, MW3 & W2's/Feb 28~~	~~Monthly - 15th of month following/ P12~~
~~Annual~~	~~<$1,200~~	~~AR, MW3 & W2's/Feb 28~~	~~Feb 28/P1~~

~~* Threshold determined by amount of tax withheld during the 12 month "lookback period", i.e., July 1 - June 30 of the preceding fiscal year.~~

~~(8) If an accelerated employer's payment requirement for state purposes conflicts with the federal tax deposit requirements, the employer may elect to remit according to the federal schedule.~~

~~(9) De minimis exception: If an employer's estimated annual state income tax withholding and old fund liability tax liability is not expected to exceed $100 for the calendar year, the employer may apply to the department of revenue to remit and file on the annual report and remittance schedule. If, during the year, the combined liability exceeds $100, the employer must remit the total amount due and begin to remit on a monthly basis for the remainder of the calendar year. The employer is responsible for monitoring the accrued combined tax liability.~~

(2) If an employer's payment requirement of withholding tax for state purposes conflicts with the federal tax deposit requirements, the employer may elect to remit according to the federal schedule. The employer must provide the department with a copy of its federal notification.

(3) Once an employer becomes subject to withholding tax as provided in 15-30-201, MCA, the employer must continue to withhold, and report, income tax from the employees' wages for all subsequent calendar years.

AUTH: Sec. 15-30-305, MCA
IMP: Sec. 15-30-201, 15-30-204, and 15-30-210, MCA

REASONABLE NECESSITY: There is reasonable necessity to amend ARM 42.17.113 to delete the reference to old fund liability taxes and delete language, which is now found in statute. The new language is necessary to clarify withholding requirements for a subject employer and that the employer must file a copy of the notification form with the department. New (2) was

rewritten for better clarification of the language previously designated as (8). Section 15-30-201, MCA, defines an employer as being someone who pays $1,000 or more in wages within a calendar year. Section (3) clarifies that once an employer meets that definition they must continue to report and pay for all subsequent calendar years. The employer may not discontinue withholding each subsequent calendar year until such a time as they have paid an accumulated total of $1,000 in wages.

42.17.114 ANNUAL RECONCILIATION AND WAGE STATEMENTS

(1) On or before February 28 of each year, every employer must file with the department ~~of revenue~~ a transmittal document form MW3. Form MW3 must be accompanied by the original copies of each employee's earnings statements on federal form W-2.

(a) Employee's earning statements, federal form W-2, must be prepared for each employee, regardless of whether or not withholding ~~and/or old fund liability~~ taxes were actually withheld from the employee's wages. The state wages and state income tax withheld must be shown in the area provided. ~~The old fund liability tax wages and the tax withheld must be shown in either the employer's use box and designated as "OFLT" or in the local tax area and designated as "OFLT".~~

(b) and (c) remain the same.

(2) ~~Magnetic tape~~ Electronic reporting of employee earnings may be allowed if in conformity with department and federal specifications ~~and Federal Publication TIB-4a~~.

(3) Computer-generated W-2 equivalents in printout form may be allowed by the department in lieu of W-2's or ~~magnetic tape~~ electronic media.

(4) Application to provide ~~magnetic tape~~ electronic or printout reports must be made, and department approval given, before such report~~ing~~s are made.

(5) The federal form 1099R that has Montana state income tax withholding must be filed with the department in paper form by February 28 following the year that the tax was withheld.

AUTH: Sec. 15-30-305, MCA
IMP: Sec. 15-30-206~~,~~ and 15-30-207~~, and 39-71-2503~~, MCA

REASONABLE NECESSITY: There is reasonable necessity to amend ARM 42.17.114 to include the federal form 1099R, which reflects state income tax withheld. This is the form used for reporting pension payments and it is the only way the department can verify the amount.

42.17.131 WITHHOLDING ALLOWANCES (1) For purposes of determining the employee's withholding allowances, the amount of tax to be withheld is the same as or less than those claimed on the ~~I.R.S.~~ IRS Form W-4 withholding allowance certificate~~,~~ (on the line stating "Total number of allowances you are claiming"), furnished by the employee to the employer for federal withholding tax purposes. The department may determine the amount claimed on the ~~I.R.S.~~ IRS Form W-4 should be adjusted. The department ~~of revenue~~ does not provide forms for this purpose. The department has determined that the federal child

tax credit which allows extra allowances for federal withholding is not allowed for state purposes when determining the number of allowances for state withholding.

(2) "Exempt" status claimed for federal purposes does not exempt an employee's wages from withholding requirements for Montana purposes.

(3) and (4) remain the same.

(5) An employer is required to provide a copy of any withholding allowance certificate (W-4) to the Department of Revenue, P.O. Box 6339, Helena, Montana 596204-6339, on which an employee has claimed more than ~~10~~ ten withholding allowances. Each such certificate is to be provided at the same time and in the same manner as such certificate is required to be provided to the ~~internal revenue service~~ IRS under 26 CFR 37.3402-1. If, upon review of any such certificates, the department determines that the certificate is defective, it may require in writing that the employer disregard the allowances claimed and advise the employer of a maximum number of withholding allowances permitted the employee for state purposes. The filing of a new certificate by an employee whose withholding allowances have been set at a fixed maximum number by the department shall be disregarded by the employer unless a number equal to or less than the set maximum is claimed or written notice by the department is given authorizing a different maximum.

(6) When adjusting claimed withholding allowances for an employee under (5) above, the department shall consider:

(a) exemptions provided under 15-30-112, 15-30-113, and 15-30-114, MCA;

(b) marital status and number of employers;

(c) estimated wages and salaries;

(d) estimated allowable deductions under 15-30-121, 15-30-122, 15-30-123, and 15-30-131, MCA, to the extent that such deductions exceed the average itemized deductions taken into account in the withholding tables;

(e) business losses;

(f) annuity plan contributions; and

(g) residency.

(7) remains the same.

AUTH: Sec. 15-30-305, MCA
IMP: Sec. 15-30-202, MCA

REASONABLE NECESSITY: There is reasonable necessity to amend ARM 42.17.131 to clean up the language and make general housekeeping changes which reflect general terminology.

42.17.134 RECIPROCAL AGREEMENT - NORTH DAKOTA (1) through (1)(b) remain the same.

(c) A copy of the employee's NR-2 must be submitted by the employer to the ~~D~~department ~~of Revenue, Helena, Montana,~~ during or with the quarterly report for the quarter in which the NR-2 was provided the employer;

(d) If the department determines that an employee's certificate is false or unsubstantiated, it may require an employer to disregard any claim to North Dakota residency and

resume withholding on compensation earned in Montana~~; and~~.

~~(e) The reciprocal agreement does not affect an employer's liability for the old fund liability tax.~~

AUTH: Sec. 15-30-305, MCA
IMP: Sec. 15-30-202~~,~~ and 15-30-209~~, and 39-71-2503~~, MCA

REASONABLE NECESSITY: There is reasonable necessity to amend ARM 42.17.134 to delete the reference to old fund liability.

42.17.136 AFFIDAVIT - FORM AND CONTENT (1) The form and content of the affidavit exempting property from ~~state income tax~~ withholding ~~or old fund liability~~ tax liens shall be approved by the department and shall contain as much as available of the following information:

(a) through (c)(iv) remain the same.

(d) A statement or certification that all taxes, assessments, penalties and interest due from the grantor under 15-30-201 through 15-30-209 ~~and 39-71-2501 through 39-71-2504~~, MCA, have been paid.

AUTH: Sec. 15-30-305, MCA
IMP: Sec. 15-30-208 ~~and 39-71-2503~~, MCA

REASONABLE NECESSITY: There is reasonable necessity to amend ARM 42.17.136 to delete the reference to old fund liability.

6. The department is proposing to transfer and amend the following rules from ARM Title 24, chapter 11 and Title 42, chapter 17, sub-chapter 1. The proposed new rule number is identified behind each current rule number as follows:

42.17.112 (42.17.218) EMPLOYER REGISTRATION (1) Every employer required to withhold state individual income tax or ~~withhold and/or~~ pay ~~the old fund liability tax~~ unemployment insurance tax must ~~file an application~~ register for a~~n account~~ customer identification number ~~on the Combined Unemployment Insurance/Revenue Employer Registration Form UI/R-1~~ on a form provided by the department. A new employer who has acquired the business of another employer must not use ~~his~~ the predecessor's ~~account~~ identification number. Application for a~~n account~~ customer identification number is to be ~~made~~ sent to the Department of ~~Labor and Industry, P.O. Box 1728, Helena, Montana 59624~~ Revenue, P.O. Box 6339, Helena, Montana 59604-6339.

(2) ~~No r~~Registration is not considered complete unless:

(a) ~~T~~the federal employer identification number appears on the ~~application~~ registration; and

(b) ~~In the case of a sole proprietor or partnership,~~ all applicable ~~the~~ social security number~~(s)~~ of the owners, partners, corporate officers, or other principal~~(s)~~ appear~~(s)~~ on the ~~application~~ registration.

(3) ~~Not being~~ Failure to register~~ed~~ does not relieve an employer from withholding, reporting and remitting state income tax and~~/or for the old fund liability~~ unemployment insurance tax.

AUTH: Sec. 15-30-305 and 39-51-301, MCA
IMP: Sec. 15-30-209 and ~~39-71-2503~~ 39-51-202, MCA

REASONABLE NECESSITY: There is reasonable necessity to transfer ARM 42.17.112 to sub-chapter 2 in order to keep all of the withholding and unemployment insurance rules together. This will assist the taxpayer in finding administrative rules that apply to employer withholding and unemployment insurance requirements. The rule is amended to correct the address and provide a reference to "customer identification" as a new term used throughout the rules.

42.17.118 (42.17.219) FORMS AND PAYMENTS TO FILE AFTER TERMINATION OF WAGE PAYMENTS (1) The following ~~statements~~ must be filed with the department ~~of revenue~~ within 30 days ~~after the termination of wage payments:~~ of ceasing to be an employer as defined in 15-30-201 and 39-51-202, MCA:

(a) ~~Form QR, the quarterly report, (for accelerated payors) for the final quarter in which wage payments were made or the yearly report, form YR (for monthly filers) or form AR (for annual filers),~~ the payment coupon with remittance for the final payroll period ~~you paid~~ in which wages were paid ~~(P26, P12, or P1) and the appropriate cancellation coupon~~;

(b) ~~Form MW3, the transmittal document;~~ quarterly filers must file:

(i) the MTQ Employer's Quarterly Tax Report for the final quarter in which wages were paid; and

~~(c)~~(ii) the MW3 with ~~F~~form W-2, reporting individual employee's wages and taxes withheld during the year to the date of termination of wage payments.

(c) annual filers must file the final MW3/AR with form W-2, reporting individual employee's wages and taxes withheld during the year to the date of termination of wage payments.

AUTH: Sec. 15-30-305 and 39-51-301, MCA

IMP: Sec. 15-30-201, 15-30-204, 15-30-205, 15-30-206, 15-30-207, 15-30-209, and ~~39-71-2503~~ 39-51-202, MCA

REASONABLE NECESSITY: There is reasonable necessity to transfer ARM 42.17.118 to sub-chapter 2 in order to keep all of the withholding rules together and assist the taxpayer in finding administrative rules that apply to employer withholding requirements. The rule is specifically being amended to correct the reference to forms, include the unemployment requirements, and address annual filer requirements.

24.11.606 (42.17.501) EXPERIENCE-RATED EMPLOYERS (1) An experience-rated employer is a private employer whose contribution rate is based on the experience rating record of each business operated by the employer and the rate classification assigned to the employer under the contribution rate schedule.

(2) The contribution rate for each experience-rated employer is calculated by:

(a) determining the employer's experience factor;

(b) comparing that experience factor to the experience factors of all other employers; and

(c) assigning the employer a rate classification within the contribution rate schedule.

