MONTANA ADMINISTRATIVE REGISTER

2018 ISSUE NO. 15
AUGUST 10, 2018
PAGES 1456-1640

ISSUE NO. 15

The Montana Administrative Register (MAR or Register), a twice-monthly publication, has three sections. The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 Adoption Section contains final rule notices which show any changes made since the proposal stage. All rule actions are effective the day after publication of the adoption notice unless otherwise specified in the final notice. The Interpretation Section contains the Attorney General's opinions and state declaratory rulings. Special notices and tables are found at the end 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 Secretary of State's Office, Administrative Rules Services, at (406) 444-9000.

Page Number

TABLE OF CONTENTS

PROPOSAL NOTICE SECTION

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the repeal of ARM 8.2.501, 8.2.502, and 8.2.503 pertaining to the Quality Schools Grant Program	)	NOTICE OF PROPOSED REPEAL
	)	NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. The Department of Commerce proposes to repeal the above-stated rules.

2. The Department of Commerce will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Commerce no later than 5:00 p.m., August 27, 2018, to advise us of the nature of the accommodation that you need. Please contact Bonnie Martello, Department of Commerce, 301 South Park Avenue, P.O. Box 200501, Helena, Montana 59620-0501; telephone (406) 841-2596; TDD (406) 841-2731; facsimile (406) 841-2771; or e-mail to bmartello@mt.gov.

3. The department proposes to repeal the following rules:

8.2.501 INCORPORATION BY REFERENCE OF RULES FOR THE ADMINISTRATION OF THE QUALITY SCHOOLS GRANT PROGRAM – PLANNING GRANTS

AUTH: 90-6-819, MCA
IMP: 90-6-819, MCA

8.2.502 INCORPORATION BY REFERENCE OF RULES FOR THE ADMINISTRATION OF THE QUALITY SCHOOLS GRANT PROGRAM – EMERGENCY GRANTS

AUTH: 90-6-819, MCA
IMP: 90-6-819, MCA

8.2.503 INCORPORATION BY REFERENCE OF RULES FOR THE ADMINISTRATION OF THE QUALITY SCHOOLS GRANT PROGRAM – PROJECT GRANTS

AUTH: 90-6-819, MCA
IMP: 90-6-819, MCA

REASON: The sixty-fifth Legislature repealed the Quality Schools Facility Grant Program. Therefore, rules and procedures are no longer necessary. Further,

the department no longer has the authority to promulgate rules relating to the now-repealed program.

4. Concerned persons may submit their data, views, or arguments in written form or a request for opportunity to submit data, views, or arguments in oral form to: Bonnie Martello, Department of Commerce, 301 South Park Avenue, P.O. Box 200501, Helena, Montana, 59620-0501; telephone (406) 841-2596; TDD (406) 841-2731; facsimile (406) 841-2771; or e-mail to bmartello@mt.gov, and must be received no later than 5:00 p.m., September 7, 2018.

5. If persons who are directly affected by the proposed action[s] wish to express their data, views, or 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 to Bonnie Martello at the above address no later than 5:00 p.m., September 7, 2018.

6. If the agency receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons 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 directly affected has been determined to be 50 persons based on 496 school districts.

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 may make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the Department of Commerce, 301 South Park Avenue, P.O. Box 200501, Helena, Montana 59620-0501, by fax to (406) 841-2701, by e-mail to bmartello@mt.gov, or by completing a request form at any rules hearing held by the department.

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

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the repeal of the above-referenced rules will not significantly and directly impact small businesses.

/s/ G. MARTIN TUTTLE	/S/ PAM HAXBY-COTE
G. MARTIN TUTTLE	PAM HAXBY-COTE
Rule Reviewer	Director Department of Commerce

Certified to the Secretary of State July 31, 2018.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through XIII of ARM, pertaining to definitions, adoption by reference, solicitation and evaluation of qualifications and maintenance of list, energy service provider delisting and discipline, energy performance contract process, multiple projects or contracts, measuring and verifying guaranteed cost savings, cost of measurement and verification, cost-effectiveness, energy service provider reporting requirements, operation and maintenance, contract term, guaranteed cost savings as percentage of total project cost, guaranteed cost savings, escalation rates, and open book pricing	)	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION (ENERGY)

TO: All Concerned Persons

1. On September 6, 2018, at 10:00 a.m., the Department of Environmental Quality will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Sandy Scherer, Legal Secretary, no later than 5:00 p.m., August 30, 2018, to advise us of the nature of the accommodation that you need. Please contact Sandy Scherer at the Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail sscherer@mt.gov.

3. The proposed new rules for a subchapter for energy performance contracting provide as follows:

NEW RULE I DEFINITIONS As used in this subchapter, the following definitions apply:

(1) "Base agreement" means the agreement between the department and an energy service provider provided in 90-4-1110, MCA.

(2) "Baseline" means the pre-project conditions used to determine any use or cost against which the guaranteed cost savings will be measured. Where possible,

the baseline should be established by data for a term of not less than 12 months. Baseline use and costs document pre-project energy or water use, or operation and maintenance costs and conditions.

(3) "Baseline utility rate" means the mutually agreed upon utility rate at the time of an investment grade audit.

(4) "Buy-down" means a payment by an entity under 90-4-1114(2), MCA, that is applied to an energy performance contract to reduce the amount of financing needed to pay for the energy performance contract.

(5) "Certificate of acceptance" is a document issued and signed by a governmental entity to document the completion and acceptance of contract work.

(a) The certificate of acceptance for an investment grade audit report documents the governmental entity's review and acceptance of the investment grade audit report or any addendum or amendment to the investment grade audit report.

(b) The certificate of acceptance for implementation of the installed equipment documents the governmental entity's inspection and acceptance of the installation and operation of all project components.

(6) "Commissioning" means the process of verifying and documenting that the facility and all its systems and assemblies are planned, designed, installed, tested, operated, and maintained to meet the governmental entity's project requirements.

(7) "Contingency" is a predetermined amount or percentage of the contract held for unpredictable changes in the project. A contingency may account for errors and omissions in the construction documents, modify or change the scope of the project, or pay for addressing unknown conditions.

(8) "Cost-effective or cost-effectiveness" has the same meaning as in 90-4-1102, MCA.

(9) "Cost-saving measure" has the same meaning as in 90-4-1102, MCA.

(10) "Cost-weighted average useful life" of a cost-saving measure means the sum of the cost of each cost-saving measure times the useful life of each measure divided by the total cost of the cost-saving measures expressed as $CWA = ((CSM_1\$ \times UL_1) + (CSM_2\$ \times UL_2) + \ldots + (CSM_n\$ \times UL_n))/CSM_T$.

(a) CWA is the cost-weighted average useful life;

(b) $CSM_1\$$ thru $CSM_n\$$ is the cost of each cost-saving measure;

(c) UL_1 thru UL_n is the useful life of the cost-saving measure; and

(d) CSM_T is the total cost of all cost-saving measures included in the project.

(11) "Department" has the same meaning as in 90-4-1102, MCA.

(12) "Effective date" means the date the certificate of acceptance for implementation of installed equipment is signed.

(13) "Energy Code" means the International Energy Conservation Code as adopted by the state of Montana.

(14) "Energy performance contract" has the same meaning as in 90-4-1102, MCA.

(15) "Energy Performance Contracting Program" means the program administered by the department to implement Title 90, chapter 4, part 11, MCA.

(16) "Escalation rate" means the annual percentage change in the cost of

goods or services. An escalation rate may be guaranteed or unguaranteed.

(17) "Governmental entity" has the same meaning as in 90-4-1102, MCA.

(18) "Guarantee period" has the same meaning as in 90-4-1102, MCA.

(19) "Guaranteed cost savings" has the same meaning as in 90-4-1102, MCA.

(20) "Initial monitoring period" means a term starting on the effective date of an energy performance contract and ending not less than three consecutive years after the effective date.

(21) "Investment grade audit" has the same meaning as investment-grade energy audit in 90-4-1102, MCA.

(22) "Measurement and verification" has the same meaning as in 90-4-1102, MCA.

(23) "Open book pricing" means a contract for goods or services in which the parties define the costs to be paid and the markups that the energy service provider may add to these costs. The project is then invoiced to the entity based on the actual costs incurred plus the agreed markups.

(24) "Operation and maintenance" means the decisions and actions regarding the control and upkeep of property and equipment. These include, but are not limited to:

(a) actions focused on scheduling, procedures, and work/systems control and optimization; and

(b) performance of routine, preventive, predictive, scheduled, and unscheduled actions aimed at preventing equipment failure or decline with the goal of increasing efficiency, reliability, and safety.

(25) "Operation and maintenance cost savings" has the same meaning as in 90-4-1102, MCA.

(26) "Qualified energy service provider" has the same meaning as in 90-4-1102, MCA.

(27) "Shortfall" means the dollar amount by which the measured cost savings fall short of the guaranteed cost savings and any unguaranteed cost savings resulting from the use of escalation rates in the energy performance contract.

(28) "State-owned building" means a building owned by a state agency identified under 90-4-605, MCA.

(29) "Stipulated" means a set value for a parameter that is agreed upon by the entity and the energy service provider. A stipulated value remains constant throughout the term of the contract, regardless of the actual behavior of that parameter. This term has the same meaning as "estimated" for measurement and verification purposes.

(30) "Total project cost" means the total cost of the project, including costs for investment grade audit, energy performance contract, measurement and verification, contingency, and all other energy service provider fees and services provided under the energy performance contract to completely fulfill the project.

(31) "Unguaranteed" means cost savings from a utility price escalation rate that is not specifically guaranteed. If included in an energy performance contract, unguaranteed cost savings are combined with guaranteed cost savings to determine the cost-effectiveness of cost-saving measures and the amount of any shortfall.

(32) "Utility cost savings" has the same meaning as in 90-4-1102, MCA.

AUTH: 90-4-1110, MCA
IMP: 90-4-1110, 90-4-1114, MCA

REASON: New Rule I ensures that phrases or words used in the proposed rules are clearly defined so that persons reading the rules will attribute the same meaning to each phrase or word.

The definitions of these terms are from sources as noted, including 90-4-1102, MCA, ASHRAE, the Energy Services Coalition (a national association for the energy performance contracting industry), and online dictionaries. The definitions are necessary to clarify the meaning of terms used in the energy performance contracting program.

"Base agreement" is required in 90-4-1110(1)(c), MCA. The reason for the base agreement is to put into one place the major elements of the Energy Performance Contracting Program and inform the providers of the requirements of the program.

"Baseline" is referred to in the definitions of guaranteed cost savings in 90-4-1102(8), MCA, and operation and maintenance cost savings in 90-4-1102(11), MCA.

"Baseline utility rate" is drawn from the definition of "guaranteed cost savings" in 90-4-1102(8), MCA.

"Buy-down" is a term commonly used in energy performance contracting to describe an upfront cash payment to reduce the amount financed.

"Certificate of acceptance" or "COA" is a document commonly used in performance contracting programs to document a governmental entity's acceptance that all requirements for either an investment grade audit contract or an energy performance contract have been completed by the provider. It is similar to the notice of substantial completion for construction projects, but is issued when all terms of the contract are completed.

"Commissioning" is based on the ASHRAE definition as found in ASHRAE commissioning guidelines and standards.

"Contingency" is based on the definition provided by the American Institute of Architects as found in *The Architect's Handbook of Professional Practice*.

"Cost-weighted average useful life" is a term used in 90-4-1114(3)(b), MCA, and requires a mathematical formula to standardize the calculation. The formula provided is a standard mathematical formula used for weighted averages. The formula is adapted to use the cost and the useful life of each cost-saving measure.

"Effective date" would be defined here to provide consistency with the same term used in statute and in contract documents. Section 90-4-1102(7), MCA, defines guarantee period as beginning on the "effective date of the contract." "Initial monitoring period," which is used for measurement and verification, would also be defined to start on the "effective date." The guarantee period in statute (90-4-1114(4) and 90-4-1114(6)(c), MCA) means the period after the project is complete that is used to determine if the project's guaranteed savings have been met. Therefore, the "effective date" must be the date the certificate of acceptance for implementation of installed equipment is issued. The definition of "effective date" would distinguish that term from the date the energy performance contract was signed.

"Energy Code" would be defined because it is being used in these rules as a shorthand term for the International Energy Conservation Code as amended and adopted by reference by the Montana Department of Labor and Industry.

"Escalation rate" is based on definitions from several sources, most closely following the definition used in thelawdictionary.org. The term is used to determine savings caused by cost increases over time for each commodity and operation and maintenance costs.

"Initial monitoring period" is used in 90-4-1114(5)(a), MCA, concerning measurement and verification costs.

"Investment grade audit" and "Investment-grade energy audit" are interchangeable terms used in the energy performance contracting program.

"Open book pricing" is common where guaranteed maximum pricing is standard practice. This definition is based on articles from the energy performance contracting industry as well as a briefing paper from the Chartered Institute of Public Finance and Accountancy (CIPFA), an organization based in the UK that encourages accountability for government contracts.

"Operation and maintenance" is as defined in the U.S. Department of Energy's Federal Energy Management Program Operations & Maintenance Best Practices, A Guide to Achieve Operational Savings. It is used in 90-4-1102, MCA, to address cost savings and in 90-4-1113, MCA, to address required components of an investment grade audit. The proposed definition limits the term to the control and upkeep of property and equipment. This definition is consistent with that used by other national organizations, including the National Institute of Building Sciences and the American Council for an Energy-Efficient Economy.

"Shortfall" is used in 90-4-1114(6)(a), MCA, as part of the term "verified annual guaranteed cost savings shortfall" and as a shorthand reference for that term.

"Stipulated," along with variations of the term, is frequently used in energy performance contracts as an alternative to the use of "estimated" as it is a value that typically is not measured.

"Total project cost" includes all costs associated with the project. Section 90-4-1110(3)(a), MCA, authorizes the department to adopt rules to establish criteria for the amount of project costs covered by guaranteed cost savings. A definition of total project cost is necessary for the department to use in establishing those criteria as well as other purposes in these proposed rules and program documents.

"Unguaranteed" is referred to in three statutes. Section 90-4-1110(3)(d), MCA, authorizes the department to adopt rules to determine how unguaranteed utility price escalation rates may be applied to an energy performance contract. Sections 90-4-1102(1) and 90-4-1114(6)(a), MCA, refer to unguaranteed utility price escalation rates concerning cost-effectiveness and shortfall payments. An energy service provider generally does not guarantee an escalation rate, thereby making any escalation rate unguaranteed. However, under 90-4-1114(6)(a), MCA, an unguaranteed utility price escalation rate, if used in an energy performance contract, may provide part of the cost savings that are used to determine cost-effectiveness and to determine if guaranteed plus unguaranteed cost savings will pay for the financing repayment obligation.

Other terms are defined to have the same meaning as in the statute and would be defined because they are used in these rules.

NEW RULE II ADOPTION BY REFERENCE (1) Energy performance contract projects are expected to meet all current building codes and industry standards. Therefore, the department adopts and incorporates by reference:

(a) Efficiency Valuation Organization (EVO), International Performance Measurement and Verification Protocol (IPMVP), Volume I, EVO 10000 – 1:2012. The IPMVP provides a framework for reporting a project's energy savings and is available at http://evo-world.org/en/.

(b) U.S. Department of Energy Federal Energy Management Program (FEMP), Measurement and Verification Guidelines: Measurement and Verification for Performance-Based Contracts, Version 4.0, November 2015. This document contains procedures and guidelines for quantifying the savings resulting from implementation of cost saving measures. It is available at: http://energy.gov/sites/prod/files/2016/01/f28/mv_guide_4_0.pdf.

(c) Energy codes and standards:

(i) International Code Council, International Energy Conservation Code (IECC) (2012 edition), as adopted and amended in ARM 24.301.161. The International Energy Conservation Code contains energy standards for construction. The 2012 version of the IECC is available at https://codes.iccsafe.org/public/collections/ICC%20Standards;

(ii) American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE), Energy Standard for Buildings Except Low-Rise Residential Buildings. The American Society of Heating, Refrigerating and Air-Conditioning Engineer standards contain standards specific to the heating, refrigerating and air-conditioning systems used in buildings. All references to that document in this subchapter are to Standard 90.1-2010, which is available at http://www.techstreet.com/ashrae/standards/ashrae-90-1-2010-i-p?ashrae_auth_token=&gateway_code=ashrae&product_id=1739526; and

(iii) Montana Department of Administration, Architecture & Engineering Division, State of Montana High-Performance Building Standards. The High-Performance Building Standards require above code construction for state owned or leased facilities. All references to that document in this subchapter are to Adopted Version 1, December 1, 2013, which is available at http://www.architecture.mt.gov/Portals/14/docs/HPBS/HPBS_Documents_Portfolio_v1_Adopted_12_1_13.pdf.

(d) U.S. Department of Energy (DOE) Federal Energy Management Program (FEMP), Energy Escalation Rate Calculator. This calculator provides a consistent method for analyzing capital investments in buildings. All references to the Energy Escalation Rate Calculator in this subchapter are to version 2.0-16. The current version is posted at http://energy.gov/eere/femp/energy-escalation-rate-calculator-download.

(2) A printed version of each of the documents in (1) is available for viewing at the department's office located at 1520 E. 6th Avenue, Helena, MT 59601.

AUTH: 90-4-1110, MCA

IMP: 90-4-1110, 90-4-1114, MCA

REASON: New Rule II is reasonable and necessary to adopt by reference building codes and industry standards to be used in implementation of Title 90, chapter 4, subchapter 11, MCA.

Sections (1)(a) through (d) specify codes and standards specific to energy performance contracts. The IPMVP is a standard document, approximately 140 pages, used internationally for measurement and verification of savings for performance-based contracts. The IPMVP offers general guidelines and processes for conducting measurement and verification activities. The FEMP Measurement and Verification Guidelines, consisting of about 108 pages, are based on the IPMVP and give greater detail on how the IPMVP should be applied to the measurement and verification process.

The International Code Council revises the IECC, which is about 150 pages, every three years. The Montana Department of Labor and Industry has adopted the 2012 International Energy Conservation Code (IECC), with amendments, at ARM 24.301.161.

The ASHRAE Standard 90.1 - 2010 *Energy Standard for Buildings Except Low-Rise Residential Buildings* is about 225 pages and is an alternative compliance method to the IECC and is often included with the IECC.

The State of Montana High-Performance Building Standards, consisting of about 125 pages, establishes a goal for new state facilities to be 20 percent better than the IECC.

The Energy Escalation Rate Calculator would be adopted as a reference tool to standardize the escalation rate to be used in energy performance contracts. The tool has been created by the U.S. Department of Energy's Energy Information Administration (EIA).

Section (2) is reasonable and necessary to state where a copy of the materials to be incorporated by reference may be obtained.

NEW RULE III SOLICITATION AND EVALUATION OF QUALIFICATIONS AND MAINTENANCE OF LIST (1) After the department has issued a request for qualifications under 90-4-1111, MCA, and has received submissions of qualifications, it may request an energy service provider to provide additional information necessary to complete or clarify information set forth in a submission of qualifications or to satisfy other factors the department determines appropriate. If requested, an energy service provider shall submit the additional information to the department.

(2) An energy service provider may submit its qualifications to the department once per calendar year.

(3) If the department determines an energy service provider is qualified, it shall list the energy service provider upon the provider's execution of the base agreement with the department under 90-4-1110(1)(c), MCA. The department shall publish the list of qualified energy service providers on its website.

(4) An energy service provider listed by the department shall maintain the qualifications set forth in its submission of qualifications.

(5) An energy service provider shall report to the department significant changes to its qualifications within 60 days after the change occurs. Significant changes include the energy service provider:

(a) going out of business;

(b) no longer providing the services that originally qualified the energy service provider;

(c) changing personnel identified in its submission of qualifications or in report under this section; or

(d) any other matter determined by the department necessary to fulfill the requirements of this subchapter.

(6) The department shall review the provider's qualifications annually to determine if the provider is qualified to remain on the list of qualified energy providers.

AUTH: 90-4-1110, MCA
IMP: 90-4-1110, 90-4-1111, MCA

REASON: Under 90-4-1111, MCA, the department is required to request qualifications and review submitted qualifications of energy service providers at least every five years for potential inclusion on its list of qualified energy service providers. Qualifications may be submitted at any time. Subsection (2) of that statute requires the department to evaluate the submitted qualifications based on knowledge and experience with energy performance contracts, ability to guarantee cost-effectiveness, financial stability, and other factors determined by the department.

Section (1) is reasonably necessary to assure the department has all relevant information that it needs to evaluate submissions of qualifications. Based on its review of submitted qualifications, the department may determine that additional information is needed.

Section (2) is reasonably necessary to limit the number of reviews of submitted qualifications conducted by the department each year due to resource constraints.

Section (3) is reasonably necessary to satisfy the requirement in 90-4-1111(3), MCA, that the department maintain a list of qualified energy service providers.

Sections (4), (5), and (6) are reasonably necessary to ensure that each energy service provider maintains the qualifications necessary to remain on the qualified list.

NEW RULE IV ENERGY SERVICE PROVIDER DELISTING AND DISCIPLINE (1) The department shall delist an energy service provider if it determines that the energy service provider has failed to maintain the qualifications established under 90-4-1111(2), MCA.

(2) Based on the severity and culpability determined under (1), the department may decline to evaluate or act on a submission of qualifications by a provider for a period of up to five years.

(3) The department may relist an energy service provider delisted under (1) if the provider has remedied, to the satisfaction of the department, the failure to meet the qualifications established.

(4) If it determines that an energy service provider has violated Title 90, chapter 4, part 11, MCA, or an agreement or contract entered into pursuant to Title 90, chapter 4, part 11, MCA, the department may revoke or suspend the listing of the provider on the qualified list, place the provider on probation, reprimand or censure a provider, or take other appropriate disciplinary action.

(5) Based on the severity and culpability determined under (4), the department shall determine the type and duration of, or whether to modify, any action in (4).

(6) Upon taking action under (1) or (4), the department shall serve the energy service provider with a written notification of the action and the reasons for the action.

(7) A department action under (1) or (4) becomes final if the energy service provider does not file a written appeal with the department within 30 days after the notification was served. A written appeal must state with specificity the basis for appealing the determination.

(8) When it receives a written appeal, the department shall appoint a hearing examiner to conduct a hearing and decide the appeal. The Montana Rules of Civil Procedure, except 37(a)(5) and (b)(2)(C), and Montana Rules of Evidence, and the Uniform Rules of District Court, Rules, except Rules 7 and 9, apply to the appeal. Every reference in those rules to "court" or "judge" is deemed to be a reference to the hearing examiner.

(9) The hearing examiner shall serve the decision on the appeal on the parties. Except as provided in (10), the decision is final when served.

(10) A decision in (9) upholding a department action under (1) or (4) becomes final unless the provider files a written request for review with the department's director within 30 days after the decision was served.

(11) When the director receives a written request for review under (10), the director shall review the department action and issue a final decision. The director shall serve the final decision on the parties.

(12) After a department action or decision in this rule becomes final, the department shall:

(a) serve a copy to the energy service provider;

(b) provide a copy to each entity currently contracting with the energy service provider; and

(c) post a copy to the department's website.

(13) Service under this rule is accomplished via U.S. mail and is complete upon mailing.

(14) An energy service provider that has been delisted by the department shall fulfill all obligations for any current contract and meet the standard of conduct set forth in the base agreement.

AUTH: 90-4-1110, MCA
IMP: 90-4-1110, 90-4-1111, MCA

REASON: Sections (1), (2), and (3) are reasonably necessary to provide a procedure for the disqualification and delisting of energy service providers who do not comply with qualifications established through the request for qualifications as required by 90-4-1110(1)(b), MCA.

Sections (4) through (12) are reasonably necessary for the department to ensure qualified energy service providers are contracting and providing services in accordance with 90-4-1101 through 90-4-1114, MCA, as required by 90-4-1110(1)(c), MCA. These procedures generally follow the approach of the Montana Administrative Procedure Act (MAPA) for contested cases, although a contested case for a disciplinary action in these rules is not provided for by law, and so an appeal under this subchapter is not subject to MAPA. These proposed procedures are reasonable and provide due process to the energy service provider.

That statutory section authorizes the department to adopt rules "for … implementation of this part." The department is proposing to adopt in (4) provisions authorizing it to determine violations and take disciplinary action as provided in 37-1-136(1), MCA, which authorizes boards in charge of regulating occupations to adopt the authority to impose those types of action.

In (5), the department would be required to determine the type and duration of, or whether to modify, any disciplinary action in (4) based on the severity of the violation and the culpability of the energy service provider in committing it. This is necessary to ensure that the type and duration of any discipline are proportionate to the violation and culpability of the energy service provider.

Sections (6) through (13) would provide disciplinary procedures for a failure to comply with qualifications under (1) or a violation of a requirement of law, rule, or agreement under (4). These provisions also would establish a deadline for an appeal of a disciplinary action, a two-tier appeal process for delisting, and a one-tier appeal process for lesser disciplinary actions. While these appeal procedures generally follow the provisions of the Montana Administrative Procedure Act (MAPA), appeals of the disciplinary actions are not contested cases subject to MAPA. The appeal procedures are reasonable and necessary to provide due process to the energy service provider.

Section (14) is reasonably necessary to ensure that the delisting of an energy service provider does not affect its existing contractual obligations.

NEW RULE V ENERGY PERFORMANCE CONTRACT PROCESS (1) An entity must solicit a minimum of three energy service providers to submit project proposals.

(2) In a request for proposal issued by an entity, the entity shall identify the facilities that are proposed to be subject to an investment grade audit. The request for proposal may include an option to expand the project scope to include additional facilities.

(3) If the option to expand the project scope was not included in the request for proposal, an entity may not enter into an investment grade audit for a project that is outside the project scope of the request for proposal unless the entity issues another request for proposal listing additional facilities to be addressed in the project scope.

(4) If the option to expand the project scope was included in the request for proposal, the entity may:

(a) issue a request for proposal for the additional listed facilities;

(b) negotiate with the energy service provider to include additional listed facilities in the scope of work for the investment grade audit if the investment grade audit certificate has not been signed; or

(c) negotiate a new investment grade audit contract with the energy service provider if the investment grade audit certificate of acceptance has been signed.

(5) If the entity expands the project scope as provided in (1) and the energy service provider is no longer listed as a qualified provider, the entity shall:

(a) attempt to negotiate an investment grade audit contract with the provider that obtained the next-highest ranking in the request for proposal process; or

(b) issue a new request for proposal to qualified providers.

(6) The entity may not expand the project scope regarding investment grade audits more than five years after the issuance of the request for proposal for the initial project.

(7) An energy service provider may combine guaranteed cost savings for multiple contracts, as in phased or amended project contracts ("the combined energy performance contract") only if:

(a) the combined contract is based on the same investment grade audit;

(b) the combined contract meets the requirements of cost-effectiveness in 90-4-1102, MCA, and [New Rule VI];

(c) the combined contract meets all other requirements in statute and rule regarding qualification as an energy performance contract;

(d) the measurement and verification plan includes all measures in the combined contract; and

(e) measurement and verification is conducted for all measures at least through the initial monitoring period of the combined contract and through any additional period required by 90-4-1114(5)(b), MCA.

AUTH: 90-4-1110(2)(b), MCA
IMP: 90-4-1113, 90-4-1114(5)(b), MCA

REASON: Although (1) repeats the requirement that entities solicit requests for proposals from a minimum of three qualified energy service providers, it is reasonable and necessary to repeat that requirement so that New Rule V is a stand-alone provision setting forth all requirements regarding requests for proposals.

Sections (2) and (3) are reasonably necessary to provide an energy service provider the flexibility to include in its response additional facilities/energy conservation measures than those anticipated by the entity. Requiring this option to be expressly stated in the request for proposal provides notice to all energy service providers that the entity is willing to consider additional options for resource conservation. This flexibility also allows future energy performance contracts to be based on an initial investment grade audit.

Section (4) is reasonably necessary to explain the options an entity has when an energy service provider has included additional facilities/energy conservation measures in its response.

Section (5) is reasonably necessary to explain the options an entity has when it expands a project scope and the selected energy service provider is no longer listed on the department's qualified list.

Section (6) is reasonably necessary to assure that energy performance contracts are based on a reasonably current investment grade audit.

Section (7) is reasonably necessary to describe the circumstances under which multiple energy performance contracts, or phases within a single energy performance contract, can be issued using a single investment grade audit.

NEW RULE VI COST-EFFECTIVENESS (1) When an energy performance contract includes multiple cost-saving measures and/or includes multiple buildings or facilities, cost-effectiveness is determined by adding together the guaranteed and unguaranteed cost savings per year for all cost saving measures for all buildings and facilities. This total must be equal to or exceed any financing repayment obligation each year of a finance term.

AUTH: 90-4-1102(1), 90-4-1110(3)(d), MCA
IMP: 90-4-1110(3)(d), MCA

REASON: Discussions held by the department with energy service providers and governmental entities raised a question on how cost-effectiveness must be applied – whether to individual measures, a single building, or an entire project. New Rule VI is reasonably necessary to clarify that cost-effectiveness is determined based on the entire project. Cost-saving measures with higher levels of cost-effectiveness may offset measures that are less cost-effective or not cost-effective.

NEW RULE VII ENERGY PERFORMANCE CONTRACT TERM AND PROCESS (1) The minimum term of an energy performance contract is four years or one year longer than the initial monitoring period, whichever is greater.

(2) An energy service provider may not enter into an energy performance contract before:

(a) completing the final investment grade audit report;

(b) completing an energy performance contract project proposal based on the final investment grade audit report; and

(c) receiving the certificate of acceptance for the investment grade audit from an entity.

(3) An entity may not issue a certificate of acceptance for implementation of the installed equipment, unless the entity has inspected and accepted the energy service provider's installation and operation of all project components and documents prepared by the energy service provider, including:

(a) measures identified in the scope of work of the energy performance contract;

(b) the energy performance contract commissioning report;

(c) the project operation and maintenance manual;

(d) the completion of entity operation and maintenance training as per contract documents; and

(e) the measurement and verification plan.

(4) An energy service provider may not negotiate the terms of measurement and verification reports and shortfall payments under 90-4-1114(6)(b), MCA, before the end of the initial monitoring period.

(5) An energy service provider may charge an entity only for costs listed in the investment grade audit contract or energy performance contract. Costs that may not be listed in either contract include costs incurred:

(a) in developing a request for proposal responses;

(b) prior to both parties signing an investment grade audit contract;

(c) between an entity's signing of an investment grade audit certificate of acceptance and the parties' signing of an energy performance contract; and

(d) in negotiating a shortfall.

(6) Each energy performance contract must state that it is contingent upon:

(a) the entity's securing funds for the buy-down, except for potential utility incentives; and

(b) obtaining financing for the balance of the total project cost.

(7) If funds are not secured or obtained as required in (5), the entity is not liable for any costs incurred under the energy performance contract.

(8) Any contingency funds must be identified in the energy performance contract and be included as part of the guaranteed maximum price and total cost of the energy performance contract. The entity retains control of the contingency fund, which may be spent only if the entity has provided written approval for the contingency expense and the expense is for goods or services necessary to implement cost-saving measures in the energy performance contract.

AUTH: 90-4-1110, MCA
IMP: 90-4-1110, 90-4-1113, 90-4-1114, MCA

REASON: A 20-year maximum term of an energy performance contract is defined in 90-4-1114(3)(b), MCA; however, a minimum term is not established in statute. Therefore, (1) is reasonably necessary to set a minimum term for an energy performance contract. By implication, the minimum period would be the initial monitoring period, which is a minimum of three years under 90-4-1114(5)(a), MCA, plus an additional year which is necessary to provide a period for final measurement and verification reporting. Therefore, the department is proposing that the minimum term for an energy performance contract be four years, or one year longer than the initial monitoring period.

Section (2) is reasonably necessary to set a sequential process for energy performance contracting. The purpose of an investment grade audit is to identify potential cost saving measures that may be included in an energy performance contract. Completion of an investment grade audit report, as signified by the certificate of acceptance, is necessary to determine energy savings on which a contract proposal is based.

Section (3) is reasonably necessary to state the components that an entity must deem to be satisfactory before signing the certificate of acceptance for an energy performance contract. The guarantee period starts when all work necessary for the governmental entity to operate the project and start receiving the benefits of its investment has been completed.

Section (4) is reasonably necessary to ensure that project shortfall payments are not negotiated until the initial monitoring period has elapsed. The dollar amount of actual future shortfalls cannot be accurately established before this time. The department's intent is for the energy service provider to identify, correct, and document any shortfall in the measurement and verification reports before any negotiation of shortfall can be begin.

Section (5) is reasonably necessary to ensure that an energy service provider charges for costs associated with services provided under either an investment grade audit contract or an energy performance contract. This excludes costs incurred by the energy service provider leading up to the signing of an investment grade contract, between the acceptance of an investment grade audit and the signing of an energy performance contract, and after the acceptance of the equipment installation.

Section (6) is reasonably necessary to ensure that an energy performance contract not move forward until project funding is secured, including both the buy-down and the financing. Potential utility incentives included in the buy-down do not need to be secured prior to contract signature because the amount of the incentive is only estimated and not finalized until project closure.

Section (7) is reasonably necessary to protect the entity from charges incurred by the energy service provider when project financing has not been secured.

An energy performance contract includes either a fixed contract price or a Guaranteed Maximum Price (GMP) to cap the financial obligation of the entity. Section (8) is reasonable and necessary to require identification of contingency funds for unforeseen conditions in the contract price or GMP. Expenditures of contingency funds should be subject to approval by the entity. Any contingency funds remaining after the certificate of acceptance for implementation of the installed equipment is signed should remain with the entity. The provisions of (8) follow the process established by the American Institute of Architects (AIA) in *The Architect's Handbook of Professional Practice*.

NEW RULE VIII MEASURING AND VERIFYING GUARANTEED COST SAVINGS (1) In the energy performance contract, the energy service provider shall:

(a) identify the cost of measurement and verification for each year of the initial monitoring period; and

(b) include the total cost of measurement and verification in the total project cost.

(2) In an investment grade audit report, an energy service provider shall identify the International Performance Measurement and Verification Protocol Option (A, B, C, or D) it intends to use for each cost-saving measure. The energy service provider shall also indicate the measurement and verification procedures it intends to follow in compliance with Federal Energy Management Program measurement and verification guidelines.

(3) The energy service provider shall measure key parameters before and after the implementation of the cost-saving measure.

(a) An energy service provider identifying International Performance Measurement and Verification Protocol Option A shall identify and document the

sources of the values used. Those values may be stipulated only with the written consent of the entity.

(b) An energy service provider identifying International Performance Measurement and Verification Protocol Option B, C, or D shall conduct short-term or continuous field measurement to document both baseline and post-implementation conditions.

(4) The energy service provider shall include in an energy performance contract a measurement and verification plan that complies with the Federal Energy Management Program measurement and verification guidelines. Between execution of the energy performance contract and issuance of the certificate of acceptance of installed equipment, the energy service provider may modify the measurement and verification plan only with the written consent of the entity.

(5) During the guarantee period, the energy service provider shall follow the measurement and verification plan included in the energy performance contract for which a certificate of acceptance has been issued. The measurement and verification plan may not be modified without the written approval of the entity. Any modification must be based on measurable or documented factors within the measurement and verification plan such as a change in use or occupancy.

AUTH: 90-4-1110(1)(g), 90-4-1110(3)(c), MCA
IMP: 90-4-1114, MCA

REASON: Under (1), it is reasonably necessary to require the energy service provider to disclose to the entity the cost of measurement and verification as part of the overall project cost. In the event of shortfall, this allows the entity to determine the value of measurement and verification that the provider must pay.

The performance of an energy performance contract requires measurement and verification. The International Performance Measurement and Verification Protocol (IPMVP) is an internationally recognized approach that identifies options for measuring and verifying cost-saving measures. It has been adopted by several states and the federal government for performance contracts. The Federal Energy Management Program's Measurement and Verification Guidelines provides guidance in applying the options set forth in the IPMVP. It is reasonable and necessary in (2) to require energy service providers to identify the options that are applicable to the energy performance contract project. This ensures that both the energy service provider and the entity have a mutually agreed upon and consistent method for determining project performance.

In (3), it is reasonably necessary to require the energy service provider to measure key parameters before and after the implementation of the cost saving measure to verify that the cost savings are realized. Subsections (a) and (b) are reasonably necessary to enable the entity to determine the sources of the calculations used by the energy service provider in measuring and verifying cost savings under the applicable protocol.

Section (4) is reasonably necessary to allow the energy service provider to modify how the performance of the cost-saving measures will be verified after the investment grade audit report has been completed. Changes must be mutually

agreed to by the energy service provider and the entity. This reduces the risk to the entity for adjustments related to any potential shortfall.

Section (5) is reasonably necessary to require consistent implementation of the measurement and verification plan included in the signed energy performance to ensure the entity receives the services and cost savings as stated in the energy performance contract. The measurement and verification plan may be changed only with consent of the entity.

NEW RULE IX GUARANTEED COST SAVINGS AND PROJECT FINANCING (1) For a project to qualify as an energy performance contract, the guaranteed cost savings, plus any cost savings attributable to escalation under [New Rule XI], must be greater than or equal to any repayment obligation for each year of the finance term.

(2) A buy-down may be used in an energy performance contract only if the amount and sources of the buy-down are established in the energy performance contract. A buy-down is limited to utility incentives, or funds in the possession of the entity such as grants, capital reserves, or funds received from other sources.

(3) Except as provided in (4), if an energy performance contract contains an amount of a utility incentive as a buy-down, the energy service provider shall project the amount of the incentive to be used as a buy-down. If the utility incentive used as a buy-down received by the entity is:

(a) less than or equal to the projected amount, the entity shall pay any incentive amount received to the energy service provider, and the entity's obligation to pay the total project cost to the energy service provider is reduced by the amount by which the utility incentive received is less than the projected amount; or

(b) greater than the projected amount, the entity shall pay the projected amount to the energy service provider and retain the excess.

(4) If the utility has reduced the incentive due to a lack of sufficient incentive program funds or a change in the utility incentive program, and the utility incentive received is less than the projected amount, the entity shall pay the energy service provider the amount the projected utility incentive was less than the final utility incentive buy-down.

(5) Except for a general obligation bond, an entity may not enter into a financing agreement or issue an obligation, including a loan agreement, bond, installment payment contract, or lease purchase agreement, for energy performance contract project financing unless the agreement or obligation states that the restrictions on collectability in 90-4-1109, MCA, apply.

(6) If the energy service provider provides operation and maintenance services related to cost-saving measures implemented in an energy performance contract, the costs of these services must be included in the total project cost.

(7) The total cost for operation and maintenance cost-saving measures may not exceed 50 percent of the total project cost of the energy performance contract.

AUTH: 90-4-1110, MCA
IMP: 90-4-1109, 90-4-1110, 90-4-1113(2), 90-4-1114(2), MCA

REASON: Section (1) is reasonable and necessary to ensure that energy performance contracts are cost effective as defined in 90-4-1102(1), MCA.

Section (2) is reasonable and necessary to implement 90-4-1114(2), MCA, stating that "[u]tility incentives, grants, operating costs, capital budgets, or other permissible sources may be used to reduce the amount of financing" of an energy performance contract. A source used to decrease the amount financed is referred to as "buy-down." Requiring a buy-down to be disclosed in an energy performance contract enables an entity, an energy service provider, or a third-party reviewer to determine whether the buy-down is allowable under 90-4-1114(2), MCA.

Under New Rule IX, an energy performance contract is contingent upon funding of both the buy-down and any financed amount and the entity is not liable if funds are not obtained. Unlike other sources of funding used as buy-down, an entity does not receive a utility incentive until a project closes. Therefore, the dollar amount of the incentive is only estimated when the energy performance contract is signed. Section (3) is reasonable and necessary to allow adjustments either upwards or downwards to reflect the actual amount of the incentive, protecting the entity from erroneous estimates of utility incentive.

Because the energy service provider has no control over the utility incentive program, (4) is reasonable and necessary to not hold the energy service provider accountable for any shortfall resulting from reductions in utility incentive programs.

Only general obligation bonds are collectible against funds other than guaranteed cost savings or other revenue that has been pledged to pay for the financing of an energy performance contract. Other financing mechanisms such as bank loans, installment payment contracts, or lease purchase agreements, are collectible only from guaranteed cost savings provided in the energy performance contract and other revenue, if any, pledged in the energy performance contract. It is reasonable and necessary for (5) to require language containing this restriction in any financing agreement or non-general obligation bond so that any lender or bond holder will have notice of this restriction.

An entity may choose to have the energy service provider operate and/or maintain its facility during the initial monitoring period. It is reasonable and necessary for (6) to identify these services and include the cost of these services as part of the total project costs in the energy performance contract.

