

# MONTANA ADMINISTRATIVE REGISTER

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# MONTANA ADMINISTRATIVE REGISTER

## ISSUE NO. 19

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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) 438-6122.

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

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 24.17.103 and 24.17.127 ) PROPOSED AMENDMENT  
pertaining to prevailing wage rates for )  
public works projects )

TO: All Concerned Persons

1. On November 12, 2021, at 9:00 a.m., the Department of Labor and Industry (department) will hold a public hearing via remote conferencing to consider the proposed amendment of the above-stated rules. There will be no in-person hearing. Interested parties may access the remote conferencing platform in the following ways:

a. Join Zoom Meeting, <https://mt-gov.zoom.us/j/84197446312>, Meeting ID: 841 9744 6312; or

b. Dial by telephone, +1 406 444 9999 or +1 646 558 8656, Meeting ID: 841 9744 6312.

The hearing will begin with a brief introduction by department staff to explain the use of the videoconference and telephonic platform. All participants will be muted except when it is their time to speak.

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 November 5, 2021, to advise us of the nature of the accommodation that you need. Please contact Data Management Unit, Employment Relations Division, Department of Labor and Industry, Attn: Mike Smith, P.O. Box 8011, Helena, MT 59604-8011; fax (406) 444-4140; or e-mailed to MSmith3@mt.gov.

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

24.17.103 DEFINITIONS As used in this subchapter, the following definitions apply, unless the context of the rule clearly indicates otherwise:

(1) through (10) remain the same.

(11) "Dispatch city" is the courthouse in the city from the following list which is closest to the center of the job and within the same prevailing wage district, if any: Billings, Bozeman, Butte, Great Falls, Helena, Kalispell, Miles City, ~~and~~ Missoula, and Sidney.

(12) through (24) remain the same.

AUTH: 18-2-409, 18-2-431, 39-3-202, MCA

IMP: 18-2-402, 18-2-403, 18-2-411, 18-2-422, 39-3-201, 39-3-202, 39-3-203, 39-3-204, 39-3-205, 39-3-206, 39-3-207, 39-3-208, 39-3-209, 39-3-210, 39-3-211, 39-3-212, 39-3-213, 39-3-214, 39-3-215, 39-3-216, MCA

REASON: There is reasonable necessity to change the definition of "dispatch city" to include Miles City and Sidney to conform to the enactment of House Bill 201 from the 2021 Legislative Session, which includes these locations in the definition.

24.17.127 ADOPTION OF STANDARD PREVAILING RATE OF WAGES

(1) through (1)(d) remain the same.

(e) The current building construction services rates are contained in the ~~2024~~ 2022 version of the "Montana Prevailing Wage Rates for Building Construction Services" publication.

(f) The current nonconstruction services rates are contained in the ~~2024~~ 2022 version of the "Montana Prevailing Wage Rates for Nonconstruction Services" publication.

(g) The current heavy construction services rates are contained in the ~~2024~~ 2022 version of the "Montana Prevailing Wage Rates for Heavy Construction Services" publication.

(h) The current highway construction services rates are contained in the ~~2024~~ 2022 version of the "Montana Prevailing Wage Rates for Highway Construction Services" publication.

(2) and (3) remain the same.

AUTH: 2-4-307, 18-2-409, 18-2-431, MCA

IMP: 18-2-401, 18-2-402, 18-2-403, 18-2-406, 18-2-411, 18-2-412, 18-2-413, 18-2-414, 18-2-415, 18-2-422, 18-2-431, MCA

REASON: There is reasonable necessity to update the prevailing wage rates for building construction services, heavy construction services, highway construction services, and nonconstruction services following the annual survey of wages that is provided for in 18-2-413, 18-2-414, and 18-2-415, MCA, respectively. The department surveys employers and applies the methodologies provided by ARM 24.17.119 through 24.17.122 to determine those prevailing wage rates.

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Data Management Unit, Employment Relations Division, Department of Labor and Industry, Attn: Mike Smith, P.O. Box 8011, Helena, MT 59604-8011; fax (406) 444-4140; or e-mailed to MSmith3@mt.gov, and must be received no later than 5:00 p.m., November 12, 2021.

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, 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 contact person in paragraph 2 above or may be made by completing a request form at any rules hearing held by the agency.

6. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. Department staff attempted to contact the bill sponsor via U.S. Mail, electronic mail, and telephone.

7. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules may significantly and directly impact small businesses. The proposed amendments will have an impact on some, but not all small businesses (those with fewer than 50 full-time employees). The proposed amendments directly affect the wages that must be paid for work on Montana public works contracts. The types of businesses affected are primarily those in the construction industry, but only affect those businesses that perform (or seek to perform) work on public works projects. In addition, there are businesses that provide certain types of nonconstruction services to state and local government agencies that are subject to payment of the prevailing wage rate. The types of nonconstruction service businesses that potentially are subject to the award of a public works contract are listed in 18-2-401(9), MCA.

There is no single effect on small businesses as a result of the proposed amendments. Some employers may have to pay higher wages as a result of changes to the prevailing wage rates; other employers may have a wage structure that is the same as or higher than the prevailing wage rate. Historically, some employers have stated that the prevailing wage rates are set too high, while other employers have stated that the rates are too low. In certain cases, the difference between the established prevailing wage rate and the employer's customary wage rate may be significant, but it is unclear whether that difference will result in a significant change to the profitability of any given small business, as there are many other economic factors at play.