(3)~~(a)~~ The experience factor as defined in 39-51-1213, MCA, is computed by subtracting the benefits charged to the employer's account since October 1, 1981, from the amount of contributions paid by the employer since October 1, 1981. This is the "reserve." The reserve is then divided by the average annual taxable payroll for the last three fiscal years. The resulting ratio is the experience factor, also known as the reserve ratio. The following equations show how the experience factor is calculated:

Contributions paid - Benefit charges = Reserve

Reserve / Average taxable payroll = Experience Factor

~~(b)~~(a) Each experience-rated employer is assigned a rate classification on the contribution rate schedule depending upon the employer's experience factor.

~~(c)~~(b) Experience-rated employers are divided into three categories: eligible, new, and deficit employers. Each category is defined in ~~section~~ 39-51-1121, MCA.

(4) On or before April 1 of each year, the department mails rate notices to employers. The type of notice depends upon whether the employer is:

(a) an eligible employer~~,~~;

(b) a deficit employer~~,~~;

(c) a new employer~~,~~; or

(d) an employer with past due reports~~,~~ ~~and/or~~ taxes, penalties ~~and~~ or interest.

(5) Eligible employers and deficit employers who do not have delinquent accounts are sent a rate notice with the following information:

(a) ~~the~~ employer's taxable wages from the three fiscal years immediately preceding the computation date;

(b) ~~the~~ amount of all contributions paid from October 1, 1981, through the computation date~~.~~;

(c) ~~the~~ amount of benefits charged to the account since October 1, 1981~~,~~ through the computation date;

(d) ~~the~~ average taxable wages for the last three fiscal years;

(e) ~~the~~ employer's reserve and reserve ratio;

(f) ~~the~~ tax rates for the current year; and

(g) ~~the~~ taxable wage base for the current year.

(6) New employers who do not have delinquent accounts are sent a rate notice with the following information:

(a) ~~the~~ tax rates for the current year; and

(b) ~~the~~ taxable wage base for the current year.

(7)~~(a) Deficit employers with past due reports and/or taxes, penalties and interest are sent a rate notice assigning the maximum contribution rate effective for the current year. Eligible employers with past due reports and/or taxes, penalties and interest are sent a rate notice assigning the maximum eligible employer rate for the current year. New employers with~~

~~past due reports and/or taxes, penalties and interest are sent a rate notice assigning the maximum new employer rate for the current year.~~

~~(b)~~ If all past due reports~~,~~ ~~and/or~~ taxes, penalties and interest are satisfied within 30 days of the date of mailing the rate notice, the employer's deficit, eligible, or new computed contribution rate is reinstated. The department sends the employer a ~~new~~ revised contribution rate notice ~~stating the same information as eligible, deficit or new employers who do not have delinquent accounts~~.

(8)~~(a)~~ The rate notice is final unless the employer files a written request for a re-determination within 30 days of receiving the rate notice. The request for re-determination must explain why the employer believes the assigned contribution rate is incorrect.

~~(b)~~(9) If, after re-determination, the employer still contests the contribution rate, the employer may appeal the department's decision ~~to an appeals referee~~ under ~~39-51-2402 and 39-51-2403~~ 15-1-211, MCA.

~~(9)~~(10) ~~Contributions for experience-rated employers are reduced by .1% b~~Beginning in the ~~third~~ first quarter of ~~1983~~ 2000~~.~~, ~~A~~an assessment ~~equal to the amount of this reduction~~ in the amount of .13% of taxable wages must be paid by all experience-rated employers and deposited in the employment security account provided for in 39-51-409, MCA. The .13% is not considered as "contributions" for the purposes of 39-51-401, MCA, and for purposes of reporting on form 940 Employer's Annual Federal Unemployment (FUTA) Tax Return.

AUTH: Sec. 15-30-305, 39-51-301, and 39-51-302, MCA
IMP: Sec. 39-51-301, 39-51-404, 39-51-1103, 39-51-1121, 39-51-1123, and 39-51-1213, MCA

REASONABLE NECESSITY: There is reasonable necessity to transfer and amend ARM 24.11.606 from the Department of Labor and Industry to the Department of Revenue, Title 42, chapter 17, sub-chapter 5. This rule is strictly administered for unemployment insurance tax purposes. Therefore, it should be placed in the Department of Revenue rules for compliance and enforcement purposes. The amendments to this rule are necessary to advise the taxpayers that the appeals conducted under these rules will be conducted according to the appeals process of the Department of Revenue rather than Department of Labor and Industry.

24.11.607 (42.17.502) STATE, LOCAL GOVERNMENT AND NON-PROFIT ORGANIZATIONS (1) Under 39-51-1124~~,~~ ~~through~~ 39-51-1125, and 39-51-1126, MCA, in lieu of paying taxes, a nonprofit organization or governmental entity may elect to reimburse the trust fund for benefit payment costs.

~~(2)~~(a) To qualify for reimbursement, the non-profit employer must:

~~(a)~~(i) meet the criteria in ~~S~~section 501(c)(3) of the ~~Internal Revenue Code~~ IRC;

~~(b)~~(ii) submit a copy of the exemption letter from the

~~internal revenue service~~ IRS; and

~~(c)~~(iii) file an election of method of payment form ~~(UI 1A)~~.

~~(3)(a)~~(b) To reimburse the trust fund, an employer must pay into the trust fund an amount equal to the regular benefits and the state of Montana's share of extended benefits charged to the employer's account.

~~(b)~~(c) The department notifies the employer monthly of the amount of benefits charged to the account.

~~(c)~~(d) The trust fund may be reimbursed on a monthly basis, but, to avoid late payment penalties and interest, reimbursement must be ~~reimbursed~~ made no later than 30 days after the end of the quarter in which benefits were charged to the account.

~~(4)~~(2) A governmental entity that does not elect to reimburse the trust fund is assigned an experience rate based on 39-51-1212, MCA.

(a) On or before June 15 of each year, the department mails rate notices to governmental employers.

(b) All or the applicable portion of the experience rating record of a governmental employer is transferred to the successor in the event of a merger, split or acquisition, unless the successor elects to reimburse the trust fund.

(3) A non-profit organization that is not a governmental entity and does not elect to reimburse the trust fund is assigned an experience rate based on 39-51-1213, MCA.

AUTH: Sec. 15-30-305, 39-51-301, and 39-51-302, MCA

IMP: Sec. 15-30-301, 39-51-1124, 39-51-1125, and 39-51-1126, MCA

REASONABLE NECESSITY: There is reasonable necessity to transfer and amend ARM 24.11.607 from the Department of Labor and Industry to the Department of Revenue, Title 42, chapter 17, sub-chapter 5. This rule is strictly administered for unemployment insurance tax purposes. Therefore, it should be placed in the Department of Revenue rules for compliance and enforcement purposes. The amendments to this rule are necessary to clarify the administrative expense of a nonprofit organization or governmental entity rate on quarterly wages as defined in 39-51-404, MCA.

24.11.608 (42.17.503) STATE AND LOCAL GOVERNMENTS (1) A governmental entity that does not elect to reimburse the trust fund is assigned an experience rate based on 39-51-1212, MCA. ~~(See chart on page 24-673.)~~

(2) Governmental entities are assessed for purposes of 39-51-404~~(4)~~, MCA, at the rate of .05% of total quarterly wages.

(3) The following is the rate schedule used for governmental entities.

RATE FOR GOVERNMENTAL ENTITIES
EXPERIENCE RATING SYSTEM

Individual Employer's Benefit Cost Ratio	*Median Benefit Cost Ratio											
	.3	.4	.5	.6	.7	.8	.9	1.0	1.1	1.2	1.3	1.4	1.5
.1 or less	.1	.1	.2	.3	.4	.5	.6	.7	.8	.9	1.1	1.3	1.5
.2	.1	.1	.2	.3	.4	.5	.6	.7	.8	.9	1.1	1.3	1.5
.3	.1	.2	.3	.4	.5	.6	.7	.8	.9	1.0	1.1	1.3	1.5
.4	.2	.2	.3	.4	.5	.6	.7	.8	.9	1.0	1.2	1.3	1.5
.5	.2	.3	.4	.5	.6	.7	.8	.9	1.0	1.1	1.2	1.4	1.5
.6	.2	.3	.4	.5	.6	.7	.8	.9	1.0	1.1	1.3	1.4	1.5
.7	.3	.4	.5	.6	.7	.8	.9	1.0	1.1	1.2	1.3	1.4	1.5
.8	.3	.4	.5	.6	.7	.8	.9	1.0	1.1	1.2	1.3	1.4	1.5
.9	.3	.4	.5	.6	.7	.8	.9	1.0	1.1	1.2	1.3	1.4	1.5
1.0	.4	.5	.6	.7	.8	.9	1.0	1.1	1.2	1.3	1.3	1.4	1.5
1.1	.4	.5	.6	.7	.8	.9	1.0	1.1	1.2	1.3	1.4	1.4	1.5
1.2	.4	.6	.7	.8	.9	1.0	1.1	1.2	1.3	1.4	1.4	1.5	1.5
1.3	.5	.6	.7	.8	.9	1.0	1.1	1.2	1.3	1.4	1.4	1.5	1.5
1.4	.5	.7	.8	.9	1.0	1.1	1.2	1.3	1.4	1.5	1.5	1.5	1.5
1.5	.5	.7	.8	.9	1.0	1.1	1.2	1.3	1.4	1.5	1.5	1.5	1.5

*Total benefits charged to all governmental entities for all past periods divided by total wages paid by all governmental entities for all past periods. This percentage is used as a median rate. The column headed by that percent is used when the past experience computes to that figure.

AUTH: Sec. 39-51-302, MCA
IMP: Sec. 39-51-404 and 39-51-1212, MCA

REASONABLE NECESSITY: There is reasonable necessity to transfer and amend ARM 24.11.608 from the Department of Labor and Industry to the Department of Revenue, Title 42, chapter 17, sub-chapter 5. This rule is strictly administered for unemployment insurance tax purposes. Therefore, it should be placed in the Department of Revenue rules for compliance and enforcement purposes. The amendments to this rule are necessary to explain that if the governmental entity does not elect to be a reimbursable entity it is assessed at a special rate based on all governmental experience.

24.11.609 (42.17.504) RATES FOR NEW EMPLOYERS (1) Rates for new employers are based on Standard Industrial Classification (SIC) codes for ~~9~~ nine major industrial classifications, plus a non-classifiable division for employer accounts whose industrial class cannot be determined. SIC codes are assigned using the Standard Industrial Classification Manual. The SIC code assigned determines the major industrial classification and rate for the new employer account. On accounts comprised of two or more businesses or industries, the business or industry that produces the most revenue determines the proper SIC code.

(2) A professional employer organization (PEO) licensed under Title 39, chapter 8, MCA, for the first calendar year of subjectivity, is assigned the non-classifiable rate for new employers. Thereafter, unless the PEO is experience-rated, the PEO is assigned a rate as a new employer in the industry in which the majority of workers are placed for the PEO's clients.

(a) The PEO must provide ~~to~~ the department with the quarterly report ~~filing~~ and a list of workers showing which workers were assigned to which client. If the list is not provided, the PEO will be assigned the non-classifiable rate for new employers for the following year.

(3) The SIC codes are assigned as follows:

(a) Division A - agriculture, forestry, and fishing;

(b) Division B - mining;

(c) Division C - construction;

(d) Division D - manufacturing;

(e) Division E - transportation, communications, and public utilities;

(f) Division F - wholesale trade;

(g) Division G - retail trade;

(h) Division H - finance, insurance, and real estate;

(i) Division I - services; and

(j) Division K - non-classifiable establishments.

(4) Employers that do not provide sufficient information to be properly classified are assigned to the non-classifiable establishments division which carries the maximum rate for new employers. Employers have 30 days from the postmarked date of the rate notice ~~and/~~or rate letter to submit sufficient information for a proper SIC classification and rate assignment.

(5) The average rate for each major industrial classification is computed once a year to set rates for the calendar year. Rates for new employers are determined using the

average contribution rates in effect for the prior and current calendar year plus any adjustment for changes in the rate schedule.

AUTH: Sec. 39-8-201 and 39-51-302, MCA
IMP: Sec. 39-8-207 and 39-51-1101, MCA

REASONABLE NECESSITY: There is reasonable necessity to transfer and amend ARM 24.11.609 from the Department of Labor and Industry to the Department of Revenue, Title 42, chapter 17, sub-chapter 5. This rule is strictly administered for unemployment insurance tax purposes; therefore, it should be placed in the Department of Revenue rules for compliance and enforcement purposes. The amendments to this rule are general housekeeping changes.