Operation and maintenance cost saving measures are typically measures, such as behavioral modification, that require little or no capital or installed equipment. It is reasonable and necessary to limit the total cost for operation and maintenance cost-saving measures as set forth in (7) for the following reasons:

(a) Under 90-4-1101 and 90-4-1102, MCA, the purpose of an energy performance contract is to conserve energy and water and thus obtain cost savings. Long-term, verifiable energy and water use reductions, and associated cost savings are achieved through capital equipment upgrades.

(b) Savings attributable to operation and maintenance improvements are generally difficult to measure and verify.

(c) Operation and maintenance improvements may not deliver sustained and consistent savings over the long-term financing period as required by the savings guarantee.

NEW RULE X NEW CONSTRUCTION AND CHANGE OF USE (1) For new construction or facilities/buildings undergoing a change of use, an energy service provider shall determine guaranteed cost savings by taking the difference between the cost of the energy or water usage of the baseline and of the proposed design.

(a) Except as provided in (1)(b), an energy service provider shall determine the costs of the baseline and of the proposed design by using Section C407 (Total Building Performance) of the Energy Code or Informative Appendix G (Performance Rating Method) from ASHRAE Standard 90.1.

(b) For a state-owned building, an energy service provider shall determine the costs of the baseline and of the proposed design by using a building baseline that meets or exceeds the criteria in the High-Performance Building Standards.

(2) An energy service provider may include as guaranteed operation and maintenance cost savings only the savings from operating or maintaining a facility. Such guaranteed operation and maintenance cost savings may include savings from renting or leasing property only if the property is rented or leased when the investment grade audit contract is signed.

(3) Except as provided in (4), an energy performance contract may not include new construction that increases the total square footage of a facility.

(4) New construction in an energy performance contract shall be limited to:

(a) buildings or structures used to house boilers, chillers, generators, and similar equipment required as part of a cost-saving measure;

(b) mechanical penthouses; and

(c) buildings or structures determined by the department to be necessary to implement the cost-saving measure.

AUTH: 90-4-1110, MCA
IMP: 90-4-1110, MCA

REASON: Section (1) is reasonably necessary to specify how building baseline utility usage may be determined for consistency purposes.

Section (2) is reasonably necessary to limit operation and maintenance savings for rented or leased property to only current leases and only for the current rental or lease period.

Sections (3) and (4) are reasonably necessary to exclude new construction from an energy performance contract unless the construction was a component of a cost-saving measure. For example, a new structure housing a mechanical system would be allowed if the total project, including the cost of the mechanical system and new structure, is cost effective.

NEW RULE XI ESCALATION RATES (1) If an energy service provider uses an escalation rate in an energy performance contract, then:

(a) An energy service provider shall use the Energy Escalation Rate Calculator to determine the maximum escalation rate for each listed fuel type.

(b) An escalation rate may not exceed the default inflation rate provided in the Energy Escalation Rate Calculator for:

(i) fuel types not listed in the Energy Escalation Rate Calculator;

(ii) water; or

(iii) operation and maintenance.

(c) For each fuel type, water, and operation and maintenance, the energy service provider and the entity shall negotiate the escalation rate to be used in an energy performance contract. Each rate may not exceed the maximum rate determined in (2).

(d) Throughout the investment grade audit and energy performance contract process, the energy service provider shall use separate escalation rates for each fuel type, water, and operations and maintenance from the Energy Escalation Rate Calculator in (1) and (2).

(e) In an energy performance contract, the escalation rate for each fuel type, water, and operation and maintenance must remain constant for the financing term.

(f) The energy service provider shall include in the energy performance contract measurement and verification plan a determination of cost savings for each fuel type and water that first calculates the units saved (e.g., kWh, DKT, etc.) or savings due to reduction in peak load (e.g., kw) and then multiplies each unit saved by its associated rate. The associated rate is:

$AR = BR * (1.0+Esc)^{(n-1)}$, where:

AR is the associated rate for the fuel type in dollars,

BR is the baseline rate for the fuel type in dollars as established in the energy performance contract,

Esc is the fuel type escalation rate, and

n is the year of the contract finance term beginning after the effective date.

AUTH: 90-4-1110, MCA
IMP: 90-4-1110, 90-4-1114, MCA

REASON: This rule is reasonably necessary to establish a standard method for determining escalation rates energy service providers often use escalation rates in their cash flow analyses to demonstrate that the project is cost-effective because utility or other costs are projected to rise, increasing the savings earned by cost-saving measures. Escalation rates may also be used to calculate shortfall payments.

In (1)(a), the department is adopting the Energy Escalation Rate Calculator (EERC) developed by the U.S. Department of Energy as the standard method for determining escalation rates used in energy performance contract. Because the EERC does not include escalation rates for all fuel commodities, water, or operation and maintenance, it is reasonable and necessary for (1)(b) through (f) to place parameters on the use of escalation rates to maintain consistency in cost savings calculations. The energy service provider and entity are required to negotiate escalation rates for individual fuel types not listed in the EERC, water, or operation and maintenance, but the negotiated rate may not exceed the default inflation rate provided in the EERC. Negotiated rates must remain constant throughout the finance term. Finally, savings must be calculated for each year of the initial monitoring period and subsequent years of measurement and verification using a specified cost savings calculation. The calculation included in (1)(f) in its standard

form would be AR = BR * (1.0+Esc) ^{n} as found in numerous resources for economic calculations. However, since the baseline utility rate is typically used for the first year of savings, the escalation factor (1.0+Esc) is set equal to 1 (no escalation). This is equivalent to setting the exponent to n-1.

NEW RULE XII OPEN BOOK PRICING (1) In an investment grade audit and an energy performance contract, an energy service provider shall provide open book pricing that discloses all costs.

(2) An energy service provider shall maintain cost accounting records for all actual costs, including costs for labor, materials, and other services for work performed under an investment grade audit or an energy performance contract.

(3) An energy service provider shall provide the records in (1) and (2) to the entity or the department on request, and shall preserve the records for one year after the initial monitoring period.

(4) In an investment grade audit contract, the energy service provider shall provide the pricing methodology and project cost percentages. The methodology and percentages must be based on the estimated project scope and size.

(5) If there has been no substantial change in project scope or size after preparation of an investment grade audit contract, the energy service provider shall provide in the energy performance contract the pricing methodology and cost percentages from the investment grade audit contract.

(6) If there has been a substantial change in project scope or size after preparation of an investment grade audit contract, the energy service provider shall provide in the energy performance contract the revised pricing methodology and cost percentages.

(7) The energy service provider may not increase the markup percentage for any category after submitting a response to a request for proposal.

(8) To request payment for work done or services rendered under an energy performance contract, the energy service provider shall submit to the entity an invoice with a detailed report describing costs being billed.

AUTH: 90-4-1110, MCA
IMP: 90-4-1110, MCA

REASON: Sections (1) through (3) of New Rule XII are reasonable and necessary to allow the entity to review the accounting records, including invoices, labor costs, and other cost components related to the energy performance contract. This ensures that the entity pays only for the actual cost plus agreed-upon markups for the project. This is necessary because an energy service provider is not required to procure sub-contractors through a competitive process. Open book pricing is common in contracting, particularly where guaranteed maximum price (or cost) is used.

Section (4) is reasonable and necessary for the energy service provider to disclose the calculations used in the energy performance contract so that the entity may verify the cost effectiveness of the energy performance contract.

Sections (5) through (7) are reasonable and necessary to allow the energy service provider to modify its input to some portions of the cost and pricing tool, but would prohibit increasing the markup percentage. The markup percentage may not be increased as this is a consideration that the entity used to select the energy service provider for the project. This rule is based on provisions included in the documents from other states, including Colorado, and from the U.S. Department of Energy. The department has developed a cost and pricing tool that will be made available to energy service providers for use throughout the energy performance contract process.

Section (8) is reasonable and necessary to provide an entity with an itemized billing of services, equipment, and materials provided by the energy services provider.

NEW RULE XIII ENERGY SERVICE PROVIDER REPORTING REQUIREMENTS (1) An energy service provider shall notify the department via email at least two weeks before entering into an investment grade audit or energy performance contract. The notification must include the names of the energy service provider and the entity, and the name, email address, and phone number of the designated contact for the energy service provider and the entity.

(2) An energy service provider shall provide to the department electronic copies of the following:

(a) the energy performance contract proposed project summary at least two weeks prior to the signing of an energy performance contract;

(b) the energy performance contract project summary report within two weeks after issuance of a certificate of acceptance; and

(c) the measurement and verification reports, at the same time the reports are submitted to the entity.

(3) Upon request by the department, the energy service provider shall provide to the department electronic copies of the following:

(a) the investment grade audit contract;

(b) the final investment grade audit report and any addendum to the report;

(c) the investment grade audit certificate of acceptance;

(d) the energy performance contract;

(e) the certificate of acceptance for the implementation of installed equipment;

(f) negotiated terms of measurement and verification reports and amount of shortfall payment under 90-4-1114(6)(b), MCA; and

(g) any other document determined by the department to be necessary to fulfill the purposes of this subchapter, within two weeks after receiving a request.

AUTH: 90-4-1110(1)(h), MCA
IMP: 90-4-1110, 90-4-1114(6)(b), MCA

REASON: The purpose of New Rule XIII is to provide the department with information it needs to evaluate the effectiveness of energy performance contracting in the state. These reporting requirements are similar to requirements from other states. Section (1) requires notification to the department two weeks before an

investment grade audit is initiated, or an energy performance contract is executed. This allows the department to offer technical assistance to governmental entities before these two important project milestones are initiated.

Section (2) lists three documents that the energy service provider is required to deliver to the department along with timing of submission of the documents. Submission of the energy performance contract proposed project summary as required in (2)(a) would provide the department with data necessary to determine if a proposed project qualifies as an energy performance contract. This would allow the department to provide technical assistance to an entity. Submission of the energy performance contract project summary report as required in (2)(b) would provide the department with a summary report of the energy performance contract project in order for the department to evaluate the effectiveness of savings resulting from an energy performance contract. Submission of the measurement and verification report as required in (2)(c) would permit the department to track project performance after completion.

The purpose of (3) is to give the department the authority to request other documents associated with an energy service provider's provision of services under an energy performance contract. Department review of the documents may be necessary to respond to specific requests from entities or for a programmatic review conducted by the department.

4. 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 Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to sscherer@mt@gov, no later than 5:00 p.m. September 13, 2018. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. 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 that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supply; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wind energy, wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Sandy Scherer at sscherer@mt.gov, or may be made by completing a request form at any rules hearing held by the department.

6. Norm Mullen, attorney for the department, has been designated to preside over and conduct the hearing.

7. The bill sponsor contact requirements of 2-4-302, MCA, apply and were fulfilled through a letter addressed to the Honorable Jill Cohenour, dated January 8, 2016.

8. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption of the above-referenced rules will not significantly and directly impact small businesses.

Reviewed by: DEPARTMENT OF ENVIRONMENTAL QUALITY

/s/ Edward Hayes BY: */s/ Tom Livers*
EDWARD HAYES TOM LIVERS
Rule Reviewer Director

Certified to the Secretary of State, July 31, 2018.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I and II pertaining to video gambling machine malfunctions and cash ticket validation systems and the amendment of ARM 23.16.101, 23.16.1802, 23.16.1901, 23.16.1902, 23.16.1903, 23.16.1905, 23.16.1906, 23.16.1907, 23.16.1907A, 23.16.1908, 23.16.1909, 23.16.1909A, 23.16.1910, 23.16.1910A, 23.16.1911, 23.16.1916A, 23.16.1918, 23.16.1920, 23.16.1927, 23.16.1928, 23.16.1931, and 23.16.2305 pertaining to definitions, video gambling machine (VGM) specifications, and electronic live bingo and keno equipment specifications	))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On September 6, 2018, at 1:30 p.m., the Department of Justice will hold a public hearing in the conference room of the Gambling Control Division, 2550 Prospect Avenue, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The Department of Justice will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process 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 August 31, 2018, to advise us of the nature of the accommodation that you need. Please contact Jean Saye, Department of Justice, 2550 Prospect Avenue, P.O. Box 201424, Helena, Montana, 59620-1424; telephone (406) 444-1971; fax (406) 444-9157; or e-mail jsaye@mt.gov.

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

NEW RULE I PROCEDURE ON DISCOVERY OF SUSPECTED OR CONFIRMED VGM MALFUNCTION (1) A gambling operator who has a good faith belief a ticket voucher is the result of a VGM malfunction may refuse payment of the ticket voucher but must follow these steps:

(a) the gambling operator must immediately:

(i) print an audit ticket from the VGM;

(ii) suspend play of the VGM; and

(iii) contact and consult with the VGM owner if the gambling operator is not also the VGM owner;

(b) after consulting with the VGM owner, a gambling operator:

(i) who no longer believes the ticket voucher resulted from a VGM malfunction shall immediately pay the ticket voucher as provided in ARM 23.16.1903 and the VGM may be returned to active play; or

(ii) who continues to believe the ticket voucher resulted from a VGM malfunction shall within 24 hours submit a completed Form 50 to the department, together with all required documents.

(2) The department upon receipt of the completed Form 50, together with all required documents, shall inspect and evaluate the suspended VGM or its subparts and determine whether the ticket voucher resulted from a VGM malfunction. The department shall notify the player, the VGM owner, and the gambling operator of its determination:

(a) if the department determines the ticket voucher did not result from a VGM malfunction, the gambling operator shall immediately pay the ticket voucher, and the VGM may be returned to active play; or

(b) if the department determines that a VGM malfunction occurred, the ticket voucher is invalid and the gambling operator need not pay the ticket voucher, but the department's determination may include compensation due the player. The department may continue to suspend play of the VGM or a game title until all necessary software or hardware corrections are completed and approved.

(3) VGM owners and gambling operators must report suspected or confirmed software or hardware malfunctions on a completed Form 50 supported by all required documents. The VGM owner or gambling operator must submit the Form 50 and supporting documents to the department within 24 hours of the suspected or confirmed malfunction.

(4) For purposes of this rule, the following definitions apply:

(a) a software malfunction means an obvious deviation from the ordinary and expected play of a game that interrupts play, or an event resulting in a player losing credits or additional play earned before the malfunction. Such deviations include, but are not limited to:

(i) repeated game lock-ups or freezes whether or not the VGM can be manipulated to resume play without loss of credits or games earned;

(ii) inability to print an accurate ticket voucher;

(iii) play or VGM behavior inconsistent with the general rules of the game or inconsistent with the particular game description found on help screens;

(iv) any recurrent play anomalies or irregularities; and

(v) any irregular play that can be replicated;

(b) a hardware malfunction means repeated failures or breakdowns of the same VGM component. Such failures or breakdowns include, but are not limited to:

(i) power supplies;

(ii) memory storage devices; and

(iii) logic board integrated circuits.

(5) The following are not software or hardware malfunctions that must be reported under this rule:

(a) a single unexpected VGM event or behavior that cannot be replicated and is not expected to recur;

(b) routine maintenance or repairs commonly reported under ARM 23.16.1929; and

(c) routine maintenance or repairs necessary due to ordinary wear and breakdowns.

AUTH: 23-5-115, 23-5-608, 23-5-621, MCA
IMP: 23-5-602, 23-5-607, 23-5-608, 23-5-616, 23-5-621, MCA

REASON: Recent experience showed a need for a rule providing certainty to licensees on what VGM malfunctions must be reported to the department and what malfunctions may be considered ordinary maintenance and repair that need not be reported. For ease of reference, the rule covering disputes regarding ticket vouchers suspected of being produced by a VGM malfunction (ARM 23.16.1903) was combined in this rule with other situations involving a VGM hardware or software malfunction.

NEW RULE II CTVS TESTING AND RESTRICTIONS (1) A CTVS is associated equipment that electronically acquires information and data from a VGM for the sole purpose of validating the authenticity of a ticket voucher presented for payment.

(2) A person licensed as a manufacturer may manufacture and sell a CTVS subject to the following restrictions:

(a) all CTVS and site controllers must be tested and approved by the department prior to being offered for sale, sold, or installed/connected to any permitted VGM;

(b) a CTVS may only be used with VGMs employing an approved AARS;

(c) a CTVS may not electronically capture VGM accounting information and records to be communicated to the department or elsewhere; and

(d) all electronically acquired information must be limited to the sole purpose of validating ticket vouchers and may not include player tracking.

(3) A gambling operator may use a CTVS subject to the following restrictions:

(a) a gambling operator may purchase an approved CTVS only from a licensed manufacturer, distributor, or route operator; and

(b) before acquiring a CTVS system, every gambling operator must complete a CTVS use disclosure form (Form 33) supplying information to the department, which must include the gambling operator's confirmation:

(i) only AARS enabled VGMs will use a CTVS; and

(ii) the operator's use of electronically acquired information:

(A) will be limited to ticket voucher validation for VGMs permitted to the gambling operator's individual licensed premises;

(B) will be restricted to VGM ticket voucher validation; and

(C) will not be used for player tracking purposes.

AUTH: 23-5-115, 23-5-621, MCA
IMP: 23-5-602, 23-5-621, 23-5-625, 23-5-631, MCA

REASON: This new rule is necessary to provide a regulatory system for a new technology--a cash ticket validation system or CTVS--that will aid gambling operators in detecting and rejecting forged ticket vouchers.

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

23.16.101 DEFINITIONS As used throughout this subchapter, the following definitions apply:

(1) "AARS" (automated accounting and reporting system) means a system that, at a minimum, is used to electronically report VGM accounting data to the State of Montana.

~~(1)~~(2) "Accounting system vendor" means a person who sells or leases an accounting system to a licensed gambling manufacturer, route operator, or gambling operator to be utilized as an approved ~~automated accounting and reporting system~~ AARS, as provided in 23-5-637, MCA.

(2) through (14) remain the same, but are renumbered (3) through (15).

~~(15)~~(16) "Owner" or "owner of an interest" means a person with a right to share in the profits, losses, or liabilities of a gambling operation. The term "ownership interest" is synonymous with "owner" or "owner of an interest." The term "owner" or "owner of an interest" does not include route operators with a right to share in proceeds from ~~video gambling machines~~ VGMs they have leased to location operators. "Owner" or "owner of an interest" includes:

(a) through (d) remain the same.

(16) through (20) remain the same, but are renumbered (17) through (21).

(22) "VGM" means a video gambling machine as defined in 23-5-112, MCA.

(21) remains the same, but is renumbered (23).

AUTH: 23-5-115, 23-5-621, MCA
IMP: 23-5-112, 23-5-115, 23-5-118, 23-5-176, 23-5-629, 23-5-637, MCA

REASON: This rule amendment is necessary to adopt naming conventions for use throughout the Gambling Control Division's administrative rules, ARM Title 23, chapter 16. These name changes are proposed for internal consistency, brevity, and to update terminology to current usage. Many of the following proposed rule amendments apply to these and other name changes.

23.16.1802 DEFINITIONS (1) remains the same.

(2) "Applicant" means any person who has applied for a permit for a ~~video gambling machine~~ VGM.

(3) and (4) remain the same.

(5) "CTVS" (cash ticket validation system) means a system that electronically acquires information from VGMs solely for the purpose of validating cash ticket vouchers.

~~(5)~~(6) "Designated representative" means a person designated on forms provided by the department to be a representative of the licensed ~~machine~~ VGM

owner or operator. This designation is made for the purposes of filing quarterly reporting documents, applying for permits, receiving of forms, etc. However, the permit holder or ~~machine~~ VGM owner remains responsible for maintaining accurate records, filing reports in a timely manner, or paying ~~machine~~ VGM taxes due.

~~(6)~~(7) "Destruction of a ~~machine~~ VGM" may be the result of deliberate or accidental causes. However, in all cases a ~~machine~~ VGM shall be considered destroyed only if it results in the ~~machine~~ VGM never being able to function again. ~~Such a claim must be verified to the satisfaction of the department.~~

(7) remains the same, but is renumbered (8).

~~(8)~~(9) "Game marked spots" means spots selected by a keno game title that do not require player interaction.

(10) "Game title" means an identifier representing a unique playable game, as defined in 23-5-602, MCA, at its most basic level. For example, program name ABC123 has a poker game "Jacks or Better" with unique pay tables for the five cent and 25 cent denominations. The game titles might be "Jacks or Better .05" and "Jacks or Better .25."

~~(9)~~(11) "Identification decal" means a decal permanently affixed to a ~~video gambling machine~~ VGM and bears its unique identification number issued by the department.

(12) "Lifetime memory clear" means a procedure initiated by use of the audit key to clear electronic meters as defined by the department.

(10) remains the same, but is renumbered (13).

~~(11)~~(14) "Machine" means an electronic ~~video gambling machine~~ VGM.

~~(12)~~(15) "Machine permit" means a permit issued by the State of Montana ~~which~~ that authorizes a specific ~~machine~~ VGM to be ~~operated as an electronic video gambling machine~~ offered for play.

~~(13)~~(16) "Modification" means a change or alteration to a ~~video gambling machine~~ VGM that affects the manner or mode of play of the ~~video gambling machine~~ VGM. The term includes any change to the control program, graphics program, or theoretical return percentage. The term does not include:

(a) a change in a ~~video gambling machine~~ VGM from one approved configuration to another approved configuration or from one approved mode of play to another approved mode of play;

(b) remains the same.

(c) the rebuilding of a previously approved ~~machine~~ VGM with approved components in an approved configuration.

~~(14)~~(17) "Multigame machine" means a ~~video gambling machine~~ VGM that at all times offers for play to the public, within the same ~~video gambling machine~~ VGM cabinet, a combination of at least two of the following types of games that have been approved by the department:

(a) through (d) remain the same.

(15) through (18) remain the same, but are renumbered (18) through (21).

~~(19)~~(22) "Simulates the game of draw poker" means plays by or mimics the generally accepted rules or methods of any of the various card games known as "draw poker,"~~,~~ whether played against another player or the house. ~~Methods~~ Draw poker simulations include, but are not limited to, symbols used for or in place of images of playing cards, ~~description,~~ and draw poker wagering techniques. For

purposes of this definition, a determination that a ~~machine~~ VGM plays the game of draw poker is not solely based on the ~~name of the~~ game title.

(20) and (21) remain the same, but are renumbered (23) and (24).

~~(22)~~(25) "Valid ticket voucher" is a ticket produced by a ~~machine~~ VGM that is the result of bona fide play of a ~~gambling machine~~ VGM and not the result of forgery, player tampering, manipulation, or a ~~machine~~ VGM malfunction that can be documented.

~~(23)~~(26) "Video bingo" means the game of bingo as defined in Montana law when offered and simulated by a ~~video gambling machine~~ VGM ~~which~~ that uses video images and a random number generator rather than authorized equipment as defined in 23-5-112, MCA. The image or images projected on the video display of ~~video bingo gambling machines~~ VGMs are a material component of the game and shall not simulate an illegal gambling device or enterprise.

~~(24) "Video gambling machine" means a video poker, video keno, or video bingo machine as defined in 23-5-112, MCA, and a multigame machine as defined in 23-5-602, MCA and in this rule and authorized in 23-5-621, MCA.~~

~~(25)~~(27) "Video keno" means the game of keno as defined in Montana law when offered and simulated by a ~~video gambling machine~~ VGM ~~which~~ that uses video images and a random number generator rather than authorized equipment as defined in 23-5-112, MCA. The image or images projected on the video display of ~~video keno gambling machines~~ VGMs are a material component of the game and shall not simulate an illegal gambling device or enterprise.

(26) remains the same, but is renumbered (28).

~~(27)~~(29) "Video poker" means the games of draw poker, stud, or ~~hold'em~~ hold 'em as defined in this rule when offered and simulated by a ~~video gambling machine~~ VGM ~~which~~ that uses video images and a random number generator.

(a) The images projected on the video display of ~~video poker gambling machines~~ VGMs are a material component of the game and shall not simulate an illegal gambling device or enterprise.

(b) Varieties of draw poker, stud, and ~~hold'em~~ hold 'em must be found in the department's authority reference used for the live game of poker.

(28) remains the same, but is renumbered (30).

AUTH: 23-5-115, 23-5-602, 23-5-621, MCA
IMP: 23-5-111, 23-5-112, 23-5-115, 23-5-151, 23-5-602, 23-5-603, 23-5-607, 23-5-608, 23-5-610, 23-5-611, 23-5-612, 23-5-621, 23-5-637, MCA

REASON: As indicated above in ARM 23.16.101, this rule amendment is necessary to provide for a new technology--a cash ticket validation system or CTVS--and to create a new term for a basic level game within a video gambling machine that may feature multiple varieties of bingo, poker, keno, and/or video line games.

23.16.1901 GENERAL SPECIFICATIONS OF ~~VIDEO GAMBLING MACHINES~~ VGMS (1) Each ~~video gambling machine~~ VGM model or modification must:

(a) ~~be inspected in the state for approval and licensure by the department. The department may inspect any machine sold or operated in the state. Any~~

~~approval granted by the department to a person is not transferable. The department must be allowed immediate access to each machine. Keys to allow access to a machine for purposes of inspection may be provided to the department or must be immediately available at the premise. Machines for which a substantial modification or a series of minor modifications whose total result is substantial must meet all of the specific law or rule requirements in effect at the time of submission. Only those machines which are owned or operated in Montana, and to which the submitted modification will be applied are required to meet those specifications in effect at time of submission. The department's determination that a modification is substantial may be contested pursuant to the Montana Administrative Procedure Act~~ be tested and approved by the department before it may be sold or permitted. The department's approval of a VGM is limited to the manufacturer to whom the approval was granted and may not be transferred. The department may inspect any VGM sold or permitted in the state. All owners or permit holders must grant the department immediate access to inspect VGMs in their possession. Keys to allow access to a VGM for inspection may be provided to the department or must be immediately available at the premises;

(b) remains the same.

(c) not have any ~~switches, jumpers, wire posts, or other~~ means of manipulation that could affect the accounting, and operation or outcome of a game. The ~~machine~~ VGM may not have any functions or parameters adjustable by ~~and through~~ any separate video display or input codes except for the adjustment of features that are wholly cosmetic or other operational parameters as approved by the Gambling Control Division~~. This is to include devices known as "knockoff switches;";~~

(d) and (i) remain the same.

(ii) ~~the~~ each game title must display the combinations for which credits/cash value will be awarded and the ~~number of~~ credits/cash value awarded for each combination;

~~(iii) one credit may not exceed twenty-five cents in value;~~

~~(iv)~~(iii) the ~~machine~~ VGM must have locked doors to two separate areas, one containing the logic board and software for the game and the other housing the cash. Conventional ~~ROM~~ media storage devices must be accessible from the front of the ~~machine~~ VGM. Access from one area to another must not be allowed;

~~(v)~~(iv) the ~~machines~~ VGM may have~~:~~

~~(A) two mechanisms that accept coins, referred to as "mechanism 1" and "mechanism 2." These mechanisms must have devices referred to as "lockouts" which prohibit the machine from accepting coins during periods when the machine is inoperable;~~

~~(B)~~ a mechanism that accepts cash in the form of bills that do not exceed $100;

~~(vi)~~(v) in the case of poker, each ~~machine~~ VGM must use a color display with images of cards that closely resemble ~~the~~ standard poker playing cards;

~~(vii)~~(vi) the ~~machine~~ VGM must be capable of printing a ticket voucher for all credits/cash value owed the player at the completion of each game. A valid ticket voucher must contain the following information in a format prescribed by the department:

(A) and (B) remain the same.

(C) the ~~machine~~ VGM serial number;

(D) the ~~video gambling machine~~ VGM identification number (VGMID) assigned to the ~~machine~~ VGM;

(E) the time of day in hours, ~~and~~ minutes, and seconds in a 24-hour format. The clock must automatically account for daylight savings time and indicate "S" for standard time and "D" for daylight savings time;

(F) remains the same.

(G) the program name ~~and revision~~;

(H) the cash value ~~of the prize~~ in ~~numbers~~ numerals;

(I) the cash value ~~of the prize~~ in words;

(J) remains the same.

(K) this notice clearly displayed on the ticket voucher: "Ticket Void After 48 Hours."

~~(viii)~~(vii) the printing mechanism must be located in a locked area of the ~~machine~~ VGM to ensure the safekeeping of the audit copy. The printing mechanism must have a paper sensing device that upon sensing a "low paper" condition will allow the ~~machine~~ VGM to finish printing the ticket and prevent further play. The ~~machine~~ VGM must recognize a printer power loss occurrence and cease play until power has been restored to the printer and the ~~machine~~ VGM is capable of producing a valid ticket voucher;

~~(ix)~~(viii) the ~~machine~~ VGM must have non-resettable mechanical meters of at least seven digits, housed in a readily accessible locked ~~machine~~ VGM area. These meters must be in a configuration prescribed by the department. The mechanical meters must be manufactured in such a way as to prevent access to the internal parts without destroying the meter. ~~Meters must be hardwired (no quick connects will be allowed in the meter wiring system).~~ The department may require and provide a validating identification sticker to attach to the mechanical meters to verify the meters are assigned to a specific licensed ~~machine~~ VGM. The meters must keep a permanent record of:

(A) total dollars accepted by the coin acceptor mechanism(s) (if applicable), and bill acceptor (if applicable);

(B) through (D) remain the same.

~~(x)~~(ix) the ~~machine~~ VGM must contain electronic metering, using meters that record and display the following on the video screen in a format prescribed by the department:

(A) total cents ~~in~~ through mechanism(s) 1 and 2 (if applicable);

(B) through (F) remain the same.

~~(xi)~~(x) the ~~machine~~ VGM must issue by ~~activation of an external key switch~~ use of the audit key, an accounting ticket containing a performance synopsis of the ~~machine~~ VGM and progressive accounting data (if applicable). The printing of all totals from the electronic meters shall occur automatically each time access occurs to either the logic compartment or any compartment where cash is collected. Whenever ~~electronic meters are reset,~~ a lifetime memory clear is performed, each ~~machine~~ VGM must produce a full accounting ticket both before and after each resetting. The tickets must be in the format prescribed by the department and contain:

(A) and (B) remain the same.

(C) the VGM serial number ~~of the machine~~;

(D) the ~~video gambling machine~~ VGM identification number (VGMID) assigned to the ~~machine~~ VGM;

(E) the time of day~~,~~ in hours, ~~and~~ minutes, and seconds in a 24-hour format. The clock must automatically account for daylight savings time and indicate "S" for standard time and "D" for daylight savings time;

(F) remains the same.

(G) the program name ~~and revision number~~; and

(H) remains the same.

~~(xii)~~(xi) ~~the machine~~ each VGM ~~and any peripheral electronic device~~ must have ~~an~~ a manufacturer identification tag permanently affixed to ~~the machine~~ it by the VGM manufacturer. The tag must be ~~on the right-hand side, upper left corner of the machine or peripheral electronic device or in another~~ affixed in a location approved by the department and must include the following information:

(A) and (B) remain the same.

(C) model; and

(D) date of manufacture; ~~and~~

~~(xiii)~~(xii) the ~~face of the machine~~ VGM must ~~be~~ clearly ~~labeled so as to inform the public that no person under the age of 18 years is allowed to play~~ display "No Person Under the Age of 18 Years is Allowed to Play";

~~(xiv)~~(xiii) each ~~machine~~ VGM and peripheral electronic device must pass a static test that is determined by the department; ~~and~~

~~(xv)~~(xiv) a ~~machine~~ VGM shall be equipped with a surge protector that will feed all A.C. electrical current to the ~~machine~~ VGM and ~~a backup power supply capable of maintaining~~ maintain for a 30-day period the accuracy of all electronic meters, date, and time during power fluctuations and loss~~. The battery must be in a state of charge during normal operation of the machine. Manufacturers incorporating either the use of E2 PROMs or a lithium battery for memory retention will be considered to meet this requirement; and~~

~~(e) video gambling machines submitted for approval on or after October 1, 2003 must comply with ARM 23.16.1920~~.

(2) Any ~~and all~~ modification~~s~~ made to an approved ~~video gambling machine~~ VGM must be submitted to the department for approval prior to installation. If a modification is substantial or if a series of minor modifications results in a substantial modification, the VGM as modified must meet all specifications in effect at the time of submission. A licensee's challenge to the department's determination that a modification is substantial must proceed under ARM 23.16.203.

(3) ~~The department may suspend, or revoke a permit or revoke approval of a machine at any time when it finds that any machine or machine component does not comply with statutes and rules governing electronic video gambling machines in effect at the time of approval. The department may also suspend, or revoke the licenses or revoke approval of other similar model machines or machine components in use in the state.~~ When the department finds that any CTVS, AARS, VGM, VGM component, or game title does not comply with statutes and rules applicable at the time of approval, or its actual operation differs from its intended and approved functioning, the department may require game title(s) to be disabled,

suspend or revoke a permit, or revoke approval of the CTVS, AARS, VGM, or VGM component. The department may also require game title(s) to be disabled, suspend or revoke the permits, or revoke approval of models of a CTVS, AARS, VGM, or VGM component similar to one the department finds noncompliant.

AUTH: 23-5-115, 23-5-602, 23-5-621, MCA
IMP: 23-5-136, 23-5-602, 23-5-603, 23-5-608, 23-5-610, 23-5-621, 23-5-637, MCA

REASON: As indicated above in ARM 23.16.101, this proposed amendment is necessary to delete references to obsolete technologies such as "knockoff switches" and coin mechanism lockouts. The rule contains updates to current electronics standards and terminology. Certain subsections of the rule were rewritten to improve readability and clarity.

23.16.1902 AUDIT DATA STORAGE DEVICES (1) The department may approve a VGM ~~(video gambling machine) utilizing~~ using an audit storage device (ASD) ~~(audit storage device) for use~~ in place of duplicate printed audit tapes. Each VGM providing ASD support must be reported on a tier I or tier II system and operate in the following manner:

(a) remains the same.

(b) at a minimum, record information on the ASD as required in ARM 23.16.1901~~(1)(d)(vii) and(xi)~~ as defined by the department;

(c) at a minimum, maintain current record of $$IN, $$PL, $$WN, $$PD electronic meters as defined by the department;

(d) through (k)(iv) remain the same.

(v) a newly installed ASD has unexpected files, directories, or contains files from a ~~machine~~ VGM with a different VGMID;

(l) remains the same.

(m) ASD data must be displayed on VGM ~~via~~ by use of the audit key; and

(n) remains the same.

AUTH: 23-5-115, 23-5-621, 23-5-637, MCA
IMP: 23-5-112, 23-5-115, 23-5-616, 23-5-621, 23-5-628, 23-5-637, MCA

REASON: As indicated above in ARM 23.16.101.

23.16.1903 ~~VIDEO GAMBLING MACHINE~~ VGM TICKET VOUCHERS – EXPIRATION DATE – PAYMENT IN FULL UPON DEMAND – EXCEPTIONS

(1) remains the same.

(2) A ticket voucher that is printed more than 48 hours before it has been presented for payment may, at the discretion of the gambling operator, be deemed invalid and not payable, only if ~~there has been notice to the player of the expiration period by the presence of a sign~~ the operator has given notice to players of the 48-hour voucher expiration by:

(a) posting a notice in plain view of the gambling public at the time of play that is not less than 24 inches by 36 inches ~~displayed in a licensed premises at the~~

~~time of play, in plain view of the gambling public, which~~ that reads "Promptly Redeem Your Win Tickets -- Tickets Void After 48 Hours"; and~~:~~

(b) issuing ticket vouchers displaying their expiration by:

~~(a)~~(i) for ~~machines~~ VGMs and programs approved prior to adoption of this rule, the face of the ticket voucher paper has been preprinted with the expiration notice required by ARM 23.16.1901; or

~~(b)~~(ii) for ~~machines~~ VGMs and programs approved after adoption of this rule, the expiration notice is printed on the face of the ticket voucher as required by ARM 23.16.1901.

(3) A gambling operator who has a good faith reason to believe a ticket voucher resulted from a ~~machine~~ VGM malfunction may refuse payment of the ticket voucher and must proceed as required by [NEW RULE I]~~, pending the department's finding in (4), provided the gambling operator immediately:~~

~~(a) prints an audit ticket from the machine;~~

~~(b) suspends play of the VGM;~~

~~(c) contacts and consults with the machine owner if the gambling operator is not also the machine owner.~~

~~(i) After consulting with the machine owner, the gambling operator who no longer believes the ticket voucher resulted from a machine malfunction shall immediately pay the ticket voucher as provided in (1).~~

~~(ii) After consulting with the machine owner, the gambling operator who continues to believe the ticket voucher resulted from a machine malfunction shall promptly submit a completed Form 50 to the department, together with all required documents.~~

~~(4) Upon receipt of the completed Form 50, together with all required documents, the department shall inspect and evaluate the suspended video gambling machine or its subparts, and determine whether the ticket voucher resulted from a machine malfunction. The department shall notify the player, the machine owner, and the gambling operator of its determination.~~

~~(a) If the department determines the ticket voucher did not result from a machine malfunction, the gambling operator shall immediately pay the ticket voucher, and the VGM may be returned to active play.~~

~~(b) If the department determines that a machine malfunction occurred, the ticket voucher is invalid, and the department will prescribe appropriate remedial action to the machine owner.~~

AUTH: 23-5-115, 23-5-608, MCA
IMP: 23-5-608, MCA

REASON: As indicated above in ARM 23.16.101, certain subsections of the rule were rewritten to improve readability and clarity. Portions of the rule regarding VGM malfunctions were stricken and reproduced in New Rule I to cover in one rule licensees' responsibilities in all forms of VGM malfunctions.

23.16.1905 SAFETY SPECIFICATIONS (1) A ~~video gambling machine~~ VGM must include the following hardware specifications:

(a) remains the same.

(b) A ~~video gambling machine~~ VGM shall be designed to ensure that the player will not be subjected to any physical, electrical, or mechanical hazards.

AUTH: 23-5-605, 23-5-621, MCA
IMP: 23-5-606, 23-5-607, 23-5-609, 23-5-621, MCA

REASON: As indicated above in ARM 23.16.101.

23.16.1906 GENERAL SOFTWARE SPECIFICATIONS FOR ~~VIDEO GAMBLING MACHINES~~ VGMS (1) Each ~~video gambling machine~~ VGM must meet the following specifications:

(a) through (d) remain the same.

(e) for ~~any~~ each game title played, the paytable ~~for that game~~ must be prominently displayed and understandable to the player;

(f) remains the same.

(g) prominently displays the message "Promptly Redeem Your Win Tickets – Tickets Void After 48 Hours" when the printing of a cash ticket voucher is initiated;

(h) the duration of a game title shall be the period of play for a game authorized under Title 23, chapter 5, part 6, MCA, starting with the utilization of the first random number ~~from the "previously frozen field"~~ and ending with the last utilized random number ~~from the "previously frozen field"~~; and

(i) remains the same.

(2) A ~~machine~~ VGM may have ~~a personality program~~ software that includes but is not limited to the following:

(a) through (d) remain the same.

(e) ~~personality~~ program ~~number~~ name.

(3) remains the same.

(4) Notwithstanding any other rule to the contrary, on or after June 30, 1997, the image or images projected on each ~~video gambling machine~~ VGM shall not simulate, in part or in whole, an illegal gambling device or enterprise.

AUTH: 23-5-115, 23-5-621, MCA
IMP: 23-5-602, 23-5-603, 23-5-607, 23-5-608, 23-5-611, 23-5-621, 23-5-631, 23-5-637, MCA

REASON: As indicated above in ARM 23.16.101, this proposed amendment is necessary to delete references to obsolete technologies. The rule contains updates to current electronics standards and terminology.

23.16.1907 SOFTWARE SPECIFICATIONS FOR VIDEO POKER ~~MACHINES~~ GAMES (1) Each video poker ~~machine~~ game title must meet the following specifications for approval for use within the state of Montana. ~~In order to~~ To be approved, the ~~machine~~ game must:

(a) use a deck of cards consisting of 52 standard playing cards~~, up to two~~ (jokers may also be used);

(b) remains the same.

(c) ~~deal~~ using a random number generator, draw and display the initial cards ~~from the top of the frozen field~~ in order;

(d) using a random number generator, replace any discarded cards, if applicable, with ~~remaining~~ additional cards ~~in the frozen field starting with the top of the frozen field and drawing any additional cards in the order of that frozen field~~; and

(e) display the winning hand and the ~~number of credits awarded~~ credits/cash value won for that hand.

AUTH: 23-5-621, MCA
IMP: 23-5-602, 23-5-607, 23-5-621, MCA

REASON: As indicated above in ARM 23.16.101, this proposed amendment is necessary to delete references to obsolete technologies. The rule contains updates to current electronics standards and terminology.

23.16.1907A SOFTWARE SPECIFICATIONS FOR VIDEO LINE GAMES

(1) Each video line game title must meet the following specifications for approval for use within the state of Montana. ~~In order to~~ To be approved, the game must:

(a) using a random number generator, draw and display a minimum of three numbers or symbols in a line;

(b) remains the same.

(c) display and identify each winning combination of numbers or symbols, if any, and the ~~amount~~ credits/cash value won, if any, at the end of each game;

(d) through (f) remain the same.

(2) Licensed ~~machine~~ VGM manufacturers submitting video line games for approval must supply written verification from a qualified independent testing service that the theoretical return for each bet increment does not exceed 92%. For purposes of this rule, a qualified independent testing service means a person or entity that:

(a) remains the same.