Montana law requires that prevailing wage rates be set following an annual survey of wages. There is an established statutory and administrative formula that establishes the prevailing wage rate for each work classification, based on the data and information gathered. The alternative to amending the wage rates is to not amend the rate, thus freezing the wage rate at the last-adopted level. Some employers would probably be adversely affected by the failure to adopt new prevailing wage rates. The department believes that under either alternative, some small businesses will be adversely affected by the selected alternative. The small businesses likely to be adversely affected by adoption of new rates are probably not the same as those that are likely to be adversely affected by not adopting new rates.

8. Department staff has been designated to preside over and conduct this hearing.

/s/ QUINLAN L. O'CONNOR  
Quinlan L. O'Connor  
Alternate Rule Reviewer

/s/ LAURIE ESAU  
Laurie Esau, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State September 28, 2021.

BEFORE THE BOARD OF PHYSICAL THERAPY EXAMINERS  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of                    ) NOTICE OF PUBLIC HEARING ON  
ARM 24.177.501 examinations and                    ) PROPOSED AMENDMENT  
24.177.2301 unprofessional conduct                )

TO: All Concerned Persons

1. On November 2, 2021, at 10:00 a.m., a public hearing will be held via remote conferencing to consider the proposed amendment of the above-stated rules. There will be no in-person hearing. Interested parties may access the remote conferencing platform in the following ways:

a. Join Zoom Meeting, <https://mt-gov.zoom.us/j/83710820374>  
Meeting ID: 837 1082 0374, Passcode: 194011

-OR-

b. Dial by telephone, +1 406 444 9999 or +1 646 558 8656  
Meeting ID: 837 1082 0374, Passcode: 194011

The hearing will begin with a brief introduction by department staff to explain the use of the videoconference and telephonic platform. All participants will be muted except when it is their time to speak.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Physical Therapy Examiners no later than 5:00 p.m., on October 26, 2021, to advise us of the nature of the accommodation that you need. Please contact Linda Grief, Board of Physical Therapy Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2395; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; or [dlibsdp@mt.gov](mailto:dlibsdp@mt.gov) (board's e-mail).

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

24.177.501 EXAMINATIONS (1) and (2) remain the same.

~~(3) The board may request an applicant to meet with the board at a time designated by the board and prior to licensure, for the purpose of conducting an oral interview as per 37-11-303, MCA.~~

~~(4)~~ (3) Applicants for examination shall file with the board office an application which shall include the following:

(a) application fee; and

(b) ~~copy of their certificate of graduation or transcripts from a board-approved physical therapy school or physical therapist assistant curriculum.~~ either:

(i) a copy of the applicant's certificate of graduation or transcripts

demonstrating graduation from a board-approved physical therapy school or physical therapist assistant curriculum; or

(ii) a letter from and bearing the signature of the program director, department chairperson, or similarly authorized official in a board-approved physical therapy school or physical therapist assistant curriculum stating that the applicant is a student at the physical therapy school or physical therapist assistant curriculum, is in good standing, and is expected to graduate at the next scheduled graduation date.

(4) The earliest date on which an applicant for examination may take the examination is the examination date nearest to and before the applicant's expected graduation date.

(5) and (6) remain the same.

AUTH: 37-1-131, 37-11-201, MCA

IMP: 37-1-131, 37-1-304, 37-11-303, 37-11-304, MCA

REASON: The 2021 Montana Legislature enacted Chapter 57, Laws of 2021 (Senate Bill 70), an act removing the oral interview requirement for physical therapist licensure and allowing applicants to take the licensure examination prior to graduation. The bill was signed by the Governor and became effective on March 8, 2021.

The board is amending this rule to align with the bill's changes to 37-11-303, MCA, by removing the oral interview requirement. The board is also amending (3) and (4) to implement the changes to 37-11-304, MCA, that allow students to take the licensure examination prior to graduation. The board determined it is reasonably necessary to establish guidelines to ensure that only students on track to graduate take the examination and not so early in their education that it interferes with their studies. Because physical therapy students are generally engaged in clinical work in the final semester, taking the examination nearest to their expected graduation date will cause minimal disruption.

24.177.2301 UNPROFESSIONAL CONDUCT (1) through (1)(j) remain the same.

(k) Fee-splitting and over utilization of services;

~~(l) Failure to comply with the continuing education requirement as per ARM 24.177.2105.~~

AUTH: 37-1-131, 37-1-319, 37-11-201, MCA

IMP: 37-1-316, 37-1-319, 37-11-321, MCA

REASON: The board is striking (1)(l) to align with the department's internal standardized procedures for renewals, continuing education (CE) audits, and administrative suspension. Because the department's administrative suspension statute and procedure address and cure most CE violations, it is unnecessary to include failure to comply with CE as unprofessional conduct. Implementation citations are being amended to accurately reflect all statutes implemented through the rule.

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Physical Therapy Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or e-mail to [dlibsdp@mt.gov](mailto:dlibsdp@mt.gov), and must be received no later than 5:00 p.m., November 5, 2021.

5. An electronic copy of this notice of public hearing is available at [www.pt.mt.gov](http://www.pt.mt.gov) (department and board's web site). Although the department strives to keep its web sites accessible at all times, concerned persons should be aware that web sites may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing a web site do not excuse late submission of comments.

6. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request 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 all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Physical Therapy Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2305; e-mailed to [dlibsdp@mt.gov](mailto:dlibsdp@mt.gov); or made by completing a request form at any rules hearing held by the agency.

7. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on August 16, 2021, by electronic mail; August 18, 2021, by regular mail; and September 16, 2021, by telephone.