24.11.610 (42.17.505) EXPERIENCE-RATING RECORD TRANSFER

(1) The procedures for transferring an employer's experience-rating record are described in 39-51-1219, MCA. For purposes of this rule, predecessor employer and successor employer are used in the same manner and have the same meaning as those terms have in 39-51-1219, MCA.

(2)~~(a)~~ Except as otherwise provided in this rule, an ~~form~~ application for transferring the experience-rating record ~~(UI-272)~~ is automatically sent to the successor employer if, within 90 days of the change of ownership, the department discovers that an account involves a predecessor employer. After 90 days, the successor employer must request the form.

~~(b)~~(3) An experience-rating record is automatically transferred from the predecessor employer to the successor employer if the predecessor employer had a deficit rate and the ownership or management of the successor entity is substantially the same as that of the predecessor entity. Such a record includes the amount of contributions paid, benefits charged, and taxable wages reported. For purposes of transferring the deficit experience rating, "substantially the same" means that at least 50% of the successor entity is owned or controlled by the same individuals who owned or controlled the predecessor entity.

~~(3)~~(4) A request for transfer of the experience-rating record may be approved if:

(a) all delinquent reports are filed;

(b) all past due taxes are satisfied; and

(c) the successor employer files an employer registration form ~~(UI-1)~~ as provided in ARM 42.17.112.

~~(4)~~(5) A transfer of the experience-rating record between a professional employer organization and its client is not allowed.

AUTH: Sec. 39-8-201, 39-51-301, and 39-51-302, MCA
IMP: Sec. 39-8-201 and 39-51-1219, MCA

REASONABLE NECESSITY: There is reasonable necessity to transfer and amend ARM 24.11.610 from the Department of Labor and Industry to the Department of Revenue, Title 42, chapter 17, sub-chapter 5. This rule is strictly administered for

unemployment insurance tax purposes; therefore, it should be placed in the Department of Revenue rules for compliance and enforcement purposes. The amendments to this rule are housekeeping changes which relate to registration requirements.

24.11.708 (42.17.220) CLOSING ACCOUNTS (1) ~~If a~~An ~~employing unit~~ employer that ceases all employment and ~~pays~~ reports no wages to the department for ~~8~~ eight calendar quarters is remove~~s~~d ~~the employing unit~~ from ~~it's~~ the department's record of active employers and the department notifies the ~~employing unit~~ employer of this action.

(2) An employer that has notified the department that it has ceased to employ is removed from the department's record of active employers.

AUTH: Sec. 39-51-301 and 39-51-302, MCA
IMP: Sec. 15-30-201 and 39-51-603, MCA

REASONABLE NECESSITY: There is reasonable necessity to transfer and amend ARM 24.11.708 from the Department of Labor and Industry to the Department of Revenue, Title 42, chapter 17, sub-chapter 2. The amendments to this rule are housekeeping and relate to closing accounts when an employer closes their business. A reference to 15-30-201, MCA, has been added as an implementing cite. Section (1) applies to department initiated cancellation and (2) applies to employer initiated cancellation.

24.11.801 (42.17.221) DUE DATE AND APPLICATION OF TAXES (1) ~~Taxes accrue when wages are actually or constructively paid. Wages are constructively paid if they are credited to the employee's account or set apart for an employee so that they may be withdrawn at the employee's discretion.~~

~~(2)~~ Unemployment insurance ~~T~~taxes are due and payable at the same time quarterly reports are due as provided in ~~39-51-201, MCA.~~ [New Rule III]. Withholding taxes are due as provided in 15-30-204, MCA.

~~(3) Extensions to file a quarterly report may be granted for good cause if the employer applies in writing for an extension on or before the tax due date. An estimated tax payment based on the employer's past payrolls must nevertheless be made on or before the tax due date.~~

~~(4)~~(2) Payments are applied to ~~the following obligations~~ tax liabilities ~~in the following order~~ as provided in ARM 42.2.501, unless bankruptcy proceedings or the department has determined otherwise~~:~~.

~~(a) contributions;~~
~~(b) 1985 surtax;~~
~~(c) administrative fund tax;~~
~~(d) assessment for interest on federal loan;~~
~~(e) interest;~~
~~(f) penalty; and~~
~~(g) jeopardy penalty.~~

~~(5)~~(3) Payments submitted with quarterly reports or payment coupons are applied to that quarter or period. If an employer pays more than the amount owed for withholding tax ~~under~~ on the

quarterly report, the withholding overpayment is applied to ~~the unpaid~~ other amounts due as provided in (2) above ~~from the oldest quarter~~. Unemployment insurance tax overpayments may only be applied to future unemployment insurance tax obligations or refunded to the employer unless the employer has authorized the department to use the amount overpaid for other tax liabilities. The employer may request that payments be applied to a more recent quarter.

~~(6) An employer electing to reimburse the trust fund is notified by the department monthly of the amount of payment in lieu of taxes. Such payments are not delinquent until 30 days after the completed calendar quarter.~~

AUTH: Sec. 15-30-305, 39-51-301, and 39-51-302, MCA
IMP: Sec. 15-1-216, 15-1-708, 15-30-321, 39-51-1103, and 39-51-1110, MCA

REASONABLE NECESSITY: There is reasonable necessity to transfer and amend ARM 24.11.801 from the Department of Labor and Industry to the Department of Revenue, Title 42, chapter 17, sub-chapter 2. Subsection (1) was transferred to New Rule IV because it applied to the reporting requirements. This rule is a joint withholding and unemployment insurance rule. New (3) clarifies the unemployment insurance overpayment restrictions found in 39-51-110, MCA. The original (4) was amended for consistency of the department's practice in applying partial payments. Subsection (6) was deleted because it is addressed in ARM 42.17.502 and therefore unnecessary in this rule.

24.11.803 (42.17.538) REPORTING OF WAGES IN EXCESS OF TAXABLE WAGE BASE (1) All wages paid to an employee by an employer are reportable as total wages. Wages paid to an employee in any single calendar year by an employer, up to and including the annual taxable wage base as defined in 39-51-1108, MCA, for that calendar year, are taxable wages. All further wages paid to the employee by that employer in that calendar year are "excess wages" and not taxable. ~~Below is an illustration of total wages, taxable wages and excess wages:~~

~~| Qtr. | Total Wages Paid in Qtr. | Total Wages Paid to Date | Taxable Wages | Excess Wages |~~
~~|---|---|---|---|---|~~
~~| First | 6,000 | 6,000 | 6,000 | none |~~
~~| Second | 6,000 | 12,000 | 6,000 | none |~~
~~| Third | 6,000 | 18,000 | 3,500 | 2,500 |~~
~~| Fourth | 5,200 | 23,200 | 000 | 5,200 |~~
~~| TOTAL | 23,200 | | 15,500 | 7,700 |~~

~~In this example, the $15,500 taxable wage base for the 1995 calendar year was reached in the third quarter with $3,500 as taxable and $2,500 in excess of the $6,000 paid to that employee. There is no tax due on the $5,200 paid in the fourth quarter because these wages are in excess of the taxable wage base.~~

(2) A successor employer, as described in 39-51-1219, MCA, may use the amount of wages paid by the predecessor to determine the successor employer's taxable wages. If a successor does not acquire a portion or all of the experience-rating record of a predecessor, the successor cannot use the amount of wages paid by the predecessor to determine the successor employer's taxable wages.

(3) If an employer has reported wages for an employee to another state, these wages may be used in ~~determining~~ calculating the employee's taxable wage ~~base~~ in Montana.

AUTH: Sec. 39-51-301 and 39-51-302, MCA
IMP: Sec. 39-51-1108, MCA

REASONABLE NECESSITY: There is reasonable necessity to transfer and amend ARM 24.11.803 from the Department of Labor and Industry to the Department of Revenue, Title 42, chapter 17, sub-chapter 5. The amendments to this rule are necessary because the base amount, which is the amount subject to tax for each employee, may change yearly and the example would not be kept current. The remaining amendments to this rule are housekeeping.

24.11.804 (42.17.539) DUE DATE OF TAXES FOR NEW EMPLOYERS

(1) An employing unit that meets the definition of an employer must file all quarterly reports and pay taxes due within 30 days following the quarter in which it met coverage requirements.

AUTH: Sec. 15-30-325 and 39-51-301, ~~39-51-1103,~~ MCA
IMP: Sec. 15-30-204, 39-51-301, and 39-51-302, MCA

REASONABLE NECESSITY: There is reasonable necessity to transfer and amend ARM 24.11.804 from the Department of Labor and Industry to the Department of Revenue, Title 42, chapter 17, sub-chapter 5. This rule is strictly administered for unemployment insurance tax purposes; therefore, it should be placed in the Department of Revenue rules for compliance and enforcement purposes.

24.11.805 (42.17.222) DEMAND OF PAYMENT OR REPORTS IF EMPLOYER TRANSFERS OR DISCONTINUES BUSINESS (1) The department may demand that an employer file a quarterly report and submit payment before the quarterly due date if the employer:

(a) quits doing business;

(b) sells or transfers the business, or the major portion of the business assets; or

(c) becomes insolvent.

(2) If the quarterly report and payment are not received within ~~thirty (30)~~ days of demand, the accrued taxes are subject to penalty and interest as provided in ~~section~~ 15-1-216 and 39-51-1301, MCA.

AUTH: Sec. 15-30-305 and 39-51-301~~, 39-51-302~~, MCA
IMP: Sec. 15-1-216, 15-30-204, and 39-51-1103, MCA

REASONABLE NECESSITY: There is reasonable necessity to transfer and amend ARM 24.11.805 from the Department of Labor and Industry to the Department of Revenue, Title 42, chapter 17, sub-chapter 2. The amendments to this rule are housekeeping.

24.11.835 (42.17.223) DETERMINING ~~WHETHER A WORKER IS THE~~ EMPLOYEE STATUS ~~OF A TEMPORARY SERVICE CONTRACTOR OR A PROFESSIONAL EMPLOYER ORGANIZATION~~ (1) If there is a dispute as to whether a worker is an employee of a temporary service contractor or a professional employer organization, the matter will be resolved by reference to the provisions of Title 39, chapter 8, MCA, and Title 39, chapter 71, MCA. If such a worker is not the employee of a temporary service contractor or professional employer organization, the worker is deemed to be an employee of the temporary service contractor's or professional employer organization's client.

(2) It is the intent of the department that any determination of a worker's status as an employee for unemployment insurance or withholding tax purposes be consistent with the determination of the same person's status under the Workers' Compensation Act and the professional employer organization laws.

AUTH: Sec. ~~39-51-302~~ 15-30-305 and 39-51-301, MCA
IMP: Sec. 15-30-248, 39-51-202, 39-51-203, 39-51-204, and 39-51-603, MCA

REASONABLE NECESSITY: There is reasonable necessity to transfer and amend ARM 24.11.835 from the Department of Labor and Industry to the Department of Revenue, Title 42, chapter 17, sub-chapter 2. The amendments to this rule are necessary to add withholding tax.

7. The Department proposes to repeal the following rules:

42.17.121 INDIVIDUAL LIABILITY which can be found on page 42-1714 of the Administrative Rules of Montana.
AUTH: Sec. 15-30-305, MCA
IMP: Sec. 15-30-203, 35-10-307, 39-71-2501, and 39-71-2503, MCA

REASONABLE NECESSITY: There is reasonable necessity to repeal ARM 42.17.121 because this language is now available in 15-30-203, MCA. The language would be redundant if retained.

42.17.132 TREATMENT OF VACATION ALLOWANCES AND BACK PAY which can be found on page 42-1722 of the Administrative Rules of Montana.
AUTH: Sec. 15-30-305, MCA
IMP: Sec. 15-30-201, MCA

REASONABLE NECESSITY: There is reasonable necessity to repeal ARM 42.17.132 because this language is now available in 15-30-201, MCA. The language would be redundant if retained.