(b) shares no common ownership interests with the licensed ~~machine~~ VGM manufacturer that submits the video line game to the department for approval; and

(c) has at least one contract with, or is licensed by, another governmental entity to test gambling machines and provide mathematical certification for the maximum theoretical return for ~~video gambling machine~~ VGM software.

AUTH: 23-5-115, 23-5-602, 23-5-603, 23-5-621, MCA
IMP: 23-5-602, 23-5-603, 23-5-607, 23-5-608, 23-5-611, 23-5-621, MCA

REASON: As indicated above in ARM 23.16.101.

23.16.1908 SOFTWARE SPECIFICATIONS FOR VIDEO KENO ~~MACHINES~~ GAMES (1) Each video keno ~~machine~~ game title must meet the following specifications for approval for use within the state of Montana. ~~In order to~~ To be approved, the ~~machine~~ game must:

(a) and (b) remain the same.

(c) using a random number generator, draw and display the balls picked;

(d) conform to standard rules of keno except:

(i) game marked spots can be used to trigger free games, games with altered play, bonus games, award multipliers, or ~~additional credit that can be redeemed for cash~~ credits/cash value;

(ii) remains the same.

(e) display the total number of player spots picked at the end of each game, display the number of balls drawn that matched the players' picks (this may be shown as three out of eight, eight out of ten, etc.) and display any credits/cash value awarded for these combinations.

AUTH: 23-5-602, 23-5-621, MCA
IMP: 23-5-602, 23-5-621, MCA

REASON: As indicated above in ARM 23.16.101.

23.16.1909 SOFTWARE SPECIFICATIONS FOR VIDEO BINGO ~~MACHINES~~ GAMES (1) Each video bingo ~~machine~~ game title must meet the following specifications for approval within the state of Montana. ~~In order to~~ To be approved, the ~~machine~~ game must:

(a) through (d) remain the same.

(e) using a random number generator, draw and display the number of balls picked and the credits/cash value awarded for the number of balls drawn ~~in order~~ to obtain a bingo;

(f) allow the player the choice of cards on which to play. All winning cards must be available for display on the screen, including any that may be played by the ~~machine~~ VGM in any game; and

(g) remains the same.

AUTH: 23-5-621, MCA
IMP: 23-5-621, MCA

REASON: As indicated above in ARM 23.16.101.

23.16.1909A SOFTWARE SPECIFICATIONS FOR ~~VIDEO~~ MULTIGAME ~~MACHINES~~ VGMS (1) Each ~~video~~ multigame ~~machine~~ VGM must meet the following specifications for approval for use within the State of Montana, if applicable:

(a) remains the same.

AUTH: 23-5-115, 23-5-602, 23-5-621, MCA
IMP: 23-5-602, 23-5-603, 23-5-607, 23-5-608, 23-5-611, 23-5-621, 23-5-631, 23-5-637, MCA

REASON: As indicated above in ARM 23.16.101.

23.16.1910 RESTRICTIONS ON OPTIONAL GAME FORMAT OR FEATURES (1) The department shall determine what optional features may be allowed and such features must be approved by the department prior to inclusion in a ~~machine's~~ VGM's game format. For video poker ~~machines~~ games the department will evaluate only those draw poker, stud poker, and ~~hold'em~~ hold 'em games described in the authority references identified in the department's card game rules.

AUTH: 23-5-115, MCA
IMP: 23-5-602, 23-5-607, 23-5-608, 23-5-621, MCA

REASON: As indicated above in ARM 23.16.101.

23.16.1910A BONUS GAMES (1) through (2)(c) remain the same.

(d) the award of ~~credit that can be redeemed for cash~~ credits/cash value.

(3) remains the same.

AUTH: 23-5-115, 23-5-602, 23-5-621, MCA
IMP: 23-5-112, 23-5-602, 23-5-603, 23-5-608, 23-5-611, 23-5-621, MCA

REASON: As indicated above in ARM 23.16.101.

23.16.1911 INFORMATION TO BE PROVIDED TO THE DEPARTMENT

(1) ~~A licensed manufacturer or accounting system vendor may be required to provide information to the department necessary to~~ To ensure a ~~machine or automated accounting and reporting system is in compliance~~ VGM, AARS, or CTVS complies with the act and these rules~~.~~, the department may require a licensed manufacturer or accounting system vendor to supply information, including but not limited to: ~~The information shall include, but not be limited to:~~

(a) through (c) remain the same.

(d) all source ~~listings~~ code, including programmer's comments~~, and flow charts for the game program(s) and printer routine(s)~~;

(e) ~~hexadecimal dump(s) for each compiled program~~ binary images for all programs;

(f) ~~conventional ROM~~ media storage devices containing ~~compiled game programs and character sets~~ binary image(s), including those that may reside on the peripheral devices;

(g) ~~access to a~~ software compiler ~~for the programming language used if the department is unable to compile the program with the equipment it has available~~;

(h) remains the same.

(i) schedule of proposed payout(s), percentage(s) and odds determinations;

(j) ~~a complete copy of the~~ programmer's memory map;

~~(k) programmer's memory map defining unused program and data storage space reserved for automated accounting and reporting system communication protocol and related data storage;~~

(l) remains the same, but is renumbered (k).

~~(m) truth tables for all PALs used;~~

~~(n)~~ (l) an operator's manual for each peripheral device utilized; and

~~(o)~~(m) additional information to be provided for ~~automated accounting and reporting systems:~~ an AARS or CTVS upon request.

~~(i) electronic copy of an output data file produced by the system for communication to the department. File shall contain no less than one hundred records for each of the following classes:~~

~~(A) video gambling machine startup;~~

~~(B) video gambling machine electronic meter period;~~

~~(C) video gambling machine event (if applicable) ;~~

~~(D) video gambling machine before service (if applicable) ;~~

~~(E) video gambling machine after service (if applicable) ; and~~

~~(F) video gambling machine end.~~

AUTH: 23-5-115, 23-5-621, MCA
IMP: 23-5-607, 23-5-621, 23-5-631, 23-5-637, MCA

REASON: As indicated above in ARM 23.16.101, this proposed amendment is necessary to delete references to obsolete technologies. The rule contains updates to current electronics standards and terminology. Certain subsections of the rule were rewritten to improve readability and clarity.

23.16.1916A ACCOUNTING SYSTEM VENDOR LICENSE (1) ~~Before conducting business in this state, a~~ A vendor of a tier I or tier II ~~automated accounting and reporting systems~~ AARS must obtain a license from the department before conducting business in this state. An applicant for a license must submit to the department:

(a) ~~application for an accounting system vendor license using~~ Form 17, with special accounting system vendor instructions, and Form FD-258, ~~are~~ available from the Gambling Control Division, 2550 Prospect Ave., P.O. Box 201424, Helena, MT 59620-1424, or on the department's web site www.dojmt.gov/gaming;

(b) through (3) remain the same.

AUTH: 23-5-112, 23-5-115, 23-5-178, 23-5-621, MCA
IMP: 23-5-115, 23-5-178, 23-5-637, MCA

REASON: As indicated above in ARM 23.16.101.

23.16.1918 TESTING FEES (1) Each person submitting a ~~video gambling machine~~ VGM, an ~~automated accounting and reporting system~~ AARS, CTVS, or a modification to an approved ~~video gambling machine~~ VGM or an ~~automated accounting and reporting system~~ AARS for testing and department approval must:

(a) remains the same.

(b) at the time of submission deposit with the department a sum of money to begin testing. This sum is to be as follows:

(i) ~~video gambling machines~~ VGMs, $10,000;

(ii) CTVS, $5,000;

~~(ii)~~(iii) ~~automated accounting and reporting system~~ AARS, $15,000;

~~(iii)~~(iv) modification to an approved ~~video gambling machine~~ VGM, CTVS, or ~~automated accounting and reporting system~~ AARS, $1,000.

(2) This account will be charged at the rate of ~~$105~~ $130 per hour.

(3) The division will provide an accounting to the submitting person for charges assessed ~~to them~~ and will refund any overpayment ~~at the time department final approval is given~~. The department will notify the submitting person of any underpayment and collect that money prior to giving ~~any department approval~~ notice of its intended action.

AUTH: 23-5-115, 23-5-621, MCA
IMP: 23-5-631, 23-5-637, MCA

REASON: The division's actual costs of testing services must be paid by applicants. 23-5-110(3), MCA. The existing hourly rate is insufficient to cover current costs and will be raised from $105 per hour to $130 per hour, a rate commensurate with testing fees charged by private laboratories and other states' gambling regulatory agencies. The division's actual costs for CTVS testing are not expected to be as great as experience shows are common for VGM or AARS testing. The CTVS deposit of $5,000 reflects the division's lower estimate of its costs.

23.16.1920 ~~AUTOMATED ACCOUNTING AND REPORTING SYSTEM~~ AARS, CTVS, ~~VIDEO GAMBLING MACHINE,~~ AND VGM HARDWARE AND SOFTWARE SPECIFICATIONS (1) The ~~logical interface~~ communications protocol used shall be the full implementation of ~~the Gaming Standards Association's (GSA)~~ International Game Technology's (IGT) Slot Accounting System (SAS) protocol version 6.00 or later.

(a) The ~~GSA~~ IGT SAS protocol specification documents may be obtained from ~~GSA~~ IGT ~~Main Office, 48377 Fremont Blvd., Suite 117, Fremont, CA 94538; phone: (510) 492-4060;~~ via e-mail: ~~sec@gamingstandards.com~~ sasman@igt.com~~; or its web site (www.gamingstandards.com)~~.

(b) The required minimum implementation of the ~~GSA~~ IGT SAS protocol is defined in the Montana SAS Serial Protocol Implementation Guide. The guide is available on the Montana Department of Justice, Gambling Control Division web site (www.dojmt.gov/gaming) and is available by request from the Gambling Control Division, Technical Services Section, 2550 Prospect Ave., P.O. Box 201424, Helena, MT 59620-1424; (406) 444-1971.

(2) The physical interface specification is the Electronic Industries Association (EIA) standard EIA-232-F serial communication interface. Note: This standard is also known as RS-232 and TIA (Telecommunication Industry Association).

(a) The physical interface at the ~~video gambling machine~~ VGM shall be a female D-type 9-pin connector. The cable must be of sufficient length to easily reach the system interface board mounting regardless of the orientation of the interface board.

(b) The ~~video gambling machine~~ VGM shall be configured as data terminal equipment with EIA-232 connector pin out in accordance with the standard as follows:

PIN	SIGNAL	Description
1	DCD	Data Carrier Detect (not used)
2	RX	Received Data
3	TX	Transmit Data
4	DTR	Data Terminal Ready (optional)
5	GND	Signal Ready
6	DSR	Data Set Ready (not used)
7	RTS	Request To Send (not used)
8	CTS	Clear To Send (not used)
9	RI	Ring Indicator (not used)

AUTH: 23-5-115, 23-5-621, MCA
IMP: 23-5-603, 23-5-621, 23-5-631, 23-5-637, MCA

REASON: As indicated above in ARM 23.16.101, this proposed amendment is necessary to delete references to obsolete technologies. The rule contains updates to current electronics standards and terminology. Certain subsections of the rule were rewritten to improve readability and clarity.

23.16.1927 APPROVAL OF ~~VIDEO GAMBLING MACHINES~~ VGMS AND/OR MODIFICATIONS TO APPROVED ~~VIDEO GAMBLING MACHINES~~ VGMS BY DEPARTMENT (1) The department may conditionally approve specific models of ~~machines~~ VGMs or modifications based on its finding that the ~~machines~~ VGMs conform to the act and these rules.

(a) Final approval of each ~~machine~~ VGM or modification is required even if a ~~machine~~ VGM has been conditionally approved.

(b) Conditional or final approval may be withdrawn ~~by the department subsequent to finding that~~ if the department later learns a ~~machine~~ VGM does not conform to specifications or requirements that were in effect at the time conditional or final approval was granted.

(2) Approval includes inspection of the hardware and software and all information provided to the department ~~under the Administrative Rules of Montana~~ to determine whether a ~~machine~~ VGM or modification meets all requirements of the act and these rules.

(3) The department may accept shipment of ~~a machine or modification for the purpose of providing conditional approval of that particular make and model or modification provided the following conditions are met~~ hardware or software as part of an application for conditional or final approval provided that:

(a) remains the same.

(b) all the applicable information required in ARM 23.16.1911 must accompany the ~~machine~~ VGM or modification; and

(c) prior to shipment, the department approved such shipment of a ~~machine~~ VGM or modification for scheduled testing and approval.

(4) ~~New rules may be adopted which redefine or set forth new specifications that previously approved machines and/or modifications do not comply with. In such cases, and only in such cases, the department shall allow up to 90 days for a licensee to bring a machine and/or modification into compliance with a new or modified specification.~~ A licensee holding approval of a VGM shall have 180 days from the effective date of a new or amended rule establishing VGM specifications in which to conform the VGM to the new specifications.

AUTH: 23-5-115, 23-5-602, 23-5-605, 23-5-621, MCA
IMP: 23-5-605, 23-5-606, 23-5-611, 23-5-621, 23-5-631, MCA

REASON: As indicated above in ARM 23.16.101, this proposed amendment is necessary to delete references to obsolete technologies. The rule contains updates to current electronics standards and terminology. Certain subsections of the rule were rewritten to improve readability and clarity.

23.16.1928 DISSEMINATION OF INFORMATION (1) and (1)(a) remain the same.

(b) ~~listings of~~ source code~~s and flow charts~~;

(c) remains the same.

(d) ~~model PROMs~~ media or logic boards containing compiled programs.

(2) Information relating to the results of actual operations as shown on a ~~machine's~~ VGM's meters is not confidential and may be used to compile studies or reports.

(3) and (4) remain the same.

AUTH: 23-5-115, 23-5-605, MCA
IMP: 23-5-115, 23-5-605, 23-5-606, MCA

REASON: As indicated above in ARM 23.16.101, the rule contains updates to current electronics standards and terminology.

23.16.1931 INSPECTION AND SEIZURE ~~OF MACHINES~~ (1) The department has the right ~~at all times to make an examination of~~ during the licensee's normal business hours to inspect an AARS or CTVS, or any ~~machine~~ VGM ~~being used to play or simulate video poker, keno, bingo, or video line games~~. Such right of inspection includes immediate access to ~~all machines~~ each AARS, CTVS, or VGM and unlimited inspection of all ~~machine~~ VGM parts. The department may immediately seize and remove any ~~machine~~ AARS, CTVS, VGM, or device ~~which~~ that violates state law or these rules.

(2) Given reasonable cause, the department may remove ~~a machine~~ an AARS, CTVS, or VGM or parts from a ~~machine~~ VGM for laboratory testing and analysis.

(3) The department may seal any ~~machine~~ AARS, CTVS, or VGM left on the licensee's premises pending the department's investigation. ~~The breaking or removal of~~ Breaking or removing the department's seal will subject the licensee to seizure of

the entire ~~machine~~ AARS, CTVS, or VGM and suspension or revocation of any permit or license issued by the department.

AUTH: 23-5-115, 23-5-602, 23-5-621, MCA
IMP: 23-5-113, 23-5-602, 23-5-603, 23-5-608, 23-5-611, 23-5-613, 23-5-621, MCA

REASON: As indicated above in ARM 23.16.101, the department's right of inspection is proposed to be limited to normal business hours, consistent with other inspection time frames.

23.16.2305 EQUIPMENT SPECIFICATIONS (1) remains the same.

(2) The equipment must:

(a) allow easy access to the equipment~~'s conventional ROM devices~~ for field verification;

(b) have ~~an~~ a manufacturer identification tag permanently affixed to approved hardware in a location approved by the department that lists the manufacturer, serial number, model, and date of manufacture;

(c) have no ~~switches, jumpers, wire posts, or other~~ means of manipulation that could affect the accounting operation or outcome of a game;

(d) generate game numbers ~~before each game by~~ using a random number generator~~. After the game numbers are generated and before start of the game, the numbers must be frozen in the order they were generated, and all numbers used for play must be taken in order from the top of the frozen field~~; and

(e) meet the same specifications imposed on ~~video gambling machines~~ VGMs under~~:~~

~~(i)~~ ARM 23.16.1901~~(1)(d)(xiv);~~

~~(ii) ARM 23.16.1901(1)(d)(xv);~~

~~(iii) ARM~~ 23.16.1905~~;~~ and

~~(iv) ARM~~ 23.16.1906~~(1)(a), (d), and (e)~~.

(3) through (6) remain the same.

AUTH: 23-5-115, 23-5-426, MCA
IMP: 23-5-115, 23-5-426, MCA

REASON: As indicated above in ARM 23.16.101, this proposed amendment is necessary to delete references to obsolete technologies. The rule contains updates to current electronics standards and terminology. Certain subsections of the rule were rewritten to improve readability and clarity.

5. 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: Michael L. Fanning, 2550 Prospect Avenue, P.O. Box 201424, Helena, Montana, 59620-1424; telephone (406) 444-1971; fax (406) 444-9157 or e-mail j.saye@mt.gov and must be received no later than 5:00 p.m., September 14, 2018.

6. Michael L. Fanning, Department of Justice, has been designated to preside over and conduct this 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 that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

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

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption and amendment of the above-referenced rules will not significantly and directly impact small businesses.

10. Pursuant to 2-4-302, MCA, the cumulative amount for all persons of the proposed fee change in ARM 23.16.1918 is approximately $41,848 based on the average total fees collected over the last three fiscal years, 2016-18 ($174,370 x 24%). Collections are declining and if only the most recent year is considered, the cumulative effect of the fee increase is approximately $36,725 ($153,021 x 24%). The number of persons affected is approximately 13, representing the number of manufacturers licensed in Montana, though not all of that number are active currently. Additionally, the division will collect fees to cover actual costs for testing cash ticket validation systems (CTVS), a new technology that is not currently tested or deployed. The division expects no more than one or two CTVS submissions annually, each subject to a $5,000 deposit toward actual testing costs.

/s/ Matthew Cochenour
Matthew Cochenour
Rule Reviewer

/s/ Timothy C. Fox
Timothy C. Fox
Attorney General
Department of Justice

Certified to the Secretary of State July 31, 2018.

BEFORE THE BOARD OF PERSONNEL APPEALS
AND THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 24.26.614, 24.26.620, 24.26.655, and 24.26.667, and the adoption of NEW RULE I, related to collective bargaining for public sector employees	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On August 31, 2018, at 1:30 p.m., the Department of Labor and Industry and the Board of Personnel Appeals will hold a public hearing in conference rooms A and B of the Beck Building, 1805 Prospect Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Labor and Industry no later than 5:00 p.m. on August 24, 2018, to advise us of the nature of the accommodation that you need. Please contact Patty Flynn-Anderson, Department of Labor and Industry, P.O. Box 201503, Helena, Montana, 59620-1503; telephone (406) 444-0032; fax (406) 444-4140; TDD (406) 444-5549; or e-mail pflynn-anderson@mt.gov.

3. General statement of reasonable necessity for amendments: There is reasonable necessity to amend the rules outlined herein to eliminate mandatory election proceedings in all instances. In the interests of efficiency for workers, employers, and the board, the board seeks to require representation elections only when there is a question of representation, as required by statute. However, as currently stated, the rules require elections in all instances. The board determines that, when a majority of unit employees sign authorization cards, there is no question of representation. Rather than scheduling an election, the exclusive representative should then be recognized. These proposed amendments continue to permit disputes regarding the proper members of a unit as well as the filing of intervention petitions. In instances where these procedures create a question of representation, an election may be scheduled and held.

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

24.26.614 EMPLOYER COUNTER PETITION (1) through (5) remain the same.

(6) If an employer fails to file a timely counter petition, the board or its agent shall direct an election, when required pursuant to ARM 24.26.655, after the time for

intervention has ~~past~~ passed, provided the board or its agent have determined the unit as described by the ~~petitioner~~ petition is appropriate under 39-31-202, MCA.

(7) remains the same.

AUTH: 39-31-104, MCA
IMP: 39-31-207, MCA

24.26.620 PROCEDURE FOLLOWING FILING OF PETITION FOR NEW UNIT DETERMINATION AND ELECTION (1) and (2) remain the same.

(3) After a hearing, the board shall issue its determination of the appropriate unit. If a unit petitioned for is found not to be appropriate, the findings and conclusions shall give specific reasons therefore. If the unit is found to be appropriate, the board shall schedule the election, when required pursuant to ARM 24.26.655, and a pre-election conference at which time challenges for individual inclusions and exclusions shall be made by either party.

AUTH: 39-31-104, MCA
IMP: 39-31-207, MCA

24.26.655 WHEN ELECTION DIRECTED (1) ~~When a petition for an election has been filed, the board shall direct an election be held, if an appropriate unit has been determined or if no question of representation exists. The election shall be conducted under the direction and supervision of the board's agent. Determinations made by the board's agent are subject to review by the Board of Personnel Appeals at the board's discretion.~~ An election shall be conducted under the direction and supervision of the board's agent when:

(a) a petition for an election has been filed with authorization cards of fewer than a majority of employees in the proposed unit;

(b) after a determination by the Office of Administrative Hearings, including any appeals therefrom, fewer than a majority of employees in the unit have signed authorization cards; or

(c) a petition to intervene pursuant to ARM 24.26.646 has been filed.

(2) An election is deemed unnecessary and the board determines there to be no question of representation when a majority of the proposed unit sign authorization cards requesting representation by a designated representative and:

(a) no counter petition is filed;

(b) the time to file a petition to intervene has passed and no such petition has been filed; or

(c) after determination by the Office of Administrative Hearings, including any appeals therefrom, a majority of the employees in the determined unit have signed authorization cards.

AUTH: 39-31-104, MCA
IMP: 39-31-208, MCA

24.26.667 CERTIFICATION (1) If no objections are filed within the time set forth above, ~~or~~ if the challenged ballots are insufficient in number to affect the result

of the election, or if an election is deemed unnecessary pursuant to ARM 24.26.655, the board shall forthwith issue to the parties a certification of representative, where appropriate.

(2) remains the same.

AUTH: 39-31-104, MCA
IMP: 39-31-208, MCA

5. The board proposes to adopt a new rule as follows:

NEW RULE I STANDARD OF REVIEW BY THE BOARD ON A NOTICE OF INTENT TO DISMISS COMPLAINT (1) The board reviews a notice of intent to dismiss a complaint of an unfair labor practice, issued pursuant to 39-31-405, MCA, to determine whether, in the sound discretion of the board, the board's agent erroneously concluded that the complaint is without reasonable merit.

(2) In exercising its discretion, the board shall consider whether the investigator appropriately reviewed the evidence presented or that was otherwise reasonably available to the investigator, regarding the allegations of an unfair labor practice made in the complaint. The board may also consider other factors that go to question of reasonable merit, including the arguments of the parties.

AUTH: 39-31-104, MCA
IMP: 39-31-405, MCA

Reasonable necessity: There is reasonable necessity to adopt NEW RULE I in order to clearly establish the standard of review the board applies when reviewing an objection to a notice of intent to dismiss. The board has recently heard oral arguments in cases objecting to a notice of intent to dismiss, and notes that a standard of review has not formally been established by statute or by the board. The investigation is conducted as a somewhat informal procedure, without the right of the parties to conduct discovery or cross-examine witnesses. The board believes that if a majority of the board determines there is "probable merit" in a complaint, the matter should be set for a hearing on the merits of the dispute. An alternative standard of review, "an abuse of discretion by the investigator" has been considered and is rejected by the board as being too restrictive and deferential to the investigator's analysis. The board believes that in order to implement the protections against unfair labor practices, the board should have the ability to reasonably exercise its authority to decide whether or not a complaint's allegations have probable merit.

6. 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: Amber Carpenter, Department of Labor and Industry, P.O. Box 201503, Helena, Montana, 59620-1503; telephone (406) 444-1376; fax (406) 444-7071; or e-mail acarpenter@mt.gov, and must be received no later than 5:00 p.m., September 7, 2018.

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 that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in Paragraph 2 above or may be made by completing a request form at any rules hearing held by the department.

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

9. With regard to the requirements of 2-4-111, MCA, the department and board have determined that the amendment and adoption of the above-referenced rules will not significantly and directly impact small businesses.

10. The Office of Administrative Hearings, Department of Labor and Industry, has been designated to preside over and conduct this hearing.

/s/ Mark Cadwallader
Mark Cadwallader
Rule Reviewer

/s/ Galen Hollenbaugh
Galen Hollenbaugh
Commissioner
Department of Labor and Industry

/s/ Anne L. MacIntyre
Anne L. MacIntyre
Chair
Board of Personnel Appeals

Certified to the Secretary of State July 31, 2018.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I and II, the amendment of ARM 24.29.609, 24.29.616, 24.29.703, 24.29.902, 24.29.929, 24.29.956, 24.29.971, 24.29.1401A, 24.29.1801, 24.29.1821, 24.29.2614, 24.29.3103, 24.29.3107, 24.29.3117, 24.29.3124, and the repeal of ARM 24.29.966, 24.29.1425, 24.29.1426, 24.29.1427, 24.29.1428, 24.29.1430, 24.29.1431, 24.29.1511, 24.29.1519, 24.29.1521, 24.29.1531, 24.29.1532, 24.29.1536, 24.29.1537, 24.29.1541, 24.29.1551, 24.29.1561, 24.29.1566, 24.29.1571, 24.29.1572, 24.29.1573, 24.29.1574, 24.29.1575, 24.29.1581, 24.29.1582, 24.29.1583, 24.29.1584, 24.29.1585, 24.29.1586, 24.29.1702, 24.29.1721, 24.29.1722, 24.29.1727, 24.29.1731, 24.29.1733, 24.29.1735, 24.29.1737 pertaining to workers' compensation	)	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION, AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On August 31, 2018, at 10:00 a.m., the Department of Labor and Industry (department) will hold a public hearing in conference rooms A and B of the Beck Building, 1805 Prospect Avenue, Helena, Montana, to consider the proposed adoption, amendment, and repeal 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 department no later than 5:00 p.m., on August 24, 2018, to advise us of the nature of the accommodation that you need. Please contact Cindy Zimmerman, Employment Relations Division, P.O. Box 8011, Helena, Montana 59604-8011; telephone (406) 444-1752; Montana TTD (406) 444-5549; facsimile (406) 444-4140; or e-mail Cindy.Zimmerman@mt.gov.

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

NEW RULE I CALCULATING SIF PAID PREVIOUS YEAR THROUGH CURRENT YEAR (1) The total amount paid by SIF from April 1 of the previous

year through March 31 of the current year includes commitments for payments by SIF on individual reimbursements or settlements.

AUTH: 39-71-203, MCA
IMP: 39-71-915, MCA

STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to adopt NEW RULE I so that the subsequent injury fund (SIF) can obtain sufficient funding during the annual assessment cycle to properly fund reimbursements and settlements it has authorized, without shorting other SIF claims which may arise during the SIF's fiscal year. The SIF is authorized only to obtain funding annually, and therefore there is no mechanism to fund claim payments as due if there is a shortfall.

NEW RULE II USE OF SIGNATURES WHEN DOCUMENTS ARE BEING ELECTRONICALLY TRANSMITTED (1) The department may accept signatures in an electronically reproduced format on claims filing forms and petitions for settlement. The document must bear an original, manual signature, but it may be transmitted to the department electronically. The document may be transmitted to the department by means of:

(a) a fax copy;

(b) a portable document format (.pdf copy), transmitted electronically;

(c) an electronic scan, transmitted electronically; or

(d) a photocopy.

(2) The department may, in its sole discretion, accept appropriately authenticated digital signatures on documents, except as provided in (4).

(3) An insurer may, at its discretion, require a document being submitted directly to it to bear an original manual signature.

(4) Electronically reproduced signatures are not accepted by the department for independent contractor exemption certificate applications or waivers, in order to ensure that all such signatures are genuine and made under oath as provided by law.

AUTH: 39-71-203, MCA
IMP: 39-71-203, 39-71-717, MCA

STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to adopt NEW RULE II in order to clarify that commonly used electronically reproduced manual signatures such as faxes, .pdf documents, and such may be submitted to the department and are accepted in lieu of an original manual signature. The practice has been generally accepted by the department, but the adoption of NEW RULE II will provide certainty to injured workers, insurers, claims examiners, and other users in the workers' compensation system that the practice is allowed. The use of electronically reproduced manual signatures will allow the department, insurers, and injured workers to use commonly available technology and improve the speedy transmission of documents and the use of computer imaging systems. There is reasonable necessity to allow insurers to request original manual signatures

on documents, should the insurer find it desirable or necessary to verify the genuineness of a signature. Finally, there is reasonable necessity to specifically exclude the use of electronically reproduced signatures from the independent contractor exemption certificate application and waiver, in order that the identity verification and oath-taking function of notaries can be appropriately used as required by law. The department notes that an electronically reproduced original manual signature is distinguished from a "digital signature" in which no manual signature is made. The department may accept such digital signatures if the department is reasonably assured that such digital signatures provide suitable assurance of authenticity, including the identity of the party making the digital signature.

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

24.29.609 ABILITY TO PAY--EVIDENCE REQUIRED (1) Employers or employer groups electing to be self-insured shall demonstrate ability to pay ~~by providing~~ benefits as required by the Workers' Compensation Act. The determination of the ability to pay is determined based on an analysis by the department, with the concurrence of the guaranty fund as provided by law. The employer or group shall provide the department with:

(a) audited financial statements~~,~~;

(b) evidence of excess insurance, if required~~, and~~;

(c) a security deposit, if required~~,~~;

(d) an agreement (or parental agreement) of assumption and guarantee of workers' compensation and occupational disease liabilities, on forms prescribed by the department, if required; and

(e) other documentation as required by the department ~~that upon analysis indicate ability to pay, as determined by the department, with the concurrence of the guaranty fund~~.

(2) and (3) remain the same.

AUTH: 39-71-203, 39-71-2102, MCA
IMP: 39-71-403, 39-71-2102, MCA

24.29.616 EXCESS INSURANCE--WHEN REQUIRED (1) through (3)(e) remain the same.

(f) It must include an endorsement regarding late claim reporting penalty waiver.

(f) and (g) remain the same but are renumbered (g) and (h).

AUTH: 39-71-203, MCA
IMP: 39-71-403, 39-71-2101, 39-71-2103, MCA

STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to amend ARM 24.29.609 and 24.29.616 in order to ensure that Plan No. 1 employers have provided adequate assurance of the timely payment of all claims when due.

The rule amendments are needed to make sure that Plan No. 1 insurers are given timely notice of the type of documentation needed for approval of self-insured status.

24.29.703 ELECTION TO BE BOUND BY COMPENSATION PLAN NO. 2 OR 3 (1) and (2) remain the same.

(3) Insurance policies as required by (1) and (2) must include section 3A, on the Insurance Declaration page, evidencing Montana coverage.

(4) In order to meet the requirements of this rule:

(a) the insurance policy must list Montana as a state under whose laws coverage is provided; or

(b) section 3A of the coverage declarations page must expressly list Montana as a state under whose laws coverage is provided.

AUTH: 39-71-203, MCA
IMP: 39-71-2201, 39-71-2301, MCA

STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to amend ARM 24.29.703 in order to ensure that employers in Montana are properly covered under the terms of the Montana Workers' Compensation Act. The department has found that some employers, particularly those who operate in states other than Montana mistakenly assume that various statements such as "all states coverage" provide workers' compensation insurance coverage under Montana law when the policy does not actually provide that coverage.

24.29.902 DEFINITIONS For the purpose of this subchapter, the following definitions apply, unless the context of the rule clearly indicates otherwise:

(1) and (2) remain the same.

~~(3) "Industrial accident rehabilitation account" or "IARA" has the same meaning as provided by 39-71-1004, MCA.~~

(~~4~~) through (7) remain the same but are renumbered (3) through (6).

~~(8) "Paid losses" are as defined in 39-71-915, MCA.~~

(9) and (10) remain the same but are renumbered (7) and (8).

(9) "SAW/RTW" means stay-at-work/return-to-work assistance as defined in 39-71-1011, MCA.

(10) "Safety fund assessment" means the assessment for the occupational safety and health administration fund as defined in 50-71-128, MCA.

(11) remains the same.

AUTH: 39-71-203, 50-71-114, MCA
IMP: 39-71-201, 39-71-915, ~~39-71-1004~~, 39-71-1011, 39-71-2352, 50-71-128, MCA

STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to amend ARM 24.29.902 in order to update the references to the split in assessments and other changes in terminology, and to update the AUTH and IMP citations.

24.29.929 ASSESSMENTS OTHER THAN THE ADMINISTRATION FUND ASSESSMENT (1) The department may combine the assessments for the administration fund, SIF, SAW/RTW, and safety fund ~~and IARA assessments~~ into one bill.

~~(2) The IARA assessment is due by July 1 of the year it is billed, which is consistent with the due date for the SIF assessment.~~

AUTH: 39-71-203, 50-71-114, MCA
IMP: 39-71-201, 39-71-915, ~~39-71-1004,~~ 39-71-1011, 50-71-128, MCA

STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to amend ARM 24.29.929 in order to update the references to the split in assessments and other changes in terminology, and to update the AUTH and IMP citations.

24.29.956 COMPUTATION AND COLLECTION OF THE ADMINISTRATION FUND AND SAFETY FUND ASSESSMENT PREMIUM SURCHARGE RATE FOR PLAN NO. 2 AND NO. 3 (1) The department will compute the premium surcharge to be paid by all employers insured by plan No. 2 insurers and by the plan No. 3 insurer in the manner provided by 39-71-201 and 50-71-128, MCA.

(a) In calculating the total administration fund and safety fund assessment premium surcharge rate, the department will use previous calendar year premium data reported to the ~~insurance commissioner pursuant to 33-2-705, MCA, and premium reported by~~ department by plan No. 2 insurers and the plan No. 3 insurer.

~~(b) If premium has not been reported to the insurance commissioner by the date the surcharge is computed, the department will use the premiums reported on the quarterly surcharge forms in computing the surcharge rate.~~

~~(c) A plan No. 2 insurer who has failed to report premium earned to the insurance commissioner, pursuant to 33-2-705, MCA, as of the date the surcharge is computed must pay an assessment of $500.00 and the department will use an estimated premium amount for purposes of the surcharge calculation.~~

~~(d) The resulting single premium surcharge rate will apply to all employers being insured by plan No. 2 insurers and the plan No. 3 insurer.~~

~~(2) In determining the premium surcharge for the coming fiscal year, the department shall compare the total amount of premium surcharge remitted by all plan No. 2 insurers and the plan No. 3 insurer for the most recently completed fiscal year to the amount of the administration fund assessment that the premium surcharge was calculated to fund.~~

~~(a) If the amount actually collected in premium surcharge is greater than the calculated assessment on paid losses from the preceding year, the department shall subtract the excess amount from the next assessment. If the amount actually collected in premium surcharge is less than the calculated assessment on paid losses from the preceding year, the department shall add the underfunded amount to the next assessment.~~

(b) remains the same.

~~(3)~~ (2) The administration fund and safety fund assessment premium surcharge rate is effective for policies written or renewed on or after July 1 of each year. For policies written or renewed during the fiscal year, the current surcharge

rate will apply to all payments made during the policy year regardless of any changes in the surcharge rate effective as of the next fiscal year.

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

~~(5) If an insurer uses a deposit placed by a policyholder for payment of premium, the deposit must also be used for payment of the administration fund assessment premium surcharge. If the amount of the deposit is insufficient to cover both the cost of the premium and the surcharge, the deposit must first be applied to the surcharge and the remaining amount to the premium due.~~

~~(6)~~ (4) Each plan No. 2 insurer and the plan No. 3 insurer is responsible for correctly calculating the amount of the authorized premium surcharge for the administration fund and safety fund assessment that the insurer is to collect from each of its insured employers using the rate established by the department. Because the insurer, not the department, calculates the amount of premium due from the employer, disputes between the insurer and the insured regarding the amount of the premium surcharge are not disputes over which the department has jurisdiction.

(7) and (8) remain the same but are renumbered (5) and (6).

AUTH: 39-71-203, 50-71-114, MCA
IMP: 39-71-201, 39-71-203, 39-71-2352, 50-71-128, MCA

STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to amend ARM 24.29.956 in order to update the references to the split in assessments and other changes in terminology, and to update the AUTH and IMP citations.

24.29.971 FAILURE OF INSURER TO TIMELY REPORT PAID LOSSES--DEPARTMENT ESTIMATE OF PAID LOSSES--RECALCULATION OF ASSESSMENT AND PREMIUM SURCHARGE--PENALTY (1) In the event an insurer fails to timely and accurately report its paid losses for the previous year by the following March 1, the department ~~will estimate~~ may base the insurers' paid losses using the quarterly information submitted by the insurer pursuant to 39-71-306, MCA. ~~The~~ If the insurer has not filed all of the quarterly reports as required by 39-71-306, MCA, the department may consult with the advisory organization or other sources regarding the appropriate amount to estimate as those paid losses. The department may also use that estimate as the basis for the SIF, ~~and IARA~~ SAW/RTW, and safety fund assessment as well.

(2) remains the same.

(3) An annual paid loss report received after March 1, but received by or before March 31, may be considered pursuant to ARM 24.29.954 for assessment calculation purposes.

~~(3)~~(4) The department ~~will~~ may, in its sole discretion, recalculate the ~~assessments after the insurer reports its paid losses~~ assessment and surcharge rates if the insurer makes a late report as provided by (3). ~~The department will then give the insurer whatever credit may be due if the July 1 payment of the estimated assessments exceeds the amount due following the recalculation.~~

(5) Pursuant to 39-71-306, MCA, a penalty of up to $1,000 may be assessed against the insurer for an annual report received after March 1.

AUTH: 39-71-203, 39-71-306, 50-71-114, MCA
IMP: 39-71-201, 39-71-306, 39-71-915, ~~39-71-1004,~~ 50-71-128, MCA

STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to amend ARM 24.29.971 in order to update the references to the split in assessments and other changes in terminology, and to update the AUTH and IMP citations, and to more accurately assess insurers that have not timely filed required reports to the department.

24.29.1401A DEFINITIONS As used in subchapters 14 and 15, the following definitions apply:

(1) and (2) remain the same.

(3) "Ambulatory surgery center (ASC)" means a health care facility ~~that operates primarily for the purpose of furnishing outpatient surgical services to patients~~ where surgical procedures not requiring an overnight hospital stay are performed.

(4) "Base rate" means the dollar value published by the department annually which is multiplied by the relative weight of the MS-DRG or APC to determine payment.

(5) through (7) remain the same.

(8) "Correct Coding Initiative (CCI)" means the code edits adopted by the department ~~that~~ which are used to correct contradictory billing information.

(9) and (10) remain the same.

(11) "Designated Treating Physician" means a provider ~~who is~~ designated or formally approved by the insurer as the physician who ~~will be~~ is responsible for coordinating the injured worker's care, according to the criteria in 39-71-1101, MCA.

(12) and (13) remain the same.

(14) "Evidence-based" means use of the best evidence available in making decisions about the care of the individual patient, gained from the scientific method of medical decision-making ~~and~~. It includes use of techniques from science, engineering, and statistics, such as:

(a) randomized controlled trials (RCTs)~~,~~;

(b) meta-analysis of medical literature~~,~~;

(c) integration of individual clinical expertise with the best available external clinical evidence from systematic research~~,~~; and

(d) a risk-benefit analysis of treatment (including lack of treatment).

(15) "Facility" or "health care facility" means all or a portion of an institution, building, or agency, private or public, excluding federal facilities, whether organized for profit or not, that is used, operated, or designed to provide health services, medical treatment, or nursing, rehabilitative, or preventive care to any individual.

(a) The term includes the following facilities, as defined in 50-5-101, MCA:

(i) chemical dependency facilities~~,~~;

(ii) critical access hospitals~~,~~;

(iii) end-stage renal dialysis facilities~~,~~;

(iv) home health agencies~~,~~;

(v) home infusion therapy agencies~~,~~;

(vi) hospices~~,~~;
(vii) hospitals~~,~~;
(viii) long-term care facilities~~,~~;
(ix) intermediate care facilities for the developmentally disabled~~,~~;
(x) medical assistance facilities~~,~~;
(xi) mental health centers~~,~~;
(xii) outpatient centers for surgical services~~,~~;
(xiii) rehabilitation facilities~~,~~;
(xiv) residential care facilities~~,~~; and
(xv) residential treatment facilities. ~~The above facilities are defined in 50-5-101, MCA.~~

(b) The term does not include outpatient centers for:
(i) primary care~~,~~;
(ii) infirmaries~~,~~;
(iii) provider-based clinics~~,~~; and
(iv) offices of private physicians, dentists, or other physical or mental health care workers, including licensed addiction counselors.

(16) "Functional status" means written information that is complete, clear, and legible, and ~~that~~ identifies objective findings indicating the claimant's physical capabilities and provides information about the change in ~~the~~ status ~~as a result of~~ resulting from treatment.