8. Regarding the requirements of 2-4-111, MCA, the board has determined that the amendment of ARM 24.177.501 and 24.177.2301 will not significantly and directly impact small businesses.

Documentation of the board's above-stated determination is available upon request to the Board of Physical Therapy Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2395; facsimile (406) 841-2305; or to [dlibsdp@mt.gov](mailto:dlibsdp@mt.gov).

9. Department staff has been designated to preside over and conduct this hearing.

BOARD OF PHYSICAL THERAPY  
EXAMINERS  
HOLLY CLAUSSEN, PT  
PRESIDING OFFICER

/s/ DARCEE L. MOE  
Darcee L. Moe  
Rule Reviewer

/s/ LAURIE ESAU  
Laurie Esau, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State September 28, 2021.

BEFORE THE DEPARTMENT OF LIVESTOCK  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PROPOSED  
ARM 32.8.201 pertaining to scope of ) AMENDMENT  
rules )  
 ) NO PUBLIC HEARING  
 ) CONTEMPLATED

TO: All Concerned Persons

1. The Department of Livestock proposes to amend the above-stated rule.

2. 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 Department of Livestock no later than 5:00 p.m. on November 1, 2021, to advise us of the nature of the accommodation that you need. Please contact Executive Officer, Department of Livestock, 301 N. Roberts St., Room 304, P.O. Box 202001, Helena, MT 59620-2001; telephone: (406) 444-9525; TTD number: 1 (800) 253-4091; fax: (406) 444-4316; e-mail: MDOLcomments@mt.gov.

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

32.8.201 SCOPE OF RULES (1) Employing the definitions in ARM 32.8.101, and in 81-23-101, MCA, these rules apply to milk producers, processors, distributors, wholesalers, and retailers who conduct business in Montana. The rules of this chapter do not apply to "small dairies" as defined in 81-21-101, MCA.

AUTH: 81-2-102, MCA  
IMP: 81-2-102, MCA

REASON: The department is proposing to amend the above-stated rule for clarity purposes after the passage of SB199, also known as The Montana Local Food Choice Act, during the 2021 Legislative session. The bill amended 81-21-101, MCA, to add a definition of "small dairies" and exempts them from the department's regulations and rules. As such, the department felt it prudent to note that exemption in its rules.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: Department of Livestock, P.O. Box 202001, Helena, Montana, 59620-2001; telephone (406) 444-9761; fax (406) 444-1929; or e-mail MDOLcomments@mt.gov, and must be received no later than 5:00 p.m., November 5, 2021.

5. If persons who are directly affected by the proposed action 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 the same address as above no later than 5:00 p.m., November 5, 2021.

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 six persons based on seven operating Grade A licensed plants and 48 operating Grade A licensed producers.

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 4 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, apply and have been fulfilled. The primary bill sponsor, Senator Greg Hertz, was contacted by email on June 14, 2021.

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.

BY: /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 September 28, 2021.

BEFORE THE DEPARTMENT OF LIVESTOCK  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PROPOSED AMENDMENT  
ARM 32.2.403 pertaining to )  
diagnostic laboratory fees ) NO PUBLIC HEARING  
 ) CONTEMPLATED

TO: All Concerned Persons

1. The Department of Livestock proposes to amend the above-stated rule.

2. The Department of Livestock will make reasonable accommodations for persons with disabilities who wish to participate in the 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., November 1, 2021, to advise us of the nature of the accommodation that you need. Please contact Executive Officer, Department of Livestock, 301 N. Roberts St., Room 304, P.O. Box 202001, Helena, MT 59620-2001; telephone: (406) 444-9525; TTD number: 1 (800) 253-4091; fax: (406) 444-4316; e-mail: MDOLcomments@mt.gov.

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

32.2.403 DIAGNOSTIC LABORATORY FEES (1) through (3)(k) remain the same.

(l) Virology

Test	Fee
canine parvovirus SNAP	\$30.00
fluorescent antibody (FA) testing - per agent:	
bovine coronavirus (BCV)	\$11.00
bovine respiratory syncytial virus (BRSV) SN	\$11.00
bovine viral diarrhea virus (BVDV)	\$11.00
canine distemper (CDV)	\$11.00
canine parvovirus (CPV)	\$11.00
equine herpesvirus (EHV)	\$11.00
feline panleukopenia (FPLV)	\$11.00
feline infectious peritonitis (FIP)	\$11.00
feline herpes (FHV)	\$11.00
infectious bovine rhinotracheitis (IBR)	\$11.00
leptospira	\$11.00
parainfluenza - 3 Virus (PI-3)	\$11.00
porcine parvovirus (PPV)	\$11.00
chronic wasting disease IHC	\$34.00

chronic wasting disease ELISA	\$14.00
virus isolation (livestock only)	\$34.00
bovine viral diarrhea virus (BVDV) antigen SNAP test	\$7.00
equine virus arteritis (EVA) virus neutralization test	\$16.00
pregnancy test	\$4.50
<u>small animal pregnancy test</u>	<u>\$25.00</u>
coxiella burnetii (Q fever) ELISA	\$13.00
<u>parainfluenza 3 serum neutralization (PI-3 SN)</u>	<u>\$7.00</u>

(m) remains the same.