42.17.145 OLD FUND LIABILITY TAX which can be found on page 42-1725 of the Administrative Rules of Montana.
AUTH: Sec. 15-30-305 and 39-71-2503, MCA
IMP: Sec. 39-71-2502, MCA

REASONABLE NECESSITY: There is reasonable necessity to repeal ARM 42.17.145 because the law was repealed in 1999.

42.17.147 WAGES - EXCEPTIONS which can be found on page 42-1725 of the Administrative Rules of Montana.
AUTH: Sec. 15-30-305 and 39-71-2503, MCA
IMP: Sec. 15-30-304 and 39-71-2501, MCA

REASONABLE NECESSITY: There is reasonable necessity to repeal ARM 42.17.147 because the law was repealed in 1999.

42.17.148 EMPLOYER'S FAILURE TO WITHHOLD OLD FUND LIABILITY TAX which can be found on page 42-1726 of the Administrative Rules of Montana.
AUTH: Sec. 15-30-305 and 39-71-2503, MCA
IMP: Sec. 15-30-203, 15-30-209, and 39-71-2503, MCA

REASONABLE NECESSITY: There is reasonable necessity to repeal ARM 42.17.148 because the law was repealed in 1999.

42.17.149 INDIVIDUAL LIABILITY - OLD FUND LIABILITY TAX which can be found on page 42-1726 of the Administrative Rules of Montana.
AUTH: Sec. 15-30-305 and 39-71-2503, MCA
IMP: Sec. 15-30-209, 35-10-307, and 39-71-2503, MCA

REASONABLE NECESSITY: There is reasonable necessity to repeal ARM 42.17.149 because the law was repealed in 1999.

42.17.401 OLD FUND LIABILITY TAX RATE which can be found on page 42-1757 of the Administrative Rules of Montana.
AUTH: Sec. 15-30-305 and 39-71-2503, MCA
IMP: Sec. 39-71-2503 and 39-71-2505, MCA

REASONABLE NECESSITY: There is reasonable necessity to repeal ARM 42.17.401 because the law was repealed in 1999.

42.17.402 ESTIMATED TAX, PENALTIES AND INTEREST ON OLD FUND LIABILITY TAX which can be found on page 42-1758 of the Administrative Rules of Montana.
AUTH: Sec. 15-30-305 and 39-71-2503, MCA
IMP: Sec. 39-71-2503, MCA

REASONABLE NECESSITY: There is reasonable necessity to repeal ARM 42.17.402 because the law was repealed in 1999.

42.17.403 OLD FUND LIABILITY TAX INCOME which can be found on page 42-1758 of the Administrative Rules of Montana.
AUTH: Sec. 15-30-305 and 39-71-2503, MCA

IMP: Sec. 39-71-2503, MCA

REASONABLE NECESSITY: There is reasonable necessity to repeal ARM 42.17.403 because the law was repealed in 1999.

8. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to:

Cleo Anderson
Department of Revenue
Director's Office
P.O. Box 5805
Helena, Montana 59604-5805

and must be received no later than July 27, 2001.

9. Cleo Anderson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

10. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding particular subject matter or matters. Such written request may be mailed or delivered to the person in paragraph 2 above or faxed to the office at 406-444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

11. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme
KURT G. ALME
Director of Revenue

Certified to Secretary of State June 11, 2001

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 44.6.201 and adoption of new rules regarding Uniform Commercial Code Filings (UCC)	)))))	NOTICE OF PUBLIC HEARING

TO: All Concerned Persons

1. On July 11, 2001, a public hearing will be held at 10:00 a.m. in the Secretary of State's Office Conference Room at room 260 of the State Capitol, Helena, Montana, to consider the proposed amendment of ARM 44.6.201 defining search criteria and adoption of new rules regarding UCC searches, amendments and consumer liens.

2. The Secretary of State will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you request an accommodation, contact the Secretary of State no later than 5:00 p.m. on July 9, 2001, to advise us of the nature of the accommodation that you need. Please contact Kitty Ryan, Secretary of State's Office, P.O. Box 202801, Helena, MT 59620-2801; telephone (406) 444-5598; FAX (406) 444-5833; e-mail kryan@state.mt.us.

3. The rule as proposed to be amended provides as follows:

44.6.201 DEFINING SEARCH CRITERIA FOR UNIFORM COMMERCIAL CODE CERTIFIED SEARCHES (1) through (6)(d) remain the same.

(7) A search limited to a particular city may not reveal all filings against the debtor searched and the searcher bears the risk of relying on such search.

AUTH: Sec. 2-15-404 and 30-9-407, MCA
IMP: Sec. 30-9-403 and 30-9-421, MCA

4. The rules as proposed to be adopted provide as follows:

RULE I EFFECTIVE DATE AND TIME (1) Any filing delivered by the postal service has an effective date as of 8:00 a.m. on the delivery date.

(2) Any filing received by fax, walk-in, or express delivery service will have the same date and time as received.

AUTH: Sec. 30-9-539, MCA
IMP: Sec. 30-9-539, MCA

RULE II REQUIREMENTS FOR FILING UCC AMENDMENTS (1) In addition to the requirements of 30-9-532, MCA, the following information needs to be included:

(a) the name of the debtor(s) currently on file with the secretary of state;

(b) the name of the secured party(s) currently on file with the secretary of state;

(c) the original filing number on file with the secretary of state;

(d) only one filing number per form.

(2) Multiple amendments, other than terminations, may be submitted on one form.

(3) Only one termination is allowed per form and must be signed by the secured party of record.

AUTH: Sec. 30-9-546, MCA
IMP: Sec. 30-9-539, MCA

5. The rules as proposed are intended to clarify procedures for perfecting liens under Revised Article 9.

6. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Janice Doggett, Secretary of State's Office, P.O. Box 202801, Helena, Montana 59620-2801, or by e-mailing jdoggett@state.mt.us, and must be received no later than July 19, 2001.

7. Janice Doggett, address given in paragraph 6 above, has been designated to preside over and conduct the hearing.

8. The Secretary of State maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding administrative rules, corporations, elections, notaries, records, uniform commercial code or combination thereof. Such written request may be mailed or delivered to the Secretary of State’s Office, Administrative Rules Bureau, 1236 Sixth Avenue, P.O. Box 202801, Helena, MT 59620-2801, faxed to the office at (406) 444-5833, e-mailed to klubke@state.mt.us, or may be made by completing a request form at any rules hearing held by the Secretary of State’s Office.

9. The bill sponsor notice requirements of 2-4-302, MCA do not apply.

/s/ BOB BROWN
BOB BROWN
Secretary of State

/s/ Janice Doggett
JANICE DOGGETT
Rule Reviewer

Dated this 11th day of June, 2001

**BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA**

In the matter of the adoption of New Rules I through IX relating to a specific agricultural chemical ground water management plan	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On May 10, 2001, the Department of Agriculture published notice of the proposed adoption of new rules I through IX relating to a specific agricultural chemical ground water plan at page 734 of the 2001 Montana Administrative Register, Issue Number 9.

2. The agency has adopted New Rule I, ARM 4.11.1201; New Rule II, ARM 4.11.1202; New Rule III, ARM 4.11.1203; New Rule IV, ARM 4.11.1204; New Rule V, ARM 4.11.1205; New Rule VI, ARM 4.11.1206; New Rule VII, ARM 4.11.1207; New Rule VIII, ARM 4.11.1208; and New Rule IX, ARM 4.11.1209 exactly as proposed.

3. The following two written comments were received and appear with Department of Agriculture's response:

COMMENT 1: The commenter indicated they are very concerned about the state of their ground water and are willing to do whatever needs to be done to protect their place and their respective groundwater.

RESPONSE: The Department appreciates the comment and concurs.

COMMENT 2: The commenter indicated that they are glad the department is taking steps to protect the ground water and are in favor doing whatever it takes to keep the water pure.

RESPONSE: The Department concurs.

DEPARTMENT OF AGRICULTURE

/s/ W. Ralph Peck
Ralph Peck
Director

/s/ Tim Meloy
Tim Meloy, Attorney
Rule Reviewer

Certified to the Secretary of State June 11, 2001.

BEFORE THE BOARD OF ATHLETICS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of ARM 8.8.2902, 8.8.3105, 8.8.3107, 8.8.3202, and 8.8.3401 pertaining to female contestants, downs, fouls, handwraps and officials	))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 5, 2001, the Board of Athletics published a notice of proposed amendment of the above-stated rules at page 505, 2001 Montana Administrative Register, issue number 7.

2. The Board has amended ARM 8.8.2902, 8.8.3105, 8.8.3107, 8.8.3202, and 8.8.3401 exactly as proposed.

3. No comments or testimony were received.

BOARD OF ATHLETICS
GARY LANGLEY, CHAIRMAN

By: /s/ Richard M. Weddle
Staff Attorney
Department of Commerce

By: /s/ Richard M. Weddle
Rule Reviewer

Certified to the Secretary of State, June 11, 2001.

BEFORE THE BOARD OF BARBERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of ARM 8.10.414, 8.10.415, and 8.10.501 pertaining to general requirements, posting requirements, toilet facilities and the adoption of a rule pertaining to inspections	)))))))	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On February 28, 2001, the Board of Barbers published a notice of proposed amendment and adoption of the above-stated rules at page 208, 2001 Montana Administrative Register, issue number 3. The hearing was held March 22, 2001.

2. The Board has amended ARM 8.10.414, 8.10.415 and 8.14.501 exactly as proposed.

3. The Board adopted NEW RULE I (ARM 8.14.416) INSPECTIONS exactly as proposed.

4. No comments or testimony were received.

BOARD OF BARBERS
MAX DeMARS, CHAIRMAN

By: /s/ Richard M. Weddle
Staff Attorney
Department of Commerce

By: /s/ Richard M. Weddle
Rule Reviewer

Certified to the Secretary of State, June 11, 2001.

BEFORE THE BOARD OF COSMETOLOGISTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of ARM 8.14.401, 8.14.602, 8.14.605, 8.14.1209, 8.14.1210, 8.14.1213, 8.14.1214, and 8.14.1216 pertaining to general requirements, inspections - school layouts, curriculum, construction of utensils and equipment, cleaning and sanitizing tools and equipment, storage and handling of salon preparations, disposal of waste, premises and the adoption of new rule I pertaining to definitions	CORRECTED NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On December 21, 2001, the Board of Cosmetologists published a notice of proposed amendment and adoption of the above-stated rules at page 3467, 2000 Montana Administrative Register, issue number 24 and on June 7, 2001 published notice of the amendment and adoption of said rules at page 935 of the 2001 Montana Administrative Register, issue number 11.

2. This corrected notice is being filed to correct an error in the amendment of ARM 8.14.602 in that sections (8) through (14) should have been adopted as proposed.

8.14.602 INSPECTION - SCHOOL LAYOUT

(1) through (7) remain the same as adopted.

(8) through (14) remain the same as proposed.

3. This corrected notice is also being filed to correct an error in the amendment of ARM 8.14.605 in that the punctuation is incorrect.

8.14.605 CURRICULUM - COSMETOLOGY, MANICURING AND ESTHETICS STUDENTS

(1) through (6)(a) remain the same as adopted.

(b) electricity, chemistry, light therapy (including the use of vaporizer, high frequency, massage brush, vacuum spray, galvanic unit and lamps) 175 hours

(c) massage, skin care and make-up, cosmetics, facials, essential oils 225 hours

(d) through (11) remain the same as adopted.

BOARD OF COSMETOLOGISTS
WENDELL PETERSON, CHAIRMAN

By: /s/ Richard M. Weddle
Staff Attorney
Department of Commerce

By: /s/ Richard M. Weddle
Rule Reviewer

Certified to the Secretary of State, June 11, 2001

**BEFORE THE BOARD OF COSMETOLOGISTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA**

In the matter of the amendment of rules pertaining to the general practice of cosmetology, schools, instructors applications, examinations, electrology schools, electrolysis, sanitary standards for electrology salons, and sanitary rules for beauty salons and cosmetology schools and the adoption of a new rule pertaining to aiding and abetting unlicensed practice and the repeal of rules pertaining to renewals, booth rental license applications, walls and ceilings, doors and windows and ventilation	CORRECTED NOTICE OF AMENDMENT, ADOPTION AND REPEAL

TO: All Concerned Persons

1. On December 21, 2001, the Board of Cosmetologists published a notice of proposed amendment, adoption and repeal of the above-stated rules at page 3437, 2000 Montana Administrative Register, issue number 24 and on April 6, 2001 published notice of the amendment, adoption and repeal of said rules at page 536 of the 2001 Montana Administrative Register, issue number 7.