(17) through (19) remain the same.

(20) "Inpatient services" means services rendered to a person ~~who has been~~ admitted to a hospital for bed occupancy for purposes of receiving inpatient hospital services. Generally, a patient is considered an inpatient if formally admitted as inpatient with the expectation ~~that~~ the patient will remain at least overnight and occupy a bed even though it later develops ~~that~~ the patient can be discharged or transferred to another hospital and not actually use the hospital bed overnight. The physician or other practitioner responsible for a patient's care at the hospital is also responsible for deciding whether the patient ~~should be~~ is admitted as an inpatient.

~~(21) "Insurer" has the same meaning as provided by 39-71-116, MCA.~~

(22) remains the same but is renumbered (21).

~~(23) "Maintenance care" has the same meaning as provided by 39-71-116, MCA.~~

~~(24)~~ (22) "Medical director" means a person who is an employee of, or contractor to, the department, and who is responsible for the independent medical review of requests for treatment(s) or procedure(s)~~,~~ when those requests are denied, petitions to reopen medical benefits according to 39-71-717, MCA, and whose responsibility will also include other areas to be determined by the department. A person serving as a medical director must be a physician licensed by the state of Montana under Title 37, chapter 3, MCA.

~~(25) "Medical stability", "maximum medical improvement", "maximum healing", or "maximum medical healing" has the same meaning as provided by 39-71-116, MCA.~~

(26) and (27) remain the same but are renumbered (23) and (24).

~~(28)~~ (25) "Objective medical findings" means medical evidence ~~that is~~ substantiated by clinical findings. Clinical findings include, but are not limited to,

range of motion, atrophy, muscle strength, muscle spasm, and diagnostic evidence. Complaints of pain in the absence of clinical findings are not ~~considered~~ objective medical findings.

~~(29)~~ (26) "Outpatient" means a patient ~~who is~~ not admitted for inpatient or residential care.

~~(30) "Palliative care" has the same meaning as provided by 39-71-116, MCA.~~

(31) remains the same but is renumbered (27).

~~(32) "Primary medical services" has the same meaning as provided by 39-71-116, MCA.~~

~~(33)~~ (28) "Prior authorization" means:

(a) ~~with respect to services provided on or before June 30, 2011, that~~ for those matters identified by ARM 24.29.1517 the provider requests and receives (either verbally or in writing) authorization from the insurer to perform a specific procedure or series of related procedures, prior to performing that procedure; and

(b) ~~with respect to services provided on or after July 1, 2011,~~ the interested party requests and receives ~~prior~~ authorization (either verbally or in writing) from the insurer ~~to perform~~ prior to providing treatment for those cases identified by ARM 24.29.1593.

(34) remains the same but it renumbered (29).

~~(35)~~ (30) "Rebuttable presumption" means that the Montana Guidelines, as adopted in ARM 24.29.1591, are presumed to be compensable medical treatment for an injured worker. The presumption ~~can~~ may be rebutted by a preponderance of credible medical evidenced-based material and medical reasons to justify ~~that~~ the medical treatment(s) or procedure(s) ~~that require~~ requiring prior authorization are reasonable and necessary care for the injured worker.

(36) and (37) remain the same but are renumbered (31) and (32).

~~(38) "Secondary medical services" has the same meaning as provided by 39-71-116, MCA.~~

~~(39)~~ (33) "Service or services" means treatment including procedures and supplies ~~provided in a facility or nonfacility that is~~ billable under these rules.

(40) through (42) remain the same but are renumbered (34) through (36).

(a) ~~With respect to~~ For services provided on or before June 30, 2011, the treatment plan must include a diagnosis of the condition, the specific type(s) of treatment, procedure, or modalities ~~that will be~~ employed, a timetable for the implementation and duration of the treatment, and the goal(s) or expected outcome of the treatment. Treatment, as used in this definition, may consist of diagnostic procedures that are reasonably necessary to refine or confirm a diagnosis. The treating physician may indicate ~~that~~ treatment ~~is to~~ be performed by a provider in a different field or specialty, and defer to the professional judgment of that provider in the selection of the most appropriate method of treatment~~;~~.. However, the treating physician must identify the scope of the referral in the treatment plan and provide guidance to the provider concerning the nature of the injury or occupational disease.

(b) ~~With respect to~~ For services provided on or after July 1, 2011, a treatment plan must be made in accordance with the Montana Guidelines adopted in ARM 24.29.1591 and made in accordance with any insurer authorized treatments or procedures.

AUTH: 39-71-203, MCA
IMP: 39-71-116, 39-71-704, MCA

24.29.1801 DEFINITIONS As used in this subchapter, the following definitions apply:

~~(1) "Health care provider" means a person who is licensed, certified, or otherwise authorized by the laws of this state to provide health care in the ordinary course of business or practice of a profession, as defined in 39-71-116, MCA.~~

(2) through (10) remain the same but are renumbered (1) through (9).

AUTH: 39-71-203, 39-71-1051, MCA
IMP: 39-71-105, 39-71-116, 39-71-1011, 39-71-1036, MCA

STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to amend ARM 24.29.1401A and 24.29.1801 to streamline the rules by eliminating redundant references to terms defined in statute. In addition, there is reasonable necessity to make certain formatting changes to ensure that ARM 24.29.1401A conforms with the style requirements of the Secretary of State's Administrative Rules Bureau.

24.29.1821 VOCATIONAL REHABILITATION COUNSELOR ~~POOL~~ FOR DEPARTMENT-PROVIDED SAW/RTW ASSISTANCE ~~(1) The department shall obtain qualified vocational rehabilitation counselors under contract to provide SAW/RTW services to injured workers.~~

(2) and (3) remain the same but are renumbered (1) and (2).

~~(4)~~ (3) The vocational rehabilitation counselor shall notify the department of the services provided, the progress toward transitional employment, and assistance outcomes, as ~~specified by the contract with~~ directed by the department.

~~(5) The department shall periodically request proposals from vocational rehabilitation counselors and execute contracts for services with qualified applicants.~~

AUTH: 39-71-203, 39-71-1051, MCA
IMP: 39-71-105, 39-71-1043, MCA

STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to amend ARM 24.29.1821 to eliminate references to contracts that are not being used by the department.

24.29.2614 REIMBURSEMENT PROCESS (1) remains the same.

(2) ~~The insurer shall provide written notice to the department no sooner than 150 days or later than 90 days before the SIF becomes liable to reimburse the insurer for medical or indemnity benefits paid on behalf of the SIF-certified individual.~~ An insurer shall send the following to the department to document 104 weeks of payments for medical and indemnity after SIF has been notified of the insurer's intent to seek reimbursement:

(a) for medical benefit reimbursements:

(i) a cover letter;

(ii) medical notes from first and last visit from the treating physician; and

(iii) a spreadsheet documenting all medical benefits, including prescriptions, paid by the insurer for the first 104 weeks.

(b) for indemnity benefit reimbursements:

(i) a cover letter; and

(ii) a spreadsheet documenting all indemnity benefits paid.

(3) remains the same.

(a) The department ~~may~~ shall not reimburse the insurer for medical benefits paid to or on behalf of an SIF-certified individual during the first 104 weeks following the date of injury. ~~The insurer shall submit copies of the SIF-certified individual's first report of injury and all related medical reports for department review.~~

(b) The department ~~may~~ shall not reimburse an insurer for indemnity benefits until after the insurer has paid a total of 104 weeks of indemnity benefits to the SIF-certified individual.

(4) remains the same.

(a) computer printout or comparable listing that identifies the type of indemnity payment to the SIF-certified individual (temporary partial disability, temporary total disability, permanent partial disability, or permanent total disability) and includes:

(i) ~~check numbers,~~ dates checks were issued~~,~~;

(ii) dates of indemnity~~,~~;

(iii) total weeks of indemnity~~,~~; and

(iv) the total amount paid~~,~~.

(b) computer printout or comparable listing of all medical bills paid, including:

(i) ~~check numbers,~~ dates checks were issued~~,~~;

(ii) provider names~~,~~; ~~and~~

(iii) dates of service;

(iv) billed amount;

(v) paid amount;

(vi) NDC# or drug type and dosage;

(vii) date of fill; and

(viii) amount paid; and

(c) through (6) remain the same.

(a) Attorney fees must be itemized separately from medical and/or indemnity benefits.

(7) remains the same.

AUTH: 39-71-203, 39-71-904, MCA
IMP: 39-71-907, 39-71-908, 39-71-909, 39-71-912, 39-71-920, MCA

STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to amend ARM 24.29.2614 in order to clarify and modernize the procedures used by the SIF to timely provide reimbursement, including the documentation required to be submitted to support the request for reimbursement.

24.29.3103 DEFINITIONS Terms defined in 39-71-116, MCA, are used in subchapter 31 as they are defined by statute. As used in subchapter 31, the following definitions apply unless the context clearly indicates otherwise:

(1) and (2) remain the same.

(3) "Approved" means that after the medical review has been performed, medical benefits are reopened~~, as specified in the medical director's report~~ for two years before being subject to a biennial review.

(4) through (22) remain the same.

AUTH: 39-71-203, MCA
IMP: 39-71-116, 39-71-717, MCA

24.29.3107 TIMELINES AND EXPLANATION OF STATUS CLASSIFICATIONS OF A PETITION (1) through (4) remain the same.

(5) Once filed, the parties have 14 days to submit medical records and additional information to be considered during the medical review. Once the medical review is completed and the report is issued by the medical director, the petition will have one of the two following status conditions:

(a) the petition is approved, with a recommendation in the report ~~as to the nature and extent of the~~ that medical benefits ~~that~~ should be provided by the insurer for two years before being subject to a biennial review; or

(b) through (7) remain the same.

AUTH: 39-71-203, MCA
IMP: 39-71-717, MCA

24.29.3117 JOINT PETITION FOR REOPENING (1) If the worker and the insurer agree ~~on the nature and duration of the~~ to reopen medical benefits ~~to be reopened~~, the worker and the insurer may file a joint petition for reopening. A joint petition for reopening must be made on the department's joint petition form. Joint petition forms are available from the department in the manner described in ARM 24.29.3111.

(2) remains the same.

(3) Because the parties agree on the need for reopening medical benefits, the department's medical director will summarily review and approve the petition, reopening medical benefits for two years before being subject to a biennial review.

(4) remains the same.

AUTH: 39-71-203, MCA
IMP: 39-71-717, MCA

24.29.3124 REVIEW BY MEDICAL REVIEW PANEL - REPORT AND RECOMMENDATIONS (1) through (3) remain the same.

(4) If a panel member concludes that additional medical benefits are necessary, ~~the panel member shall identify the extent of~~ the medical benefits ~~that~~ should be provided for two years before being subject to a biennial review. The analysis must include the reasons and rationale that explain:

(a) through (6) remain the same.

AUTH: 39-71-203, MCA
IMP: 39-71-717, MCA

STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to amend ARM 24.29.3101, 24.29.3107, 24.29.3117, and 24.29.3124 to clarify that medical benefits, once reopened for two years, will be reviewed on a biennial basis, as well as to clarify that reopened benefits are subject to the normal claims examination process for relevance and need.

5. The rules proposed to be repealed are as follows:

GENERAL STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to repeal the following rules to eliminate rules that apply to programs that are no longer in existence, or pertain to services or processes that have been superseded by the passage of time and subsequent statutes and rules.

24.29.966 INDUSTRIAL ACCIDENT REHABILITATION ACCOUNT ASSESSMENT

AUTH: 39-71-203, MCA
IMP: 39-71-1004, MCA

24.29.1425 RATES FOR HOSPITAL SERVICES PROVIDED PRIOR TO JULY 1, 1997

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1426 HOSPITAL SERVICE RULES FOR SERVICES PROVIDED FROM APRIL 1, 1998, THROUGH DECEMBER 31, 2007

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1427 HOSPITAL SERVICE RULES FOR SERVICES PROVIDED FROM JANUARY 1, 2008, THROUGH NOVEMBER 30, 2008

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1428 HOSPITAL RATES FOR JULY 1, 1997, THROUGH JUNE 30, 1998

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1430 HOSPITAL RATES FROM JULY 1, 1998, THROUGH JUNE 30, 2001

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1431 HOSPITAL RATES FROM JULY 1, 2001, THROUGH NOVEMBER 30, 2008

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1511 SELECTION OF PHYSICIAN FOR CLAIMS ARISING BEFORE JULY 1, 1993

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1519 SECOND OPINIONS FOR SERVICES PROVIDED ON OR BEFORE JUNE 30, 2011

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1521 MEDICAL EQUIPMENT AND SUPPLIES FOR DATES OF SERVICE BEFORE JANUARY 1, 2008

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1531 USE OF FEE SCHEDULES FOR SERVICES PROVIDED FROM APRIL 1, 1993, THROUGH JUNE 30, 2002

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1532 USE OF FEE SCHEDULES FOR SERVICES PROVIDED FROM JULY 1, 2002, THROUGH DECEMBER 31, 2007

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1536 CONVERSION FACTORS--METHODOLOGY FOR SERVICES PROVIDED FROM APRIL 1, 1993, THROUGH DECEMBER 31, 2007

AUTH: 39-71-203, MCA

IMP: 39-71-704, MCA

24.29.1537 SPECIAL MONITORING AND ADJUSTMENT OF PHYSICAL MEDICINE FEES DURING THE PERIOD JULY 1, 2002, THROUGH DECEMBER 31, 2003

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1541 ACUPUNCTURE FEES FOR SERVICES PROVIDED FROM APRIL 1, 1993, THROUGH DECEMBER 31, 2007

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1551 DENTAL SPECIALTY AREA FEES FOR SERVICES PROVIDED FROM APRIL 1, 1993, THROUGH DECEMBER 31, 2007

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1561 PHYSICIAN FEES -- MEDICINE FOR SERVICES PROVIDED FROM APRIL 1, 1993, THROUGH DECEMBER 31, 2007

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1566 PHYSICIAN FEES -- ANESTHESIA SPECIALTY AREA FOR SERVICES PROVIDED FROM APRIL 1, 1993, THROUGH DECEMBER 31, 2007

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1571 CHIROPRACTIC FEES FOR SERVICES PROVIDED FROM APRIL 1, 1993 THROUGH JUNE 30, 2002

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1572 CHIROPRACTIC FEES FOR SERVICES PROVIDED FROM JULY 1, 2002, THROUGH DECEMBER 31, 2007

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1573 PRIOR AUTHORIZATION AND BILLING LIMITATIONS FOR CHIROPRACTIC SERVICES PROVIDED FROM JULY 1, 2002, THROUGH DECEMBER 31, 2007

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1574 CHIROPRACTIC FEE SCHEDULE FOR SERVICES PROVIDED FROM JANUARY 1, 2008, THROUGH JUNE 30, 2011

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1575 CHIROPRACTIC--PRIOR AUTHORIZATION AND BILLING LIMITATIONS FOR SERVICES PROVIDED FROM JANUARY 1, 2008, THROUGH JUNE 30, 2011

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1581 PROVIDER FEES--OCCUPATIONAL AND PHYSICAL THERAPY SPECIALTY AREA FOR SERVICES PROVIDED FROM APRIL 1, 1993 THROUGH JUNE 30, 2002

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1582 PROVIDER FEES--OCCUPATIONAL AND PHYSICAL THERAPY SPECIALTY AREA FOR SERVICES PROVIDED FROM JULY 1, 2002, THROUGH SEPTEMBER 30, 2003

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1583 PRIOR AUTHORIZATION AND BILLING LIMITATIONS FOR SERVICES PROVIDED BY OCCUPATIONAL THERAPISTS AND PHYSICAL THERAPISTS FROM JULY 1, 2002, THROUGH DECEMBER 31, 2007

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1584 PROVIDER FEES--OCCUPATIONAL AND PHYSICAL THERAPY SPECIALTY AREA FOR SERVICES PROVIDED FROM OCTOBER 1, 2003, THROUGH DECEMBER 31, 2007

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1585 OCCUPATIONAL AND PHYSICAL THERAPY FEE SCHEDULE FOR SERVICES PROVIDED FROM JANUARY 1, 2008, THROUGH JUNE 30, 2011

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1586 OCCUPATIONAL AND PHYSICAL THERAPISTS--PRIOR AUTHORIZATION AND BILLING LIMITATIONS FOR SERVICES PROVIDED FROM JANUARY 1, 2008, THROUGH JUNE 30, 2011

AUTH: 39-71-203, MCA
IMP: 39-71-704, MCA

24.29.1702 REHABILITATION PANELS FOR CLAIMS BETWEEN JULY 1, 1987 AND JUNE 30, 1991

AUTH: 39-71-203, MCA
IMP: 39-71-1015 to 39-71-1019, MCA

24.29.1721 PAYMENT OF REHABILITATION EXPENSES FROM THE INDUSTRIAL ACCIDENT REHABILITATION ACCOUNT FOR CLAIMS ARISING BEFORE JULY 1, 1991

AUTH: 39-71-203, MCA
IMP: Title 39, chap. 71, part 10, MCA (1987) (1989) and (1991)

24.29.1722 PAYMENT OF REHABILITATION EXPENSES FROM THE INDUSTRIAL ACCIDENT REHABILITATION ACCOUNT FOR CLAIMS ARISING ON OR AFTER JULY 1, 1991, AND BEFORE JULY 1, 1997

AUTH: 39-71-203, MCA
IMP: Title 39, chap. 71, part 10, MCA

24.29.1727 DEPARTMENT'S NOTICE OF AUTHORIZATION OR DENIAL OF USE OF TRUST FUNDS

AUTH: 39-71-203, MCA
IMP: Title 39, chap. 71, part 10, MCA

24.29.1731 ALLOWABLE REHABILITATION EXPENSES

AUTH: 39-71-203, MCA
IMP: Title 39, chapter 71, part 10, MCA

24.29.1733 DISALLOWED REHABILITATION EXPENSES

AUTH: 39-71-203, MCA
IMP: Title 39, chapter 71, part 10, MCA

24.29.1735 DOCUMENTATION REQUIRED

AUTH: 39-71-203, MCA
IMP: Title 39, chapter 71, part 10, MCA

24.29.1737 INSURER RESPONSIBILITY TO PROVIDE INFORMATION TO THE DEPARTMENT

AUTH: 39-71-203, MCA
IMP: Title 39, chap. 71, part 10, MCA

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 Jason Swant, Employment Relations Division, P.O. Box 8011, Helena, Montana 59604-8011, by facsimile to (406) 444-4140, or e-mail to JSwant@mt.gov, and must be received no later than 5:00 p.m., September 7, 2018.

7. An electronic copy of this notice of public hearing is available through the department's web site at http://dli.mt.gov/events/calendar.asp, under the Calendar of Events, Administrative Rules Hearings Section. The department strives to make its electronic copy of this notice of public hearing conform to the official version of the notice, as published in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy, only the official text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that a person's difficulties in sending an e-mail do not excuse late submission of comments.

8. 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 e-mail or mailing address of the person to receive notices, and specifies the particular subject matter or matters regarding which the person wishes to receive notices. Such written request may be mailed or delivered to the Department of Labor and Industry, attention: Mark Cadwallader, 1315 E. Lockey Avenue, P.O. Box 1728, Helena, Montana 59624-1728, faxed to the department at (406) 444-1394, or e-mailed to mcadwallader@mt.gov, or may be made by completing a request form at any rules hearing held by the agency.

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

10. Pursuant to 2-4-111, MCA, the department has determined that the rule changes proposed in this notice do not have a significant and direct impact upon small businesses.

11. The department's Office of Administrative Hearings has been designated to preside over and conduct this hearing.

/s/ Mark Cadwallader	/s/ Galen Hollenbaugh
Mark Cadwallader	Galen Hollenbaugh
Rule Reviewer	Commissioner
	Department of Labor and Industry

Certified to the Secretary of State July 31, 2018.

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 32.3.108 quarantine and release of quarantine, 32.3.201 definitions, 32.3.206 official health certificate, 32.3.207 permits, 32.3.212 additional requirements for cattle, 32.3.216 horses, mules, and asses, 32.3.307 department ordered pseudorabies testing, 32.3.311 procedure upon detection of pseudorabies, 32.3.407 department ordered brucellosis testing of animals, 32.3.411 procedure upon detection of brucellosis, 32.3.412 memorandum of understanding, 32.3.433 designated surveillance area, 32.3.436 vaccination within the counties in which the DSA is located, 32.3.1003 contaminated premises, 32.4.101 definitions, 32.4.202 identification of omnivores and carnivores, 32.4.601 importation of alternative livestock, and repeal of ARM 32.3.224 domestic bison, 32.3.430 quarantine and retest of suspect animals in negative herd, and 32.3.2002 swine identification code: assignment of codes	)	NOTICE OF EXTENSION OF COMMENT PERIOD ON PROPOSED AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On July 6, 2018, the Department of Livestock published MAR Notice No. 32-18-291 pertaining to the proposed amendment and repeal of the above-stated rules at page 1225 of the 2018 Montana Administrative Register, Issue Number 13.

2. The Department of Livestock is extending the comment period in order to give concerned persons additional time for comment on the above-stated rules. The new deadline for submitting written comments is August 17, 2018.

3. The Department of Livestock will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Livestock no later than 5:00 p.m. on August 14, 2018, to advise us of the nature of the accommodation that you need. Please contact the Department of Livestock, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena,

MT 59620-2001; telephone: (406) 444-9321; TTD number: 1 (800) 253-4091; fax: (406) 444-1929; e-mail: MDOLcomments@mt.gov.

4. Concerned persons may submit their data, views, or arguments in writing concerning the proposed action to the Department of Livestock, 301 N. Roberts St., Room 306, P.O. Box 202001, Helena, MT 59620-2001, by faxing to (406) 444-1929, or by e-mailing to MDOLcomments@mt.gov to be received no later than 5:00 p.m., August 17, 2018.

/s/ Michael S. Honeycutt
Michael S. Honeycutt
Executive Officer
Board of Livestock
Department of Livestock

BY: */s/ Cinda Young-Eichenfels*
Cinda Young-Eichenfels
Rule Reviewer

Certified to the Secretary of State July 31, 2018.

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

In the matter of the amendment of ARM 37.71.102, 37.71.301, 37.71.401, 37.71.601, and 37.71.602, pertaining to low income weatherization assistance program (LIWAP)	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On August 30, 2018, at 11:00 a.m., the Department of Public Health and Human Services will hold a public hearing in Room 207 of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on August 17, 2018, to advise us of the nature of the accommodation that you need. Please contact Todd Olson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

<u>37.71.102 ROLE OF THE LOCAL CONTRACTOR</u> (1) The department will contract with appropriate community-based organizations in the state to provide outreach, receive and process applications<u>,</u> and provide weatherization services for the low income weatherization assistance program. A local contractor may provide one or all of these functions as designated by the department.

(a) and (b) remain the same.

(c) The designated local contractor shall see that priority is given to identifying and providing weatherization assistance to <u>the</u> elderly<u>,</u> ~~and handicapped low income~~ persons <u>with a disability, and children</u> using a computerized listing of households prioritized for service provided by the department and described in ARM 37.71.601. The computerized listing may be amended by the designated local contractor using the procedure described in ARM 37.71.601.

(2) remains the same.

AUTH: 53-2-201, MCA
IMP: 90-4-201, 90-4-202, MCA

37.71.301 NOTIFICATION OF ELIGIBILITY DETERMINATION (1) and (2) remain the same.

(3) Notification of eligibility shall contain the following language: "Because of limited funds, homes are weatherized on a priority basis with special consideration given to ~~handicapped and~~ the elderly, persons with a disability, and children. ~~You~~ Households will be notified when funds become available to weatherize ~~your~~ the applicant's home. If not notified within one year, ~~you~~ the applicant must reapply to be reassigned priority for service."

AUTH: 53-2-201, 90-4-201, MCA
IMP: 90-4-201, 90-4-202, MCA

37.71.401 LOW INCOME WEATHERIZATION ASSISTANCE PROGRAM, DEFINITIONS (1) remains the same.

(2) "Child" means a person who is under age 18.

(3) "Disability" means the same as when the term is used in Social Security law purposes and is determined by the Federal Social Security Administration (SSA) under Title II or Title XVI of the Social Security Act. Verification of disability will be demonstrated by persons showing a supplemental security income disability card, Social Security disability check, or award letter.

(4) "Elderly" means a person who is 60 years of age or older.

(5) "Energy burden" means the percentage of a household's income which is allocated to energy costs for the household's dwelling. The energy burden is calculated by dividing the household's actual or estimated annual heating costs by the household's annual income.

(2) through (4) remain the same, but are renumbered (6) through (8).

AUTH: 53-2-201, MCA
IMP: 53-2-201, 90-4-201, 90-4-202, MCA

37.71.601 ELIGIBILITY FOR WEATHERIZATION SERVICE: PRIORITIES

(1) through (4) remain the same.

(5) In determining which eligible households will receive weatherization services and in what order, households in each of the governor's substate planning districts will be ranked according to ~~energy usage.~~ priority according to the following: ~~Households with the highest energy usage must be given the highest priority and households with the lowest energy usage must be given the lowest priority.~~

(a) ~~The energy usage, as defined in ARM 37.71.401, of households containing a member who is either 60 years of age or older or who has a disability as determined by the federal Social Security Administration under Title II or Title XVI of the Social Security Act will be multiplied by 1.25 for purposes of prioritization.~~ The highest priority is given to households with the highest energy burden.

(i) When calculating the energy burden of households containing any of the following, the energy usage shall be multiplied by 1.25:

(A) an elderly household member;

(B) a disabled household member; or

(C) a household with a member who is a child.

(b) Households with the same energy burden are prioritized by highest usage.

(6) If there exists a weatherization-related imminent threat to the health or safety of an eligible household, ~~their~~ the home may be given a higher priority than ~~that dictated by energy usage~~ described in (5). It is the obligation of the household to provide proof of an imminent threat to the health or safety of the household to the local contractor. The local contractor must request that the department give the household's dwelling a higher priority.

(7) through (9) remain the same.

(10) When a dwelling is prioritized high enough to be scheduled for weatherization work, the delivery of services will be deferred until a later date if providing the services would pose a threat to the health or safety of either the weatherization installers or any other person. In such cases the delivery of services will be postponed until the conditions that pose a threat to health or safety have been resolved. The department adopts and incorporates by reference the department's Weatherization Assistance Program (WAP) Policy Manual effective July 1, ~~2017~~ 2018, which outlines the circumstances that justify a deferral of weatherization services. The WAP Policy Manual is located at the department's web site at http://dphhs.mt.gov/hcsd/energyassistance.aspx or a copy may be obtained from the Department of Public Health and Human Services, Human and Community Services Division, Intergovernmental Human Services Bureau, P.O. Box 202956, Helena, MT 59620.

AUTH: 53-2-201, 90-4-201, MCA
IMP: 53-2-201, 90-4-201, 90-4-202, MCA

37.71.602 DETERMINING LOW INCOME WEATHERIZATION ASSISTANCE (1) remains the same.

(2) Dwellings chosen to be weatherized must receive those measures determined to be cost effective as defined in 10 CFR~~, part~~ 440, as amended through July 1, ~~2017~~ 2018. The department adopts and incorporates by reference 10 CFR~~, part~~ 440, as amended through July 1, ~~2017~~ 2018. A copy of these federal regulations may be obtained from the Department of Public Health and Human Services, Human and Community Services Division, 111 N. Jackson St., P.O. Box 202925, Helena, MT 59620-2925.

(3) remains the same.

(4) The department adopts and incorporates by reference the department's Weatherization Assistance Program (WAP) Policy Manual and National Renewable Energy Laboratory (NREL) Standard Work Specifications effective July 1, ~~2017~~ 2018. The WAP Policy Manual is located at the department's web site at http://dphhs.mt.gov/hcsd/energyassistance.aspx or a copy may be obtained from the Department of Public Health and Human Services, Human and Community Services Division, Intergovernmental Human Services Bureau, P.O. Box 202956, Helena, MT 59620. The NREL Standard Work Specifications are located at the NREL web site at https://sws.nrel.gov/.

AUTH: 53-2-201, 90-4-201, MCA
IMP: 53-2-201, 90-4-201, 90-4-202, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) is proposing the amendment of ARM 37.71.102, 37.71.301, 37.71.401, 37.71.601, and 37.71.602 pertaining to the Low Income Weatherization Assistance Program (LIWAP). LIWAP is a program to help low income households save home heating costs and address health and safety issues. The department proposes to make the following changes to its administrative rules governing LIWAP.

ARM 37.71.102, 37.71.301, and 37.71.601

The department is proposing amendments to ARM 37.71.102(1)(c) and 37.71.301(3). The amendments replace the term "handicapped low-income persons" with "persons with disabilities." The preferred way of describing a person who has a condition that causes a serious impairment is now "person with a disability" rather than "handicapped person" or "disabled person." The reason for this change in terminology is to emphasize that the individual is foremost a person like anyone else although the person has a disability rather than being a person who is solely defined by his or her disability. In ARM 37.71.301(3), the department is proposing to add the word "language" to be consistent with current rule drafting styles.

Rule amendments to ARM 37.71.102, 37.71.301, 37.71.401, and 37.71.601(5) and (6) specify that priority for weatherization services will be based on special considerations for households with elderly members, members with a disability, households with children, energy usage, and energy burden.

In ARM 37.71.601(5) the proposed amendments identify appropriate members to be consistent with the proposed text amendments in ARM 37.71.102 and 37.71.301.

The language "households with children" in ARM 37.71.601(5)(c) is being added to ensure special consideration is given when prioritizing weatherization assistance for households with children.

ARM 37.71.401

The department is proposing amendments to clarify terms used in this rule. This is necessary to ensure defined terms are interpreted as the department intends.

It is necessary to add a definition of "child" to correspond with the proposed amendments of ARM 37.71.102, 37.71.301, and 37.71.601, explaining that a child is anyone under the age of 18.

It is necessary to add a definition of "disability" to correspond with the proposed amendments of ARM 37.71.102, 37.71.301, and 37.71.601 explaining that a disability is as defined in 20 CFR 416.905, which is the basic definition of disability for Social Security law purposes.

It is necessary to add a definition of "elderly" to correspond with the proposed amendments of ARM 37.71.102, 37.71.301, and 37.71.601 explaining that an elderly person is anyone 60 years of age or older.

The definition of "energy burden" is being added to correspond with the proposed amendment of ARM 37.71.601, changing the way the priority list is generated to include energy burden.

ARM 37.71.601

This rule currently requires the weatherization priority list to be generated based on energy usage with special consideration for households comprised of elderly or people with disabilities, and children. It was noted that generating the priority list based on energy usage identifies and provides weatherization assistance to households with the primary heat source of electricity. In several instances these dwellings were newer and a limited number of measures were needed. The program intends to change the way the weatherization priority list is generated using energy burden; energy usage; and giving special consideration to households with children, as well as households with elderly and people with disabilities. This proposed rule change is consistent with 10 CFR 440.16, the Department of Energy's minimum program requirements, for generating a priority list.

The department is proposing to amend (10) to require the circumstances that justify a deferral outlined in the July 1, 2018 Weatherization Assistance Program Policy and Procedure Manual will be used for the 2018-2019 program year. This is necessary to ensure that deferrals are processed as the department intends.

ARM 37.71.602

The department is proposing to amend ARM 37.71.602(2) to require the use of the current edition of 10 CFR 440 amended through July 1, 2018. This is necessary to ensure the most current edition of 10 CFR 440 is utilized. The department is also correcting a citation reference by removing the word "part" when citing the Code of Federal Regulations (CFR).

The department is proposing to amend (4) by providing that the updated Weatherization Assistance Program Policy and Procedure Manual will be used for the 2018-2019 program year. This is necessary to ensure weatherization measures are installed as the department intends.

In addition, the department is proposing to further amend (4) to incorporate by reference the updated Standard Work Specifications (SWS) on the National

Renewal Energy Laboratory (NREL) website, amended through July 1, 2018. The amendment also provides the link to the NREL website where the Standard Work Specifications are stored. This is necessary to ensure the most current weatherization standards are utilized.

Fiscal Impact

The Low Income Energy Assistance Program, Department of Energy, Bonneville Power Associates are 100% federally funded. Montana Dakota Utilities, Northwestern Energy are 100% utility funds. U.S. Department of Energy funding in 2018 is based on the 2016 allocation levels and will be updated once the Federal Fiscal Year (FFY) 2018 budget is passed and the updated allocations have been issued to the State of Montana. The department estimates that Montana will receive the same amount in utility funds, compared to last heating season. It is estimated that 20,000 households will qualify for weatherization benefits this year which is comparable to last year.

This new method of determining priority will cause some households to have a lower priority and other households to have a higher priority than under the current rules.

5. The department intends to apply ARM 37.71.601(10) and 37.71.602 retroactively to July 1, 2018. A retroactive application of these proposed rules does not result in a negative impact to any affected party. ARM 37.71.102, 37.71.301, 37.71.401, and 37.71.601(5), (5)(a), and (6) will be effective the day after publication of the final notice.

6. 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: Todd Olson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., September 7, 2018.

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

8. 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 that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 6 above or may be made by completing a request form at any rules hearing held by the department.

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

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Jennifer C. Kaleczyc
Jennifer C. Kaleczyc
Rule Reviewer

/s/ Sheila Hogan
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State July 31, 2018.

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

In the matter of the amendment of ARM 37.70.305, 37.70.311, 37.70.401, 37.70.402, 37.70.406, 37.70.407, 37.70.408, 37.70.601, and 37.70.607 pertaining to Low Income Energy Assistance Program (LIEAP)	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On August 30, 2018, at 11:30 a.m., the Department of Public Health and Human Services will hold a public hearing in Room 207 of the Department of Public Health and Human Services building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on August 17, 2018, to advise us of the nature of the accommodation that you need. Please contact Todd Olson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-9503; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.70.305 APPLICATION (1) through (3) remain the same.

(4) Publicly subsidized housing households whose energy costs are included as a fixed portion of their rent or households who reside in publicly subsidized housing and have an obligation to pay a base-load electric bill are not eligible for a regular LIEAP benefit computed using the benefit matrices and multipliers in the LIEAP Benefit Award Matrix and Table of Multipliers for the ~~2017-2018~~ 2018-2019 heating season. However, these households are eligible for weatherization assistance as provided in ARM Title 37, chapter 71 and a modified LIEAP benefit. The modified LIEAP benefit is equal to five percent of the amount of a regular LIEAP benefit computed using the benefit matrices and multipliers in ARM 37.70.601 or a minimum payment of $25, whichever is greater, paid to the household annually. Households determined eligible for the modified LIEAP benefit whose economic and housing situation does not change are eligible for a period of five years.

(5) through (7) remain the same.

AUTH: 53-2-201, MCA

IMP: 53-2-201, MCA

37.70.311 PROCEDURES FOLLOWED IN PROCESSING APPLICATIONS AND VERIFIABLE ELIGIBILITY REQUIREMENTS (1) through (6) remain the same.

(7) Eligibility in regard to income is based on the household's income in the ~~12~~ six months immediately preceding the month of application, which will be annualized by. ~~If the household is ineligible using income in the 12 months preceding the month of application, eligibility will be determined by ascertaining the household's gross income in the three months immediately preceding the month of application and~~ multiplying that figure by ~~four~~ two to arrive at the household's annual income ~~based on the three-month period~~.

(8) remains the same.

AUTH: 53-2-201, MCA
IMP: 53-2-201, MCA

37.70.401 DEFINITIONS (1) "Annual gross income" means all nonexcluded income including, but not limited to, wages, salaries, commissions, tips, profits, gifts, interest or dividends, retirement pay, workers' compensation, unemployment compensation, social security retirement and disability payments, supplemental security income payments, veterans administration payments, cash public assistance benefits such as temporary assistance for needy families or tribal, state, or county general relief, and capital gains received by the members of the household in the ~~12~~ six months immediately preceding the month of application, which will be annualized by multiplying that figure by two.

(a) For households with self-employment income, annual gross income means gross receipts for the ~~12~~ six months preceding the month of application ~~or the three months annualized, based on whichever method was used in determining eligibility~~ minus self-employment deductions for the ~~12~~ six months preceding the month of application which will be annualized by multiplying that figure by two.~~or the three months annualized, based on whichever method was used in determining eligibility.~~ For households with self-employment income, annual gross income means annual gross receipts minus self-employment deductions.

(2) through (4) remain the same.

(5) "Child" means a person who is under age 18.

(5) through (21) remain the same, but are renumbered (6) through (22).

~~(22)~~ (23) "Member receiving supplemental security income (SSI), or TANF-funded cash assistance~~, or county or tribal general assistance (GA)~~" means any member of a household whose needs are included in the SSI, TANF-funded cash assistance, ~~indigent assistance or tribal GA grant,~~ or any person whose income and resources are considered in determining eligibility for those programs.

(23) remains the same, but is renumbered (24).

~~(24)~~ (25) "Modified LIEAP benefit" means the amount paid to eligible households who reside in publicly subsidized housing and whose energy costs are included as a fixed portion of their rent or who have an obligation to pay a base-load electric bill. The modified LIEAP benefit is equal to 5 percent of the amount of a regular LIEAP benefit computed using the benefit matrices and multipliers in the

LIEAP Benefit Award Matrix and Table of Multipliers for the ~~2017-2018~~ 2018-2019 heating season or a minimum payment of $25, whichever is greater paid to the household annually. Households determined eligible for the publicly subsidized housing modified LIEAP benefit, whose economic and housing situation does not change, are income eligible for a period of five years.

(25) through (39) remain the same, but are renumbered (26) through (40).

AUTH: 53-2-201, MCA
IMP: 53-2-201, MCA

37.70.402 GENERAL ELIGIBILITY REQUIREMENTS, ELIGIBILITY REQUIREMENTS FOR CERTAIN TYPES OF INDIVIDUALS, AND HOUSEHOLDS

(1) remains the same.

(2) Except as provided elsewhere in this rule, households which consist solely of members who are eligible for and receiving supplemental nutritional assistance payments (SNAP), supplemental security income (SSI), or TANF-funded cash assistance~~, or county or tribal general assistance~~ are automatically financially eligible for LIEAP benefits.

(3) Households which consist of members receiving SNAP, SSI, or TANF-funded cash assistance, ~~or county or tribal general assistance,~~ and other individuals whose income and resources were not considered in determining eligibility for SNAP, SSI, or TANF-funded cash assistance~~, or general assistance~~ are not automatically eligible for LIEAP benefits but must meet the financial requirements set forth in this rule.

(4) Individuals living in shelters, including but not limited to, recipients of SNAP, SSI, or TANF-funded cash assistance, ~~or county or tribal general assistance,~~ are not eligible for LIEAP benefits. Individuals living in licensed group-living situations as defined in ARM 37.70.401 may be eligible if they meet all other requirements for eligibility. Individuals living in licensed group-living situations which are not group-living situations as defined in ARM 37.70.401 are not eligible for LIEAP benefits.

(5) and (6) remain the same.

(7) Residents of publicly subsidized housing whose energy costs are included as a fixed portion of their rent or who reside in publicly subsidized housing and have an obligation to pay a base-load electric bill are not eligible for a regular LIEAP benefit computed using the benefit matrices and multipliers in the LIEAP Benefit Award Matrix and Table of Multipliers for the ~~2017-2018~~ 2018-2019 heating season. However, these households are eligible for weatherization assistance as provided for in ARM Title 37, chapter 71 and a modified LIEAP benefit. The modified LIEAP benefit is equal to five percent of the amount of a regular LIEAP benefit, or a minimum payment of $25, whichever is greater, paid to the household annually. Households determined eligible for the modified LIEAP benefit whose economic and housing situation does not change are eligible for a period of five years.

(8) and (9) remain the same.

~~(10) Benefits may be denied to any person who, having been prioritized for weatherization services as a high excess energy user, according to the criteria set~~

~~forth in ARM 37.71.401 and 37.71.601, refuses, for reasons within his or her control, energy conservation services for the weatherization assistance program (WAP). The person may become eligible for benefits again by accepting the WAP energy conservation services.~~

AUTH: 53-2-201, MCA
IMP: 53-2-201, MCA

37.70.406 INCOME STANDARDS (1) Households with one through seven members with annual gross income at or below 60 percent of the estimated state median are eligible for LIEAP benefits on the basis of income. Households with eight or more members are eligible for LIEAP benefits on the basis of income only if the household's annual gross income is at or below 150 percent of the ~~2017~~ 2018 U.S. Department of Health and Human Services poverty guidelines for a household of that size. Households with annual gross income above the applicable income standard are ineligible for LIEAP benefits, unless the household is automatically financially eligible for LIEAP benefits as provided in ARM 37.70.402 because all members of the household are receiving SNAP, SSI, or TANF-funded cash assistance~~, or county or tribal general assistance~~.