AUTH: 81-1-102, 81-2-102, MCA  
IMP: 81-1-301, 81-1-302, 81-2-102, MCA

REASON: The department is proposing to amend the above-stated rule with two new tests as follows:

Small Animal Pregnancy Test – In response to multiple client requests, MVDL seeks to add a small animal pregnancy test to our offerings. This lateral flow assay can detect the hormone relaxin in canine and feline serum. The presence of this hormone is a reliable indicator of pregnancy in as early as 20 days of gestation in dogs and 25 days of gestation in cats. Turnaround time is expected to be same day. The proposed cost of this test is \$25/test. Cost at other diagnostic labs: Texas A&M - \$40; Arkansas - \$22.

We expect that the incremental additional test fee revenue for the small animal pregnancy test will be negligible as we do not expect high volume.

Parainfluenza Virus type 3 Serum Neutralization test (PI-3 SN) – MVDL has previously offered a hemagglutination inhibition test for the serological diagnosis of PI3 (PI3 HAI). MVDL seeks to replace this test with a serum neutralization test that will provide more reliable titer results with no additional overhead cost. The proposed cost of the test would be the same as the previous PI3 HAI (\$7/test).

There are approximately 600 veterinary submitters, at least 150 nonveterinary submitters, and 100 governmental entities only minimally affected by the proposed fee adjustments.

4. Concerned persons may submit their data, views, or arguments in writing concerning the proposed action to 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., November 5, 2021.

5. If persons who are directly affected by the proposed action wish to express their data, views, and arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written

comments they have to the same address as above. The written request for hearing must be received no later than 5:00 p.m., November 5, 2021.

6. If the department 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 public hearing will be held at a later date. Notice of the public hearing will be published in the Montana Administrative Register. Ten percent of those entities directly affected has been determined to be 85 based upon approximately 600 veterinary submitters, at least 150 nonveterinary submitters, and 100 governmental entities affected by the proposed fee adjustments.

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 4 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.

BY: /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 September 28, 2021.

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

In the matter of the amendment of        ) NOTICE OF PUBLIC HEARING ON  
ARM 37.85.105 pertaining to                ) PROPOSED AMENDMENT  
updating Medicaid provider rates, fee     )  
schedules, and effective dates            )

TO: All Concerned Persons

1. On October 28, 2021, at 3:00 p.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed amendment of the above-stated rule. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/86004196571>, meeting ID: 860 0419 6571, or

(b) Dial by telephone +1 646 558 8656, meeting ID: 860 0419 6571. Find your local number: <https://mt-gov.zoom.us/j/86004196571>.

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 October 14, 2021, to advise us of the nature of the accommodation that you need. Please contact Heidi Clark, 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](mailto:dphhslegal@mt.gov).

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

37.85.105 EFFECTIVE DATES, CONVERSION FACTORS, POLICY  
ADJUSTERS, AND COST-TO-CHARGE RATIOS OF MONTANA MEDICAID  
PROVIDER FEE SCHEDULES (1) and (2) remain the same.

(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 ~~October 1, 2020~~ October 1, 2021; and

(ii) the Montana Medicaid APR-DRG relative weight values, average national length of stay (ALOS), outlier thresholds, and APR grouper version ~~37 38~~ are contained in the APR-DRG Table of Weights and Thresholds effective ~~October 1, 2020~~ October 1, 2021. The department adopts and incorporates by reference the

APR-DRG Table of Weights and Thresholds effective ~~October 1, 2020~~ October 1, 2021.

(b) The outpatient hospital services fee schedules including:

(i) remains the same

(ii) the conversion factor for outpatient services on or after ~~January 1, 2019~~ October 1, 2021 is ~~\$56.64~~ \$55.89;

(iii) through (j) remain the same.

(k) Montana Medicaid adopts and incorporates by reference the Region D Supplier Manual, effective ~~July 1, 2021~~ October 1, 2021, 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 ~~July 1, 2021~~ October 1, 2021. The prosthetic devices, durable medical equipment, and medical supplies fee schedule, as provided in ARM 37.86.1807, is effective ~~July 1, 2021~~ October 1, 2021.

(l) through (6) remain the same

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-125, 53-6-402, MCA

#### 4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) is proposing to amend ARM 37.85.105 pertaining to updating Medicaid provider rates, fee schedules, and effective dates.

The following explanation represents the reasonable necessity for the proposed amendments. The department administers the Montana Medicaid and non-Medicaid program 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.

The proposed amendments are explained below, with reference to the specific subsections of ARM 37.85.105.

ARM 37.85.105 Effective Dates, Conversion Factors, Policy Adjusters, And Cost-To-Charge Ratios of Montana Medicaid Provider Fee Schedules

##### ARM 37.85.105(3)(a) Inpatient Hospital Services Rates

The House Bill (HB) 2 Narrative for the 2023 biennium provides for a reduced appropriation from the 2021 biennium for Medicaid services provided by non-critical access hospitals in an amount equivalent to a 1.0% provider rate reduction. (<https://leg.mt.gov/content/Publications/fiscal/Session-2021/HB-2-Narrative/B-Senate-Floor.pdf>, page 2). With a proposed effective date of October 1, 2021, the department must target a 1.33% reduction to hospital reimbursement as the SFY 2022 reduction is applied over 9 months instead of 12, thereby reducing the number

of months over which the 1.0% annual decrease is implemented. Hospital rates are modified in October to align with the effective dates of the 3M APR-DRG grouper. The changes proposed below to APR-DRG are projected to provide for an overall inpatient hospital reimbursement reduction of 1.0% during SFY 2022.