2. This corrected notice is being filed to correct an error in the amendment of ARM 8.14.603(12) in that the citation is incorrect.

8.14.603 SCHOOL OPERATING STANDARDS (1) through (11) remain the same as adopted.

(12) The school shall not allow instructors to practice on members of the public, unless strictly for educational demonstration purposes to instruct students in a classroom setting, pursuant to ARM 8.14.301~~(5)~~(7).

(13) through (19) remain the same adopted.

3. This corrected notice is also being filed to correct an error in the amendment of ARM 8.14.612 in that subsection (14) should have been added to the citation of ARM 8.14.603.

8.14.612 TRANSFER POLICIES - RECRUITMENT - FIELD TRIPS

(1) remain the same as adopted.

(2) Schools shall not allow a student who re-enrolls to practice on members of the public until the school receives, from the board office, a verified transcript of the student's

hours and grades within the required curriculum areas and standing demonstrating compliance within the training time set forth in ARM 8.14.603(14) above.

(3) through (5) remain the same as adopted.

4. This corrected notice is also being filed to correct an error in the amendment of ARM 8.14.805 in that the catchphrase is incorrect.

8.14.805 APPLICATION - OUT-OF-STATE COSMETOLOGISTS~~/~~, MANICURISTS, ESTHETICIANS (1) through (11) remain the same as adopted.

5. This corrected notice is also being filed to correct an error in the amendment of ARM 8.14.807 in that (2) lists the incorrect citation.

8.14.807 TRANSFER STUDENTS - OUT-OF-STATE - COSMETOLOGY, MANICURING, ESTHETICS (1) remains the same as adopted.

(2) Transfer students and out-of-state students will be considered basic students until the board office has received and reviewed their transcript of hours and grades within the required curriculum areas, registration form and/or any other documents which the board may deem necessary and may not be permitted to work on members of the public until approval from the board or the completion of the prescribed hours as set forth in ARM 8.14.603~~(10)~~ (14).

6. This corrected notice is also being filed to correct an error in ARM 8.14.1211(2) for consistency.

8.14.1211 SANITIZING AGENTS (1) remains the same as adopted.

(2) All tools, equipment and implements used in the practice of cosmetology, esthetics, manicuring or electrology, except those which have come in contact with blood, body fluids and/or mucous membrane must be disinfected by either complete immersion in an EPA-registered, bactericidal, virucidal, fungicidal, and pseudomonacidal (formulated for hospitals) disinfectant that is mixed and used according to the manufacturer's directions.

(3) through (4) remain the same as adopted.

BOARD OF COSMETOLOGISTS
WENDELL PETERSON, CHAIRMAN

By: /s/ Richard M. Weddle
Staff Attorney
Department of Commerce

By: /s/ Richard M. Weddle
Rule Reviewer

Certified to the Secretary of State, June 11, 2001

BEFORE THE BOARD OF MEDICAL EXAMINERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of ARM 8.28.1705 and 8.28.1905 pertaining to ankle surgery certification and fees and failure to submit fees	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On February 8, 2001, the Board of Medical Examiners published a notice of proposed amendment of the above-stated rules at page 211, 2001 Montana Administrative Register, issue number 3. The hearing was held on March 12, 2001.

2. The board has amended ARM 8.28.1905 exactly as proposed.

3. The Board has amended ARM 8.28.1705 as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

8.28.1705 ANKLE SURGERY CERTIFICATION (1) through (1)(b) remain the same as proposed.

(c) submits proof of completion of a podiatric surgical residency approved in the year of the candidate's residency by the council on podiatric medical education or the American board of podiatric surgery or successor(s), and submits evidence satisfactory to the board of not fewer than 25 ankle surgeries performed ~~as the~~ by the candidate and proctored by a primary surgeon of record who is an orthopedic surgeon with foot and ankle experience or a doctor of podiatric medicine with ankle surgery certification within the five years immediately preceding the application.

(2) remains the same as proposed.

4. The Board received 11 comments. The comments received and the Board's responses are as follows:

COMMENT NO. 1: Nine commentors stated that the ankle surgeries could not be performed by the candidate as surgeon of record and therefore the applicant's surgeries should be proctored under the supervision of the primary surgeon of record.

RESPONSE: The Board agrees that the requirement of 25 ankle surgeries performed by the candidate as primary surgeon of record is an impossible standard to meet. The Board thus adopts the suggestions by the commentors (more specifically, the recommendations of the Montana Podiatric Medical Association) that the 25 ankle surgeries be proctored by a primary surgeon of record.

COMMENT NO. 2: Two commentors suggested that the Board recognize certifying boards other than the American Board of Podiatric Surgery.

RESPONSE: The Board declines to recognize the additional certifying boards suggested by the commentors and will adhere to the recommendations from the American Board of Podiatric Surgery.

BOARD OF MEDICAL EXAMINERS
LAWRENCE R. McEVOY, M.D.
PRESIDENT

By: /s/ Richard M. Weddle
Staff Attorney
Department of Commerce

By: /s/ Richard M. Weddle
Rule Reviewer

Certified to the Secretary of State, June 11, 2001.

BEFORE THE BOARD OF RESPIRATORY CARE PRACTITIONERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of ARM 8.59.402 and 8.59.506 pertaining to definitions and fees	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On January 25, 2001, the Board of Respiratory Care Practitioners published a notice of proposed amendment of the above-stated rules at page 141, 2001 Montana Administrative Register, issue number 2. The hearing was held February 14, 2001.

2. The Board has amended ARM 8.59.506 exactly as proposed.

3. The Board has amended ARM 8.59.402 as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

8.59.402 DEFINITIONS (1) through (3) will remain the same.

(4) The board defines "pulse oximetry," "pulmonary function testing" and "spirometry" as diagnostic procedures that, pursuant to the orders of a physician, may be performed only by, or under clinical supervision of, a licensed respiratory care practitioner and/or other licensed health care provider who has met the minimum competency standards. The individual performing pulmonary function testing and spirometry must meet minimum competency standards, as they currently exist, as established by the national institute for occupational safety and health (NIOSH) or the national board for respiratory care (NBRC) certification examination for entry level respiratory therapist, certification examination for entry level pulmonary function technologist (CPFT) credential or registry examination for advanced pulmonary function technologists (RPFT) specific to pulmonary function testing.

4. The Board received one comment. The comment received and the Board's response are as follows:

COMMENT NO. 1: Dr. McEvoy, President of the Board of Medical Examiners testified at the hearing. He asked whether it is correct that pulse oximetry can be done by someone who has met certain minimum standards or by someone who is under someone who has met these minimum standards. Dr. McEvoy also asked where the minimum competency standards are the same and if someone who is going to do pulse oximetry needs to pass the NIOSH certification exam. Dr. McEvoy questioned whether a physician practicing in his office would have to pass one of

the exams for certification and whether that was the intent of the Board.

RESPONSE: The Board responded that individuals who have met certain minimum standards can perform pulse oximetry pursuant to the American Association of Respiratory Care/Clinical Practice Guidelines 10.1.2., Monitoring Devices 10.1.2.1, Pulse Oximeter 10.2.1., and Personnel level and patient assessment 10.2.2.

Physicians can perform the tests under their medical license. If the physician is delegating the task, the individual needs to meet the minimum competency standards as presented in the AARC Clinical Practice Guideline for Pulse Oximetry.

Individuals other than a licensed respiratory care practitioner and/or other licensed health care provider who has met the minimum competency standards can perform pulse oximetry.

The rule states that the NIOSH exam is required for pulmonary function testing and spirometry, not pulse oximetry. Individuals who have met certain minimum standards can perform pulse oximetry.

It is not the Board's intent that a physician needs additional exams from NIOSH to perform pulmonary function tests. The physician can perform these tests under the physician's medical license pursuant to 37-3-102(6), MCA. It is the assumption of the board that the physician has had some form of training in PFT's and is competent in performing PFT's just as any other licensed individual performing PFT's.

BOARD OF RESPIRATORY CARE PRACTITIONERS
GREGORY PAUALAUSKIS, CHAIRMAN

By: /s/ Richard M. Weddle
Staff Attorney
Department of Commerce

By: /s/ Richard M. Weddle
Rule Reviewer

Certified to the Secretary of State, June 11, 2001.

**BEFORE THE TRAVEL PROMOTION AND DEVELOPMENT DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA**

In the matter of the amendment of ARM 8.119.101 pertaining to the Travel Promotion and Development Division	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 26, 2001, the Department of Commerce published a notice of the proposed amendment of the above-stated rule at page 595, 2001 Administrative Register, issue number 8. The hearing was held on May 16, 2001.

2. The Department has amended ARM 8.119.101 exactly as proposed.

3. No comments or testimony were received.

DEPARTMENT OF COMMERCE

By: /s/ Richard M. Weddle
Staff Attorney
Department of Commerce

By: /s/ Richard M. Weddle
Rule Reviewer

Certified to the Secretary of State June 11, 2001.

**BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 10.16.3505 pertaining to special education	))))	NOTICE OF AMENDMENT OF ARM 10.16.3505

TO: All Concerned Persons

1. On April 26, 2001, the Superintendent of Public Instruction published notice of the proposed amendment of ARM 10.16.3505, concerning special education, at page 597 of the 2001 Montana Administrative Register, Issue Number 8.

2. ARM 10.16.3505 is amended as proposed.

3. No comments or testimony were received.

By: /s/ Linda McCulloch
Linda McCulloch
Superintendent of Public Instruction

/s/ Jeffrey A. Weldon
Jeffrey A. Weldon
Rule Reviewer

Certified to the Secretary of State June 11, 2001.

**BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 12.11.3205, creating no wake zones on Hauser Lake near Devil's Elbow Campground, Clark's Bay, and York Bridge fishing access site	)	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 26, 2001, the Fish, Wildlife and Parks Commission (commission) published notice of the proposed amendment of ARM 12.11.3205, creating no wake zones on Hauser Lake near Devil's Elbow Campground, Clark's Bay, and York Bridge fishing access site at page 601 of the 2001 Montana Administrative Register Issue Number 8.

2. The commission has amended ARM 12.11.3205 exactly as proposed.

3. Two written comments and seven oral comments were received. The following is a summary of the comments and appear with the commission's responses.

COMMENT 1: One individual stated that the recent development of sites at Devil's Elbow and Clark's Bay made the new no wake zones necessary for the safety of boaters and recreators.

RESPONSE: The commission concurs.

COMMENT 2: One individual stated that no wake zones are worthless and said that the zones are not enforced and have not worked at the Gates of the Mountains.

RESPONSE: No wake zones provide a safety margin in congested or heavily used areas. Clark's Bay, Devil's Elbow, and York Bridge fishing access site are all Hauser Lake areas that are heavily used by boaters, anglers, and water skiers, and this heavy use makes this type of safety margin very necessary for the protection of lives and property.

Whenever possible no wake zones are enforced. As stated in the rule proposal notice, the no wake zone at York Bridge is currently unenforceable. However, with the adoption of this rule it will be enforced by the commission to the extent possible. As with most enforcement issues, it is necessary to have an officer present at the time the no wake rule is violated. Saturation patrols in problem areas have resulted in higher or almost complete compliance levels. On other parts of Hauser reservoir, such as Spokane Creek Bay and Riverside, no

wake zones have contributed significantly to reducing conflicts between users. The experience of the commission is that most watercraft users obey the law.

COMMENT 3: One individual suggested establishing certain days as non motorized watercraft use days on all of Hauser Lake. This individual thought this suggestion would be popular among canoe and kayak users. This individual also thought that the commission should establish a no wake zone at the Gates of the Mountains area, stating that a no wake zone at the Gates of the Mountains would allow users of quiet, non motorized watercraft to enjoy the historic area without the danger and noise associated with personal watercraft and speeding motor boats.