~~(2) If a household that is otherwise eligible for LIEAP benefits has annual gross income in excess of the applicable income standard, the local contractor will determine the household's total gross monthly income for the three months immediately preceding the month in which the application for assistance was filed. If the product of four multiplied by the total gross monthly income for the three months immediately preceding the month of application is at or below the applicable income standard, the household is eligible for a three-month annualized income benefit as provided in ARM 37.70.601.~~

~~(3)~~ (2) The department adopts and incorporates by reference the department's Low Income Energy Assistance Program (LIEAP) Table of Income Standards, ~~2017-2018~~ 2018-2019 heating season. The LIEAP table of income standards, ~~2017-2018~~ 2018-2019 heating season, is located at the department's web site at http://www.dphhs.mt.gov/hcsd/energyassistance.aspx or a copy may be obtained from the Department of Public Health and Human Services, Human and Community Services Division, Intergovernmental Human Services Bureau, P.O. Box 202956, Helena, MT 59620.

(4) remains the same, but is renumbered (3).

AUTH: 53-2-201, MCA
IMP: 53-2-201, MCA

37.70.407 EXCLUDED INCOME (1) The following types of unearned income are excluded or deducted:

(a) through (s) remain the same.

(t) foster care payments received for a foster child or adult if the LIEAP applicant has chosen to exclude the foster child or adult from the household; such payments are not excluded if the applicant has chosen to include the foster adult or child as a member of the household. Additionally, any foster care payments

received during the ~~12~~ six months immediately preceding the month of application for a foster child or adult who is no longer living in the household at the time of application shall be excluded;

(u) through (w) remain the same.

(x) nonrecurring lump sum payments, such as, but not limited to, federal and state income tax refunds, one time insurance payments or worker's compensation payments and retroactive SSI or SSDI payments, but only to the extent that the payment does not constitute income or benefits for any of the ~~12~~ six months immediately preceding the month of application. The funds received from a nonrecurring lump sum payment are considered as a resource until the funds are spent, however;

(y) through (ab) remain the same.

AUTH: 53-2-201, MCA
IMP: 53-2-201, MCA

37.70.408 RESOURCES (1) through (3) remain the same.

(4) The department adopts and incorporates by reference the department's LIEAP Table of Resource Standards, for the ~~2017-2018~~ 2018-2019 heating season. The LIEAP table of resource standards is located at the department's web site at http://www.dphhs.mt.gov/hcsd/energyassistance.aspx or a copy may be obtained from the Department of Public Health and Human Services, Human and Community Services Division, Intergovernmental Human Services Bureau, P.O. Box 202956, Helena, MT 59620.

(5) remains the same.

AUTH: 53-2-201, MCA
IMP: 53-2-201, MCA

37.70.601 BENEFIT AWARD (1) The department adopts and incorporates by reference the department's LIEAP Benefit Award Matrix and Table of Multipliers, for the ~~2017-2018~~ 2018-2019 heating season. The LIEAP Benefit Award Matrix is located at the department's web site at http://www.dphhs.mt.gov/hcsd/energyassistance.aspx or a copy may be obtained from the Department of Public Health and Human Services, Human and Community Services Division, Intergovernmental Human Services Bureau, P.O. Box 202956, Helena, MT 59620. These matrices are used to establish the benefit payable to an eligible household for a full heating season. The benefit varies by:

(a) through (g) remain the same.

(2) The benefit payable to an eligible household will be computed by multiplying the applicable amount in the table of base benefit levels found in the LIEAP Benefit Award Matrix for the ~~2017-2018~~ 2018-2019 heating season by the applicable matrix amount in the table of income/climatic adjustment multipliers found in the LIEAP Benefit Award Matrix for the ~~2017-2018~~ 2018-2019 heating season.

(3) remains the same.

(4) Publicly subsidized households whose energy costs are included as a fixed portion of their rent or who reside in publicly subsidized housing and have an

out-of-pocket obligation to pay a base-load electric bill are not eligible for a regular LIEAP benefit computed using the benefit matrices and multipliers in the LIEAP Benefit Award Matrix and Table of Multipliers for the ~~2017-2018~~ 2018-2019 heating season. However, these households may be eligible for a modified LIEAP benefit. The modified LIEAP benefit is equal to five percent of the amount of a regular LIEAP benefit computed using the benefit matrices and multipliers in the LIEAP Benefit Award Matrix and Table of Multipliers for the ~~2017-2018~~ 2018-2019 heating season or a minimum payment of $25, whichever is greater, would be paid to the household annually. Households determined eligible for the modified LIEAP benefit whose economic and housing situation does not change would be determined eligible for a period of five years.

AUTH: 53-2-201, MCA
IMP: 53-2-201, MCA

37.70.607 AMOUNT AND METHOD OF PAYMENT (1) Eligible households that are billed for energy costs directly by the fuel vendor will be paid a benefit in the amount computed using the benefit matrices and multipliers in the LIEAP Benefit Award Matrix and Table of Multipliers for the ~~2017-2018~~ 2018-2019 heating season and will be paid as follows:

(a) through (d) remain the same.

(2) Eligible households that pay energy costs for heating their homes that are not billed directly by the fuel vendor because the fuel account is not in the name of a member of the household will be reimbursed for eligible energy costs paid by the household, provided that the amount paid to the household for the heating season does not exceed the benefit amount computed using the benefit matrices and multipliers in the LIEAP Benefit Award Matrix and Table of Multipliers for the ~~2017-2018~~ 2018-2019 heating season. Reimbursement will be made by check payable to the household. The household must provide receipts to document paid eligible energy costs claimed. The household must provide receipts to support the paid eligible energy costs to the local contractor by June 20.

(3) and (4) remain the same.

AUTH: 53-2-201, MCA
IMP: 53-2-201, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) is proposing the amendment of ARM 37.70.305, 37.70.311, 37.70.401, 37.70.402, 37.70.406, 37.70.407, 37.70.408, 37.70.601, and 37.70.607 pertaining to Low Income Energy Assistance Program (LIEAP). LIEAP is a federally funded program to help low income households pay their home heating costs. The department proposes to make the following changes to its administrative rules governing LIEAP.

ARM 37.70.305, 37.70.401, 37.70.402, 37.70.601, and 37.70.607

The department is proposing to amend these rules by providing that an updated LIEAP Benefit Award Matrix will be used for the 2018-2019 heating season. ARM 37.70.601 provides that, in most cases, an eligible household's benefit is computed by multiplying the applicable amount in the table of base benefits found in the LIEAP Benefit Award Matrix by the applicable multiplier from the table of income/climatic adjustment multipliers also found in the LIEAP Benefit Award Matrix. The amounts in the table of base benefits vary based on the type of heating fuel the household uses and the type and size of the household's dwelling. The benefit amounts also take into consideration available funding, fuel costs, and the number of households expected to receive benefits in a given heating season, all of which change from year to year. The amounts in the benefit tables in the LIEAP Benefit Award Matrix for 2018-2019 are being revised based on estimates of the amount of funds available to pay LIEAP benefits for the 2018-2019 heating season, the estimated number of households that will apply and be found eligible for LIEAP for the 2018-2019 season, and fuel cost projections for the 2018-2019 heating season. If the amounts in the benefit tables were not updated for the 2018-2019 heating season, the amount of benefits paid out for the season might exceed available funding or a large amount of funds that could have helped low income households heat their homes might go unspent.

In addition to the table of base benefits, the LIEAP Benefit Award Matrix also contains a table of income/climatic adjustment multipliers. These multipliers are based on a household's income as a percentage of the federal poverty guidelines and also on what part of the state the household lives in. The state is divided into ten regions with different multipliers to take into account the climatic differences from one part of the state to another, which have an impact on residential heating costs. It isn't necessary to revise the multipliers annually because the factors on which they are based do not vary significantly from year to year. The department is not proposing any changes to the table of income/climatic adjustment multipliers in the LIEAP Benefit Award Matrix for 2018-2019 for this reason.

ARM 37.70.406

The department proposes to amend ARM 37.70.406 to provide that it will use the U.S. Department of Health and Human Services' poverty guidelines for 2018-2019, in the table of income standards used to determine eligibility for LIEAP for the 2018-2019 heating season. This change is necessary to take into account increases in the cost of living. The department uses the poverty guidelines for the current year because they are usually higher than the guidelines for the previous year, resulting in higher standards for the current heating season. If the department did not use the updated guidelines, some households might be ineligible for LIEAP due to inflationary increases in the household's income that do not reflect an increase in buying power.

ARM 37.70.408

The department is proposing to amend ARM 37.70.408 by updating the date of the LIEAP Table of Nonbusiness Resource Limits used to determine LIEAP eligibility on the basis of resources. This is necessary because (5) provides that the dollar limits on nonbusiness resources will be revised annually to adjust for inflation by multiplying the current dollar limits by either the percentage increase in the consumer price index (CPI) for the previous calendar year or three percent, whichever is less. The increase in the CPI for 2016 was 0.7 percent and in 2017 it was 2.1 percent. The nonbusiness resource limits for the 2018-2019 heating season will also increase by 2.1 percent. If the resource limits were not revised annually to adjust for inflation, some households might be ineligible for LIEAP because their resources exceed the resource limit although the buying power of their resources was less than in previous years due to inflation.

ARM 37.70.311, 37.70.401, 37.70.406, and 37.70.407

The department is proposing to amend ARM 37.70.311, 37.70.401, 37.70.406, and 37.70.407 to change LIEAP eligibility related to household income based on 12 months to income based on six months annualized. This will allow for more low income households to qualify for LIEAP. The U.S. Department of Health and Human Services, Administration for Families and Children, Office of Community Services, the federal agency that administers LIEAP, issued guidance to encourage states to develop LIEAP policies and procedures that do not discourage, delay, or deny LIEAP benefits to eligible persons. At times, the current LIEAP eligibility requirement related to household income based on 12 months discourages, delays, or causes denial of LIEAP benefits to eligible persons. Often LIEAP applications are incomplete due to missing income verification. If a household fails to provide information or documentation necessary for a determination of eligibility within 45 days of the date of the most recent request for additional information, the application will be denied as per ARM 37.70.311(1)(c). Changing the household income verification from 12 months to six months annualized will decrease the number of denials and expedite the issuance of LIEAP benefits to low income households.

The department is proposing to amend these rules to remove the LIEAP eligibility requirement related to household income based on three months preceding the month of application which is annualized by multiplying that number by four. Applicants can reapply for LIEAP assistance if their LIEAP application is denied based on the new six-month income calculation.

ARM 37.70.401

The department proposes to amend 37.70.401 to add a definition of ″child″ to clarify rule. This is necessary to ensure defined terms used in the rule are interpreted consistently as the department intends. It is necessary to add a definition of ″child″ to explain that a child is anyone under the age of 18.

ARM 37.70.401, 37.70.402, and 37.70.406

The Low Income Home Energy Program (LIHEAP) statute, as cited below identifies four federal assistance types, recipients of whom can be categorically eligible. State funded programs cannot not be designated as one such program. Section 2605(b)(2) of the LIHEAP statute, 42 U.S.C. 8624(b)(2), does not allow state funded programs as a categorically eligible program for LIHEAP. Therefore, county or tribal general assistance, both state funded programs, are being removed as designated categorically eligible programs for LIEAP.

ARM 37.70.402(10)

The department has the option to set aside up to 15 percent of the LIEAP allocation for weatherization purposes (up to 25 percent with a written waiver from the federal Office of Community Service) and is required to coordinate bill payment assistance with other federal programs, including the U.S. Department of Energy′s (DOE) Weatherization Assistance Program (WAP). Client refusal to participate in those programs cannot be grounds for suspension of bill payment assistance if the client is otherwise eligible for LIEAP. This policy will have unintended impact, especially on households in home energy crisis situations. Households with vulnerable members, such as the elderly, disabled, and children can also be impacted by this policy.

Section 2605(b)(8) of the LIHEAP statute (42 U.S.C. Section 8624(b)(8)), does not allow LIEAP benefits to be denied for refusal of weatherization services. Therefore, it is proposed that the language that allows LIEAP benefits to be denied if weatherization services are refused be removed from the LIEAP rule.

Fiscal Impact

LIEAP is 100 percent federally funded. Congress has not yet appropriated funds for the LIEAP 2018-2019 heating season but based upon the information available at this time, the department estimates that Montana will receive comparable funding to last heating season. Benefit levels for households using all types of heating fuel and for all dwelling types are expected to be comparable to the 2017-2018 heating season. It is estimated that 20,000 households will qualify for LIEAP benefits this year which is comparable to last year. As in past years, if LIEAP funds for the 2018-2019 season are appropriated at a higher level, the additional funding will allow subsequent payments to be issued to each LIEAP client.

5. The department intends to apply ARM 37.70.311, 37.70.401(1) and (1)(a), and 37.70.407 retroactively to October 1, 2017. A retroactive application of these proposed rule amendments does not result in a negative impact to any affected party.

The department intends to apply ARM 37.70.305, 37.70.401(25), 37.70.402(7), 37.70.406(1), 37.70.406(2), 37.70.408, 37.70.601, and 37.70.607 retroactively to July 1, 2018. A retroactive application of these proposed rules does not result in a negative impact to any affected party.

Rule amendments to ARM 37.70.401(5) and (23), 37.70.402(2), (3), (4), and (10), and 37.70.406(1) (the reference to General Assistance) and ARM 37.70.406(2) will be effective the day after publication of the final notice.

6. 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: Todd Olson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., September 7, 2018.

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

8. 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 that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 6 above or may be made by completing a request form at any rules hearing held by the department.

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

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Jennifer C. Kaleczyc
Jennifer C. Kaleczyc
Rule Reviewer

/s/ Sheila Hogan
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State July 31, 2018.

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

In the matter of the amendment of ARM 37.95.102, 37.95.103, 37.95.106, 37.95.161, and 37.95.162, pertaining to the federal Child Care and Development Block Grant Reauthorization Act requirements for child care facilities	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On August 31, 2018, at 1:30 p.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, at Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on August 17, 2018, to advise us of the nature of the accommodation that you need. Please contact Todd Olson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; t4elephone (406) 444-9503; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.95.102 DEFINITIONS (1) through (11) remain the same.

(12) "Early childhood assistant teacher (ECAT)" or "assistant teacher" means a facility staff member who carries out assigned care-giving and teaching tasks under the ~~direct supervision~~ guidance and oversight of an early childhood lead teacher or center director.

(13) remains the same.

(14) "Early childhood teacher (ECT)" or "teacher" means a facility staff member who is responsible for the direct care, teaching, and supervision of children in a day care or child care facility. This term includes directors, substitutes, ECAT, and ECLT.

(15) through (60) remain the same.

AUTH: 52-2-704, 53-4-212, 53-4-503, MCA
IMP: 52-2-702, 52-2-703, 52-2-704, 52-2-713, 52-2-723, 52-2-725, 52-2-731, 52-2-735, 52-2-736, 53-2-201, 53-4-211, 53-4-212, 53-4-601, 53-4-611, 53-4-612, MCA

37.95.103 FAMILY, FRIEND, AND NEIGHBOR (FFN) AND RELATIVE CARE EXEMPT (RCE) PROVIDERS ~~(RCP)~~: REQUIREMENTS AND PROCEDURES (1) The applicant and all adults who reside in the applicant's home must provide authorization for background checks pursuant to ARM 37.95.161~~(1)~~.

(2) and (3) remain the same.

(4) FFN providers must also meet the following requirements to be registered under this chapter:

(a) through (d) remain the same.

(e) hold current certification for infant, child and adult CPR, infant choking response, and standard first aid. CPR certification must be completed in a hands-on setting; ~~and~~

(f) complete at least eight hours of approved annual training per year~~. This training must include health and safety training.~~ ; and

(g) complete a health and safety review course at least every three years. The health and safety review course may count towards the annual training required in (f).

(5) The department may investigate and inspect the conditions and qualifications of any FFN provider and the home that care is provided in.

(6) FFN providers must meet the applicable requirements of ARM 37.95.115, 37.95.121, 37.95.124, 37.95.126, 37.95.127, 37.95.171, 37.95.172, 37.95.182, 37.95.184, 37.95.706, 37.95.708, 37.95.1001, 37.95.1003, 37.95.1005, 37.95.1011, 37.95.1015, and 37.95.1016.

(7) ~~Relative care~~ RCE providers are exempt from (4)(e) and (f), (5), and (6).

AUTH: 52-2-704, MCA
IMP: 52-2-704, 52-2-713, 52-2-721, 52-2-722, 52-2-731 MCA

37.95.106 CHILD CARE FACILITIES, REGISTRATION, OR LICENSING

(1) Any individual, agency, or group may apply for a license to operate a ~~day~~ child care center, or may apply for a registration certificate to operate a family ~~day~~ child care ~~home~~ facility or a group ~~day~~ child care ~~home~~ facility. Applications may be obtained from the Department of Public Health and Human Services, Quality Assurance Division, Licensure Bureau, P.O. Box 202953, 2401 Colonial Drive, Helena, MT 59620-2953.

(2) remains the same.

(3) Before a regular child care center license may be granted, the applicant must have the following:

(a) and (b) remain the same.

(c) proof of current fire and liability insurance coverage for the ~~day~~ child care center;

(d) through (f) remain the same.

(g) ~~meet~~ satisfactory background check ~~requirements pursuant to ARM 37.95.161 on the provider and staff, over age 18~~ results;

(h) through (j) remain the same.

(4) Before a regular group or family child care facility registration certificate may be granted, the applicant must have the following:

(a) remains the same.

(b) proof of current fire and liability insurance coverage for the provision of ~~day~~ child care in the ~~home~~ facility;

(c) ~~a criminal background and child and adult protective services check on the provider or staff member over age 18 and persons over age 18 residing in the day care facility prior to any services being provided by an individual covered by this requirement~~ satisfactory background check results;

(d) a written emergency disaster plan in accordance with ARM 37.95.124~~. For registration certificate renewal there must also be documentation of eight annual emergency evacuation practices, including when each drill took place and how long it took to evacuate everyone from the facility~~; and

(e) and (5) remain the same.

(6) A ~~day~~ child care facility may not provide care for more than the number of children permitted at any one time by its ~~day~~ child care license or registration certificate.

(7) and (8) remain the same.

AUTH: 52-2-704, 53-4-503, MCA
IMP: 52-2-704, 52-2-722, 52-2-723, 52-2-731, 53-4-504, 53-4-507, MCA

37.95.161 CHILD CARE FACILITIES: ~~CRIMINAL~~ FINGERPRINT AND BACKGROUND CHECK~~S~~ REQUIREMENTS ~~(1) A satisfactory criminal background, motor vehicle, and child and adult protective services check is required for each child care provider, on all staff members over the age of 18, and all persons over the age of 18 residing in the child care facility or who stays in the child care facility regularly or frequently.~~

~~(2) If the provider, staff member, volunteer, or resident has always lived in Montana, a Montana based criminal background check will be conducted based upon a name based criminal records check.~~

~~(3) If the provider, staff member, volunteer, resident of the facility, or any person who regularly or frequently stays in the facility, has lived outside of Montana for any portion of the previous five years, that person must submit a completed fingerprint card so that a fingerprint based criminal records check can be requested~~

~~(4) If an applicant has lived in states other than Montana, a check will be made of the violent offender and criminal history registries if this information is available for states in which the applicant has lived.~~

~~(5) If after 45 days, the department has been unable to obtain results of a criminal records check for an applicant who has lived in Montana for at least five years, the applicant must sign an affidavit attesting to his lack of criminal history or to the details of existing criminal history. The affidavit will be accepted in lieu of receipt of results from a criminal history check.~~

~~(6) An applicant who has not lived in Montana for at least five years cannot be licensed without receipt of results of a criminal records check from every state in which the applicant has lived since the age of 18.~~

~~(7) Persons formerly licensed as day care providers will be treated as new applicants if the former provider has not been licensed for a period of more than one~~

~~year or if the provider has lived out-of-state for any period of time since being licensed in Montana.~~

~~(8) A name based check for criminal records will be used for applicants who have lived in Montana since the expiration of their previous license or registration if it has been less than one year since the expiration of the license.~~

(1) A fingerprint background check by the Montana Department of Justice and Federal Bureau of Investigation is required prior to working in a child care facility and every five years thereafter.

(a) Fingerprints must be processed by a trained individual within a certified fingerprinting agency. Results will be transmitted electronically to the department by the Montana Department of Justice.

(b) Satisfactory results of background checks must be received prior to approval of any new application or staff approval. Unsatisfactory results are those crimes and offenses listed in ARM 37.95.173 and 37.95.176, or the adverse licensure actions described in ARM 37.95.175.

(2) A check of the Montana Sex Offender Registry and the national Sexual Offender Registry from the National Criminal Information Center (NCIC) is required prior to working in a child care facility and annually thereafter.

(3) A child protective services check for Montana and any state where the individual has resided in the preceding five years is required prior to working in a child care facility and annually thereafter.

(4) A name-based criminal records check for Montana and any state where the individual has resided in the preceding five years is required prior to working in a child care facility and annually thereafter.

AUTH: 52-2-704, MCA
IMP: 52-2-704, 52-2-723, 52-2-731, MCA

37.95.162 CHILD CARE FACILITIES: REQUIRED ANNUAL TRAINING

(1) through (5) remain the same.

(6) All directors, substitutes, ECTs, ECLTs, and ECATs must complete a health and safety review course at least every three years. The health and safety review course will count towards the annual training required in (1).

AUTH: 52-2-704, MCA
IMP: 52-2-704, 52-2-723, 52-2-731, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) proposes to amend ARM 37.95.102, 37.95.103, 37.95.106, 37.95.161, and 37.95.162, pertaining to licensing requirements for child care facilities.

As a result of the Child Care and Development (CCDF) Block Grant Reauthorization Act (Act), the U.S. Office of Child Care has directed states to implement new requirements which focus on child care health and safety in addition to improving the quality of care that children receive from licensed or registered child care providers.

While a majority of these requirements are in place, there are additional rule amendments that the department must implement by September 30, 2018 in order to substantially comply with the Act and continue to receive federal funding after September 30.

The department also proposes some general updates in terminology, which are necessary to promote consistency across the Child Care Licensing Program (CCLP)'s varied provider types and reflect current practices and verbiage used in the industry and the Act.

ARM 37.95.102

The department propose to amend the supervisory language in (12) to permit providers flexibility in staffing. Without this amendment, providers face challenges meeting the staffing requirements set forth in the rule. In (14), the department proposes to amend the types of staff to which the requirements apply.

ARM 37.95.103 and 37.95.162

The Act require states to include ongoing health and safety training. The proposed amendment reflects the department's interpretation of this requirement for Family, Friend, and Neighbor (FFN) and child care facilities providers. The department believes the proposed amendments meet this federal requirement with minimum impact.

ARM 37.95.106

The department proposes to amend this rule to include staff of any age. It is also proposed that language in this rule is revised to exclude staff from working in a facility prior to receiving satisfactory background check results.

ARM 37.95.161

The Act require states to adopt more comprehensive background check procedures and criminal history analysis for providers, staff employed by providers, or those persons over the age of 18 who reside in, or are regularly present around child care facilities. The proposed amendments are necessary to meet this detailed federal requirement.

FISCAL IMPACT

The department believes that there is no direct, determinable fiscal impact. The rule amendments will require additional resources, including data base changes, the development of new training curriculum, and fingerprint processing. CCDF funds will be the funding source.

As for providers, there may be an increased cost to providers who elect to pay for fingerprint and background checks for their staff. A fingerprint background check will be required for all staff at all child care facilities.

5. 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: Todd Olson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., September 10, 2018.

6. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this 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 that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

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

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Flint Murfitt
Flint Murfitt
Rule Reviewer

/s/ Sheila Hogan
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State July 31, 2018.

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

In the matter of the amendment of ARM 37.34.3005, 37.85.104, 37.85.105, 37.85.106, 37.86.705, 37.86.805, 37.86.1006, 37.86.1101, 37.86.1105, 37.86.1406, 37.86.1807, 37.86.2005, 37.86.2605, 37.86.2803, 37.86.2806, 37.86.2905, 37.86.2912, 37.86.3007, 37.86.3109, 37.86.3205, and 37.86.3607 pertaining to updating the effective dates of non-Medicaid and Medicaid fee schedules	)))))))))))))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On August 30, 2018, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on August 17, 2018, to advise us of the nature of the accommodation that you need. Please contact Todd Olson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-9503; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.34.3005 REIMBURSEMENT FOR SERVICES OF MEDICAID FUNDED DEVELOPMENTAL DISABILITIES HOME AND COMMUNITY-BASED SERVICES (HCBS) WAIVER PROGRAMS (1) remains the same.

(2) The department adopts and incorporates by this reference the rates of reimbursement for the delivery of services and items available through each Home and Community-Based Services Waiver Program as specified in the Montana Developmental Disabilities Program Manual of Service Rates and Procedures of Reimbursement for Home and Community-Based Services (HCBS) 1915c, 0208, ~~1037~~ and 0667 Waiver Programs, effective ~~July 1, 2018~~ September 1, 2018. A copy of the manual may be obtained through the Department of Public Health and Human Services, Developmental Services Division, Developmental Disabilities Program,

111 N. Sanders, P.O. Box 4210, Helena, MT 59604-4210 and at http://dphhs.mt.gov/dsd/developmentaldisabililities/DDPratesinf.

AUTH: 53-2-201, 53-6-402, MCA
IMP: 53-2-201, 53-6-402, MCA

37.85.104 EFFECTIVE DATES OF PROVIDER FEE SCHEDULES FOR MONTANA NON-MEDICAID SERVICES (1) The department adopts and incorporates by reference the fee schedule for the following programs within the Addictive and Mental Disorders Division and Developmental Services Division on the dates stated:

(a) Mental health services plan provider reimbursement, as provided in ARM 37.89.125, is effective ~~July 1, 2018~~ September 1, 2018.

(b) 72-hour presumptive eligibility for adult-crisis stabilization services reimbursement for services, as provided in ARM 37.89.523, is effective ~~July 1, 2018~~ September 1, 2018.

(c) Youth respite care services, as provided in ARM 37.87.2203, is effective ~~July 1, 2018~~ September 1, 2018.

(d) Substance use disorder services provider reimbursement, as provided in ARM 37.27.905, is effective ~~July 1, 2018~~ September 1, 2018.

(2) remains the same.

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

37.85.105 EFFECTIVE DATES, CONVERSION FACTORS, POLICY ADJUSTERS, AND COST-TO-CHARGE RATIOS OF MONTANA MEDICAID PROVIDER FEE SCHEDULES (1) remains the same.

(2) The department adopts and incorporates by reference, the resource-based relative value scale (RBRVS) reimbursement methodology for specific providers as described in ARM 37.85.212 on the date stated.

(a) remains the same.

(b) Fee schedules are effective ~~July 1, 2018~~ September 1, 2018. The conversion factor for physician services is ~~$36.68~~ $37.99. The conversion factor for allied services is ~~$22.96~~ $23.78. The conversion factor for mental health services is ~~$23.20~~ $24.03. The conversion factor for anesthesia services is ~~$28.87~~ $29.90.

(c) remains the same.

(d) The payment-to-charge ratio is effective ~~January 1, 2018~~ September 1, 2018 and is ~~45.59%~~ 47% of the provider's usual and customary charges.

(e) through (h) remain the same.

(i) Reimbursement for physician-administered drugs described in ARM 37.86.105 is determined in 42 CFR 414.904 (2016). The department adopts ~~102.83%~~ 106% of the Average Sale Price (ASP), effective ~~January 1, 2018~~ September 1, 2018.

(j) Reimbursement for vaccines described at ARM 37.86.105 is effective ~~July 1, 2018~~ September 1, 2018.

(3) The department adopts and incorporates by reference, the fee schedule for the following programs within the Health Resources Division, on the date stated.

(a) The inpatient hospital services fee schedule and inpatient hospital base fee schedule rates including:

(i) the APR-DRG fee schedule for inpatient hospitals as provided in ARM 37.86.2907, effective ~~March 1, 2018~~ September 1, 2018; and

(ii) the Montana Medicaid APR-DRG relative weight values, average national length of stay (ALOS), outlier thresholds, and APR grouper version ~~34~~ 35 are contained in the APR-DRG Table of Weights and Thresholds effective ~~March 1, 2018~~ September 1, 2018. The department adopts and incorporates by reference the APR-DRG Table of Weights and Thresholds effective ~~March 1, 2018~~ September 1, 2018.

(b) The outpatient hospital services fee schedules including:

(i) remains the same.

(ii) the conversion factor for outpatient services on or after ~~March 1, 2018~~ September 1, 2018 is ~~$49.46~~ $51.22;

(iii) remains the same.

(iv) the bundled composite rate of ~~$244.47~~ $252.00 for services provided in an outpatient maintenance dialysis clinic effective on or after ~~January 1, 2018~~ September 1, 2018.

(c) The hearing aid services fee schedule, as provided in ARM 37.86.805, is effective ~~March 1, 2018~~ September 1, 2018.

(d) The Relative Values for Dentists, as provided in ARM 37.86.1004, reference published in ~~2017~~ 2018 resulting in a dental conversion factor of ~~$32.77~~ $33.94 and fee schedule is effective ~~March 1, 2018~~ September 1, 2018.

(e) The dental services covered procedures, the Dental and Denturist Program Provider Manual, as provided in ARM 37.86.1006, is effective ~~March 1, 2018~~ September 1, 2018.

(f) The outpatient drugs reimbursement, dispensing fees range as provided in ARM 37.86.1105(3)(b) is effective ~~July 1, 2018~~ September 1, 2018:

(i) for pharmacies with prescription volume between 0 and 39,999, the minimum is $2.75 and the maximum is ~~$14.55~~ $15.07;

(ii) for pharmacies with prescription volume between 40,000 and 69,999, the minimum is $2.75 and the maximum is ~~$12.61~~ $13.06; or

(iii) for pharmacies with prescription volume greater than 70,000, the minimum is $2.75 and the maximum is ~~$10.67~~ $11.05.

(g) remains the same.

(h) The outpatient drugs reimbursement, vaccine administration fee as provided in ARM 37.86.1105(6), will be ~~$20.68~~ $21.32 for the first vaccine and ~~$13.42~~ $13.90 for each additional administered vaccine, effective ~~July 1, 2018~~ September 1, 2018.

(i) remains the same.

(j) The home infusion therapy services fee schedule, as provided in ARM 37.86.1506, is effective ~~January 1, 2018~~ September 1, 2018.

(k) Montana Medicaid adopts and incorporates by reference the Region D Supplier Manual, effective ~~January 1, 2018~~ September 1, 2018, which outlines the Medicare coverage criteria for Medicare covered durable medical equipment, local

coverage determinations (LCDs), and national coverage determinations (NCDs) as provided in ARM 37.86.1802, effective ~~January 1, 2018~~ September 1, 2018. The prosthetic devices, durable medical equipment, and medical supplies fee schedule, as provided in ARM 37.86.1807, is effective ~~March 1, 2018~~ September 1, 2018.

(l) Fee schedules for nutrition, children's special health services, and orientation and mobility specialists as provided in ARM 37.86.2207(2), are effective ~~July 1, 2018~~ September 1, 2018.

(m) and (n) remain the same.

(o) The ambulance services fee schedule, as provided in ARM 37.86.2605, is effective ~~July 1, 2018~~ September 1, 2018.

(p) The audiology fee schedule, as provided in ARM 37.86.705, is effective ~~July 1, 2018~~ September 1, 2018.

(q) The therapy fee schedules for occupational therapists, physical therapists, and speech therapists, as provided in ARM 37.86.610, are effective ~~July 1, 2018~~ September 1, 2018.

(r) The optometric fee schedule provided in ARM 37.86.2005, is effective ~~July 1, 2018~~ September 1, 2018.

(s) The chiropractic fee schedule, as provided in ARM 37.85.212(2), is effective ~~July 1, 2018~~ September 1, 2018.

(t) The lab and imaging fee schedule, as provided in ARM 37.85.212(2) and 37.86.3007, is effective ~~July 1, 2018~~ September 1, 2018.

(u) remains the same.

(v) The Targeted Case Management for Children and Youth with Special Health Care Needs fee schedule, as provided in ARM 37.86.3910, is effective ~~March 1, 2018~~ September 1, 2018.

(w) The Targeted Case Management for High Risk Pregnant Women fee schedule, as provided in ARM 37.86.3415, is effective ~~January 1, 2018~~ September 1, 2018.

(x) The mobile imaging fee schedule, as provided in ARM 37.85.212, is effective ~~July 1, 2018~~ September 1, 2018.

(y) The licensed direct entry midwife fee schedule, as provided in ARM 37.85.212, is effective ~~July 1, 2018~~ September 1, 2018.

(z) remains the same.

(4) The department adopts and incorporates by reference, the fee schedule for the following programs within the Senior and Long Term Care Division on the date stated:

(a) Home and community-based services for elderly and physically disabled persons fee schedule, as provided in ARM 37.40.1421, is effective ~~July 15, 2018~~ September 1, 2018.

(b) Home health services fee schedule, as provided in ARM 37.40.705, is effective ~~January 1, 2018~~ September 1, 2018.

(c) Personal assistance services fee schedule, as provided in ARM 37.40.1135, is effective ~~January 1, 2018~~ September 1, 2018.

(d) Self-directed personal assistance services fee schedule, as provided in ARM 37.40.1135, is effective ~~January 1, 2018~~ September 1, 2018.

(e) Community first choice services fee schedule, as provided in ARM 37.40.1026, is effective ~~January 1, 2018~~ September 1, 2018.

(5) The department adopts and incorporates by reference, the fee schedule for the following programs within the Addictive and Mental Disorders Division on the date stated:

(a) Mental health center services for adults reimbursement, as provided in ARM 37.88.907, is effective ~~July 1, 2018~~ September 1, 2018.

(b) Home and community-based services for adults with severe disabling mental illness, reimbursement, as provided in ARM 37.90.408, is effective ~~July 15, 2018~~ September 1, 2018.

(c) Substance use disorder services reimbursement, as provided in ARM 37.27.905, is effective ~~July 1, 2018~~ September 1, 2018.

(6) The department adopts and incorporates by reference, the fee schedule for the following program within the Developmental Services Division, on the date stated: Mental health services for youth, as provided in ARM 37.87.901 in the Medicaid Youth Mental Health Services Fee Schedule, is effective ~~July 1, 2018~~ September 1, 2018.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-125, 53-6-402, MCA

37.85.106 MEDICAID BEHAVIORAL HEALTH TARGETED CASE MANAGEMENT FEE SCHEDULE (1) remains the same.

(2) The Department of Public Health and Human Services (department) adopts and incorporates by reference the Medicaid Behavioral Health Targeted Case Management Fee Schedule effective ~~January 1, 2018~~ September 1, 2018 for the following programs within the Developmental Services Division (DSD) and the Addictive and Mental Disorders Division (AMDD):

(a) through (3) remain the same.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 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) For patients who are eligible for Medicaid, the lowest of:

(i) and (ii) remain the same.

(iii) ~~97.01%~~ 100% of the Medicare Region D allowable fee; or

(iv) remains the same.

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

37.86.805 HEARING AID SERVICES, REIMBURSEMENT (1) The department will pay the lowest of the following for covered hearing aid services and items:

(a) and (b) remain the same.

(c) ~~97.01%~~ 100% of the Medicare Region D allowable fee.

(2) For items or services where no Medicare allowable fee is available, the fee schedule amount in (1)(b) will be calculated using the following methodology:

(a) remains the same.

(b) For supplies or equipment, reimbursement will be set at ~~72.8%~~ 75% of the manufacturer's suggested retail price. For items without a manufacturer's suggested retail price, the charge will be considered reasonable if the provider's acquisition cost from the manufacturer is at least 50% of the charge amount. For items that are custom-fabricated at the place of service, the amount charged will be considered reasonable if it does not exceed the average charge of all Medicaid providers by more than 20%.

(c) and (3) remain the same.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, ~~53-6-141,~~ MCA

37.86.1006 DENTAL SERVICES, COVERED PROCEDURES (1) through (4) remain the same.

(5) Covered services for adults age 21 and over include:

(a) and (b) remain the same.

(c) basic restorative services including prefabricated crown; ~~and~~

(d) extractions~~.~~; and

(e) porcelain fused to base metal crowns with prior authorization, limited to two per person per year, total. For second molars, base metal crowns only.

(6) remains the same.

(7) Full maxillary and full mandibular dentures are a Medicaid-covered service. Coverage is limited to one set of dentures every ten years. Only one lifetime exception to the ten-year time period is allowed per person if one of the following exceptions is authorized by the department:

(a) The dentures are no longer serviceable and cannot be relined or rebased; or

(b) The dentures are lost, stolen, or damaged beyond repair.

(8) Maxillary partial dentures and mandibular partial dentures are a Medicaid-covered service. Coverage is limited to one set of partial dentures every five years. Only one lifetime exception to the five-year limit is allowed per person if one of the following exceptions is authorized by the department:

(a) The partial dentures are no longer serviceable and can no longer be relined or rebased; or

(b) The partial dentures are lost, stolen, or damaged beyond repair.

(9) The limits on coverage of denture replacement may be exceeded when the department determines that the existing dentures are causing the person serious physical health problems. The dentist or denturist should indicate "replacement dentures" on the request for prior authorization of replacement dentures and document the medical necessity for the replacement.

(10) Coverage of all denture services is subject to the following requirements and limitations:

(a) A denturist may provide initial immediate full prosthesis and initial immediate partial prothesis only when prescribed in writing by a dentist. The prescription must be signed and dated within 90 days of the order and must be maintained in the patient file.

(b) Requests for full prothesis must show the approximate date of the most recent extractions, and/or the age and type of the present prosthesis.

(7) through (13) remain the same, but are renumbered (11) through (17).

~~(14)~~ (18) ~~All crowns~~ Porcelain/ceramic crowns, noble metal crowns, and bridges are not covered benefits of the Medicaid program for individuals age 21 and over.

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

37.86.1101 OUTPATIENT DRUGS, DEFINITIONS (1) and (2) remain the same.

(3) "Allowed ingredient cost" means the "Average Acquisition Cost (AAC)" or "submitted ingredient cost," whichever is lower. If AAC is not available, drug reimbursement is determined at the lesser of "Wholesale Acquisition Cost (WAC)" ~~minus 2.99%~~, "Federal Maximum Allowable Cost (FMAC)," or the "submitted ingredient cost."

(4) through (15) remain the same.

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

37.86.1105 OUTPATIENT DRUGS, REIMBURSEMENT (1) through (12) remain the same.

(13) Specialty pharmacies, hemophilia treatment centers, or centers of excellence that dispense clotting factors:

(a) not purchased through the 340B program will be reimbursed at the lesser of the usual and customary charge, submitted ingredient cost, or wholesale acquisition cost ~~minus 2.99%~~, plus the professional dispensing fee; or

(b) when purchased through the 340B program, will be reimbursed the lesser of the usual and customary charge or wholesale acquisition cost ~~minus 2.99%~~, plus the professional dispensing fee.

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

37.86.1406 CLINIC SERVICES, REIMBURSEMENT (1) Ambulatory surgical center (ASC) services as defined in ARM 37.86.1401(2) provided by an ASC will be reimbursed on a fee basis as follows:

(a) ~~97.01%~~ 100% of the Medicare allowable amount. For purposes of determining the Medicare allowable amount for ASC services to Medicaid members under this rule, the department adopts and incorporates by reference the methodology at 42 CFR part 416, subpart F, and the schedule listing the allowable

amounts for ASC services in the Medicare Claims Processing Manual. The cited authorities are federal regulations and manuals specifying the methods and rules used to determine reasonable cost for purposes of the Medicare program. The Medicare Claims Processing Manual can be found on the Centers for Medicare and Medicaid website at www.cms.gov. The Code of Federal Regulations can be found at www.gpo.gov.

(i) through (2) remain the same.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-6-101, ~~53-6-141,~~ MCA

37.86.1807 PROSTHETIC DEVICES, DURABLE MEDICAL EQUIPMENT, AND MEDICAL SUPPLIES, FEE SCHEDULE (1) and (2) remain the same.

(3) The department's DMEPOS Fee Schedule for items other than those billed under generic or miscellaneous codes as described in (1) will include fees set and maintained according to the following methodology:

(a) ~~97.01%~~ 100% of the Medicare region D allowable fee;

(b) remains the same.

(c) Except as provided in (4), for all items for which no Medicare or Medicaid allowable fee is available, the department's fee schedule amount will be ~~72.8%~~ 75% of the provider's usual and customary charge.

(i) remains the same.

(ii) Items having no product retail list price, such as items customized by the provider, will be reimbursed at ~~72.8%~~ 75% of the provider's usual and customary charge as defined in (3)(b)(i).

(4) The department's DMEPOS Fee Schedule, referred to in ARM 37.86.1807(2), for items billed under generic or miscellaneous codes as described in (1) will be ~~72.8%~~ 75% of the provider's usual and customary charge as defined in (3)(b)(i).

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, ~~53-6-141,~~ MCA

37.86.2005 OPTOMETRIC SERVICES, REIMBURSEMENT (1) remains the same.

(2) For items or services where no RBRVS or Medicare is available, the fee schedule amount in (1)(c) will be calculated using the following methodology:

(a) remains the same.