The department proposes to adopt Version 38 of the 3M APR-DRG grouper effective October 1, 2021. This grouper update includes changes to DRG relative weights, average length of stays, and adds or deletes some DRGs. The department proposes to increase the adult age adjustor to 1.00, increase the mental health age adjustor to 1.65, increase the neonate policy adjustor to 1.50, and add a new obstetric policy adjustor of 1.30. These adjustments are necessary to offset changes to relative DRG weights. In addition, the department proposes to decrease base rates. The department proposes the following base rates:

General Hospitals: \$5,365  
Centers of Excellence: \$7,995  
Long Term Acute Care Hospitals: \$7,250

#### ARM 37.85.105(3)(b) Outpatient Hospital Services Fee Schedules

The department proposes to decrease the conversion factor utilized when pricing services under the Outpatient Prospective Payment System reimbursement methodology. The conversion factor is proposed to be \$55.89. With a proposed effective date of October 1, 2021, the department must target a 1.33% reduction to hospital reimbursement as the SFY 2022 reduction is applied over 9 months instead of 12. This decrease is necessary to meet the intent of the legislature provided in the HB 2 Narrative document. This document reduced the appropriation for Medicaid services provided by non-critical access hospitals in an amount equivalent to a 1.0% provider rate reduction during SFY 2022.

Free Standing Birthing Centers are reimbursed under the Outpatient Hospital Service reimbursement methodology in accordance with ARM 37.86.3005. Therefore, while the HB 2 reduction does not specify Free Standing Birthing Centers, the reimbursement rates for this provider will be reduced the equivalent of 1.00% during SFY 2022.

#### ARM 37.85.105(3)(k)

The department proposes to update the fee schedule date for prosthetic devices, durable medical equipment, and medical supplies. This update is necessary to ensure the department can implement CMS quarterly updates for these services.

#### Fiscal Impact

The following table displays the anticipated financial impact during SFY 2022, and the number of providers affected by the proposed amendments.

Provider Type	SFY 2022 Budget Impact (Federal Funds)	SFY 2022 Budget Impact (State Funds)	SFY 2022 Budget Impact (Total Funds)	Active Provider Count
Durable Medical Equipment	\$0	\$0	\$0	501
Free Standing Birthing Centers	(\$253)	(\$100)	(\$353)	2
Hospitals – Inpatient	(\$747,587)	(\$714,186)	(\$1,461,773)	431
Hospitals – Outpatient	(\$912,807)	(\$238,121)	(\$1,150,928)	431

The department intends for the proposed amendments to be effective retroactive to October 1, 2021.

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: Heidi Clark, 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., November 5, 2021.

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.

/s/ Brenda K. Elias  
Brenda K. Elias  
Rule Reviewer

/s/ Adam Meier  
Adam Meier, Director  
Public Health and Human Services

Certified to the Secretary of State September 28, 2021.

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

In the matter of the adoption of New	)	NOTICE OF PUBLIC HEARING ON
Rules I and II and the amendment of	)	PROPOSED ADOPTION AND
ARM 37.95.102, 37.95.103,	)	AMENDMENT
37.95.106, 37.95.108, 37.95.115,	)	
37.95.117, 37.95.140, 37.95.160,	)	
37.95.163, 37.95.622, 37.95.702,	)	
37.95.703, 37.95.704, 37.95.718, and	)	
37.95.1005 pertaining to child care	)	
licensing	)	

TO: All Concerned Persons

1. On October 28, 2021, at 1:00 p.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed adoption and amendment of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/82419567565>; meeting ID: 824 1956 7565; or

(b) Dial by telephone +1 646 558 8656; meeting ID: 824 1956 7565. Find your local number: <https://mt-gov.zoom.us/j/82419567565>.

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 October 14, 2021, to advise us of the nature of the accommodation that you need. Please contact Heidi Clark, 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](mailto:dphhslegal@mt.gov).

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

NEW RULE I RELATIVE CARE EXEMPT (RCE) PROVIDERS:  
REQUIREMENTS AND PROCEDURES (1) The applicant shall provide relative care to a child as defined in ARM 37.95.102.

(2) The applicant and all adults who reside in the applicant's home must provide authorization for background checks pursuant to ARM 37.95.161.

(3) An application shall be denied for reasons identified in ARM 37.95.176 and for the following reasons:

(a) parent and provider reside at the same residence and the proposed caregiver is not an approved relative caregiver;

- (b) applicant discriminates in the provision of child care services on the basis of the race, sex, religion, creed, color, or national origin of the parent or the child; or
- (c) the background check process has exceeded 90 days.
- (4) RCE providers must also meet the following requirements to be registered under this chapter:
  - (a) be 18 years of age or older;
  - (b) limit the care they provide to a period of less than 24 consecutive hours;
  - (c) may care for either a sibling group of any size or no more than two children from separate households;
  - (d) complete orientation approved by the department that includes health and safety training;
  - (e) complete a health and safety review course at least every three years;and
- (f) complete pediatric first aid and CPR.
- (5) Care can only be provided in the child's home as defined in ARM 37.80.208.

AUTH: 52-2-704, MCA

IMP: 52-2-703, 52-2-704, 52-2-713, 52-2-721, 52-2-722, 52-2-723, 52-2-731, MCA

NEW RULE II IDENTIFYING AND PREVENTING SHAKEN BABY SYNDROME AND ABUSIVE HEAD TRAUMA (1) In addition to all forms of prohibited discipline listed in ARM 37.95.606 and 37.95.715(4), shaking an infant or child of any age is strictly prohibited.