RESPONSE: The commission does not desire to regulate more than is necessary to protect public's health, safety, property, resources, and welfare as mandated in 87-1-303, MCA; additionally, the commission attempts to balance the interests of all recreators. Currently, Holter Lake has no wake zones within 300 feet of the docks at the Gates of the Mountains marina, near the bureau of land management boat landing, in Juniper Bay, Log Gulch, Departure Point, Merriweather Camp, and near the Holter Lake Lodge docks. In addition, waterskiing is restricted on Saturday and Sunday and on all legal holidays from the mouth of the canyon on upper Holter Lake to the Gates of the Mountains near Mann Gulch. Individuals who would like to recreate in a no wake area have these no wake areas available for their use, as well as areas on other lakes and rivers that are no wake or closed to the use of motorized watercraft.

COMMENT 4: Several individuals thought that the no wake zone at Devil's Elbow extended across the entire river. They opposed a no wake zone extending across the river as this would not allow them to use their favorite waterskiing area.

RESPONSE: The no wake zone at Devil's Elbow Campground extends only from the campground shore to 100 feet into the river channel, or as buoyed. It does not extend across the entire river. The "as buoyed" language was added to insure that there would be enough room for boating activities during low water years as the buoys could be moved closer to shore if necessary. Individuals will still be able to water ski outside the no wake zone.

By: /s/ Rich Lane
Rich Lane, Chairman
Fish, Wildlife and Parks Commission

/s/ Rebecca Dockter Engstrom
Rebecca Dockter Engstrom
Rule Reviewer

Certified to the Secretary of State June 11, 2001

**BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA**

In the matter of the amendment of Montana's prevailing wage rates, pursuant to ARM 24.16.9007	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 5, 2001, the Department published notice of the proposed amendment of the above-captioned rule at page 523 of the 2001 Montana Administrative Register, Issue No. 7.

2. On April 27, 2001, at 10:00 a.m., a public hearing was held in Room 104 of the Walt Sullivan Building (Department of Labor and Industry Building), 1327 Lockey, Helena, Montana, to consider the proposed amendment to the above-captioned rule. No members of the public attended, although Department staff made brief comments. Prior to the closing date, written comments were received by the Department.

3. After consideration of the comments received on the proposed amendment, the Department has amended the rule exactly as proposed.

4. The Department has thoroughly considered the comments received on the proposed amendment. The following is a summary of the comments received, along with the Department's responses to those comments:

Comment 1: William E. Bayless, Montana Department of Administration, quoted the 1999 security guard prevailing wage rates and commented on the new rates. He did not believe that compensation for these unskilled, entry positions increased by 67%.

Response 1: The 1999 security guard wage rate for District 5 was calculated based upon a survey of employers. The 2001 proposed security guard wage rate for District 5 was also based upon data provided by a survey of employers. The data and calculations have been checked and were verified as being accurate. The Non-Construction Services survey is conducted every two years. When comparing the survey results, some rates may go up, some may go down or some may remain the same based upon the data provided by employers and unions.

Comment 2: Mr. Bayless commented on the calculation of the proposed security guard wage rate for District 4. He wondered why there can be such a discrepancy when one rate is factored into the computation of the other.

Response 2: The rate in question was analyzed and the proposed 2001 District 4 rate for security guard was calculated using the

contiguous district rates. District 5 data as well as data from Districts 1, 4, 7 and 9 were used to set rates. While the wages in District 5 may be higher than the rate set in District 4, these higher wages were offset by lower wages in the other contiguous districts. The data and calculations have been checked and were verified as being accurate.

Comment 3: Mr. Bayless commented on the proposed rate for dispatcher and noted that it is lower than the rate set in 1999.

Response 3: The 1999 rate was based upon a survey of employers while the proposed 2001 District 5 rate for dispatcher was based upon a collective bargaining agreement. This was because there were not enough hours submitted by employers in the 1999-2000 Non-Construction Services survey to set the rate. Whenever there is an insufficient number of hours to set a wage rate and union contracts are provided, a rate based upon the union contracts must be used. According to 18-2-402(3), MCA, the union rate cannot be any higher than the lowest existing collective bargaining agreement. The lowest existing collective bargaining agreement in District 5 for dispatchers was used.

Comment 4: Mr. Bayless noted that the wage rates paid for security guards by contractors at federal facilities at the federal wage determination rate are different from the Montana Prevailing Wage and stated there seems to be no correlation between the rates.

Response 4: The observation is correct. The Department surveys every organization that may employ people in the Non-Construction Services industry, and this would include any organization that may have a federal or state contract. These employers may or may not have responded to our survey.

Comment 5: Mr. Bayless commented that the compensation for the cleaner/janitor decreased and was not consistent with the general trend in the wage market. He also noted the rate paid by the federal government.

Response 5: This is also a matter of who responded to the survey. Cleaners and janitors can work in diverse places in small businesses as well as a large institution. The only requirement is that the work be performed in a commercial or industrial establishment.

Comment 6: Mr. Bayless commented on the impact of workers occasioned by the new wage rates and the consistency between the old and new rates.

Response 6: The Department is also concerned about the impacts on the workers, as well as the employers, and that is the reason much time is spent making sure the data are valid and wage rates are calculated correctly. The prevailing wage surveys are voluntary surveys and are dependent on employers responding to

the surveys. The Non-Construction Services Prevailing Wage survey is conducted every two years. Along with the survey, employers are given a list of occupations and descriptions so they can match their jobs to the occupations surveyed. This is the same list of occupations and descriptions that is published with the Non-Construction Services rates.

The prevailing wage rates only establish the minimum wage and benefits that must be paid in public sector contracts subject to Montana's prevailing wage laws. If employers want to pay at a higher rate, or are required to pay a higher rate due to market conditions, they may do so.

The Department is always looking for ways to improve the program. Any ideas that Mr. Bayless may have on how the program can be improved are welcome.

Comment 7: Cathy Shenkle, Montana Department of Labor and Industry, suggested that the new wage rates should be effective June 30, 2001, so they wouldn't cause confusion with the way rates will be determined pursuant to Chap. 517, Laws of 2001 (HB 500).

Response 7: The Department agrees with the comment, and the effective date of the new rates will be June 30, 2001.

5. As noted above in response to a comment, the amendment is effective June 30, 2001.

/s/ KEVIN BRAUN
Kevin Braun
RULE REVIEWER

/s/ MIKE FOSTER
Mike Foster, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: June 11, 2001.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the amendment of ARM 16.32.302 pertaining to health care licensure	))))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On May 10, 2001, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rule at page 772 of the 2001 Montana Administrative Register, issue number 9.

2. The Department has amended ARM 16.32.302 as proposed.

3. The Department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

COMMENT #1: There are areas of conflict between the 1997 Guidelines for Design and Construction of Hospitals and Health Care Facilities (Guidelines) and the 2000 edition of the National Fire Protection Association 101 Life Safety Code (LSC). How are the owners and design professionals to interpret the state's intent to assure compliance?

RESPONSE: There is a difference between the Guidelines and the LSC: The Guidelines are a compilation of general design requirements while the LSC is a safety code. The department feels that these two rarely conflict, and in instances where they may conflict, the department applies the most stringent requirement out of the two. Resolving the conflicts between the two is always part of the building process, as construction projects must conform not only to the Guidelines and the LSC, but to local ordinances, other state requirements, and federal regulations.

COMMENT #2: The Uniform Building Code (UBC) addresses safety issues adequately, and enforcement of the LSC in ARM 16.32.302 should be eliminated. This is especially true with the upcoming replacement of the UBC with the 2000 International Building Code.

RESPONSE: Whereas the UBC treats health care facilities generally as institutional occupancies, the LSC addresses health care facilities in more detail. The LSC is used by virtually every state in the country for health facility licensure. The International Building Code references LSC standards. The Joint Commission on Accreditation of Health Organizations has adopted the LSC requirements as a standard for accreditation. Finally, the federal Health Care Finance Administration uses LSC

requirements in determining certification for health facilities to receive Medicare and Medicaid financing. By adopting the LSC, the department ensures that licensed facilities are in compliance with these accrediting and certifying organizations.

COMMENT #3: There are conflicts between the UBC and the LSC.

RESPONSE: The UBC is a building code, while the LSC is a safety code. While they occasionally address similar issues, it is usually for different reasons and conflict is rare. Most frequently, the difference between the two is one may have more stringent standards than the other. For instance, the LSC limits dead end corridors to 30 feet (LSC 12-2.5.9) while the UBC restricts dead end corridors to 20 feet (UBC 1005.3.4.6). In this case, the UBC is more stringent. Resolving the conflicts between the two is always part of the building process, as construction projects must conform to not only the UBC and the LSC, but to local ordinances, other state requirements, and federal regulations.

COMMENT #4: Will the amended version of ARM 16.32.302 require existing licensed facilities to comply with the 2000 edition of the LSC? Will it apply to future projects? What about projects that have already been submitted to the state?

RESPONSE: The amended version of ARM 16.32.302 will not apply to existing licensed facilities. The amended rule will apply to all future construction projects of licensed facilities, including alterations. The projects already submitted will be reviewed under the version of ARM 16.32.302 that was in effect at the time of the submittal unless there are substantial changes to the projects after the amended ARM 16.32.302 is in effect.

/s/ Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State June 11, 2001.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.5.307, 37.5.313 and 37.97.118 pertaining to fair hearings and contested case proceedings	))))))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On April 26, 2001, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rules at page 622 of the 2001 Montana Administrative Register, issue number 8.

2. The Department has amended rules 37.5.307, 37.5.313 and 37.97.118 as proposed.

3. No comments or testimony were received.

4. The Department noticed an incorrect statement in its justification for the amendments to ARM 37.5.313. It stated that the changes were mandated by Federal food stamp regulations published at 65 Fed. Reg. 70134 (November 21, 2000). Those regulations actually give States the option to allow oral withdrawal of hearing requests. The Department determined that as a convenience to claimants it would amend the rule to allow oral withdrawals. The procedural requirement that the Department provide a written notice to the food stamp household confirming the oral hearing withdrawal and providing the household with an opportunity to request a hearing is mandated by the Federal regulation.

/s/ Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State June 11, 2001.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.40.302, 37.40.306, 37.40.307, 37.40.308, 37.40.311, 37.40.320, 37.40.321, 37.40.323, 37.40.325, 37.40.326, 37.40.330, 37.40.360 and 37.40.361 pertaining to nursing facilities	)	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On April 26, 2001, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rules at page 642 of the 2001 Montana Administrative Register, issue number 8.

2. The Department has amended rules 37.40.302, 37.40.306, 37.40.308, 37.40.311, 37.40.320, 37.40.321, 37.40.323, 37.40.325, 37.40.326, 37.40.330, 37.40.360 and 37.40.361 as proposed.

3. The Department has amended the following rule as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

<u>37.40.307 NURSING FACILITY REIMBURSEMENT</u> (1) through (5)(b) remain as proposed.

(i) The medicaid average case mix index for each facility to be used in rate setting will be the simple average of each facility's four medicaid case mix indices calculated for the periods of February 1 of the current year and November 1, August 1 and May 1 of the year immediately preceding the current year. The statewide average medicaid case mix index will be the ~~simple~~ <u>weighted</u> average of each facility's 4 quarter average medicaid case mix index to be used in rate setting.

(c) The rate setting methodology effective July 1, 2001, will hold nursing facilities harmless. To the extent that a provider's rate could decrease using the price-based reimbursement methodology described in this rule, each facility will receive the greater of their price-based rate or their rate in effect on June 30, 2001 increased by 2%. This hold harmless methodology, which provides for a minimum 2% rate increase each state fiscal year, will be in effect for state fiscal years 2002 and 2003. For state fiscal year 2004<u>, or at such time as all facilities have moved to the price,</u> ~~and in following years~~ each facility will be reimbursed according to the price-based nursing facility reimbursement system.

(d) The statewide price for nursing facility services will be determined each year though a public process. Factors that could be considered in the establishment of this price include the cost of providing nursing facility services, medicaid recipients access to nursing facility services, and the quality of nursing facility care ~~as well as budgetary constraints~~.