(b) For supplies or equipment, reimbursement will be set at ~~72.8%~~ 75% of the manufacturer's suggested retail price. For items without a manufacturer's suggested retail price, the charge will be considered reasonable if the provider's acquisition charge from the manufacturer is at least 50% of the charge amount. For items that are custom-fabricated at the place of service, the amount charged will be considered reasonable if it does not exceed the average charge of all Medicaid providers by more than 20%.

(c) and (3) remain the same.

AUTH: 53-6-113, MCA
IMP: 53-6-101, 53-6-113, ~~53-6-141,~~ MCA

37.86.2605 AMBULANCE SERVICES, REIMBURSEMENT (1) through (3) remain the same.

(4) For supplies or equipment, where there is no Medicare or Medicaid set fee, the provider's usual and customary charge in (1)(a) will be considered reasonable if set at ~~72.8%~~ 75% of the manufacturer's suggested retail price. For items without a manufacturer's suggested retail price, the charge will be considered reasonable if the provider's acquisition cost from the manufacturer is at least 50% of the charge amount.

(5) remains the same.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-6-101, 53-6-113, ~~53-6-141,~~ MCA

37.86.2803 ALL HOSPITAL REIMBURSEMENT, COST REPORTING

(1) Allowable costs will be determined in accordance with generally accepted accounting principles as defined by the American Institute of Certified Public Accountants.

(a) through (d) remain the same.

(e) For cost report periods ending ~~on or after~~ January 1, 2018 through August 31, 2018, for each hospital which is a critical access hospital, as defined in ARM 37.86.2901, reimbursement for reasonable costs of inpatient and outpatient hospital services will be limited to 97.98% of allowable costs, as determined in accordance with (1).

(f) For cost report periods ending on or after September 1, 2018, for each hospital which is a critical access hospital, as defined in ARM 37.86.2901, reimbursement for reasonable costs of inpatient and outpatient hospital services will be limited to 101% of allowable costs, as determined in accordance with (1).

(2) and (3) remain the same.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-149, MCA

37.86.2806 COST-BASED HOSPITAL, GENERAL REIMBURSEMENT

(1) Cost-based reimbursement shall be applied as follows:

(a) Critical access hospital (CAH) interim reimbursement is based on a hospital specific Medicaid inpatient cost-to-charge ratio (CCR), not to exceed 100%. For dates of service ~~on or after~~ January 1, 2018 through August 31, 2018, ~~critical access hospital (~~CAH~~)~~ interim reimbursement is based on a hospital-specific Medicaid inpatient cost-to-charge ratio (CCR), less 2.99%, not to exceed 100%.

(b) For cost report periods ending on or prior to December 31, 2017, CAH final reimbursement is for reasonable costs of hospital services limited to 101% of allowable costs, as determined in accordance with ARM 37.86.2803(1). For cost report periods ending ~~on or after~~ January 1, 2018 through August 31, 2018, CAH final reimbursement is for reasonable costs of hospital services limited to 97.98% of

allowable costs as determined in accordance with ARM 37.86.2803(1). For cost report periods ending on or after September 1, 2018, CAH final reimbursement is for reasonable costs of hospital services limited to 101% of allowable costs as determined in accordance with ARM 37.86.2803(1).

(2) through (8) remain the same.

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

37.86.2905 INPATIENT HOSPITAL SERVICES, GENERAL REIMBURSEMENT (1) remains the same.

(2) Interim reimbursement for cost-based facilities is based on a hospital-specific Medicaid inpatient cost-to-charge ratio, not to exceed 100%. For dates of service ~~on or after~~ January 1, 2018 through August 31, 2018, the interim reimbursement is based on a hospital-specific Medicaid inpatient cost-to-charge ratio, less 2.99%, not to exceed 100%. Cost-based facilities will be reimbursed their allowable costs as determined according to ARM 37.86.2803. For cost report periods ending on or prior to December 31, 2017 final cost settlements for CAH facilities will be reimbursed at 101% of allowable costs. For cost report periods ending ~~on or after~~ January 1, 2018 through August 31, 2018, final cost settlements for CAH facilities will be reimbursed at 97.98% of allowable costs. For cost report periods ending on or after September 1, 2018, final cost settlements for CAH facilities will be reimbursed at 101% of allowable costs.

(3) through (5) remain the same.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, ~~53-6-141,~~ MCA

37.86.2912 INPATIENT HOSPITAL PROSPECTIVE REIMBURSEMENT, CAPITAL-RELATED COSTS (1) remains the same.

(2) The interim payment made to CAHs is based on the hospital-specific cost-to-charge ratio and includes capital costs. For dates of service ~~on or after~~ January 1, 2018 through August 31, 2018, the interim payment made is based on the hospital-specific cost-to-charge ratio, less 2.99%, and includes capital costs. For dates of service on or after September 1, 2018, the interim payment made is based on the hospital-specific cost-to-charge ratio, and includes capital costs.

(3) remains the same.

AUTH: 2-4-201, 53-2-201, 53-6-113, MCA
IMP: 2-4-201, 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

37.86.3007 OUTPATIENT HOSPITAL SERVICES, PROSPECTIVE PAYMENT METHODOLOGY, CLINICAL DIAGNOSTIC LABORATORY SERVICES

(1) Clinical diagnostic laboratory services, including automated multichannel test panels (commonly referred to as "ATPs") and lab panels, will be reimbursed on a fee basis as follows with the exception of hospitals reimbursed under ARM 37.86.3005 and specific lab codes which are paid under ARM 37.86.3020:

(a) The fee for a clinical diagnostic laboratory service is the applicable percentage of the Medicare fee schedule as follows:

(i) ~~58.206%~~ 60% of the prevailing Medicare fee schedule for a birthing center or where a hospital laboratory acts as an independent laboratory, i.e., performs tests for persons who are nonhospital patients;

(ii) ~~60.1462%~~ 62% of the prevailing Medicare fee schedule for a hospital designated as a sole community hospital as defined in ARM 37.86.2901; or

(iii) ~~58.206%~~ 60% of the prevailing Medicare fee schedule for a hospital that is not designated as a sole community hospital as defined in ARM 37.86.2901.

(b) and (c) remain the same.

(2) For purposes of this rule, clinical diagnostic laboratory services include the laboratory tests listed in codes defined in the HCPCS and listed in the Clinical Diagnostic Fee Schedule (CLAB) published ~~January 1, 2017~~ January 1, 2018.

(3) remains the same.

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

37.86.3109 OUTPATIENT CARDIAC AND PULMONARY REHABILITATION REIMBURSEMENT (1) Critical access hospital (CAH) interim reimbursement is based on a hospital-specific Medicaid outpatient cost-to-charge ratio, not to exceed 100%. For dates of service ~~on or after~~ January 1, 2018 through August 31, 2018, the interim reimbursement is based on the hospital specific Medicaid outpatient cost-to-charge ratio (CCR), less 2.99% not to exceed 100%. For dates of service on or after September 1, 2018, the interim reimbursement is based on the hospital-specific Medicaid outpatient cost-to-charge ratio. CAHs will be reimbursed their actual allowable costs determined according to ARM 37.86.2803.

(2) and (3) remain the same.

AUTH: 53-2-201, 53-6-111, MCA
IMP: 53-2-201, 53-6-101, MCA

37.86.3205 NONHOSPITAL LABORATORY AND RADIOLOGY (X-RAY) SERVICES, REIMBURSEMENT (1) through (3) remain the same.

(4) For clinical laboratory services, the department pays the lower of:

(a) remains the same.

(b) ~~58.206%~~ 60% of the Medicare fee schedule for physician offices and independent labs and hospitals functioning as independent labs; or

(c) remains the same.

AUTH: 53-6-113, MCA
IMP: 53-6-113, ~~53-6-141,~~ MCA

37.86.3607 CASE MANAGEMENT SERVICES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, REIMBURSEMENT (1) Reimbursement for the delivery by provider entities of Medicaid funded targeted case management services to persons with developmental disabilities is provided as specified in the Montana

Developmental Disabilities Program Manual of Service Reimbursement Rates and Procedures for Developmental Disabilities Case Management Services for Persons with Developmental Disabilities Who Are 16 Years of Age or Older or Who Reside in a Children's Community Home, dated ~~January 1, 2018~~ September 1, 2018.

(2) The department adopts and incorporates by this reference the Montana Developmental Disabilities Program Manual of Service Reimbursement Rates and Procedures for Developmental Disabilities Case Management Services for Persons with Developmental Disabilities Who Are 16 Years of Age or Older or Who Reside in a Children's Community Home, dated ~~January 1, 2018~~ September 1, 2018. A copy of the manual may be obtained through the Department of Public Health and Human Services, Developmental Services Division, Developmental Disabilities Program, 111 N. Sanders, P.O. Box 4210, Helena, MT 59604-4210 and at http://dphhs.mt.gov/dsd/developmentaldisabililities/DDPratesinf.

AUTH: 53-6-113, MCA
IMP: 53-6-101, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) administers the Montana Medicaid and non-Medicaid programs to provide health care to Montana's qualified low income, elderly, and disabled residents. Medicaid is a public assistance program paid for with state and federal funds appropriated to pay health care providers for the covered medical services they deliver to Medicaid members. Pursuant to 53-6-113(3), MCA, the legislature has delegated authority to the department to set by rule, the reimbursement rates that Medicaid pays to providers for covered services.

The purpose of the proposed rule amendment is to: 1) increase provider rates effective September 1, 2018; 2) reflect the rebasing of the All Patient Refined Diagnosis Related Groups (APR-DRG) reimbursement methodology for inpatient services used by several divisions in the department which is necessary to stay within legislative appropriation; 3) increase the fee schedule rates for certain durable medical equipment in accordance with CMS final published rule – CMS 1687-IFC, effective September 1, 2018; and 4) modify the adult benefit package for restoring certain high cost, extensive dental procedures and dentures.

These rules apply to services for all people and eligibility categories for Montana Medicaid, including the Montana Medicaid Health and Economic Livelihood Partnership (HELP) Program that serves the Medicaid expansion population.

Proposed Provider Rate Increases

The department is proposing a number of provider rate increases effective September 1, 2018. The rate increases reverse across-the-board Medicaid provider rate reductions implemented in state fiscal year 2018. The provider rate increases

are expected to distribute $5,085,784 of the Senate Bill (SB) 9 general fund budget restoration in 10 months of state fiscal year 2019.

The department has determined the new proposed provider rates are consistent with the efficiency, economy, and quality of care. The department believes these rates are sufficient to enlist enough providers so that care and services are available to the general population in the geographic area.

The department has posted proposed fee schedules to http://medicaidprovider.mt.gov/proposedfs.

The department has posted the Montana Developmental Disabilities Program Manual of Service Rates and Procedures of Reimbursement for Home and Community-Based Services (HCBS) 1915c, 0208, and 0667 Waiver Programs manual at http://dphhs.mt.gov/dsd/developmentaldisabililities/DDPratesinf.

Hospital Rates

The department proposes to adopt a new version of the APR-DRG grouper effective September 1, 2018. Version 35 of the APR-DRG grouper contains changes to DRG weights, average length of stays, and adds new DRGs. Hospital base rates are proposed to increase to meet the appropriated budget for inpatient hospitals. In addition, an increase in the conversion factor for outpatient hospitals is proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases. This increase applies to free-standing birthing centers as they are paid under the outpatient hospital reimbursement methodology.

Fee Schedules

The department is proposing the adoption of September 1, 2018 fee schedules. The rates contained within these proposed fee schedules were modified to implement the provider rate increases discussed in the preceding section titled Proposed Provider Rate Increases.

Conversion Factor

The department is proposing an increase of 3.56% to the conversion factors utilized within the Resource Based Relative Value Scale (RBRVS) reimbursement methodology, to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

Medicare Rates

Many Montana Medicaid programs utilize Medicare rates for fee schedules, cost settlements, and reimbursements. The proposed rule change will increase reimbursement at posted Medicare rates for applicable codes. The September 1, 2018 proposed fee schedules reflect the rate increase, Medicare updates, and

procedure code changes. The changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

Durable Medical Equipment

CMS published a final rule (CMS 1687-IFC) on May 11, 2018, that increases the Medicare fee schedule rates for certain durable medical equipment to safeguard beneficiary access for necessary items and services furnished in rural areas.

The CMS rule increases the fee schedule amounts for certain DME items in rural areas effective June 1, 2018. In order to align the fee schedule effective date with the State Plan Amendment – Introduction Page, Attachment 4, 19B, the department is proposing an effective date of September 1, 2018.

ARM 37.34.3005

The department proposes to amend this rule to incorporate a new edition of the Montana Developmental Disabilities Program Manual of Service Rates and Procedures of Reimbursement for Home and Community-Based Services (HCBS) 1915c, 0208, and 0667 Waiver Programs, effective September 1, 2018, which includes increases in the rates of reimbursement for Medicaid-funded home and community services. The changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.104(1)(a), (b), and (d)

The department is updating the effective date of the mental health services plan, the 72-hour presumptive eligibility for adult crisis stabilization services, and substance use disorder services fee schedules to September 1, 2018. This includes updating codes. The changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.104(1)(c)

The department proposes to amend the Medicaid Youth Mental Health Fee Schedule to update the effective date to September 1, 2018.

ARM 37.85.105(2)(b)

The department proposes to update the following conversion factors in the following amounts to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases: physician services conversion factor from $36.68 to $37.99; allied services conversion factor from $22.96 to $23.78; mental health services conversion factor from $23.20 to $24.03; and anesthesia services conversion factor from $28.87 to $29.90. These changes will be effective on September 1, 2018, and therefore the RBRVS fee schedules will be made effective on that date.

ARM 37.85.105(2)(d)

The department is proposing to reinstate the provider payment to charge percentage to 47%. The changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(2)(i)

The department proposes to update reimbursement for physician-administered drugs as determined at 42 CFR 414.904 (2016). The department is proposing an increase in the percentage of average sales price (ASP) paid for physician-administered drugs. This increase is to reinstate the Medicare reimbursement of 106% of ASP. The changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(2)(j)

The department proposes to increase the fee schedule for vaccines effective September 1, 2018 by 3.56%, to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(a)(i)

The department proposes to update and revise the APR-DRG fee schedule for inpatient hospitals as provided in ARM 37.86.2907 effective September 1, 2018. The base rates will be increased to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(a)(ii)

The department adopts and incorporates by reference the APR-DRG Table of Weights and Thresholds effective September 1, 2018, and updates the APR-DRG grouper version 34 to version 35. The department proposes these changes to include the revisions to the weights, thresholds, and DRGs proposed in version 35 of the APR-DRG grouper. The changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(b)(ii)

The department proposes to revise the conversion factor for outpatient services on or after September 1, 2018 from $49.46 to $51.22. The conversion factor for outpatient services is being increased to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(b)(iv)

The department proposes to revise the composite Rate for Dialysis from $244.47 to $252.00 effective September 1, 2018. The change is proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(c)

The department proposes to increase the hearing aid services fee schedule by 3.56% effective September 1, 2018, to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(d)

The department proposes to revise the relative value for dentists publish date to 2018 and revise the fee schedule effective date to September 1, 2018. This change is required to incorporate the most recently published relative value units for dentists. In addition, the department proposes to increase the dental conversion factor from $32.77 to $33.94. The changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(e)

The department proposes to update the fee schedules for dental services to reinstate coverage of certain high cost, extensive dental procedures, and dentures for adults. These changes result in a required update to the effective date of the fee schedule to September 1, 2018. The department proposes to update the Dental and Denturist Program Provider Manual effective September 1, 2018, to reflect changes outlined in ARM 37.86.1006.

ARM 37.85.105(3)(f)

The department proposes to revise the effective date regarding the outpatient drugs reimbursement dispensing fee ranges to September 1, 2018. The department is increasing the maximum dispensing fees by 3.56%. The change is proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(f)(i)

The department proposes to revise the maximum dispensing fees for pharmacies with prescription volumes between 0 and 39,999 from $14.55 to $15.07. The change is proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(f)(ii)

The department proposes to revise the maximum dispensing fee for pharmacies with prescription volumes between 40,000 and 69,999 from $12.61 to $13.06. The change is proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(f)(iii)

The department proposes to revise the maximum dispensing fee for pharmacies with prescription volumes greater than 70,000 from $10.67 to $11.05. The change is proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(h)

The department proposes to revise the outpatient drugs reimbursement vaccine administration fee, as provided in ARM 37.86.1105(6), from $20.68 to $21.32 for the first vaccine, and from $13.42 to $13.90, for each additional administered vaccine effective September 1, 2018. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(j)

The department proposes to revise the effective date of the home infusion therapy services fee schedule to September 1, 2018 increasing rates by 3.56%. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(k)

The department proposes to revise the effective date of the reference to the Region D Supplier Manual to September 1, 2018. The department will remove the 2.99% reductions to the 2018 Medicare rates, department set fees, and MSRP rates. Effective date of the revised fee schedule is September 1, 2018. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(l)

The department proposes to revise the effective date regarding the Early Periodic Screening, Diagnostic, and Treatment (EPSDT) fee schedule for nutrition, and orientation and mobility specialists to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(o)

The department proposes to revise the effective date regarding the ambulance services fee schedule to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(p)

The department proposes to revise the effective date for the audiology services fee schedule to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(q)

The department proposes to revise the effective date of the fee schedule for occupational therapists, physical therapists, and speech therapists to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(r)

The department proposes to revise the effective date of the optometric fee schedule to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(s)

The department proposes to revise the effective date of the chiropractic fee schedule to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(t)

The department proposes to revise the effective date of the lab and imaging fee schedule to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(v)

The department proposes to revise the effective date of the Targeted Case Management for Children and Youth with Special Health Care Needs fee schedule to September 1, 2018. A rate increase of 3.56% is proposed. These changes are

proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(w)

The department proposes to revise the effective date of the Targeted Case Management for High Risk Pregnant Women fee schedule to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(x)

The department proposes to revise the effective date of the mobile imaging fee schedule to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(3)(y)

The department proposes to revise the effective date of the licensed direct entry midwife fee schedule to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(4)(a)

The department proposes to increase the fee schedule date for Home and Community Based Services (HCBS) Waiver program to September 1, 2018. A rate increase (excluding member mileage) of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(4)(b)

The department proposes to update the fee schedule date for Home Health Services to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(4)(c) and (d)

The department proposes to update the fee schedule date for Personal Assistance Services to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(4)(e)

The department proposes to update the fee schedule date for Community First Choice program services to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(5)(a)

The department proposes to update the fee schedule date for mental health center services to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(5)(b)

The department proposes to update the fee schedule date for home and community based services to September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(5)(c)

The department proposes to update the fee schedule for a reference for substance use disorder services reimbursement with an effective date of September 1, 2018. A rate increase of 3.56% is proposed. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.105(6)

The department proposes to incorporate by reference the new fee schedules to implement the rates set by Montana Medicaid's resource based relative value scale (RBRVS) reimbursement for psychologists, social workers, and professional counselors. The department proposes to update the fee schedule date to September 1, 2018. A rate increase of 3.56% is proposed.

It is necessary for the department to incorporate new assigned relative values to implement rates set by Montana Medicaid's RBRVS reimbursement for psychologists, social workers, and professional counselors. The RBRVS is located in ARM 37.85.212.

These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.85.106(2)

The department proposes to amend this rule and update the fee schedule for targeted case management for adult and children's mental health services. The updated provider rates reflect a 3.56% increase to implement the provider rate increases outlined in the section titled Proposed Provider Rate Increases.

ARM 37.86.705 and 37.86.805

The department is proposing that the Montana Medicaid program pays the following for audiology and hearing aid services: the lowest of: the provider's usual and customary charge for the service; the department fee schedule for each respective service; or 100% of the Medicare Region D allowable fee.

This change is proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.86.1006

The department proposes to reinstate dental coverage of certain high cost, extensive dental procedures and dentures for the adult Medicaid population. The Dental and Denturist Program Provider Manual informs providers of the requirements applicable to the delivery of services. Copies of the manual are available on the Montana Medicaid provider web site at http://medicaidprovider.mt.gov and from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

ARM 37.86.1101

The department proposes to eliminate the 2.99% reduction to WAC reimbursements made when Average Acquisition Cost (AAC) is not available. This change is proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.86.1105

The department proposes to eliminate the 2.99% reduction to WAC, within the clotting factor reimbursement calculation when dispensed by specialty pharmacies, hemophilia treatment centers, or centers of excellence. This increase is to both 340B and non-340B dispensed drugs. This change is proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.86.1406

The department proposes to reinstate reimbursement for ambulatory surgical centers services at 100% of the Medicare allowable amount. This change is

proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.86.1807

The department proposes to modify the department's DMEPOS Fee Schedule for items other than those billed under generic or miscellaneous to 100% of the Medicare region D allowable fee. The department proposes to multiplicatively modify the Medicaid fee for all items for which there is no Medicare allowable fee available. The department is modifying the reimbursement percentage of the provider's usual and customary charge to 75%, effective September 1, 2018. In addition, for items that have no product retail list price, the department is proposing a reimbursement of 75% of the provider's usual and customary charge, effective September 1, 2018. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.86.805, 37.86.2005, and 37.86.2605

The department proposes to change the percentage of the manufacturer's suggested retail price that is considered reasonable when there is no established Medicare or Medicaid fee to 75%. For items without a manufacturer's suggested retail price, the charge will be considered reasonable if the provider's acquisition cost from the manufacturer is at least 50% of the charge amount effective September 1, 2018. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.86.2803, 37.86.2806, 37.86.2905, 37.86.2912, and 37.86.3109

The department proposes to increase the final cost settlement for critical access hospitals amount to 101%. In addition, the department proposes to increase the interim payment for all Critical Access Hospitals (CAHs) to their individual cost to charge ratios. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.86.3007

The department proposes to increase the percentage of the prevailing Medicare fee schedule for clinical diagnostic laboratory services. The revised percentages are as follows: 60% for a birthing center or where a hospital laboratory acts as an independent laboratory; 62% for a hospital designated as a sole community hospital; and 60% for a hospital that is not designated as a sole community hospital. These changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.86.3205

The department proposes to increase the percentage of the Medicare fee schedule for nonhospital laboratory services to 60%. This change is proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

ARM 37.86.3607

The purpose of this proposed amendment is to incorporate into the rule a new edition of the Montana Developmental Disabilities Program Manual of Service Reimbursement Rates and Procedures for Developmental Disabilities Case Management Services for Persons with Developmental Disabilities Who Are 16 Years of Age or Older or Who Reside in a Children's Community Home, to be dated September 1, 2018. The changes are proposed to implement the provider rate increases outlined in the preceding section titled Proposed Provider Rate Increases.

FISCAL IMPACT

The following table displays the fiscal impact as well as number of providers affected by the proposed changes.

Provider Type	SFY 2019 State Funds Impact	SFY 2019 Fed. Funds Impact	SFY 2019 Total Funds Impact	Enrolled Provider Count
Health Resources Division				
Hospital - Inpatient	$1,927,995	$3,666,883	$5,594,878	376
Hospital - Outpatient	$1,072,455	$2,039,719	$3,112,174	315
Critical Access Hospital	$1,062,972	$2,021,684	$3,084,656	50
Physician	$1,269,757	$2,414,971	$3,684,728	8,830
Pharmacy Dispensing Fee	$257,272	$489,310	$746,582	425
Pharmacy WAC	$456,332	$867,904	$1,324,236	425
Dental	$824,814	$1,568,726	$2,393,540	584
Audiologist	$1,687	$3,209	$4,896	59
Licensed Professional Counselor	$31	$59	$90	657
Physical Therapist	$58,631	$111,511	$170,142	634
Podiatrist	$15,174	$28,860	$44,034	67
Private Duty Nursing Agency	$53,185	$101,153	$154,338	4
Psychiatrist	$2,931	$5,575	$8,506	260

Psychologist	$15	$29	$44	192
Occupational Therapist	$39,796	$75,690	$115,486	155
Social Worker	$578	$1,100	$1,678	454
Speech Pathologist	$42,378	$80,600	$122,978	171
Ambulance	$75,997	$144,539	$220,536	160
Ambulatory Surgical Center	$94,231	$179,219	$273,450	23
Case Mngmnt - Targeted HRPW/CSHCN	$8,388	$15,954	$24,342	15
Children's Special Health Svcs	$3,906	$7,430	$11,336	3
Chiropractor	$17,145	$32,607	$49,752	208
Denturist	$34,835	$66,253	$101,088	19
Dentists/Denturists (High Cost Dental Services)	$1,610,783	$3,063,574	$4,674,357	603
Dialysis Clinic	$50,860	$96,732	$147,592	21
Durable Medical Equipment	$297,390	$565,610	$863,000	443
Hearing Aid Dispenser	$2,998	$5,702	$8,700	35
Home Infusion Therapy	$17,711	$33,685	$51,396	15
Indep Diag Testing Facility	$6,474	$12,312	$18,786	19
Laboratory	$57,736	$109,808	$167,544	161
Mid-Level Practitioner	$280,069	$532,667	$812,736	3,127
Nutritionist/Dietician	$511	$971	$1,482	62
Optician	$1,795	$3,413	$5,208	34
Optometrist	$78,747	$149,769	$228,516	195
Free Standing Birthing Centers	$289	$551	$840	2
Orientation and Mobility	$467	$889	$1,356	3
Total	$8,115,553	$15,435,093	$23,550,646	

Provider Type	SFY 2019 State Funds Impact	SFY 2019 Fed. Funds Impact	SFY 2019 Total Funds Impact	Enrolled Provider Count

Senior and Long Term Care Division				
Home Health Agency	$10,645	$20,245	$30,890	26
Hospice	$62,774	$119,390	$182,164	30
Personal Care	$52,096	$99,082	$151,178	71
Community First Choice	$930,829	$1,770,357	$2,701,186	71
Home & Community Based Services	$765,082	$1,455,120	$2,220,202	583
Total	$1,821,425	$3,464,195	$5,285,620	

Provider Type	SFY 2019 State Funds Impact	SFY 2019 Fed. Funds Impact	SFY 2019 Total Funds Impact	Enrolled Provider Count
Addictive and Mental Disorders Division				
*Chemical Dependency Clinic (Sud) (Pt32)	$76,872	$146,204	$223,076	23
Targeted Case Management	$52,012	$98,923	$150,935	
Critical Access Hospital (Pt74)	$10,084	$19,180	$29,264	50
Home & Comm. Based Services (Pt28)	$80,685	$153,455	$234,140	583
Hospital - Inpatient (Pt01)	$53,183	$101,151	$154,334	141
Hospital - Outpatient (Pt02)	$14,912	$28,360	$43,272	315
Indep. Diag. Testing Facility (Pt72)	$3	$7	$10	19
Laboratory (Pt40)	$9,611	$18,279	$27,890	161
Licensed Professional Counselor (Pt58)	$82,422	$156,760	$239,182	657
Mental Health Center (Pt59)	$331,687	$630,841	$962,528	19
Mid-Level Practitioner (Pt44)	$30,534	$58,074	$88,608	3127
Physician(Pt27)	$24,886	$47,332	$72,218	8830
Psychiatrist (Pt65)	$21,387	$40,677	$62,064	260
Psychologist (Pt17)	$3,363	$6,395	$9,758	192
Social Worker(Pt42)	$41,424	$78,786	$120,210	454

1115 Waiver	$127,717	$242,907	$370,624	192
Total	$960,784	$1,827,329	$2,788,113	

Provider Type	SFY 2019 State Funds Impact	SFY 2019 Fed. Funds Impact	SFY 2019 Total Funds Impact	Enrolled Provider Count
Disability Services Disorders Division				
DD Waiver	$2,936,068	$5,343,876	$8,279,944	70
Case Management - DD	$115,915	$210,975	$326,890	1
Case Management – Children's Mental Health	$77,340	$147,095	$224,435	19
Critical Access Hospital	$8,549	$16,259	$24,808	50
Home & Community Based Services 1915(i)	$730	$1,388	$2,118	583
Hospital - Inpatient	$119,504	$227,286	$346,790	141
Hospital - Outpatient	$44,103	$83,879	$127,982	315
Indep Diag Testing Facility	$14	$28	$42	19
Laboratory	$16,649	$31,665	$48,314	161
Licensed Professional Counselor	$153,478	$291,902	$445,380	657
Mental Health Center	$121,108	$230,336	$351,444	26
Mid-Level Practitioner	$26,154	$49,742	$75,896	3127
Physician	$34,850	$66,282	$101,132	8830
Psychiatric Res Treatment Facility	$334,252	$635,720	$969,972	15
Psychiatrist	$36,684	$69,770	$106,454	260
Psychologist	$11,474	$21,822	$33,296	192
Social Worker	$87,666	$166,732	$254,398	454
Home Support Services or Therapeutic Foster Care	$178,756	$339,978	$518,734	14
Therapeutic Group Home	$370,729	$705,095	$1,075,824	16
Comprehensive School & Community Treatment (Pt45)	$894,868	$1,701,962	$2,596,830	464
Total	$5,568,890	$10,341,793	$15,910,683	

5. 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: Todd Olson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail the departmentlegal@mt.gov, and must be received no later than 5:00 p.m., September 7, 2018.

6. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this 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 that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

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

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

10. Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

11. The department intends to apply these rule amendments retroactively to September 1, 2018. A retroactive application of the proposed rule amendments does not result in a negative impact to any affected party.

/s/ Brenda K. Elias
Brenda K. Elias
Rule Reviewer

/s/ Sheila Hogan
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State July 31, 2018.

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

In the matter of the amendment of ARM 37.40.307 pertaining to nursing facility reimbursement rates for state fiscal year 2019	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On August 31, 2018, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on August 17, 2018, to advise us of the nature of the accommodation that you need. Please contact Todd Olson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-9503; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.40.307 NURSING FACILITY REIMBURSEMENT (1) remains the same.

(2) Effective July 1, 2001, and in subsequent rate years, nursing facilities will be reimbursed using a price-based reimbursement methodology. The rate for each facility will be determined using the operating component defined in (2)(a) and the direct resident care component defined in (2)(b):

(a) through (c) remain the same.

(d) The total payment rate available for the period ~~July 1, 2018~~ September 1, 2018 through June 30, 2019 will be the rate as computed in (2), plus any additional amount computed in ARM 37.40.311 and 37.40.361.

(3) Providers who, as of July 1 of the rate year, have not filed with the department a cost report covering a period of at least six months participation in the Medicaid program in a newly constructed facility will have a rate set at the statewide median price as computed on ~~July 1, 2018~~ September 1, 2018. Following a change in provider as defined in ARM 37.40.325, the per diem rate for the new provider will be set at the previous provider's rate, as if no change in provider had occurred.

(4) through (12) remain the same.

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

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) is proposing a provider rate increase effective September 1, 2018. The rate increase reverses across-the-board provider rate reductions implemented in state fiscal year (SFY) 2018. The department proposes to raise Medicaid nursing facility rates effective September 1, 2018 by 3.56%.

ARM 37.40.307

The proposed amendment to (2)(d) and (3) changes a SFY 2019 date reference from July 1, 2018 to September 1, 2018. This change is necessary for the department to provide notice of the change in Medicaid nursing facility provider rates and the Medicaid nursing facility statewide median price.

Rate calculations include House Bill (HB) 2 and HB 618 funding appropriated by the 65th Legislative Session, annualized SFY 2018 Medicaid paid days adjusted to the 10 months remaining in SFY 2019 (September 1 to June 30), and individual facility case mix index (resident acuity) to determine nursing facility providers' reimbursement according to the methodology outlined in (2), (2)(a), and (2)(b) of the rule.

FISCAL IMPACT

Nursing facility reimbursement will include an increase of 3.56% in provider rates. The estimated total funding available for SFY 2019 for nursing facility reimbursement is estimated at approximately $202,688,201 of combined state funds, federal funds, and patient contributions. These numbers do not include at risk provider funds or direct care wage funding.

This proposed rule amendment increases estimated expenditures in the nursing home program by $2,055,776 in state funds and $3,834,712 in federal funds in SFY 2019.

Anticipated days for SFY 2019 are 1,002,018 using estimates from SFY 2018 Medicaid paid days. 835,015 days are used in the rate calculation ((1,002,018/12)*10).

Seventy-one nursing facility providers participated in the Medicaid nursing facility payment program and approximately 4,200 recipients received services in nursing facilities under Medicaid

5. 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: Todd Olson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., September 10, 2018.

6. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this 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 that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

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

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rule will not significantly and directly impact small businesses.

10. Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

11. The department intends to apply this rule amendment retroactively to September 1, 2018. A retroactive application of the proposed rule amendment does not result in a negative impact to any affected party.

/s/ Brenda K. Elias
Brenda K. Elias
Rule Reviewer

/s/ Sheila Hogan
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State July 31, 2018.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I and the amendment of ARM 10.55.701 pertaining to suicide prevention in schools	))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On May 25, 2018, the Board of Public Education (board) published MAR Notice No. 10-55-282 pertaining to the proposed adoption and amendment of the above-stated rules at page 1001 of the 2018 Montana Administrative Register, Issue Number 10.

2. The board has adopted New Rule I (10.55.720) as proposed.

3. The board has amended the above-stated rule as proposed.

4. The board has thoroughly considered the comments and testimony received. A summary of the comments received and the board's responses are as follows:

COMMENT #1: Mr. Dennis Parman, Executive Director, Montana Rural Education Association and member of MT PEC, spoke in support of the rule amendment and thanked Senator Edie McClafferty for her work regarding the rule amendment.

RESPONSE #1: The board thanks the commenter for his comments.

COMMENT #2: Senator Edie McClafferty, Butte, spoke in support of the rule amendment and stated that the amendment is what she envisioned with SB 381 in the 2015 Legislative Session.

RESPONSE #2: The board thanks Senator McClafferty for her comments.

COMMENT #3: Mr. Marco Ferro, MEA-MFT and member of MT PEC, spoke in support of the rule amendment and thanked Senator McClafferty for her work.

RESPONSE #3: The board thanks the commenter for his comments.

COMMENT #4: Dr. Kirk Miller, School Administrators of Montana and MT PEC member, thanked Senator McClafferty for her work on SB 381 and spoke in support of the rule amendment, noting that the phrase "policy, procedures, and plans" as stated in the rule amendment gives school districts flexibility.

RESPONSE #4: The board thanks the commenter for his comments.

/s/ Peter Donovan
Peter Donovan
Rule Reviewer

/s/ Sharon Carroll
Sharon Carroll
Chair
Board of Public Education

Certified to the Secretary of State July 31, 2018.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 10.57.421 pertaining to teacher licensure	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On May 25, 2018, the Board of Public Education (board) published MAR Notice No. 10-57-283 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1004 of the 2018 Montana Administrative Register, Issue Number 10.

2. The board has amended the above-stated rule as proposed.

3. The board has thoroughly considered the comments and testimony received. A summary of the comments received and the board's responses are as follows:

COMMENT #1: Dr. Rob Watson, Superintendent, Bozeman Public Schools and Administrative Representative on the Certification Standards and Practices Advisory Council, spoke in support of the proposed rule amendment. Dr. Watson discussed the state requirement for all students who graduate from accredited schools to have one credit of Career and Technical Education (CTE). Expanding CTE offerings in P-12 provides students with new opportunities for career readiness. The board added a BioMed CTE in 2008. The proposed computer coding and teacher education endorsements will add two new CTE options for students. Local industry and workforce employers are supportive of preparing students in skill sets listed in the proposed CTE offerings. The proposed CTE endorsements are consistent with the board's definition of Career and Vocational/Technical Education Program Standards as defined in ARM 10.55.1701.

RESPONSE #1: The board thanks the commenter for his comments and appreciates his support for expanding opportunities for students to explore new opportunities in CTE.

COMMENT #2: Dr. Kirk Miller, School Administrators of Montana, and Mr. Marco Ferro, MEA-MFT, spoke in support of the proposed rule amendments and believe the proposed rule supports the board's constitutional duty and mission to supervise and strengthen Montana's public schools. The proposed rule will ensure greater opportunities for students to engage in content that will prepare them for post-secondary success while considering current and projected workforce needs and job opportunities as described in 20-7-301(8), MCA.

RESPONSE #2: The board thanks the commenters for their comments and supports expanding opportunities for students in workforce and career development

in fulfillment of the board's constitutional obligation to supervise and strengthen Montana's public-school system.

COMMENT #3: The Montana Public Education Center (MT PEC), SAM, MTSBA, MEA-MFT, MASBO, MREA, and MQEC submitted a letter of support for the proposed rule amendment, noting that by 2020 the U.S. Bureau of Labor Statistics predicts that there will be 1.4 million more software development jobs available than applicants. The proposed rule amendment will allow students the opportunity to "engage in content that will prepare them for post-secondary success while considering the current and projected workforce need and job opportunities."

RESPONSE #3: The board thanks the commenters for their comments and for expressing support for the proposed rule.

COMMENT #4: Mr. Dennis Parman, Executive Director, Montana Rural Education Association, spoke in support of the rule amendment noting that the rulemaking process has been slow and deliberate, allowing many opportunities for thorough debate and consideration of the proposal. MREA recognizes concerns regarding quality but supports the rule.

RESPONSE #4: The board thanks the commenter for his comments and appreciates the comments on the rulemaking process.

COMMENT #5: Mr. Cameron Wilson, Chief Operating Officer, Code.org, submitted a letter in support of the proposed rule amendment stating that Code.org has made "computer science more accessible for teachers through high-quality professional development pathways to certification" and urges the board's approval of the rule amendment.

RESPONSE #5: The board thanks the commenter for his comments regarding the availability of quality professional development opportunities for educators to learn computer coding.

COMMENT #6: Mr. Douglas Fischer, Trustee, Bozeman Public Schools, submitted comments in support of the computer coding proposal. Mr. Fischer stated that schools have an obligation to prepare today's students for tomorrow's careers. Mr. Fischer added that school districts must have maximum flexibility to bring qualified professionals to fill crucial positions to meet student demand for classes, without diminishing the quality of instruction.

RESPONSE #6: The board thanks the commenter for his comments and supports the concept of affording school districts flexibility to provide qualified professionals to teach students the necessary content and skills to enhance the potential for post-secondary and career success.

COMMENT #7: Dr. Carol Reifschneider, Interim Dean of the College of Education, Arts, and Sciences at MSU-Northern, and member of the Montana Council of Deans

of Post-Secondary Education and representing the Council of Deans (MSU-Bozeman, MSU-Northern, MSU-Billings, UM-Missoula, UM-Western, University of Providence, Rocky Mountain College, Carroll College, Salish-Kootenai College, Stone Child College), spoke in opposition to the proposed rule amendment. The Council of Deans is concerned that the rules will negatively impact the quality of preparation for educators to teach computer science courses in K-12 schools. The Council of Deans believes 80 hours of preparation in computer coding is insufficient and does not provide the necessary pedagogy to effectively prepare teachers to teach computer science coursework in schools. The Council of Deans outlined several steps the educator preparation programs are taking to address school district challenges in Montana. The Council of Deans assert the proposed rule amendments are detrimental to the teaching profession, weaken the current Class 4 CTE endorsement 10,000-hour requirement, and that professional development courses will not replace what can be learned through a teaching endorsement in computer science.

RESPONSE #7: The board thanks the commenters for their comments. The board appreciates the concerns expressed by the Council of Deans of Post-Secondary Education regarding quality of teacher preparation. However, the computer coding and teacher education CTE endorsements will expand opportunities for P-12 students in schools of every size, across the state, to explore opportunities in computer coding and teacher education without compromising educator quality.

COMMENT #8: Dr. Tricia Siefert, Head of the Department of Education at MSU-Bozeman, submitted a letter that highlighted concerns that computer coding is a very narrow skill set within the much broader field of computer science and an educator needs to have the breadth of knowledge of a computer science degree to effectively teach the specific skill of computer coding.

RESPONSE #8: The board thanks the commenter for their comments and concurs that computer coding is a specific skill set within the broad field of computer science. However, exposing P-12 students to computer coding courses in P-12 will enhance opportunities for students to have an initial introduction to a CTE skill that may lead to further exploration of computer science in post-secondary education.

COMMENT #9: Dr. Nick Lux, MSU-Bozeman, Dr. John Paxton, MSU-Bozeman, and Dr. Yolanda Reimer, University of Montana, submitted a joint letter in opposition to the proposed rule amendment. The letter expressed four areas of concern: 1) the rule change is shortsighted with too much emphasis on computer coding and not enough emphasis in other areas of computer science, 2) coding is secondary in the process of learning computer science, 3) there are already teacher training mechanisms pertaining to computer science available within the Montana University System teacher training programs, and 4) that the proposed rule amendment is a misuse of the Class 4 endorsement as also stated by Dr. Siefert.

RESPONSE #9: The board thanks the group for their comments but believes that the proposed rule will expand opportunities for P-12 students to explore

opportunities in computer coding and teacher preparation. The new computer coding and teacher education CTE courses may increase the number of students who consider post-secondary education opportunities and careers in the areas of computer science and teaching.