(2) A child care facility must have a written policy on identifying and preventing shaken baby syndrome and abusive head trauma. The policy must include the following:

- (a) how the child care facility will ensure all early childhood teachers and caregivers are knowledgeable about and able to recognize the signs and symptoms of shaken baby syndrome and abusive head trauma;

- (b) procedures for coping with a crying, fussing, or distraught infant or child;

and

- (c) mandatory reporting of suspected child abuse and neglect as defined in ARM 37.95.171.

(3) All child care facility staff must sign an acknowledgement indicating that they have read, understood, and agree to follow the child care facility's policy outlined in (2).

AUTH: 52-2-704, MCA

IMP: 52-2-704, 52-2-723, 52-2-731, MCA

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

37.95.102 DEFINITIONS (1) through (3) remain the same.

(4) "Child care facility" is the same as "Day-care facility" as defined in 52-2-703, MCA. ~~In addition to the previous definitional language found at 52-2-703, MCA,~~

~~the term also does not include a person caring for the children of a single family, or a person, not receiving any type of state payment for day care, who is caring for children in the children's own home. In addition to the children being cared for in their own home, there may be no more than two children from another home being cared for by the same provider.~~

(5) remains the same.

(6) "Day care center" means an out-of-home place in which day care is provided to ~~43~~ 16 or more children on a regular basis.

(7) ~~"Day care facility" means a person, association, or place, incorporated or unincorporated, that provides day care on a regular basis, or a place licensed or registered to provide day care on an irregular basis for children suffering from illness. It includes a family day care home, a day care center, a group day care home, or a facility providing care in a child's home for the purpose of meeting registration requirements for the receipt of payments as provided in 52-2-713, MCA. The term does not include:~~

~~(a) a person who limits care to children who are related to the person by blood or marriage or under the person's legal guardianship, unless registration or licensure as a day care facility is required to receive payments as provided in 52-2-713, MCA; or~~

~~(b) any group facility established chiefly for educational purposes that limits its services to children who are three years of age or older. In addition to the previous definitional language found at 52-2-703, MCA, the term also does not include a person caring for the children of a single family, or a person, not receiving any type of state payment for day care, who is caring for children in the children's own home. In addition to the children being cared for in their own home, there may be no more than two children from another home being cared for by the same provider is defined in 52-2-703, MCA.~~

(8) "Delayed renewal application" means a renewal application ~~which is submitted to the department prior to the certificate expiration date, but is submitted~~ in an incomplete manner, resulting in a delay in the issuance of the certificate.

(9) through (15) remain the same.

(16) "Family child care facility" is the same as a "Family ~~child~~ day care home" as defined in 52-2-703, MCA. The department may refer to a family day-care home as a family child care home. In addition to the previous definitional language found at 52-2-703, MCA, the term also means a day care facility providing care to no more than three children under two years of age unless care is provided exclusively for children under age two. For facilities providing care exclusively to children under age two, a family child care home means a place in which supplemental parental care is provided for up to four children under the age of two. No other children shall be in attendance.

(17) "Family, Friend, and Neighbor care (FFN)" is a child care provider type that provides care to no more than ~~two~~ four children from separate families or all children from a "sibling group." ~~Care may be in the child's home or the provider's home and registration is for payment purposes as provided in 52-2-713, MCA.~~

(18) through (48) remain the same.

(49) "Safe sleep environment" means an environment where an infant is placed in a safety-approved crib with a firm mattress and a firmly fitted sheet or a

safety-approved play yard for all naps. For children one year of age or over, a nap mat may be used ~~as long as compliance~~ only when compliant with ARM 37.95.1005 ~~is met~~. The infant must be placed on their back and only a lightweight blanket is allowed with the infant. The infant should be dressed in safe garments and provided a smoke-free environment.

(50) through (60) remain the same.

AUTH: 52-2-704, 53-4-212, 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: REQUIREMENTS AND PROCEDURES

(1) through (3) remain the same.

(4) FFN providers must also meet the following requirements to be registered under this chapter:

(a) and (b) remain the same.

(c) may care for either a sibling group of any size or no more than ~~two~~ four unrelated children;

(d) ~~attend~~ complete orientation approved by the department that includes health and safety training;

(e) hold current certification for infant, child, and adult CPR, infant choking response, and ~~standard~~ pediatric first aid. CPR certification must be completed in a hands-on setting;

(f) through (5) remain the same.

~~(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) RCE providers are exempt from (4)(e) and (f), (5), and (6).~~

(6) Care can only be provided in the child's home as defined in ARM 37.80.208. If care is provided in the child's home, monitoring the home as outlined in (5) applies.

(7) An FFN is required to have day care parent information as listed in ARM 37.95.115.

(8) An FFN must follow the health and safety requirements at the child care location as outlined in:

(a) facility safety requirements defined in ARM 37.95.121;

(b) emergency disaster and action plan defined in ARM 37.95.124;

(c) a smoke-free environment defined in ARM 37.95.126;

(d) swimming as defined in ARM 37.95.127;

(e) fire safety as defined in ARM 37.95.706; and

(f) other health requirements outlined in ARM 37.95.708.

(9) An FFN is a mandatory reporter of suspected child abuse and neglect as defined in ARM 37.95.171 and required to supervise children at all times as defined in ARM 37.95.172.

(10) An FFN is required to store and administer medication as outlined in ARM 37.95.182 and follow health habits as outlined in ARM 37.95.184.