(e) through (15) remain as proposed.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101, 53-6-111 and 53-6-113, MCA

4. The Department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

COMMENT #1: We support the price based change and the move to a new reimbursement system where no nursing facility gets less than a 2% increase during the transition period. Our organization agreed to the change in reimbursement philosophy, at least in part, due to the Department's pledge not to reduce any facility's reimbursement rate.

RESPONSE: The Department has worked diligently with providers and association representatives in order to make this transition to a price based system of reimbursement. The industry provided feedback to the Department on the changes that are proposed in these rule amendments and we are thankful to the reimbursement work group members for their assistance in the process of developing these changes to the reimbursement system. We believe that the price based system will lessen the volatility of the reimbursement process by reimbursing facilities at a reasonable price for the provision of nursing facility services. We agreed that is was appropriate during the transition to the price based system of reimbursement to not reduce any providers rate.

COMMENT #2: It is important to note that the volatility in the current reimbursement system was not caused solely by flaws in the system. Rebasing the nursing home rates without funds necessary to accomplish the task resulted in lowering of some facility rates in order to raise others. We believe the major factor causing the volatility was the serious under funding of this program by the Legislature. And, transitioning to a "price based" system will not solve the problem with under funding. Support for a price based system is dependent on the underlying principle that the price is set at an amount that is fair and reasonable. Thus, there will be little support in the future for a price based system that does not reasonably take into account the cost of providing care to Montana's elderly Medicaid recipients residing in nursing facilities. We do not see the transition to a price based system as meaning that we totally disconnect the reimbursement system from the cost of care. Clearly, the "price" will have to have a rational basis and the cost of care provides that rational basis.

RESPONSE: There are many reasons why the system for reimbursing nursing facility providers has evolved into the current methodology that exists today, and many reasons why it is in need of change. Lessening of the Boren Amendment provisions, which historically required state Medicaid programs to put into their systems of reimbursement components that would stand the scrutiny of a court of law have helped in allowing states to simplify their reimbursement methodologies. Declining occupancy levels, increased acuity of residents coupled with modest increases in legislative funding over the years have resulted in a system of reimbursement that is clearly in need of a change. The Department requested and the Legislature appropriated a significant amount of funding to move to a price based system of reimbursement. This clearly shows the commitment that the State of Montana puts on access to quality nursing facility care for all residents of Montana. The Department will continue to work with the nursing facility industry and the Legislature to insure that there is adequate funding to provide services to Medicaid recipients residing in Montana's nursing facilities. We will continue to gather information, such as, cost trends in Montana nursing homes, wage data, staffing levels, access to service information, quality of care, occupancy levels, as well as budgetary constraints in the development of future funding requests for nursing facility reimbursement under Medicaid.

COMMENT #3: The State has a responsibility under federal law and regulations to set Medicaid reimbursement rates for nursing facilities which are consistent with efficiency, economy and quality of care. The "price" resulting from this rule is about $101.00 per patient day, while the actual cost of a day of care is projected to be about $115.00 per patient day. However, facilities will receive an additional $5.00 to $12.00 per patient day add-on through the IGT program, which will decrease the current gap between rates and costs.

RESPONSE: Federal laws or regulations do not mandate that established Medicaid rates must cover all of the actual costs incurred by nursing facility providers. This is not a standard by which the legal adequacy of rates has been measured in the past nor is it the standard that will be utilized in the future. The Department has developed rates which are reasonable and adequate and in compliance with all requirements. The price is reflective of many factors that impact the ways that nursing facilities do business and is set at a level that is fair when considering all of those factors together. The state wide price will be determined through a public process. Factors that will be considered in the establishment of this price include the cost of providing nursing facility services, Medicaid recipients access to nursing facility services, the quality of nursing facility care as well as budgetary or funding levels. The price based rate will reflect a rate commensurate with the services that are required to be provided by nursing facility providers when meeting federal and state requirements. Predictability of

the reimbursement system is a plus with the new price based approach, as is the recognition of the acuity of the residents in a facility over time. Intergovernmental transfers will provide additional funding for facilities meeting the 'at risk' criteria, as well as additional funds for all nursing facility providers to maintain quality nursing facility services.

COMMENT #4: Rates are set based on FY 2001 patient days. The trend in nursing facility occupancy and Medicaid days has been down for several years. We are concerned that the issue of patient days, together with the calculation of patient contribution, results in a 4% increase instead of a 4.5% increase in rates. Thus, we believe that additional funding is available to increase rates above what is being proposed. We ask that the Department review its estimates now and again prior to the end of FY 2002 to determine whether additional funding is available for distribution to nursing facilities.

RESPONSE: The Department has monitored the bed day trends and the utilization projections through the end of FY 2001. We believe that the days that are being utilized in the reimbursement model are appropriate and reflective of what utilization will be during FY 2002. The Department will continue to track and evaluate the utilization patterns in Montana nursing homes. The reimbursement calculation includes an amount that represents the contribution that is provided from patients toward the cost of nursing home care. This amount is in addition to the state and federal funding levels. The patient contribution amounts have not been increasing at the 4.5% levels that the state and federal share has been appropriated to provide. When the patient contribution funding is included with the other funds the aggregate increase will be calculated at less than the 4.5% level that the legislature appropriated for the state and federal share for the nursing home program. The Department will continue to monitor patient contribution and will evaluate if any adjustments in reimbursement are warranted based upon this source of revenue in the second year of the biennium.

COMMENT #5: We support the intergovernmental transfer program outlined in the proposed rules. It will provide critical funds to all of our nursing facilities and substantially greater increases to some of our smallest and most rural facilities who are struggling to keep their doors open.

RESPONSE: The Department agrees that the intergovernmental transfer program will provide critical funds for 'at risk' nursing facilities in Montana, many of whom are struggling with occupancy as well as other financial constraints while trying to keep their doors open and continue to provide needed nursing home services in their communities. The Health Care Financing Administration recently approved the Montana state plan amendment for FY 2001 which provides for the transfer of these funds and establishes the methodology for the distribution of

this additional funding. We will continue to monitor the federal regulations for any changes that might be proposed in the area of intergovernmental fund transfers and are willing to continue to discuss with the nursing facility reimbursement work group and all providers creative ideas for funding nursing facility services in Montana.

COMMENT #6: ARM 37.40.307(5)(b) indicates that the statewide average case mix will be a simple average. The accompanying spreadsheet appears to use a weighted average. We recommend use of the weighted average as most accurately reflecting the statewide case mix.

RESPONSE: The Department agrees and the rules have been clarified to provide that the statewide average Medicaid case mix will be the weighted average of each facility's 4 quarter average Medicaid case mix index to be used in rate setting.

COMMENT #7: ARM 37.40.307(5)(d) provides that the price will be determined based on the cost of providing nursing facility services, Medicaid recipients access to nursing facility services, the quality of nursing facility care "as well as budgetary constraints". We recommend that "budgetary constraints" be removed as a factor and that efficiency and economy be added. The Department should have as much interest as providers in advocating for a price that is based on factors such as actual cost, quality, acuity, economy and efficiency and not on "artificial" factors such as the budget. We recognize the Department is charged with living within its budget but do not believe "budgetary constraints" is an appropriate specific factor to be listed in this rule.

RESPONSE: Budgetary constraints and the levels of appropriated funding will be evaluated in the determination of price whether or not it is specifically provided for in the rules. It is clear that the cost of providing services and the level of funding available must be considered in the development of any reimbursement system whether it is based on price or some other factors. It is also clear that the level of funding cannot be the sole determining factor in the development of a system of reimbursement. The Department removed the reference to budgetary constraints from the rule language because the Department believes that it is understood that this is one of several factors that would be considered in the development and ongoing funding for any system of reimbursement.

COMMENT #8: We expect the new system to allow lower-than-average paid facilities to experience increased funding. But we also expect that those facilities with higher-than-average per diem rates will no longer be expected to fund those increases.

RESPONSE: For FY 2002 and FY 2003, no nursing facility gets less than a 2% increase during the transition period to a price based system. Additional funds will be provided to 'at risk'

facilities as well as nursing facilities not meeting the 'at risk' criteria to provide for continued access and availability of nursing facility services across Montana.

COMMENT #9: We note that the new system is not yet complete in its design. The Department promised that after implementation of the core payment system the issue of payments for so-called heavy care residents would be addressed. We have long advocated for adoption of Department policies that would adequately pay those facilities who accept and provide care to residents who need specialized services. Hospitals in Montana currently house patients from time to time who require nursing facility care but who cannot access those facilities due to low Medicaid rates.

One foreseeable flaw in the new payment system is the clear incentive for facilities to limit access to their facilities for those residents who require higher-than-average care. Since the payment system limits the rate adjustments for resident acuity there is little financial incentive to admit higher cost residents. The Department puts other medical providers at risk to subsidize the nursing facilities. Policies need to be created to protect the resident's right to access care and to prevent increased Medicaid spending in other medical programs.

We recognize that the Department is beginning to address our concern with the provisions at ARM 37.40.330 by allowing additional payments for those residents who are ventilator-dependent and who require extraordinary staffing resources. We believe that there are other medical conditions which should also qualify for enhanced payments. The Medicaid hospital program might be helpful to identify those conditions worthy of the Department's consideration.

RESPONSE: Additional recognition in the Medicaid nursing facility reimbursement system for residents with extremely heavy care needs will be evaluated by the Department and the reimbursement work group in the coming biennium. The nursing home program will work with the Medicaid hospital program to develop an evaluation process for those individuals that are in the hospital awaiting placement for extremely long periods of time in an effort to assist in gathering factual data on the placement of hard to serve residents, as well as, to identify the diagnosis or medical complications that make these individuals hard to place and serve in long term care settings. We will continue to look at ways the Medicaid program can facilitate placement in the lowest cost setting that can meet these individuals needs. We look forward to working with the industry on identifying a mechanism or process through which the utilization of MDS-case mix data as well as other sources of available data can be utilized to address this area of concern.

COMMENT #10: At ARM 37.40.307(5)(c) the Department proposed hold-harmless language for FY 2002 and 2003. We oppose the last sentence of this part which states "for state fiscal year 2004

and in following years each facility will be reimbursed according to the price-based nursing facility reimbursement system".

Providers were assured by the Department that their support to move to a price-based system meant an end to cutting per diem rates to fund the reimbursement system. Unless the Department has completed phasing in the new payment system those providers with rates higher than the new formula or price line must continue to be held harmless. Providers agreed to lower than average rate hikes to allow lower paid facilities to catch up, but those providers did not agree to fund that through lower payments. We ask that the Department remove the last sentence from this ARM rule.

RESPONSE: The Department is envisioning the movement to the full price system for all nursing home providers by the end of fiscal year 2003. To the extent that there are some providers that remain above the price line and have not moved to price they will not receive a rate decrease. The rule has been modified based upon this comment to provide that for state fiscal year 2004, or at such time as all facilities have moved to the price line, each facility will be reimbursed according to the price-based nursing facility reimbursement system. This should clarify that until all providers move to the price line they will not receive a rate decrease in order to fund other providers move to the price.

COMMENT #11: The provisions relating to private pay rates at ARM 37.40.307(3)(c) should be repealed. The Department no longer needs, nor is the Department authorized by Legislative directive, to limit Medicaid rates to the rate paid by private pay residents. Since the Department is moving to a price-based system the linkage to private pay rates should be ended.

RESPONSE: The Department at ARM 37.40.307(5)(e) has eliminated the private pay rate limit requirement as part of the transition to a price-based system of reimbursement.

COMMENT #12: We support adoption of the proposed language for payments funded through intergovernmental transfers at ARM 37.40.311. We will closely monitor this program to assure that county-funded facilities are treated fairly and that the program meets the stated intent to provide additional support to at risk facilities.

We are concerned that the Department is moving a considerable portion of the IGT funding to fund the supplemental budget request approved by the Legislature. Our expectation is that the Department will not increase its request for IGT funds to be diverted to other parts of the budget or that the diverted funding will be requested in the next biennial budget.

RESPONSE: This would be an area that would need to be discussed

during the next Legislative session. The distribution of funding that may be available from IGT and the process for distribution of these funds will be the topic of future discussions between the Department, the industry, the public and the legislature.