COMMENT #10: Devin Holmes, Founder: Teachers Teaching Tech, and Lander Bachert, K-12 Programs Director: Teachers Teaching Tech, wrote a letter in support of the proposed rule amendment. Teachers Teaching Tech provides rigorous, no-cost/low cost computer science curriculum and professional development opportunities to all Montana teachers, providing "a pathway for motivated teachers to fulfill the proposed 80-hour endorsement at no cost to them or their district." Teachers Teaching Tech 100% approves of the proposed rule amendment.

RESPONSE #10: The board thanks Teachers Teaching Tech for their comments and for the professional development opportunities they provide to Montana teachers seeking educational opportunities in computer science to meet the requirements of the proposed rule amendment.

/s/ Peter Donovan
Peter Donovan
Rule Reviewer

/s/ Sharon Carroll
Sharon Carroll
Chair
Board of Public Education

Certified to the Secretary of State July 31, 2018.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS
OF THE STATE OF MONTANA

In the matter of the adoption of an emergency rule closing a portion of the Kootenai River in Lincoln County	)))	NOTICE OF ADOPTION OF AN EMERGENCY RULE

TO: All Concerned Persons

1. The Department of Fish, Wildlife and Parks (department) has determined the following reasons justify the adoption of an emergency rule closing a portion of the Kootenai River:

(a) A wildland fire, approximately 3.5 miles up Highway 37 outside of Libby.

(b) Fire suppression efforts which include helicopters bucketing water from the river.

(c) The closure is necessary so helicopter crews can safely operate and maneuver without potential collisions with recreationists on the lake. The closure is also necessary so recreationists, including those with limited maneuverability, are not subject to potential collision with large, heavy water buckets suspended from helicopters.

(d) Therefore, as this situation constitutes an imminent peril to public health, safety, and welfare, and this threat cannot be averted or remedied by any other administrative act, the department adopts the following emergency rule. The emergency rule will be sent as a press release to newspapers throughout the state. Also, signs informing the public of the closure will be posted at access points. The rule will be sent to interested parties, and published as an emergency rule in Issue No. 15 of the 2018 Montana Administrative Register.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of the notice. If you require an accommodation, contact the department no later than 5:00 p.m. on August 24, 2018, to advise us of the nature of the accommodation that you need. Please contact Kaedy Gangstad, Fish, Wildlife and Parks, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-4594; or e-mail kgangstad@mt.gov.

3. The emergency rule is effective July 20, 2018, when this rule notice is filed with the Secretary of State.

4. The text of the emergency rule provides as follows:

NEW RULE I KOOTENAI RIVER EMERGENCY CLOSURE (1) The Kootenai River is located in Lincoln County.

(2) The Kootenai River is closed from Osprey Landing boat ramp to the Highway 37 bridge city boat ramp in Libby to all public occupation and recreation including, but not limited to, floating, swimming, wading, and boating.

(3) This rule is effective as long as the lake is needed as a source of water for fire suppression efforts. This will depend on the extent and duration of the fire in the area. Posted signs regarding the emergency closure will be removed when the rule is no longer effective.

AUTH: 2-4-303, 87-1-202, MCA
IMP: 2-4-303, 87-1-202, MCA

5. The rationale for the emergency rule is as set forth in paragraph 1.

6. Concerned persons are encouraged to submit their comments to the department. Please submit comments along with names and addresses to: Jessica Snyder, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, MT, 59602-0701; e-mail jesssnyder@mt.gov. Any comments must be received no later than September 7, 2018.

7. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department or commission. Persons who wish to have their name added to the list shall make written request that includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made by completing the request form at any rules hearing held by the department.

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

/s/ Martha Williams
Martha Williams
Director
Department of Fish, Wildlife and Parks

/s/ Zach Zipfel
Zach Zipfel
Rule Reviewer

Certified to the Secretary of State July 20, 2018.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.36.103, 17.36.106, 17.36.112, 17.36.116, 17.36.310, 17.36.314, 17.36.326, 17.36.330, 17.36.331, 17.36.333, 17.36.334, 17.36.335, 17.36.345, 17.36.802, and 17.36.804 pertaining to adoption of a new version of Department Circular DEQ-8	)	NOTICE OF AMENDMENT (SUBDIVISIONS)

TO: All Concerned Persons

1. On September 22, 2017, the Department of Environmental Quality published MAR Notice No. 17-392, pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1580 of the 2017 Montana Administrative Register, Issue No. 18.

2. On March 16, 2018, the Department of Environmental Quality published an amended notice for MAR Notice No.17-392 amending the proposed amendments to ARM 17.26.310 and 17.36.345 at page 522, 2018 Montana Administrative Register, Issue No. 5.

3. The department has amended ARM 17.36.106, 17.36.112, 17.36.116, 17.36.314, 17.36.326, 17.36.330, 17.6.334, 17.36.335, 17.36.345, and 17.36.804 exactly as proposed.

4. The department has not amended ARM 17.36.103, 17.36.331, 17.36.333, and 17.36.802.

5. The department has amended 17.36.310 as proposed but with the following changes from the original proposal, stricken matter interlined, new matter underlined:

17.36.310 STORM DRAINAGE (1) remains as proposed.

(2) Storm drainage plans must be prepared by a professional engineer and must comply with the requirements in ARM 17.36.314 if the subdivision application proposes either of the following:

(a) remains as proposed.

(b) ~~a commercial lot or~~ a lot proposed for use other than a single living unit~~,~~ with greater than 25~~%~~ percent impervious area.

(3) and (4) remain as proposed.

(5) The reviewing authority may ~~waive~~ exempt the requirements of (1), (2), and (3) for subdivisions located entirely within a first-class or second-class municipality, as described in 7-1-4111, MCA, or within a Municipal Separate Storm Sewer System (MS4) general permit area, as defined in ARM 17.30.1102, if:

(a) remains as proposed.

(b) the municipal or MS4 entity either accepts the stormwater into a municipal storm water system or requires the applicant to comply with municipal or MS4 storm water drainage design standards. ~~The design standards applicable to the applicant may not be less stringent than the requirements of Circular DEQ-8.~~

(6) through (9) remain as proposed.

6. The following comments were received and appear with the department's responses:

ARM 17.36.103

COMMENT NO. 1: One commenter stated that the rule should be revised to be clear that new surface water sources cannot be approved. Another commenter also supported the amendment but recommended making the same amendments to ARM 17.36.332(9) for consistency.

RESPONSE: The department agrees that the rule could be more clear and that the proposed rule would conflict with ARM 17.36.332(9), which was not included in this rulemaking. To ensure that the proposed rule does not conflict with other existing rules that are not a part of this rulemaking, the department will not adopt the proposed rule at this time.

ARM 17.36.106

COMMENT NO. 2: One commenter expressed support of the amendment.

RESPONSE: The department appreciates the comment.

ARM 17.36.112

COMMENT NO. 3: Two commenters supported the amendment.

RESPONSE: The department appreciates the comments.

ARM 17.36.116

COMMENT NO. 4: One commenter stated that the amendment was a good idea.

RESPONSE: The department appreciates the comment.

ARM 17.36.310

COMMENT NO. 5: One commenter asked whether certificates of subdivision approval for plans not designed by professional engineers will be required to specify commercial storm water facilities (e.g., size of buildings, amount of paved area, etc.).

RESPONSE: As a matter of practice for plans not designed by professional engineers, the certificate of subdivision approval must list the approved facilities but not the assumptions made in the approval of facilities because the level of complexity is generally lower.

COMMENT NO. 6: One commenter suggested a revision to the requirement that a professional engineer must design storm water plans for a lot proposed for use other than a single living unit with more than 25 percent impervious area. The commenter stated that there is often not a significant difference between a big house and a small duplex and, therefore, a professional engineer should not be required to design storm water plans for two living units with greater than 25 percent impervious area.

RESPONSE: The department disagrees. The requirement for a professional engineer reflects the reality that, even though a duplex is two living units in one building, storm water design plans for duplexes must address the increased complexity caused by increased parking spaces and the number of people impacted. The rule remains unchanged.

COMMENT NO. 7: One commenter suggested that proposed subsection (2)(b) be modified to clarify whether all commercial lots have to have an engineer-designed storm water plan or just commercial lots with more than 25 percent impervious area.

RESPONSE: The department agrees that the rule could be more clear. The proposed amendment has been modified to clarify that the requirement that a professional engineer submit storm drainage plans applies when there are six or more lots and when there is a lot proposed for use other than a single living unit with greater than 25 percent impervious area.

COMMENT NO. 8: One commenter noted that it would be helpful to have specific criteria outlined in the rules as to when a homeowner's association or similar entity will be required so that applicants can plan accordingly.

RESPONSE: The suggested changes are beyond the scope of this notice, but this comment may be addressed in a future rulemaking.

COMMENT NO. 9: One commenter stated that the requirement that easements be obtained to allow adequate operation and maintenance should be revised to clarify what qualified as "adequate operation and maintenance."

RESPONSE: The suggested changes are beyond the scope of this notice but may be considered in a future rulemaking.

COMMENT NO. 10: One commenter suggested that two property owners should be able to establish easements on a plat or certificate of survey. The commenter also suggested that other easement documents be allowed when both lots are owned by one person to account for applications in which plats or certificates of survey are not filed.

RESPONSE: The department has left the rule unchanged. The requirements in this rule mirror the existing easement rules for sewage systems in ARM 17.36.326 and for water systems in ARM 17.36.334, neither of which is part of this rulemaking. Modifying this rule would lead to confusion and inconsistency among the easement requirements for the three systems. The department may consider changes to all three rules in a future rulemaking.

COMMENT NO. 11: With regard to the proposed exemption from storm water review for qualifying subdivisions in municipalities or MS4 areas, one commenter noted that the rule was missing a requirement that the municipality either review or accept and manage the additional storm water.

RESPONSE: The department agrees and has amended ARM 17.36.310 to address this issue.

COMMENT NO. 12: One commenter asked how the department would determine whether the design standards applicable to the applicant were as stringent as the requirements of DEQ-8.

RESPONSE: The department has amended ARM 17.36.310 to remove the requirement that MS4 systems meet DEQ-8 requirements. The department believes meeting the MS4 requirements provides an acceptable level of protection and that compliance with DEQ-8 is not necessary for these systems.

COMMENT NO. 13: One commenter asked if a waiver fee would be required for the review of letter from the municipal or MS4 entity.

RESPONSE: The department does not intend to charge a waiver fee for this review. The rule has been modified to clarify that qualifying subdivisions will be exempt from review, instead of being eligible for a waiver.

COMMENT NO. 14: One commenter asked how the department would determine if the municipality of MS4 entity meets the minimum design standards of proposed circular DEQ-8 if the municipality has adopted a design standard that varied widely from those in DEQ-8. The commenter suggested a standard based on environmental site designs rather than adherence to DEQ-8.

RESPONSE: See the department's response to Comment No. 12.

ARM 17.36.314

COMMENT NO. 15: One commenter asked how the proposed amendment would align with ARM Title 17, chapter 38, and stated that it is important to make sure that different department programs are consistent.

RESPONSE: Standing alone, the procedure for reapproving expired approvals in the proposed amendment of ARM 17.36.314, which applies to storm water drainage plans, multi-user sewage systems, and multi-user water supply systems, does not conflict with the procedures in ARM Title 17, chapter 38, which apply only to public water and public sewage systems. However, the proposed amendment to ARM 17.36.331 created a potential conflict by tying both regulations together. Because the department is not adopting the proposed changes to ARM 17.36.331, as discussed in the responses to Comments 21 and 22, the two sets of regulations will not contradict.

COMMENT NO. 16: Two commenters expressed their support of the amendment.

RESPONSE: The department appreciates the comments.

ARM 17.36.326

COMMENT NO. 17: One commenter expressed their support of the amendment.

RESPONSE: The department appreciates the comment.

COMMENT NO. 18: One commenter asked whether a shared users agreement should be attached as an exhibit to the certificate of subdivision approval, because purchasers often do not get this information when a sale occurs.

RESPONSE: The department does not believe it is necessary to require rule user agreements to be attached as exhibits to the certificate of subdivision approval. Under 76-4-113, MCA, a seller must give a copy of the certificate of subdivision approval to a purchaser. Shared user agreements are referenced in the certificate of subdivision approval, providing the purchaser with notice that the subdivision approval included a user agreement. In any event, user agreements are typically attached to the certificates of subdivision approval as a matter of practice. The rule remains the same.

COMMENT NO. 19: One commenter noted that the proposed amendment should clarify what it means for a user agreement to "be in a form acceptable to the department."

RESPONSE: The language highlighted by the commenter is existing language that the department has not proposed to change. This suggested change is beyond the scope of this notice but may be addressed in a future rulemaking.

ARM 17.36.330

COMMENT NO. 20: One commenter stated their support for the amendment.

RESPONSE: The department appreciates the comment.

ARM 17.36.331

COMMENT NO. 21: One commenter asked for guidance regarding the proposed requirement that adequate treatment be provided through filtration and disinfection.

RESPONSE: The department agrees that the rule should clarify minimum treatment levels necessary to demonstrate adequate treatment. The department will not adopt this rule at this time.

COMMENT NO. 22: Two commenters opposed the proposed requirement that all public water supply systems be designed by a professional engineer. One contended that the subdivision rules should not require designs by professional engineers that would not otherwise be required under the public water supply rules. The commenter further contended that the new rule would make subdivision review more complicated and expensive than it needs to be. Another commenter questioned the necessity of the requirement and noted that requirements for

additional professionals added to housing costs and increased the burdens of compliance, particularly for small businesses and the communities they serve.

RESPONSE: The department agrees that the public water supply rules do not require all public water supply systems to be designed by a professional engineer. In an effort to coordinate the rules under the Montana public water supply laws and the Sanitation in Subdivisions Act, the department will not at this time adopt the rule requiring all public water systems subject to subdivision review to be designed by a professional engineer. However, the Sanitation in Subdivisions Act specifically requires the reviewing authority to require certification from a registered professional engineer that a public water supply system or a public sewage disposal system has been constructed according to approved specifications. The department will continue to enforce this statutory requirement.

ARM 17.36.333

COMMENT NO. 23: One commenter noted that the changes to the proposed rule conflicted with the requirements for existing systems in ARM 17.36.335.

RESPONSE: The department acknowledges that the proposed amendment might be confusing in light of the existing requirements of ARM 17.36.335, which are not a part of this rulemaking. To prevent potential confusion, the department will not amend this rule at this time but may consider doing so in a future rulemaking.

COMMENT NO. 24: One commenter supported the proposed amendment because it requires existing individual and shared wells to meet only the construction standards in place at the time they were drilled.

RESPONSE: Please see the department's response to Comment No. 23.

ARM 17.36.334

COMMENT NO. 25: One commenter asked whether a shared users agreement should be attached as an exhibit to the certificate of subdivision approval because purchasers often do not get a lot of information when a sale occurs.

RESPONSE: Please see the department's response to Comment No. 18.

COMMENT NO. 26: Two commenters expressed their support for the amendment.

RESPONSE: The department appreciates the comments.

ARM 17.36.335

COMMENT NO. 27: One commenter expressed their support for the amendment.

RESPONSE: The department appreciates the comment.

ARM 17.36.345

COMMENT NO. 28: One commenter urged the department, in order to avoid

confusion over other regulations that impact storm water, to compare the proposed rule amendments to the rules relating to municipal separate storm water systems (MS4) for consistency.

RESPONSE: The department is not aware of inconsistencies between the two sets of rules. Please also see the department's responses to Comments No. 11 through 14.

COMMENT NO. 29: One commenter urged the department to review the rules related to storm water pollution prevention plans as part of an overall examination of storm water regulatory practice.

RESPONSE: This comment is outside the scope of the notice but may be considered at future time.

COMMENT NO. 30: One commenter asked why a report was necessary for simplified plans under Section 2.2 rather than accept a simple checklist.

RESPONSE: A simple checklist would not adequately provide the information necessary to evaluate a storm water plan. However, the requirements for a report in Section 2.2 do not specify a format, which gives applicants the flexibility to address the necessary information in a way that is appropriate for the project.

COMMENT NO. 31: One commenter disagreed with the 3 percent maximum slope under Section 3.2.A for simplified plans and suggested changing the criteria to 5 percent, or compromising at 4 percent.

RESPONSE: The department disagrees. The maximum slope requirement for a simplified plan is established because these plans do not require an analysis of facilities to address erosion, unlike standard plans. According to the Federal Highway Administration, Hydraulic Engineering Circular No. 15, Third Edition, Design of Roadside Channels with Flexible Linings, there can be erosional issues at slopes greater than 2 percent. Additionally, *Open Channel Hydraulics* by Richard H. French states that maximum erosive velocities for graded loam or graded silt is developed on slopes of 3 percent. Thus, areas less than 3 percent should have minimal erosional concerns, and increasing the slope might result in erosive velocities in many of the soil types found in Montana. The circular remains unchanged.

COMMENT NO. 32: One commenter asked why the circular did not allow the use of the latest published storm drain spreadsheets from Montana Department of Transportation (MDT) or other acceptable sources.

RESPONSE: The circular does not prohibit the use of spreadsheets from MDT or other acceptable sources. Sections 3.2 and 3.3 state that the spreadsheets provided to calculate flow rates and volumes are examples only. Sections 3.6 and 3.7 state that applicants may use other sources that are approved by the reviewing authority.

COMMENT NO. 33: One commenter asked the department to provide Intensity, Duration, Frequency (IDF) curves for all the major areas of Montana for

uniformity in the data used in applications for the same geographical area. The commenter also stated that IDF curves for major areas in Montana needed to be provided because the circular requires designs with peak flow at time of concentration.

RESPONSE: The department will publish a spreadsheet on the subdivision webpage that provides IDF curves for all the major areas in Montana.

COMMENT NO. 34: In response to the requirement in Section 4.3 that designs for storm sewers include a hydraulic grade line, one commenter stated that hydraulic grade lines should not be required for every storm drain line. The commenter suggested that hydraulic grade lines be required only for complex storm sewer designs.

RESPONSE: The department disagrees. Due to the hydraulic complexity of storm sewer systems, hydraulic grade lines are necessary to show hydraulic functioning of the system. Hydraulic grade lines are necessary to ensure that the storm sewer will be able to convey the designed runoff. The circular remains the same.

COMMENT NO. 35: In response to Section 4.3, one commenter asked what a closed loop is and why it cannot be used in a storm sewer design.

RESPONSE: The department agrees that there should be a definition of "closed loop" in Section 4.3. Closed loops cannot be used because all storm water must be able to reach an outlet to ensure the functionality of the storm sewer network. The following change has been made to Section 4.3:

D. No closed loops. For purposes of this circular, a closed loop is a network of pipes in which there is an inlet but no outlet for storm water.

COMMENT NO. 36: One commenter stated that the requirements in Section 4.4(B) were too complex for simple storm drain designs.

RESPONSE: The department disagrees. The requirements in this section, including requirements for culvert elevation, roadway elevation, and runoff elevations, are important to ensure that the culvert diameter specified in the design can be constructed and will function correctly. The circular remains the same.

COMMENT NO. 37: One commenter asked what runoff elevation meant in Section 4.4(B).

RESPONSE: Runoff elevation is the water level, synonymous with headwater or tailwater elevation. The circular has been changed in response to this comment to read:

B. Culvert inverts, roadway elevations, and runoff water elevations for both the 10-year and 100-year storm events.

COMMENT NO. 38: One commenter stated that the provision in Section 5.2 requiring side slopes on retention facilities to be no steeper than 3 to 1 be revised to allow for steeper slopes as long as there is a fence or other barrier to keep the public

out.

RESPONSE: The requirement for slopes to be no steeper than 3 to 1 addresses not only public safety but also slope stability and ease of maintenance of the facility. To facilitate flexibility in design, all requirements in the circular are eligible for a deviation. If an applicant would like to use a steeper slope, the applicant would need to show how the deviation criteria are met. The circular remains the same.

COMMENT NO. 39: One commenter stated that the infiltration rates in Appendix C are too slow. Revising Appendix C to use reasonable values would avoid unnecessary expensive infiltration testing.

RESPONSE: The department disagrees. While the infiltration rates in Appendix C are conservative, one of the factors limiting the life expectancy of an infiltration facility is pore clogging from sediment. To ensure that a system will continue to accept runoff, even with sediment-loaded stormwater, the system must be sized with a factor of safety. With appropriate pre-treatment, the infiltration rates specified in Appendix C may be modified, as stated in Section C.1. The circular remains the same.

COMMENT NO. 40: One commenter requested clarification of where a filter fabric liner should be placed in an infiltration facility in Section 6.2(C).

RESPONSE: The fabric filter or other material must be used to prevent clogging. The placement of the liner will be project dependent. The circular remains the same.

COMMENT NO. 41: One commenter asked whether the pre-treatment facilities described in Section 6.2(F) would be required for simple, single-family storm-water designs and commented that such a requirement would be overkill.

RESPONSE: Single-family storm water designs can be simple or complex. To allow flexibility in design, pre-treatment facilities are required only when sediment, trash, debris, or organic materials are likely to impact the operation or maintenance of the infiltration facility, as stated in Section 6.2(F). The circular remains the same.

COMMENT NO. 42: One commenter noted that Appendix B provided the soil conservation service (SCS) method for computing time of concentration and commented that the circular should be revised to allow other acceptable methods.

RESPONSE: The SCS is one of several methods described in Appendix B. Section 3.7 states that other methods are allowed if approved by the reviewing authority. The circular remains the same.

COMMENT NO. 43: One commenter stated that the infiltration rates reflected in the infiltration table in Appendix C are too slow. At a minimum, a footnote should be added stating that the infiltration rates can be increased significantly if pre-treatment is provided.

RESPONSE: Please see the department's response to Comment No. 38.

COMMENT NO. 44: One commenter stated that the circular orifice discharge coefficient in the example equation in Appendix D should be 0.62 instead of 0.6.

RESPONSE: The orifice discharge coefficient is a function of the orifice diameter and whether the flow is free or submerged. The values range from 0.57 to 0.64, with 0.62 used for either sharp crested orifices or those with a diameter of 0.025 or 0.05 meters with free flow. Since the equation was provided as a guide, not as a requirement, the circular remains the same.

COMMENT NO. 45: One commenter asked how the Standard Storm Drainage Plan spreadsheet in Appendix F will calculate time of concentration without an IDF curve.

RESPONSE: Appendix F provides an example of a spreadsheet for a simple plan, not a standard plan. As described in Appendix B.1.1, the spreadsheets for both the simple plan and the standard plan use the rational or modified rational method, where the time of concentration is equal to one hour and is not based on an IDF curve. The circular remains the same.

COMMENT NO. 46: One commenter stated that the circular should not be adopted until the department has provided training that goes through in detail each of the examples in Appendices H through M.

RESPONSE: The department provided training on storm drainage in Billings, Helena, and Missoula in June to August 2016. The department may consider additional trainings in the future as a result of this comment.

COMMENT NO. 47: In response to the example in Appendix L, one commenter stated the department should provide IDF curve spreadsheets and IDF curves for all major areas in Montana, so that applicants are not penalized for not having the latest rainfall data.

RESPONSE: The department has provided Appendix A for rainfall data, but, in accordance with Section 3.6, other sources may be used with the approval of the reviewing authority. In addition, see the department's response to Comment No. 32.

COMMENT NO. 48: One commenter stated that the proposed changes to DEQ-8 would make it nearly unavoidable to employ an engineer for almost any storm water related matters in subdivision development.

RESPONSE: The department disagrees. Many designers already submit storm water plans, and the proposed amendments to DEQ-8 do not affect their ability to do so. Likewise, the proposed amendments allow fewer requirements for those applications that qualify for simplified plans, which will make such designs easier to submit for designers. Finally, the proposed amendments to DEQ-8 include a large number of spreadsheets and examples to assist users.

ARM 17.36.802

COMMENT NO. 49: Two commenters stated their support of the proposed fee changes that would allow the reviewing authority to charge a per-hour fee for certain subdivision applications that had been denied multiple times.

RESPONSE: The department appreciates the comments but has determined that the proposed changes were not adequately clear in how they would apply in relation to the rule as a whole, including those parts of the rule not part of this rulemaking. Because of that, the department is declining to make the proposed amendments at this time, but may consider the changes in a future rulemaking.

ARM 17.36.804

COMMENT NO. 50: Two commenters expressed their support for the per-lot reimbursement to local health departments. One stated that, although the reimbursement increase makes the system more equitable, more should be done in this area, which should be a point of discussion between local health departments and the department.

RESPONSE: The department will continue to discuss these issues with local health departments in the future.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL QUALITY

/s/ Edward Hayes
EDWARD HAYES
Rule Reviewer

BY: */s/ Tom Livers*
TOM LIVERS, Director

Certified to the Secretary of State, July 31, 2018.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 18.4.110, 18.4.111, and 18.4.112 and the repeal of ARM 18.4.101, 18.4.113, 18.4.114, and 18.4.115 pertaining to electronic submission of transportation construction bids	)))))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On June 8, 2018 the Department of Transportation published MAR Notice No. 18-171 pertaining to the proposed amendment and repeal of the above-stated rules at page 1086 of the 2018 Montana Administrative Register, Issue Number 11.

2. The department has amended and repealed the above-stated rules as proposed.

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

COMMENT #1: One comment was received stating the proposed rule amendments place undue costs and hardships on small businesses that typically only quote MDT projects as a prime contractor once or twice a year. The comment stated MDT's current service provider Bid Express™ charges a one-time set-up cost for a digital ID, and monthly costs to bid electronically. The comment stated the costs apply even if there are no projects specific to the contractor's work that would be bid as prime. The comment stated certain Disadvantaged Business Enterprises (DBE) subscribers may receive the services "for free," which is unfair to other small businesses seeking to quote MDT projects as prime. Finally, the comment asked whether MDT participates in the "free" subscriptions for DBE contractors, and whether MDT would consider participating in additional "free" subscriptions for contractors not currently designated as DBE.

RESPONSE #1: MDT notes the majority of its bids are already received electronically through Bid Express™, and the proposed expansion of this service to all contractors will save additional resources and time for both MDT and the bidding contractors. MDT acknowledges there are costs associated with the bid service, which would be $880 or less annually. However, small businesses may seek reimbursement of the bid service costs through the Disadvantaged Business Enterprise (DBE) or Small Business Enterprise (SBE) programs. Finally, the proposed amendment to ARM 18.4.111(4) contains an exception to the electronic bid requirement, allowing MDT to continue to accept paper bids for certain projects which MDT determines are appropriate. Any exception to electronic bidding will be designated in the notice of bid or contract special provisions.

/s/ Carol Grell Morris
Carol Grell Morris
Rule Reviewer

/s/ Michael T. Tooley
Michael T. Tooley
Director
Department of Transportation

Certified to the Secretary of State July 31, 2018.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I, II, and III pertaining to the imposition of an administrative fee for alcohol or drug test refusal	))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On May 25, 2018, the Department of Justice published MAR Notice No. 23-3-251 pertaining to the proposed adoption of the above-stated rules at page 1010 of the 2018 Montana Administrative Register, Issue Number 10.

2. The department has adopted the above-stated rules as proposed: New Rule I (23.3.992), New Rule II (23.3.993), and New Rule III (23.3.994).

3. No comments or testimony were received.

/s/ Matthew T. Cochenour
Matthew T. Cochenour
Rule Reviewer

/s/ Timothy C. Fox
Timothy C. Fox
Attorney General
Department of Justice

Certified to the Secretary of State July 31, 2018.

BEFORE THE BOARD OF PERSONNEL APPEALS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.26.612, 24.26.614, 24.26.618, 24.26.643, and 24.26.680 pertaining to public sector collective bargaining	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On February 23, 2018, the Board of Personnel Appeals published MAR Notice No. 24-26-336 regarding the public hearing on the proposed amendment of the above-stated rules, at page 382 of the 2018 Montana Administrative Register, Issue No. 4.

2. On April 6, 2018, a public hearing was held on the proposed amendment of the above-stated rules in Helena. Several comments were received by the April 13, 2018 deadline.

3. The board has thoroughly considered the comments received. A summary of the comments and the board responses are as follows:

COMMENT 1: A commenter generally expressed support for the proposed amendments to ARM 24.26.612, 24.26.618, 24.26.643, and 24.26.680.

RESPONSE 1: The board acknowledges the comment.

COMMENT 2: A commenter requested that the board amend ARM 24.26.614(5), to shorten the timeline from ten days to five days for informal resolution, to decrease the time for the issuance of a determination after hearing from 30 days to 20 days, and to decrease from 60 days to 30 days the amount of time for extension of an initial deadline.

RESPONSE 2: The board agrees that that the resolution process can be somewhat streamlined, but it is cognizant of the workload of the department's Office of Administrative Hearings, which acts as the board's agent for purposes of holding contested case hearings. Accordingly, the board will shorten the timelines as requested, but it will specify that the timelines under ARM 24.26.614(5) are business days.

COMMENT 3: A commenter expressed support for the proposed amendment of ARM 24.26.614, but stated that ARM 24.26.620 should also be amended in order to be consistent with the process described in ARM 24.26.614. The commenter stated that without providing definitive timelines for petitions to be reviewed and heard, the process is subject to lengthy delays. The commenter also suggested additional

language be added to ARM 24.26.614(1) to clarify that certain aspects of ARM 24.26.620(1)(a) and (3) do not apply to counter petitions.

RESPONSE 3: The request to amend ARM 24.26.620 is outside of the scope of the proposed rulemaking, and therefore cannot be acted upon as part of this rulemaking proceeding. The request to amend ARM 24.26.614(1) as suggested is likewise outside the scope of the proposed rulemaking. The board will consider the comment as a request for additional rulemaking, and discuss whether to propose the amendments in a future rulemaking.

COMMENT 4: A commenter requested that the board amend ARM 24.26.655, Election Directed, and ARM 24.26.677, Certification, to eliminate the need for an election if a majority of employees in the proposed bargaining unit have signed authorization cards.

RESPONSE 4: The request to amend ARM 24.26.655 and 24.26.667 is outside of the scope of the proposed rulemaking, and therefore cannot be acted upon as part of this rulemaking proceeding. The board will consider the comment as a request for additional rulemaking, and discuss whether to propose the amendments in a future rulemaking.

4. The board has amended ARM 24.26.612, 24.26.618, 24.26.643, and 24.26.680 exactly as proposed.

5. The board has amended ARM 24.26.614 with the following changes, stricken matter interlined, new matter underlined:

24.26.614 EMPLOYER COUNTER PETITION (1) through (4) remain as proposed.

(5) A board agent shall have ~~ten~~ five business days to work with the parties to resolve issues raised in the counter petition. If the parties do not reach a resolution within ~~ten~~ five business days, the board agent shall transfer the counter petition to the Office of Administrative Hearings. A hearing examiner shall conduct an informal expedited hearing and issue a determination within ~~30~~ 20 business days of the counter petition's certification by the Office of Administrative Hearings. A hearing examiner may, at the hearing examiner's discretion or upon good cause shown by a party, extend the initial deadline for an additional period not to exceed a total of ~~60~~ 30 business days from the counter petition's certification by the Office of Administrative Hearings.

(6) and (7) remain as proposed.

/s/ Mark Cadwallader
Mark Cadwallader
Rule Reviewer

/s/ Galen Hollenbaugh
Galen Hollenbaugh
Commissioner
Department of Labor and Industry

/s/ Anne L. MacIntyre
Anne L. MacIntyre
Chair
Board of Personnel Appeals

Certified to the Secretary of State July 31, 2018.

BEFORE THE BOARD OF BARBERS AND COSMETOLOGISTS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.121.301 definitions, 24.121.401 fees, 24.121.406 nonroutine applications, 24.121.407 premises and general requirements, 24.121.603 licensure by credentialing with an out-of-state license, 24.121.605 application for postsecondary school licensure, 24.121.607 application for instructor license, 24.121.808 credited hours for Montana-licensed individuals in a cosmetology or barbering program, 24.121.1103 instructor requirements - teacher-training programs, 24.121.1301 salons/booth rental, 24.121.1509 implements, instruments, supplies, and equipment, and 24.121.1511 sanitizing and disinfecting implements and equipment, and the adoption of NEW RULE I foreign-educated applicants	))))))))))))))))))	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On May 11, 2018, the Board of Barbers and Cosmetologists published MAR Notice No. 24-121-16 regarding the public hearing on the proposed amendment and adoption of the above-stated rules, at page 925 of the 2018 Montana Administrative Register, Issue No. 9.

2. On June 4, 2018, a public hearing was held on the proposed amendment and adoption of the above-stated rules in Helena. Numerous comments regarding ARM 24.121.407 were received by the June 8, 2018, deadline.

3. The board has amended ARM 24.121.301, 24.121.401, 24.121.406, 24.121.603, 24.121.605, 24.121.607, 24.121.808, 24.121.1103, 24.121.1301, 24.121.1509, and 24.121.1511 exactly as proposed.

4. The board has adopted NEW RULE I (24.121.606) exactly as proposed.

5. The board is not amending ARM 24.121.407 at this time. The board received numerous comments regarding the proposed amendments to this rule concerning animals in salons and shops. Following review and consideration of the

comments received, and due to concerns raised by commenters, the board has decided to not amend ARM 24.121.407 as proposed at this time.

BOARD OF BARBERS AND
COSMETOLOGISTS
ANGELA PRINTZ, PRESIDENT

/s/ DARCEE L. MOE
Darcee L. Moe
Rule Reviewer

/s/ GALEN HOLLENBAUGH
Galen Hollenbaugh, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State July 31, 2018.

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

In the matter of the amendment of ARM 37.86.1102, 37.86.1103, and 37.86.1105 pertaining to Medicaid outpatient drug services	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On May 11, 2018, the Department of Public Health and Human Services published MAR Notice No. 37-840 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 956 of the 2018 Montana Administrative Register, Issue Number 9.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

4. The department will apply these rules retroactively to July 1, 2018. A retroactive application of the proposed rules does not result in a negative impact to any affected party.

/s/ Brenda K. Elias
Brenda K. Elias
Rule Reviewer

/s/ Sheila Hogan
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State July 31, 2018.

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

In the matter of the amendment of ARM 37.40.305, 37.40.330, 37.86.1801, 37.86.1802, and 37.86.1806 pertaining to durable medical equipment (DME)	)))))	NOTICE OF DECISION ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On May 11, 2018, the Department of Public Health and Human Services published MAR Notice No. 37-843 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 964 of the 2018 Montana Administrative Register, Issue Number 9.

2. A public hearing on the notice of proposed amendment of the above-stated rules was held on May 31, 2018.

3. At this time, the department is withdrawing MAR Notice No. 37-843 from consideration. After receiving public comment on the proposal, the department will reassess the rules relating to durable medical equipment.

/s/ Brenda K. Elias
Brenda K. Elias
Rule Reviewer

/s/ Sheila Hogan
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State July 31, 2018.

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

In the matter of the amendment of ARM 37.79.304 pertaining to clarifying contents of Healthy Montana Kids (HMK) Evidence of Coverage	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On May 25, 2018, the Department of Public Health and Human Services published MAR Notice No. 37-844 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1013 of the 2018 Montana Administrative Register, Issue Number 10.

2. The department has amended the above-stated rule as proposed.

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

COMMENT #1: The department received one comment expressing support for the proposed amendments to the HMK Evidence of Coverage (EOC).

RESPONSE #1: The department thanks the commenter for their comment.

4. The department will apply this rule retroactively to November 1, 2017. A retroactive application of the proposed rule does not result in a negative impact to any affected party.

/s/ Brenda K. Elias
Brenda K. Elias
Rule Reviewer

/s/ Sheila Hogan
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State July 31, 2018.

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

In the matter of the amendment of ARM 37.34.3005 pertaining to home and community-based services (HCBS) waiver programs	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On June 22, 2018, the Department of Public Health and Human Services published MAR Notice No. 37-852 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1142 of the 2018 Montana Administrative Register, Issue Number 12.

2. The department has amended the above-stated rule as proposed.

3. No comments or testimony were received.

4. The private duty nursing rate increase will take effect retroactive to July 15, 2018, as described above, and as set forth in the manual adopted in the rule. The department will apply all other rule amendments retroactively to July 1, 2018, which is the effective date of the revised manual. Neither retroactive application of the proposed rule amendments results in a negative impact to any affected party.

/s/ Brenda K. Elias
Brenda K. Elias
Rule Reviewer

/s/ Sheila Hogan
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State July 31, 2018.

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

In the matter of the amendment of ARM 37.36.604 pertaining to updating the federal poverty index guidelines for the Montana telecommunications access program (MTAP)	))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On June 22, 2018, the Department of Public Health and Human Services published MAR Notice No. 37-853 pertaining to the proposed amendment of the above-stated rule at page 1146 of the 2018 Montana Administrative Register, Issue Number 12.

2. The department has amended the above-stated rule as proposed.

3. No comments or testimony were received.

4. The department will apply the rule amendment retroactively to February 2, 2018. A retroactive application of the rule amendment does not result in a negative impact to any affected party.

/s/ Nicholas Domitrovich
Nicholas Domitrovich
Rule Reviewer

/s/ Sheila Hogan
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State July 31, 2018.

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

In the matter of the amendment of ARM 37.85.105 pertaining to updating Medicaid fee schedules and effective dates	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On June 22, 2018, the Department of Public Health and Human Services published MAR Notice No. 37-854 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1149 of the 2018 Montana Administrative Register, Issue Number 12.

2. The department has amended the above-stated rule as proposed.

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

COMMENT #1: The department received two comments expressing support for the proposed private duty nursing fee schedule.

RESPONSE #1: The department thanks the commenters for their comments.

COMMENT #2: It was noted at the administrative rules hearing that the dollar amounts stated in the Health Resources Division's portion of the rulemaking's expected fiscal impact required revision.

RESPONSE #2: The department revises the dollar amounts stated in the Health Resources Division's expected fiscal impact to $209,784.66 in state general fund dollars and $407,592.20 in federal funding.

4. The department will apply the rule amendments described in ARM 37.85.105(3)(l) and (3)(z) retroactively to July 1, 2018, and the rule amendments described in ARM 37.85.105(4)(a) and (5)(b) retroactively to July 15, 2018. Neither retroactive application of the proposed rule amendments results in a negative impact to any affected party.

/s/ Brenda K. Elias
Brenda K. Elias
Rule Reviewer

/s/ Sheila Hogan
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State July 31, 2018.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through V, the amendment of ARM 42.12.104, 42.12.111, 42.12.124, 42.12.130, 42.12.131, and 42.12.144, and the repeal of ARM 42.12.125, 42.12.202, 42.12.401, 42.12.404, 42.12.405, 42.12.406, 42.12.408, 42.12.412, 42.12.414, and 42.12.416 pertaining to quota areas and the competitive bidding process for alcoholic beverage licenses	))))))))))))	NOTICE OF ADOPTION, AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On March 16, 2018, the Department of Revenue published MAR Notice No. 42-2-992 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 555 of the 2018 Montana Administrative Register, Issue Number 5.

2. On April 9, 2018, a public hearing was held to consider the proposed adoption, amendment, and repeal. John Iverson, Montana Tavern Association; Paul Cartwright, interested citizen; and John Winders, Isaacs Restaurant, appeared and testified at the hearing. The department also received written comments from Michael Lawlor, Goodrich and Reely, PLLC; Floyd F. Hoff Jr., Red Fox Supper Club and Lounge; and Paul Cartwright.

3. The department adopts New Rule III (42.12.503) and New Rule V (42.12.505), amends ARM 42.12.104, 42.12.111, 42.12.124, 42.12.130, 42.12.131, and 42.12.144, and repeals ARM 42.12.125, 42.12.202, 42.12.401, 42.12.404, 42.12.405, 42.12.406, 42.12.408, 42.12.412, 42.12.414, and 42.12.416 as proposed.

4. The department adopts New Rule I (42.12.501) and New Rule II (42.12.502), and New Rule IV (42.12.504) as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (42.12.501) DEFINITIONS The following definitions apply to this subchapter:

(1) through (3) remain as proposed.

(4) "Irrevocable letter of credit" means a letter of credit in which the issuing ~~bank~~ financial institution guarantees the:

(a) remains as proposed.

(b) ~~bank~~ financial institution will not withdraw the credit or cancel the letter if the bidder's bid results in being the highest bid submitted for the available license;

(c) ~~bank~~ financial institution will not modify or revoke the credit without the department's consent if the bidder's bid results in being the highest bid submitted for the available license;

(d) remains as proposed.

(e) ~~bank's~~ financial institution's commitment to honor the line of credit for a minimum of one year from the date of the competitive bidding closing if the bidder's bid results in being the highest bid submitted for the available license.

(5) and (6) remain as proposed.

NEW RULE II (42.12.502) PUBLISHING OF ALCOHOLIC BEVERAGE LICENSE AVAILABILITY (1) The department shall publish the availability of a retail alcoholic beverage license, that is subject to the quota limitations in 16-4-105, 16-4-201, or 16-4-420, MCA, when:

(a) remains as proposed.