(11) An FFN must follow infant and toddler health and safety requirements as outlined in:

(a) diapering and toilet training in ARM 37.95.1001;

(b) feeding in ARM 37.95.1003;

(c) sleeping in ARM 37.95.1005;

(d) activities in ARM 37.95.1011;

(e) outdoor activities in ARM 37.95.1015; and

(f) equipment standards in ARM 37.95.1016.

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 child care center, or may apply for a registration certificate to operate a family child care facility or a group child care 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~~ Early Childhood and Family Support Division, Child Care Licensing Program, P.O. Box 4210, Helena, MT 59620-4210 or at <https://dphhs.mt.gov/ecfsd/childcare/childcarelicensing>.

(2) through (8) remain the same.

AUTH: 52-2-704, MCA

IMP: 52-2-704, 52-2-722, 52-2-723, 52-2-731, 53-4-504, 53-4-507, MCA

#### 37.95.108 CHILD CARE FACILITIES, REGISTRATION, AND LICENSING PROCEDURES (1) through (5) remain the same.

(6) The department may not issue a provisional registration or license to any child care facility ~~which~~ that does not have current public liability insurance and fire insurance.

(7) Regular registration certificates and licenses are issued from the department's ~~Quality Assurance Division licensure bureau~~ for periods up to three years.

AUTH: 52-2-704, MCA

IMP: 52-2-704, 52-2-723, 52-2-731, 52-2-732, 52-2-733, MCA

#### 37.95.115 DAY CARE PARENT INFORMATION (1) remains the same.

(2) A day care facility shall post a copy of the facility registration or license and the phone number of state and local ~~quality assurance division~~ Early Childhood and Family Support Division offices in a conspicuous place. Parents should be encouraged to contact the division if they have questions regarding the license or the day care regulations.

(3) remains the same.

AUTH: 52-2-704, MCA

IMP: 52-2-723, 52-2-731, 52-2-735, MCA

37.95.117 CHILD CARE FACILITIES, JOINT PROGRAMS (1) Any day care facility ~~which~~ that operates a day care program in connection with another non-day care program on the same premises must have separate staff and separate space for each program. However, staff and space may be shared for janitorial, maintenance, cooking, or other support services.

(2) remains the same.

(3) If multiple programs, including multiple day care programs or facilities in the same building, increase the number of people regularly in the building to more than 12 individuals, all fire, safety, and sanitation requirements ~~which~~ that may be impacted must be complied with by the day care facility.

(4) Persons, corporations or organizations may be licensed or registered for more than one day care facility if facility sites, staff, and space are completely separate from one another.

(a) through (d) remain the same.

(e) If the facility is licensed or registered as a day care facility, ~~but also and~~ serves as a foster care home, the department's child and family services (CFS) regional administrator and ~~quality assurance division (QAD)~~ Early Childhood and Family Support Division (ECFSD) must both approve the dual license or registration.

AUTH: 52-2-704, 53-4-503, MCA

IMP: 52-2-731, 53-4-504, MCA

37.95.140 IMMUNIZATION (1) through (10) remain the same.

(11) A child is not required to have any immunizations which are medically contraindicated. A written and signed statement from a physician that an immunization otherwise required by (1) ~~of this rule~~ is medically contraindicated will exempt a child from those immunization requirements as deemed necessary by the physician. It is preferred, but not mandatory, that a physician's medical exemption be recorded on HES-101, ~~and~~ Medical exemption documentation must include:

(a) through (d) remain the same.

(12) A child experiencing homelessness or a child in foster care is exempt from required immunizations outlined in (1) for a 30-day grace period beginning the first day the child attends a child care facility as verified on the sign-in/sign-out records.

(a) The child experiencing homelessness must meet the definition in Section 725 of Subtitle VII-B of the McKinney-Vento Act (42 U.S.C. 11434a) (98.2).

(b) A child is in foster care when the foster care environment meets ARM 37.50.101(4).

(c) A child must meet the immunization requirement for conditional enrollment outlined in (7) before the end of the 30-day period.

(d) A child may not be granted grace periods consecutively.

AUTH: 52-2-704, 52-2-735, MCA

IMP: 52-2-704, 52-2-735, MCA

37.95.160 CHILD CARE FACILITIES: STAFF RECORDS (1) The director must maintain records regarding each staff member, according to their role type, which include:

- (a) verification of CPR and pediatric first aid training;
- (b) remains the same.
- (c) health statement and contact information; ~~and~~
- (d) immunization records that establish compliance with ARM 37.95.184- ;

and

(e) acknowledgement of and agreement to follow the child care facility's policy on identifying and preventing shaken baby syndrome and abusive head trauma.

AUTH: 52-2-704, MCA

IMP: 52-2-704, 52-2-723, 52-2-732, MCA

37.95.163 CHILD CARE FACILITIES: EARLY CHILDHOOD TEACHER ORIENTATION TRAINING (1) remains the same.

(2) Within 30 days of hire, ~~teacher orientation which includes~~ the following training must be completed as part of teacher orientation:

(a) current certification for infant, child, and adult CPR, infant choking response, and ~~standard~~ pediatric first aid. CPR certification must be completed in a hands-on setting;

(b) through (e) remain the same.

(3) Within 90 days of hire, ~~teacher orientation which includes~~ the following training must be completed as part of teacher orientation:

(a) through (4) remain the same.

AUTH: 52-2-704, MCA

IMP: 52-2-704, 52-2-723, 52-2-731, MCA

37.95.622 CHILD CARE CENTERS: STAFFING QUALIFICATIONS

(1) remains the same.

(2) An early childhood lead teacher must meet the following requirements:

(a) through (c) remain the same.