COMMENT #13: We are considering replacing the IGT program with a higher bed tax on nursing home days. Currently, a minority of homes in the affected group are required, through voluntary acts, to fund the Department's budget shortfall, provide matching funds for the payments to their competitors and provide Medicaid matching funds for payments to their facility.

While an argument is made that the increased payments are welcome relief to those facilities at risk, one can not deny that the lion's share of the new funding is being diverted to uses other than supporting those same facilities. A higher bed tax might work to assure that all facilities who benefit from the higher payments participate in matching the Federal Medicaid funds. A tax would also allow the county-funded facilities a better net payment than the Department's current proposal.

RESPONSE: An increase in the provider bed tax to fund nursing home provider rate increases, or to replace or augment, the current intergovernmental transfer program would require legislative approval.

COMMENT #14: We recommend that the Department delete ARM 37.40.361(1). We recognize that the Legislature directed the Department to collect payroll information for entry level direct care staff. We do not believe an administrative rule is required since the Department already has authority to access facility records.

RESPONSE: The Department previously gathered this type of information on the forms that were submitted by providers to support the direct care wage funding. The Department would request that providers submit the same type of information on a form that would be developed and provided by the Department. While we may have the authority to gather this information without this rule, we believe that it is clearer to providers that this is a legislative mandate which the Department must comply with if it is adopted through the rule making process.

COMMENT #15: We question retention of parts (2) through (5) of ARM 37.40.361 since the time period affected by the rule has lapsed. Perhaps the final rule can include language that repeals the language on a date-certain moment to assure that facilities do not assume repeal is retroactive.

RESPONSE: Many of the rule provisions contain reference to subsections of rules that are no longer applicable once the transition to the price based methodology is complete. It would take a substantial amount of time to edit and remove these

references from the administrative rules. The Department chose not to take the time as part of the July 1 rule changes to repeal these subsections, but the Department proposes to repeal the provisions that are no longer applicable in a separate notice. Because the rate in effect on June 30, 2001, which is the base rate that is utilized in the movement to price, was based upon many of the provisions that would need to be repealed, it seemed appropriate to continue to include them during the first year of the transition. After the rates are established for July 1, 2001, the Department agrees that these provisions become unnecessary and can and should be repealed.

/s/ Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State June 11, 2001.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the adoption of new rule I and the amendment of ARM 37.86.1001 and 37.86.1005 pertaining to dental services and ARM 37.86.2105 pertaining to eyeglasses reimbursement	))))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Interested Persons

1. On April 26, 2001, the Department of Public Health and Human Services published notice of the proposed adoption and amendment of the above-stated rules at page 617 of the 2001 Montana Administrative Register, issue number 8.

2. The Department has adopted the rule I [37.86.1004] as proposed and has amended 37.86.1001 and 37.86.2105 as proposed.

3. The Department has amended the following rule as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

<u>37.86.1005 DENTAL SERVICES, REIMBURSEMENT</u> (1) through (1)(b) remain as proposed.

(2) For dental services that are not listed in the RVD scale, the department shall pay the lowest of the following for dental services covered by the medicaid program:

(a) through (b)(i) remain as proposed.

(ii) for covered dental services provided to persons age 17 and under, 80% of the provider's usual and customary charge for the service ~~period~~.

(3) through (10)(d) remain as proposed.

AUTH: Sec. 53-2-201 and <u>53-6-113</u>, MCA
IMP: Sec. <u>53-6-101</u>, <u>53-6-113</u> and 53-6-141, MCA

4. The rate methodology will be applied effective on July 1, 2001 in order to correspond with the budget.

5. The Department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

<u>COMMENT #1</u>: The Montana Dental Association asserts that the goal of the fee methodology should be to ensure adequate dentist participation in order to ensure appropriate access to services. The Association described two examples of inconsistencies within the relative value scale. The Association also suggested that the Department set its rates based on usual and customary

charges.

RESPONSE: The Department is very concerned about ensuring access to services and would like to see dentists participate in the Medicaid program to the greatest extent possible. The Staff employed by the Department also noticed the two inconsistencies in the relative value scale described by the Association. However, the Department determined that the relative value scale methodology, with the exception of these two instances, generally provides a meaningful and effective way to account for the time, skill, risks, severity, and equipment necessary to perform certain dental services. Thus, the Department believes the relative value scale should be used in the rate methodology and that providers and the Department should work with the publisher of the scale to address the inconsistencies noted both by the Association and the Department.

COMMENT #2: The amendment to ARM 37.86.1005(2)(b)(ii) contains an extra word. The word "period" is unnecessary at the end of the sentence.

RESPONSE: The Department agrees. The word period was not intended to be the word "period". Rather, the Department intended the punctuation mark period. The translation was misunderstood and the word "period" has been removed.

/s/ Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State June 11, 2001.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.86.2605, 37.86.2801, 37.86.2901, 37.86.2905, 37.86.2910, 37.86.3002, 37.86.3005, 37.86.3009, 37.86.3011, 37.86.3016, 37.86.3018 and 37.86.3020 pertaining to Medicaid hospital reimbursement	)))))))))))))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On April 26, 2001 the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rules at page 626 of the 2001 Montana Administrative Register, issue number 8.

2. The Department has amended rules 37.86.2605, 37.86.2801, 37.86.2901, 37.86.2905, 37.86.2910, 37.86.3002, 37.86.3005, 37.86.3009, 37.86.3011, 37.86.3016, 37.86.3018 and 37.86.3020 as proposed.

3. The Department has thoroughly considered all commentary received. The comments received and the Department's response to each follow:

COMMENT #1: Data used by the Department in amending the rules to reduce hospital payments may have been based upon limited data. If the Department used limited data to project payment trends, it should restore funding to the hospital program if the proposed reductions result in savings that exceed the Department's projections.

RESPONSE: The Department developed these rules based on its estimate of annual expenditures extrapolated from partial year claims data. This is the best information available and the Department's expenditure forecast methodology is consistent with State budgeting practices. The Department is confident the projections are reasonably accurate. However, the Department agrees it should restore funding if the saving resulting from the implementation of these rules exceeds projections. If this occurred, the Department would restore funding through a mechanism other than an increase in the DRG base because the legislature may perceive such action to be an unauthorized provider rate increase. The Department would be able to increase the DRG weights, for example, if the case mix computation resulted in a figure less than 1.000. The Department would also be willing to work with the providers and their organization in targeting specific areas requiring

increased financial resources, for example, high risk obstetric care.

COMMENT #2: The Department's proposal to reimburse out-of-state hospital services at the same rate as in-state hospitals is fair and reasonable. Out-of-state hospital providers should be paid under the same outpatient reimbursement methodology as the hospitals in-state.

RESPONSE: The Department agrees and is currently evaluating the outpatient reimbursement logic with the intention of implementing a completely different system July 1, 2002 to comply with the Health Insurance Portability and Accountability Act (HIPAA). As the Department develops and evaluates a new system, out-of-state hospital services will be taken into consideration and included in the new system at the same rates as in-state hospitals.

COMMENT #3: The proposed amendment to ARM 37.86.2901 removes the definition of and reimbursement for the Medical Assistance Facility category.

RESPONSE: According to the Department's licensing authority, the waiver granted by the Health Care Financing Administration for Medical Assistance Facilities has expired, although Medical Assistance Facility status remains available under Montana licensing laws. Therefore, no certification process would be available and a Medical Assistance Facility would not be eligible for Medicaid or Medicare certification or reimbursement. Medical Assistance Facilities would be able to serve private pay patients only. Therefore, the Department need not include Medical Assistance Facility in the definition and reimbursement provisions of the rules and they are adopted as proposed.

COMMENT #4: The changes proposed in the definition of Disproportionate Share Hospital (DSH) in ARM 37.86.2901 may limit future DSH reimbursement. The Montana Hospital Association is working with Congress to obtain an increase in the federal portion of the DSH allocation for Montana. Is the Department willing to expend any increased federal allocation?

RESPONSE: The Department did not receive additional state appropriations for State fiscal years 2002 and 2003 that would have allowed it to expend additional funds related to Disproportionate Share Hospital payments. Furthermore, the formula by which DSH payments are made is limited by federal law to 4% of the DRG base for rural hospitals and 5% of the DRG base for urban hospitals. The Department would be willing to explore the option of qualifying more hospitals for DSH payments, if the latitude to do so existed in federal authority. However, the additional state match for additional DSH payments would have to be obtained through means other than appropriations, such as intergovernmental transfers.

COMMENT #5: The efforts of the Department in creating and implementing Qualified Rate Adjustment (QRA) payments are appreciated. The Department should explore ways to expand QRA payments up to 150% of the Medicare Upper Payment Limit, as permitted by federal law. Currently, only hospitals that provide inpatient services and are paid under prospective reimbursement methodologies are eligible for QRA payments. Hospitals with other reimbursement methodologies or hospitals that provide only outpatient services should be eligible to receive QRA payments. Hospitals provide Medicaid services at less than full cost. In addition, some hospitals provide free care to the State mental health program and subsidize care for injured workers under the Worker's Compensation program.

RESPONSE: The Department is aware Medicaid's reimbursement is less than full cost for some hospital services, but is limited by Federal law as to the amounts it can pay. Furthermore, the Department has no intention of compensating hospitals through the Medicaid program for costs related to the Worker's Compensation program or the State mental health program. The comments would be better addressed by the Addictive and Mental Disorders Division of the Department or the Montana State Fund, as appropriate. The Department is willing to evaluate the possibilities for expansion of the QRA program. The expansion, if any, would be proposed at a later date and are not included in the rules at this time.

COMMENT #6: The proposed amendments to the imaging and other diagnostics services are limited to the Medicare Ambulatory Payment Classification (APC) rates. The APC payments differ depending on the wage area in which the hospital is located, are billed in a manner not required by Medicaid, are subject to policies on bundling of services, are subject to multiple payments for the same claim/same date of service and are subject to other factors not reflected in the fee schedules adopted by Medicare. The Department should provide a detailed explanation of how APC payment amounts will be included in the Medicaid fee schedule. How will the Department determine the true Medicare APC amount?

RESPONSE: The Department intends to maintain a fee schedule with specific payments for imaging and other diagnostic services. Those payments may not precisely match Medicare's APC methodology. These rules replace the previous Resource Based Relative Value Scale-based fees for imaging and other diagnostic services with APC-based fees. Under these rules, the outpatient prospective payment grouping system for Medicaid that has been in effect since 1995 will remain in effect. It is the Department's understanding that Medicare pays wage-area adjustments resulting in slightly higher APC rates for hospitals in Great Falls, Billings, and Missoula. As with the previous fee schedule for imaging and other diagnostic services, the Department will pay the same Medicaid fees statewide. On a

weighted average basis, the new fees are about 96% to 98% of the rate Medicare pays Montana hospitals. Under federal law, Medicaid cannot pay more in the aggregate than Medicare for hospital services.

/s/ Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State June 11, 2001.

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee:

- **Department of Agriculture;**
- **Department of Commerce;**
- **Department of Labor and Industry;**
- **Department of Livestock;**
- **Department of Public Service Regulation; and**
- **Office of the State Auditor and Insurance Commissioner.**

Education and Local Government Interim Committee:

- **State Board of Education;**
- **Board of Public Education;**
- **Board of Regents of Higher Education; and**
- **Office of Public Instruction.**

Children, Families, Health, and Human Services Interim Committee:

- **Department of Public Health and Human Services.**

Law and Justice Interim Committee:

- **Department of Corrections; and**
- **Department of Justice.**

Revenue and Transportation Interim Committee:

- **Department of Revenue; and**
- **Department of Transportation.**

State Administration, and Veterans' Affairs Interim Committee:

- **Department of Administration;**
- **Department of Military Affairs; and**
- **Office of the Secretary of State.**

Environmental Quality Council:

- **Department of Environmental Quality;**
- **Department of Fish, Wildlife, and Parks; and**
- **Department of Natural Resources and Conservation.**

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is PO Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: **Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.**

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter	**1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.**
Statute Number and Department	**2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.**

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 2001. This table includes those rules adopted during the period April 1, 2001 through June 30, 2001 and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 2001, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 2000 and 2001 Montana Administrative Registers.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number. These will fall alphabetically after department rulemaking actions.

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