(b) the opportunity to transfer a license into a quota area becomes available in which a license of the same type is not currently available in the quota area; ~~and~~

(c) the lapse, revocation, or issuance of a license within the quota area in which the license is located has created the last remaining license for that license type in the quota area; and

(d) the department's denial of an application for licensure or the applicant's withdrawal of an application for licensure has created the last remaining license for that license type in the quota area.

(2) through (4) remain as proposed.

NEW RULE IV (42.12.504) SUCCESSFUL RETAIL ALCOHOLIC BEVERAGE LICENSE COMPETITIVE BIDDER (1) through (10) remain as proposed.

(11) The licensee is subject to forfeiture of the license at the department's discretion if the licensee:

(a) remains as proposed.

(b) does not use the license within one year of receiving the license unless the department grants an extension;

(c) and (d) remain as proposed.

(12) If the application for licensure is withdrawn, the license is forfeited, or if the department denies the application for licensure, the next highest bidder will be notified. The next highest bidder will have two weeks to submit an irrevocable letter of credit for their bid amount if the original letter of credit was cancelled.

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

COMMENT 1: Mr. Iverson commented that with a couple of exceptions, the Montana Tavern Association (MTA) generally supports the rules. Mr. Iverson's first comment relates to New Rule II, specifically the language in (1)(c) about the lapse, revocation, or issuance of a license into a quota area in which the license is located. Mr. Iverson stated that there are additional criteria that could cause the state to want

to engage in the competitive bidding process, for example, if a license is denied by the state or if an application is withdrawn. The MTA recommends the department consider changing the language in this section to ensure it encompasses all the different situations in which the last available license might occur. Mr. Iverson added that the Montana Gaming Association supports this recommendation by the MTA.

RESPONSE 1: The department has amended New Rule II to require the department to publish the availability of a license when the denial or withdrawal of an application for licensure creates the last remaining license for that license type in the quota area.

COMMENT 2: Mr. Iverson's second comment relates to the proposed repeal of ARM 42.12.416. While most of the repealed rule content is picked up in ARM 42.12.131, he does not see coverage for when a restaurant might start out with a smaller seating capacity and over time receive approval to increase their seating capacity and believes this should be included in that rule. Because restaurant beer and wine licenses are priced based on seating capacity, the repealed rule included a requirement that the restaurant owner pay the department the difference between the original application fee and the fee for the higher category of seating. Mr. Iverson added that the Montana Gaming Association supports this recommendation by the MTA.

RESPONSE 2: When an existing restaurant beer and wine license is approved by the department to increase their restaurant's seating capacity, the licensee is required in 16-4-420(13), MCA, to pay to the department the difference between the fees paid at the time of filing the original application and issuance of the license and the applicable fees for the additional seating. Since the statute is clear that the additional fees are due, the language does not need to be carried over to rule.

COMMENT 3: Mr. Cartwright commented that he has long been interested, both as a private citizen and as a Helena City Commissioner, in the effects of Montana's alcohol regulations on the shape and vitality of Montana's urban areas and offers his comments from that perspective.

He recommends the department amend New Rule II(2) to use the same language as the statutes and to clarify that initial publication meets the requirement to "publish the availability of no more than one new . . . license a year." Sections 16-4-105(2)(b), 16-4-201(5), and16-4-420(9), MCA. This will cover cases where the first round of publishing the availability of a license does not result in a successful application for a new license in that year and it becomes necessary to continue a bidding process into the subsequent calendar year. In such cases, the department could potentially be publishing the availability of two new licenses within a year, one for the current year and one for the previous year. To interpret statute to forbid this would allow some party to force continual delay in issuing subsequent licenses, possibly even until an application is approved for the previous license. Mr. Cartwright suggests the following amendment for New Rule II:

(2) No more than one new license per license type per quota area may be published per calendar year until the quota has been reached for licenses that became available due to the separation of combined quota areas. Initial publication fulfills this statutory limit on new licenses, irrespective of when the highest qualified bidder is identified and an application approved.

RESPONSE 3: Senate Bill 5, Sp. L. 2017, is clear that the department can only publish the availability of no more than one new license per license type if the availability of the license was the result of a combined quota area separating into individual quota areas. The department will not publish the availability of more than one license per year per license type for this reason. However, if an additional license becomes available for another reason, such as a change in population, a license being lapsed, revoked, or an application being denied or withdrawn, the department may publish the availability of an additional license within the same year as a license being published due to the separation of a combined quota area.

COMMENT 4: Regarding New Rule V(1), Mr. Cartwright commented that the department proposed to implement 16-4-105(1)(c) and 16-4-201(3), MCA, which replace combined quota areas, by using a pivotal straight line to separate two or more incorporated cities or incorporated towns. The messy nature of city and town boundaries presents a challenge to implementing these statutes. The use of a pivotal straight line seems a workable approach and is not objectionable, at least as shown currently in the sketches of "New Quota Area Boundary Maps" on the department's web site at mtrevenue.gov/liquor-tobacco/useful-information. To avoid confusion in the future, the department should publish the precise coordinates of the pivotal straight lines since, unlike city boundaries, those lines exist only by virtue of department action.

RESPONSE 4: Although two or more incorporated cities/towns are separated by a pivotal straight line, it is not possible to provide the precise coordinates of the boundaries. In most situations, the pivotal straight line does not extend to the furthest point of the five-mile boundary. Rather, once the pivotal straight line reaches the point to where the five-mile boundaries intercept, the boundary then follows that path, which is not a straight line. As Mr. Cartwright mentions, the department will maintain maps of these quota areas on its website (https://mtrevenue.gov/liquor-tobacco/useful-information/) and is available for any questions that may arise.

COMMENT 5: Mr. Cartwright stated that the department should strike New Rule V(3)(a), which reads, "under no circumstance may a license, restricted by the quota limitations in 16-4-105, 16-4-201, or 16-4-420, MCA, be located farther than the county boundary within which the incorporated city or incorporated town is located," because the department lacks statutory authority to impose this limitation.

The plain reading of 16-4-105(1), 16-4-201(1), 16-4-201(2), and 16-4-201(8), MCA, is that a city quota area extends 5 miles from the corporate limits of a city or town. The statutes set no other condition on that distance. With two exceptions, Title 16, chapters 1 through 6, MCA, does not condition the location of any city

license on county boundaries. Further, no reference in those statutes to "counties" or "unincorporated areas" requires any limitation on the extent of city quota areas to be comprehensible or to be feasible to administer.

The Legislature is capable of specifically conditioning a license based on county boundaries when deemed necessary. For example, see 16-4-204(9) (Temporary) and 16-4-204(2) (Effective January 1, 2024), MCA, both of which deal with certain license transfers from an incorporated area to an unincorporated area within the same county. This contrasts to the statutes' silence on the concept embodied in New Rule V(3)(a).

Mr. Cartwright further commented that for these same reasons, the department should adopt its proposed amendment of ARM 42.12.104, because the proposed amendment strikes language from that rule that is similar to the language he opposes including in New Rule V(3)(a).

RESPONSE 5: Although there is not a specific statute to identify, ending a quota area at a county line makes common sense and helps ensure that the number of licenses issued in the quota area is an accurate representation of the number of licenses that are statutorily allowed by population. Not ending the quota area at the county line could result in a quota area having more licenses issued than allowed and could result in confusion as to which quota area a license belongs to (e.g., Helena's five-mile boundary extends beyond Lewis and Clark County into Jefferson County. If the boundary did not stop at the county line, the overlapping quota areas would have varying license types issued with varying values for the same geographical area.) Additionally, and as mentioned in the reason statement, ending the quota area at the county line is existing language that was previously located in ARM 42.12.104.

COMMENT 6: Mr. Cartwright commented that New Rule V does not cover what happens when there are no bids on a license. While not likely to happen, it is possible. The absence of bids would indicate the license was not offered at market price. He suggests that in this situation the department should re-notice the license at a price closer to market value rather than abandoning it for the year.

RESPONSE 6: The department agrees with Mr. Cartwright that New Rule V does not describe a procedure for when there are no bids for a license. However, statute provides that if no bids are received during a competitive bidding process, the department shall process applications for the license in the order received. This language prohibits the department from re-noticing the availability of the license at a different market price.

COMMENT 7: Mr. Winders testified that there is a cost to decisions regarding licenses. It is difficult for startups and small operations to acquire liquor licenses in Montana and grow their businesses due to the high cost of licenses. If allowed for five more years, the regulations will be the end of small businesses forever. He requests that the department put a hold on the whole process. It all needs to change. He stated he is a small business owner who supports local producers, is fighting for the restaurant industry, and feels underrepresented and marginalized in

the current process. The highest bidder situation is a short-term strategy to get capital for the state. It favors corporatocracy and allows the guy with the most money to win. He stated that the regulations feel like an attempt to put the restaurant industry out of business and added that it would be preferable to receive facilitation from the department instead of regulations and inspections.

RESPONSE 7: The department has the responsibility to administer the Montana Alcoholic Beverage Code. As such, for the next five years, the code requires the department to conduct competitive biddings to determine which person or business entities are granted the opportunity to apply for licensure. The department cannot put the process on hold.

COMMENT 8: Mr. Winders asked the department to analyze the results of the new rules and educate the consumer. He feels out of the loop because no one notifies him or those in his industry of the proposed rule changes or auctions. Had he known about the recent availability of a license in Bozeman, he may have put in for it. But because it was only advertised in the Bozeman paper, he was unaware of it in Craig. He asked why these things are not communicated through TV, radio, newsprint, and internet media.

RESPONSE 8: The department agrees with the importance of public participation in the rulemaking process and complies with the requirements of the Montana Administrative Procedure Act regarding notifications. The department sends its notices to interested parties by e-mail and/or standard mail and has added Mr. Winders to its list of persons interested in receiving rulemaking notices regarding alcoholic beverages. The Secretary of State also publishes the Montana Administrative Register online, twice a month. The register includes all rulemaking proposal and adoption notices filed by state agencies and boards during the publication period together in a single location. Current and past issues of the register are available at sosmt.gov/arm/register.

Regarding the availability of licenses, the department cannot reasonably publish the availability of licenses in every newspaper publication across Montana. The department encourages individuals to monitor the department's website which will list licenses open to the competitive bidding process at https://mtrevenue.gov/liquor-tobacco/liquor-licenses/liquor-license-competitive-bidding-process/.

COMMENT 9: Mr. Winders noted there is a food revolution going on in this country and suggested looking at Boise, Salt Lake City, Denver, and Portland. If you have 10 or 15 good restaurants in your town, you would make it a better place to live. The number one thing that sells Montana is Montana. People want to live and visit here and eat at a local restaurant, not at a franchise entity. And yet a young chef cannot afford to move from Portland, Oregon and open a restaurant in Montana. He proposes the department offer a $5,000 annual restaurant license that allows serving from 11-11, with no gaming, and no off-premises sales. Everyone he talks to in the industry agrees with this idea. But the recent special session crushed it.

RESPONSE 9: The creation of a new restaurant license would require the adoption of new legislation by the Montana Legislature. The department encourages Mr. Winders to contact a Montana Senator or Representative to pursue this further.

COMMENT 10: Mr. Lawlor stated he recognizes that Senate Bill (SB) 5 has problems that will require legislative action to resolve, and that the department is constrained by the existing statutory language in what it can address by rule. The purpose of SB 5 was to generate revenue for the state by selling licenses to the highest bidder. The department should do what it can to ensure that the potential highest bidder's bid is not rejected due to an overly-restrictive interpretation of the statute or a rule. A more open approach will benefit both the state general fund and the bidders.

RESPONSE 10: The department agrees with Mr. Lawlor that additional legislation is necessary to resolve issues with the adopted language of SB 5. Until any further legislative changes have been adopted, the department must administer the statutes as written. The department encourages Mr. Lawlor to seek legislation for areas needing change or that are overly-restrictive.

COMMENT 11: Mr. Lawlor provided the following comments and suggestions on the proposed definition of "irrevocable letter of credit" in New Rule I:

All references to "bank" in (4) should be changed to "financial institution" to match the language in statute. Letters of credit can be issued by other types of financial institutions besides banks, such as credit unions. The department may want to define "financial institution" in this section, and could use language similar to the DOJ's definition of "institutional lender" in ARM 23.16.101(8).

In (4)(a), the irrevocable letter of credit (ILOC) could be issued to the bidding entity or to an underlying individual owner of the entity, such as the member of an LLC bidder, or the shareholder of a corporate bidder. Senate Bill (SB) 5 does not specify that the ILOC must be in the specific name of the applicant individual or entity. The statute says, "an irrevocable letter of credit from a financial institution establishing the department as the beneficiary of the bid amount." This could be in the form of credit extended to an entity, or to the entity's underlying individual owner(s), who could use the funds to make the necessary capital contributions to the entity. In some circumstances, financial institutions will be more willing to issue credit to an individual, rather than to an entity, especially a newly-formed entity. Based on experiences with ILOCs issued to license lottery entrants, it is a somewhat common situation for the financial institution to issue the ILOC to the individual rather than the entity, either by mistake or because the individual has better credit than the entity. It would be both statutorily unnecessary and at cross-purposes with the revenue-generating purpose of SB 5 for the department to reject a bid because the ILOC is issued to the individual owner of an entity rather than to the entity itself.

Section (4)(c) imposes a requirement not in statute, by saying the "[financial institution] will not modify or revoke the credit without the department's consent." This requirement should be removed. The department should be as

accommodating as possible to financial institutions, given SB 5's goal of generating revenue for the state.

Section (4)(e) imposes a requirement not in statute, by saying the ILOC must include "[financial institution]'s commitment to honor the line of credit for a minimum of one year from the date of the competitive bidding closing." Furthermore, this creates difficulties for financial institutions by requiring the ILOCs remain open in their books for an extended period even when the bidder has not been chosen as the winning bidder. Financial institutions may have difficulty justifying this to bank auditors and examiners.

RESPONSE 11: The department agrees with Mr. Lawlor that any reference to the term "bank" should be changed to "financial institution" and has further amended New Rule I.

The department is unable to implement Mr. Lawlor's comment that the department should accept irrevocable letters of credit from an underlying individual owner rather than the entity itself. Disclosing all underlying individual owners of the entity is not required at the time of submitting a bid. Instead, this is made at the time when the highest bidder submits their application for licensure to the department. Therefore, the department would not have the ability to confirm whether the irrevocable letter of credit is issued in the name of one of the underlying individual owners.

Mr. Lawlor's request to remove the requirement that prohibits a financial institution from modifying or revoking the letter of credit and requiring the financial institution to honor the letter of credit for a minimum of one year has been reconsidered by the department. The department has further amended New Rule I to state these requirements only apply to the highest bidder. Additionally, in the event the highest bidder is unable to be licensed, the department has further amended New Rule IV to require the next highest bidder to obtain a new irrevocable letter of credit within two weeks of being notified by the department as that bidder may have asked the financial institution to cancel their original irrevocable letter of credit.

COMMENT 12: Regarding New Rule II(4), which provides that the "department has the right to cancel or amend a competitive bidding process at any time," Mr. Lawlor stated he believes the department should have to publicly explain its reason for any such cancellation or amendment to an announced bidding process. This would promote transparency. The public has a right to know. Bidders and their financial institutions expend considerable time and money preparing their bids and it is a wasted effort and expense when the process is cancelled, and is especially frustrating when cancelled at the last minute. Because statute provides a specific procedure for when no bids are received (no bidding or payment to the state required in that case, and applications are to be processed in the order received), it is important for the public to know that the reason the bidding was cancelled was not due to the department failing to receive bids.

RESPONSE 12: The department will provide the reason a competitive bid is cancelled or amended upon a written request to the department.

COMMENT 13: Mr. Lawlor provided the following comments and suggestions regarding the disqualification language in New Rule III:

In (3)(c), please clarify in the rule whether a signature may be electronic or if a hand-written signature is required.

Section (3)(d) is unnecessarily restrictive because the bid should be accepted if such individual will be 19 by the time the license application is approved.

In (3)(g), or somewhere else in the new rules, the department should include example language for an ILOC that would be acceptable to the department.

Section (3)(j) includes a requirement that the ILOC must specify the license type and quota area, which goes beyond the requirements of the statute. The statute does not require the ILOC to be so specific. If the financial institution is willing to extend credit to the bidder in the bid amount, with the department as beneficiary, that is all that is required by statute. This additional requirement would run the risk of unnecessarily disqualifying an otherwise eligible high bidder, which would cost the state money.

Section (3)(k) purports to give the department discretion to determine if "for any other reason, the information provided is inaccurate or incomplete," and disqualify a bidder for such reason. If a bidder is disqualified for any stated or other reason, the department should be required to provide an explanation to the bidder of its reason for disqualification. And, given that the purpose of Senate Bill 5 is to generate revenue for the state, it would be in the department's interests to provide such explanation as soon as possible before the deadline so that the bidder will have the opportunity to remedy the problem and submit a valid bid. This would be fairer to all bidders, as it would ensure that everyone who puts forth the time and effort to submit a bid will have their bid considered and their fee and money spent on the ILOC will not be wasted.

RESPONSE 13: The department has implemented an electronic form for submitting a bid on a license. As this is the only option to submit a bid, only electronic signatures are required.

Mr. Lawlor's request to require an individual to be at least 19 years of age at the time the application for licensure is approved rather than at the time of bidding closing creates a concern for the department. For example, an application for licensure could be intentionally delayed by an applicant until the individual turns 19 years of age. For this reason, the department adopts this section as originally proposed and will require each owner, partner, member, officer or director to be 19 years of age at the time of the competitive bidding closing.

As previously mentioned, the department has implemented an electronic process for submitting a bid on a license. Within this electronic process, example language of an acceptable irrevocable letter of credit is provided.

Mr. Lawlor's request that an irrevocable letter of credit not mention the specific license type and quota area is not acceptable to the department. If an individual or business entity applies and is the highest bidder for more than one competitive bidding, the department needs confirmation that the bidder can monetarily cover the bid amount without seeking additional information from the bidder or financial institution issuing the irrevocable letter of credit.

The department's electronic form for submitting a bid is simple and easy to use. Many of the fields must be completed before the bidder can submit the bid. This should eliminate many of the instances that could have otherwise occurred for failing to submit a completed form. Furthermore, the department will not be reviewing any submissions for completeness prior to the bid closing deadline. Once the deadline has been reached, the department will only look at the entry with the highest bid. If all requirements are met on the highest bid, there is no reason to look at any further bids. Additionally, if the highest bidder is disqualified for any reason, the department will notify that bidder with the disqualification reason(s).

COMMENT 14: Mr. Lawlor provided the following comments and suggestions on New Rule IV:

Section (6) provides that the department may impose a monetary penalty, which could be substantial in the case of high bid amounts, on a high bidder who fails to submit a license application. There is no statutory authority in Senate Bill (SB) 5 for the department to impose such a penalty, and the catch-all penalty statute, 16-4-406, MCA, applies only to licensees not to bidders or applicants. This penalty provision should be removed.

Section (7) provides that the "information provided by the applicant on the application for licensure must match the information provided on the competitive bid form." The department should more fully explain what it means by this. Mr. Lawlor assumes the department intends to require that if a competitive bid form is submitted in an individual's name, that same individual cannot apply for the license using an entity he or she owns. This is a common misunderstanding by the public. The department needs to be explicit both in the text of the rule and on the competitive bid form in explaining this. Most people assume (wrongly) that they can change the applicant from their individual name to an entity they own. Alternatively, this restriction is unnecessary. There is no compelling statutory or logical reason why the individual high bidder should not be able to form an LLC or a corporation to use for his or her application. The entity ownership will be fully disclosed with the license application and the state will still get the bid amount.

Section (11) provides that, in certain circumstances, a license is subject to forfeiture "at the department's discretion." Please add a reference here that a licensee would have hearing rights under the Montana Administrative Procedure Act prior to such forfeiture. If the department does not believe this is the case, please explain why.

Section (11)(b) provides that a license is subject to forfeiture if the licensee "does not use the license within one year." But SB 5 provides an exception for when such nonuse is beyond the applicant's control. If the statutory reasons for forfeiture are going to be restated in the rules, that exception should also be mentioned in the rules.

Section (12) provides certain circumstances where the next highest bidder will be afforded the opportunity to apply for the license. One such situation is if a license is forfeited. Does the department intend for there to be any time limit on this? For example, suppose a license is forfeited five years in the future, for one of the reasons in (11), would the department go back to the second-highest bidder from five years earlier, or would the department open a new competitive bidding

process? The values of licenses are likely to change significantly after several years.

In the section of the rule regarding potential forfeiture, Mr. Lawlor asks the department to explain its intended procedures for refunding a payment made under an ILOC. The department's "Competitive Bidding Process Terms and Conditions," published during the first (cancelled) bidding process stated, "if the department determines that a refund of a payment made pursuant to an irrevocable letter of credit is due, such refund shall be made to the financial institution which issued the irrevocable letter of credit." Why isn't that language included in the proposed rule language? What criteria will the department use in determining if a refund will be made? Many lenders will be very reluctant to issue an ILOC knowing that the bidder will be acquiring a non-transferrable asset, subject to forfeiture, and in which a security interest does them no good, because the license is non-transferable. Will a refund be made to an applicant who had used his or her own funds to pay the state for the forfeited license, rather than using the ILOC funds?

RESPONSE 14: The department has proposed a monetary penalty for failing to apply for licensure to ensure only those individuals or business entities that are truly interested in obtaining a license submit a bid and minimize the administrative task of processing unwarranted bids. If only serious parties apply, the department should never need to impose the monetary penalty.

The requirement that the information on the bid form match the information on the application for licensure is necessary to ensure a different individual or business entity does not apply for the license. Additionally, the bid form asks for very minimal information from the bidder and it is clear that the individual or business entity submitting the bid must match the application for licensure in the event they are the highest bidder.

Mr. Lawlor's comment that a licensee has the right to a hearing under the Montana Administrative Procedure Act is accurate. The right to a hearing is provided for in 16-4-411, MCA, and, therefore, unnecessary to also include in rule.

The department has amended New Rule IV to provide the SB 5 exception for not using the license within one year when there are circumstances beyond the licensee's control and approved by the department.

In the case of forfeiture, the statute is clear that the department shall offer the license to the next eligible highest bidder. This shall occur regardless of when the forfeiture occurred. The statute does not provide the department with the ability to open a new competitive bidding process.

When a license is forfeited and a refund is due, the department will make the payment to the appropriate entity. This may be the applicant if they used their own funds or it may be a financial institution in which funds from the irrevocable letter of credit were drawn on.

COMMENT 15: Mr. Lawlor commented that under 16-4-420, MCA, an applicant is entitled to interest payments from the department if the processing of the application takes more than four months. As such, the applicant is entitled to know the time periods during which the department considers the four-month period to be tolled. Therefore, he suggests ARM 42.12.131 be amended as follows:

(3) "As set forth in 16-4-420, MCA, the department must make a decision either granting or denying a completed restaurant beer and wine license application within four months of receipt of the application, or must pay interest on the applicant's fee as provided in 16-4-420, MCA. However, if the investigation into the application uncovers the necessity to analyze additional information not previously provided by the applicant, the four-month time period ~~stops~~ is tolled until the information is provided. The department shall notify the applicant of the number of days for which the time period is tolled."

RESPONSE 15: The language Mr. Lawlor recommends adding regarding the payment of interest is unnecessary to repeat in rule as it is already provided for in 16-4-420, MCA. Additionally, since an application is generally tolled because of requests for additional information from the applicant, the department finds it unnecessary to notify the applicant of the number of days for which the time period is tolled.

COMMENT 16: Mr. Lawlor pointed out that paragraph 10 of the notice for this rulemaking, MAR Notice No. 42-2-992, erroneously referenced "House Bill 5" instead of "Senate Bill 5."

RESPONSE 16: The department appreciates Mr. Lawlor's observation of this error and the opportunity to correct the reference in this subsequent notice. As per the requirements of 2-4-111, MCA, the department notified the primary sponsor of Senate Bill 5, Senator Steve Fitzpatrick, in advance of the pending rulemaking on November 16, 2017 and February 7, 2018.

COMMENT 17: Mr. Hoff commented that he was not notified of the possibility of his full beverage and gambling Helena license being moved to a different quota area until after the passage of Senate Bill (SB) 5. Had he known the legislature and the department were considering revisions that could impact his business and liquor license, he would have provided testimony during the 2017 special session of the legislature. He stated he did not receive notification of the proposed revisions to the administrative rules being drafted to implement SB 5 nor the April 9, 2018, public hearing on the rules. Had he been notified, he would have provided testimony as he immediately reads notices from the department. Therefore, he provided his comments on this rulemaking in writing. He further commented that he would like to be notified via certified mail of any future revisions to rules pertaining to Montana liquor laws.

RESPONSE 17: The department agrees with the importance of public participation in the rulemaking process and complies with the requirements of the Montana Administrative Procedure Act regarding notifications. The department currently sends its notices to interested parties by e-mail and/or standard mail, but not by certified mail. The department has added Mr. Hoff to its list of persons interested in receiving rulemaking notices regarding alcoholic beverages. The Secretary of State also publishes the Montana Administrative Register online, twice a month. The register includes all rulemaking proposal and adoption notices filed by

state agencies and boards during the publication period together in a single location. Current and past issues of the register are available at sosmt.gov/arm/register.

COMMENT 18: Mr. Hoff commented that he has been unable to determine who decided that Helena would be split into Helena and East Helena quota areas and what laws and rules governed that determination. It is his understanding that if he makes no changes to his current Helena all beverage liquor and gambling license, that it will become an East Helena all beverage liquor and gambling license. It is also his understanding that the proposed rules provide guidance to the division as to how to draw the line that makes the determination as to whether a business is in the Helena or East Helena quota area. The notice states that each of the five new rules should not have any direct impact to Montana's small businesses, but in his opinion the proposed rules have a very detrimental impact on his small business. The proposed rules that provide guidance as to how the division is to determine the line that splits Helena and East Helena into two quota areas results in a devaluing of his Helena all beverage liquor and gaming license, which constitutes a taking of his assets.

RESPONSE 18: The combined quota area of Helena and East Helena has been separated because of the passage of Senate Bill 5 from the 2017 Legislative Special Session. As the statute is currently written, Mr. Hoff's license will be part of the new East Helena quota area. The legislature specifically adopted language to allow all-beverage licensees the ability to transfer their license anywhere within the formerly combined quota area for a period of twelve years from the passage of the bill to minimize the impact on existing licensees. The department encourages Mr. Hoff to continue to work with his local Senators and Representatives and the alcoholic beverage industry to propose language in the next legislative session that can be agreeable by all parties involved.

COMMENT 19: Mr. Hoff expressed concern that proposed New Rule I and New Rule V provide guidance as to how the division will separate two or more incorporated cities or towns, which is not provided for by statute. New Rule V(1) states "the department shall separate two or more incorporated cities or incorporated towns, pursuant to 16-4-105, 16-4-201, and 16-4-420, MCA, by using a pivotal straight line." As defined in New Rule I(6), it is unclear how the definition of pivotal straight line comports with 16-4-201(3), MCA, and generally accepted surveying methods. Additionally, the definition of pivotal straight line was not contained in Senate Bill 5, so the Montana Legislature has not vetted it. MAR Notice No. 42-2-992 states "the department is proposing to determine the center point between the two incorporated cities or towns and create a straight-line point from that line that minimizes the impact on existing licensees while trying to stay as true as possible to being equidistant." The rules do not appear to define what is a minimal impact on existing licensees and what is considered to be true.

RESPONSE 19: The department has attempted to separate each formerly combined quota area as directed by Senate Bill 5. The contours of the corporate boundaries of each incorporated city/town make it difficult for a straight line to be

drawn. The department's approach with pivotal straight lines has the least impact on existing licensees and places licensees in the quota area for which their license is generally located. Mr. Hoff's comment regarding surveying methods is unrelated to how the incorporated cities/towns are separated. Minimal impact is not used in the rule content and therefore does not need to be defined.

COMMENT 20: Mr. Hoff stated he would appreciate his concerns being taken into consideration prior to the rules, as proposed in MAR Notice No. 42-2-992, being finalized. Additionally, he would appreciate the opportunity to discuss the rules with the department and its written response to his letter.

RESPONSE 20: The department has met with Mr. Hoff and will respond to Mr. Hoff's letter of concerns directly as they were received outside the rule comment period.

/s/ David R. Stewart	/s/ Eugene Walborn
David R. Stewart	Eugene Walborn
Rule Reviewer	Director of Revenue

Certified to the Secretary of State July 31, 2018.

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;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

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.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

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.

Water Policy Interim Committee (where the primary concern is the quality or quantity of water):

- 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 P.O. 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 or Register) is an online 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

1. Consult ARM Topical Index.
   Update the rule by checking recent rulemaking and the table of contents in the last Montana Administrative Register issued.

Statute

2. Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers.

RECENT RULEMAKING BY AGENCY

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 2018. This table includes notices in which those rules adopted during the period January 1, 2018, through July 6, 2018, occurred and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 2018, this table, and the table of contents of this issue of the Register.

This table indicates the department name, title number, notice numbers in ascending order, the subject matter of the notice, and the page number(s) at which the notice is published in the 2018 Montana Administrative Registers.

To aid the user, this table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

ADMINISTRATION, Department of, Title 2

2-2-568	Procedural Rules, p. 1, 426
2-13-566	Public Safety Answering Point Certification, Funding, and Monitoring, p. 2363, 427
2-13-574	Public Safety Answering Point - Allowable Uses of Funds - Decertification and Funding Reduction - Reporting, Monitoring, and Recordkeeping, p. 351, 608, 1021
2-13-577	9-1-1 Grants, p. 1322
2-21-557	Recruitment and Selection Policy, p. 1309, 90, 571
2-59-570	Regulation of Privately Insured Credit Unions, p. 124, 628
2-59-571	Annual Reporting for Consumer Loan Licensees - Escrow Business Reference Updates - Mortgage Definitions - Mortgage Renewal Fees - Escrow Funds Held by Mortgage Companies, p. 357, 822

(Public Employees' Retirement Board)

2-43-564 Adoption by Reference of the State of Montana Public Employee Defined Contribution Plan Document and the State of Montana Public Employee Deferred Compensation (457) Plan Document, p. 4, 433

2-43-565 Investment Policy Statement for the Defined Contribution Retirement Plan - Investment Policy Statement for the 457(b) Deferred Compensation Plan, p. 354, 821

2-43-576 Commencement of Guaranteed Annual Benefit Adjustment, p. 1209

(State Lottery Commission)

2-63-575 Definitions - Retailer Applications, Required Rule Reading, Bonding, and Commission - Licenses - Business Changes - Electronic Funds Transfer - Tickets - Prizes - Winner Redemptions, p. 908, 1155

(Board of County Printing)

2-67-569 Rates for County Legal Advertising, p. 230, 610, 1100

(Office of the State Public Defender)

2-69-573 Model Rules - Definitions - Determination of Indigency - Reasonable Compensation, p. 364, 716

AGRICULTURE, Department of, Title 4

4-17-243 Montana Pulse Crop Committee, p. 2373, 301, 823, 1101

4-18-245 Montana State Grain Laboratory Fee Schedule, p. 127, 629

4-18-246 Fertilizer Regulations, p. 134, 630

4-18-247 Feed and Pet Food Regulations, p. 138, 631

4-18-248 Pesticide Registration Regulations, p. 758, 1212

4-18-249 Pesticide Container Recycling Program - Waste Pesticide Disposal Program, p. 763, 1213

4-18-250 Analytical Laboratory Fees, p. 1214

STATE AUDITOR, Office of, Title 6

(Commissioner of Securities and Insurance)

6-237 Medicare Supplement Insurance, p. 1542, 572, 969

6-240 Independent Liability Fund Definitions and Penalties, p. 10, 825

6-241 and other rules - Valuation of Life Insurance Policies, p. 13, 826

6-242 Public Adjusters, p. 142, 1022

6-243 Health Maintenance Organizations, p. 369, 1102

6-244 Annual Audited Financial Reports, p. 996, 1418

COMMERCE, Title 8

8-94-156 Governing the Submission and Review of Applications for Funding Under the Treasure State Endowment Program (TSEP), p. 512, 827

24-33-333 Construction Contractor Registration - Independent Contractor Central Unit, p. 235, 720
24-301-337 Operation of the Underground Facilities Protection Program, p. 1135

(Board of Personnel Appeals)
24-26-336 Public Sector Collective Bargaining, p. 382

(Board of Alternative Health Care)
24-111-26 Definitions - Fees - Nonroutine Applications - Naturopathic Physician Natural Substance Formulary List - Direct-Entry Midwife Apprenticeship Requirements - Direct-Entry Midwife Protocol Standard List Required for Application - Licensing by Examination - Licensure of Out-of-State Applicants - Conditions Which Require Physician Consultation or Transfer of Care - Midwives Continuing Education Requirements, p. 34, 976

(Board of Barbers and Cosmetologists)
24-121-16 Definitions - Fees - Nonroutine Applications - Premises and General Requirements - Licensure by Credentialing With an Out-of-State License - Application for Postsecondary School Licensure - Application for Instructor License - Credited Hours for Montana-Licensed Individuals in a Cosmetology or Barbering Program - Instructor Requirements–Teacher-Training Programs - Salons/Booth Rental - Implements, Instruments, Supplies, and Equipment - Sanitizing and Disinfecting Implements and Equipment - Foreign-Educated Applicants, p. 925

(Board of Chiropractors)
24-126-36 Fees - Fee Abatement - Applications - Military Training or Experience - License by Examination - Temporary Permit - License by Endorsement - Display of License - Inactive Status and Conversion to Active Status - Intern and Preceptor Registration - Impairment Evaluator Standards - Continuing Education Requirements - Approved Continuing Education, p. 45, 645

(Board of Dentistry)
24-138-74 Functions for Dental Hygienists - Limited Access Permit Treatment Guidelines–Practicing Under Public Health Supervision - Dental Hygiene Limited Access Permit - Subject Matter Acceptable for Dentist and Dental Hygienist Continuing Education - Requirements and Restrictions - Limited Prescriptive Authority–Qualifications–Allowable Percentages of Topical Agents, p. 386, 1279

(Board of Funeral Service)
24-147-39 Definitions - Inspections – Mortuaries, Branch Establishments, and Crematories - Transportation and Custody of Human Remains - Out-of-State Mortician Licenses - Mortuary and Branch Establishment

Operation Standards - Mortuary and Branch Establishment Licenses and Temporary Permits - Crematory Licenses, Temporary Permits, and Operation Standards - Continuing Education Requirements – Morticians - Unprofessional Conduct - Mortician Licenses - Examinations - Name Change, Closure, Transfer, or Sale – Mortuary, Branch Establishment, Crematory, or Cemetery - Change of Mortician-In-Charge or Crematory Operator-In-Charge - Nonlicensed Personnel - Sponsors, p. 2251, 440

(Board of Massage Therapy)

24-155-7 Licensure by Examination - Licensure of Out-of-State Applicants - Continuing Education Requirements - Unprofessional Conduct - School Instructors and Assistants Requiring a License in Massage Therapy and Exemption, p. 618, 1038

(Board of Medical Examiners)

24-156-84 Fee Schedule - Examination - Renewals - Purpose and Authority - Definitions - Fees - Ankle Surgery Certification - Surgery Certification - Accreditation, Approval, and Standards - Physician Assistant Fees - Obligation to Report to Board - Medical Assistant–Delegation and Supervision - Practice Requirements for Physicians Using Telemedicine - Medical Assistant - Effect of Telemedicine License, p. 936

(Board of Nursing)

24-159-85 Definitions - Enhanced Nurse Licensure Compact Rules - Issuance of a License by a Compact State - Limitations on Multistate Licensure Privilege–Discipline - Information System, p. 624, 947

(Board of Nursing Home Administrators)

24-162-41 Definitions - Application and Documentation for Licensure - Temporary License - Licensure by Credential - Public Information, p. 1355

(Board of Optometry)

24-168-43 Licensure Requirements - Military Training or Experience - General Practice Requirements - Unprofessional Conduct - Screening Panel - Ophthalmological Diagnostic Permissible Drugs, p. 1474, 307, 442

(Board of Outfitters)

24-171-38 Outfitter Assistants - Unprofessional Conduct and Misconduct, p. 530

(Board of Pharmacy)

24-174-70 Examination for Licensure as a Registered Pharmacist - Requirements to Become a Clinical Pharmacist Practitioner - Requirements for Submitting Prescription Registry Information to the Board - Screening Panel - Complaint Procedure - Legal Suspension or Revocation, p. 535

(Board of Physical Therapy Examiners)

24-177-34 Military Training or Experience - Foreign-Trained Physical Therapist Applicants - Continuing Education - List of Licensed Physical Therapists, p. 1748, 443

(Board of Psychologists)

24-189-38 Renewal Dates and Requirements - Psychologist Application Procedures - Minimum Standards - Work Samples-Examinations - Licensure as a Psychologist by Experience (Senior) - Nonroutine Psychologist Applications - Nonroutine Behavior Analyst or Assistant Behavior Analyst Applications, p. 2394, 844

24-189-39 Application Procedures for Behavior Analysts and Assistant Behavior Analysts, p. 540, 978

(Board of Public Accountants)

24-201-51 Fee Schedule - Use of CPA/LPA Designation - Applicant for Initial License - Certified Public Accountant Examination - Out-of-State Licensees Seeking a Montana License - Foreign Licensees Seeking a Montana License - Application Review - Peer Review Enrollment - Alternatives and Exemptions - Approved Peer Review Sponsoring Organizations, Programs, and Peer Review Standards - Standards for CPE Reporting - Reporting Requirements - Extension or Hardship Exception, p. 1359

(Board of Real Estate Appraisers)

24-207-41 Qualifying and Continuing Education Requirements, p. 56, 722

(Board of Realty Regulation)

24-210-44 Definitions - Fee Schedule - Trust Account Requirements - General License Administration Requirements - Inactive Licenses - Inactive to Active License Status - Renewals - Unprofessional Conduct - Disciplinary Guidelines–Public Notice - Property Management Trust Account Requirements - Inactive Status - Unprofessional Conduct for Property Management Licensees, p. 2400, 1163

(Board of Sanitarians)

24-216-23 Fee Schedule - Examination - Sanitarian-in-Training - Continuing Education - Inactive Status and Conversion From Inactive to Active Status - Unprofessional Conduct - Board Meetings - Seal of the Board - Applications - Renewal, p. 949

(Board of Behavioral Health)

24-219-31 Certification of Behavioral Health Peer Support Specialists (CBHPSS), p. 1757, 444

(Board of Speech-Language Pathologists and Audiologists)

24-222-28 Renewal Dates and Requirements - Definitions - Supervisor Responsibility - Functions of Speech-Language Pathology Aides or Assistants - Delivery of Telepractice Services - Continuing Education–Speech Language Pathologists and Audiologists - Screening Panel - License Renewal - Schedule of Supervision–Contents, p. 1368

(Board of Veterinary Medicine)

24-225-40 Definitions - Nonroutine Applications - Temporary Permits - Veterinarian Licenses - Veterinarian Examinations - Licensure of Out-of-State Veterinarian - Continuing Education - Continuing Education Instructors - Record-Keeping Standards - Management of Infectious Wastes - Inspection and Sanitation - Occasional Case Exemption, p. 774, 1281

LIVESTOCK, Department of, Title 32

32-17-286 Deeded Land Grazing Permits - Freeze Branding - County Line Grazing Permits - Brands Enforcement Division Fees, p. 252, 648

32-17-287 Animal Health Division Fees, p. 59, 449

32-18-289 Board Oversight of Agency Actions, p. 391, 543, 846

32-18-291 Quarantine and Release of Quarantine - Definitions - Official Health Certificate - Permits - Additional Requirements for Cattle - Horses, Mules, and Asses - Department Ordered Pseudorabies Testing - Procedure Upon Detection of Pseudorabies - Department Ordered Brucellosis Testing of Animals - Procedure Upon Detection of Brucellosis - Memorandum of Understanding - Designated Surveillance Area - Vaccination Within the Counties in Which the DSA Is Located - Contaminated Premises - Identification of Omnivores and Carnivores - Importation of Alternative Livestock - Domestic Bison - Quarantine and Retest of Suspect Animals in Negative Herd - Swine Identification Code: Assignment of Codes, p. 1225

(Board of Milk Control)

32-18-288 Milk Control Assessments, p. 62, 450

32-18-290 Producer Pricing Rules, p. 1219

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

36-12-196 Water Right Permitting, p. 1485, 1608, 451

36-12-198 Lockwood Solvent Groundwater Plume Site Controlled Groundwater Area, p. 1383

PUBLIC HEALTH AND HUMAN SERVICES, Department of, Title 37

MONTANA ADMINISTRATIVE REGISTER

2018 ISSUE NO. 15
AUGUST 10, 2018
PAGES 1456-1640

COREY STAPLETON
SECRETARY OF STATE

P.O. BOX 202801
HELENA, MONTANA 59620