(d) have current certification for infant, child, and adult CPR, ~~and~~ infant choking response, and ~~standard~~ pediatric first aid. CPR certification must be completed in a hands-on setting;

(e) through (6) remain the same.

AUTH: 52-2-704, MCA

IMP: 52-2-704, 52-2-723, 52-2-731, MCA

37.95.702 GROUP DAY CARE AND FAMILY DAY CARE HOMES, STAFFING AND ADDITIONAL REQUIREMENTS (1) Except for approved overlap

care, there shall be at least two caregivers caring for the children at all times when there are more than ~~six~~ eight children present at the home.

(2) through (6) remain the same.

AUTH: 52-2-704, MCA

IMP: 52-2-704, 52-2-723, 52-2-731, MCA

37.95.703 GROUP AND FAMILY CHILD CARE FACILITIES: DIRECTOR RESPONSIBILITIES AND QUALIFICATIONS (1) remains the same.

(2) The director must meet the following requirements:

(a) through (f) remain the same.

(g) have current certification for infant, child, and adult CPR, infant choking response, and ~~standard~~ pediatric first aid. CPR must be completed in a hands-on setting; and

(h) through (6) remain the same.

AUTH: 52-2-704, MCA

IMP: 52-2-704, 52-2-723, 52-2-731, MCA

37.95.704 GROUP AND FAMILY CHILD CARE: STAFFING QUALIFICATIONS AND RESPONSIBILITIES (1) remains the same.

(2) Directors and early childhood teachers must:

(a) through (c) remain the same.

(d) have current certification for infant, child, and adult CPR, infant choking response, and ~~standard~~ pediatric first aid; CPR certification must be completed in a hands-on setting; and

(e) through (5) remain the same.

AUTH: 52-2-704, MCA

IMP: 52-2-704, 52-2-723, 52-2-731, MCA

37.95.718 GROUP DAY CARE AND FAMILY DAY CARE HOMES, NIGHT CARE AND OVERLAP (1) through (3) remain the same.

(4) Overlap care may be approved by the department in situations, such as before and after school, when the number of children in care over three years of age would exceed, for a short period of time, the registered capacity.

(a) and (b) remain the same.

(c) Group day care facilities may be approved to provide overlap care for up to four additional children during the approved overlap time if there are at least two care-givers providing direct care at any time there are more than ~~eight~~ ten children being cared for at the facility.

(d) through (i) remain the same.

AUTH: 52-2-731, 52-2-735, MCA

IMP: 52-2-723, 52-2-731, 52-2-735, MCA

37.95.1005 INFANT AND TODDLER, SLEEPING (1) through (3) remain the same.

(4) Cribs must be made of durable, cleanable, nontoxic material, and have secure latching devices. Cribs must have no more than 2 and 3/8 inches of space between the vertical slats. No later than December 28, 2012, all cribs must meet the requirements for full-size baby cribs and non-full-size baby cribs as specified by the Consumer Product Safety Commission at 16 CFR Part 1219 (2011) and 16 CFR Part 1220 (2011), incorporated by these references. A copy of the requirements for full-size baby cribs and non-full-size baby cribs is available at <http://www.dphhs.mt.gov/earlychildhood/cribrequirements.shtml>, or by contacting the Montana Child Care Licensing Program at P.O. Box 202953, Helena, Montana 59620; Phone: (406) 444-2012 <https://www.cpsc.gov>.

(5) through (11) remain the same.

AUTH: 52-2-704, MCA  
IMP: 52-2-731, MCA

## 5. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) proposes to adopt New Rule I and New Rule II and proposes to amend ARM 37.95.102, 37.95.103, 37.95.106, 37.95.108, 37.95.115, 37.95.117, 37.95.140, 37.95.160, 37.95.163, 37.95.622, 37.95.702, 37.95.703, 37.95.704, 37.95.718, and 37.95.1005. The department proposes the adoption and amendment of the referenced rules to align with federal regulations in 45 CFR Part 98, meet changes from Senate Bill (SB) 142 as enacted by the 67th Legislature of the State of Montana, and clarify division and address changes.

The department proposes to amend each of the referenced rules as necessary to correct grammar and punctuation, to remove text duplicative of current statutory language, or to clarify rule meaning where necessary. The department believes these changes will make the rules easier to understand.

### NEW RULE I

The department proposes to add a new rule for RCE providers. The department believes a separate RCE provider rule will make the requirements easier to understand.

### NEW RULE II

The department proposes to add a new rule to meet federal regulations, 45 CFR Part 98, 98.41(a)(1). This federal regulation requires that child care facility staff have health and safety training on prevention of shaken baby syndrome, abusive head trauma, and child maltreatment. Child care facility staff are required to take a training course on shaken baby syndrome, but this may not ensure the prevention of shaken baby syndrome, abusive head trauma, and child maltreatment. Therefore, the department proposes to require a child care facility to have a written policy on identifying and preventing shaken baby syndrome and abusive head

trauma and to have procedures on how to cope with a crying, fussing, or distraught infant or child.

The department proposes child care facility staff would be required to read, understand, and agree to these policies. The department believes these steps will allow both the child care facility and staff to plan on how to deal with a possible frustrating situation to prevent a shaken baby and recognize when a child may have experienced head trauma.

The department proposes to prohibit the shaking of an infant or child. The department intends to add this specific language to ensure the safety of all children in a child care setting.

#### ARM 37.95.102

The department proposes to change the number of children for whom a day care center can provide child care. The number of children changed with SB 142.

The department proposes to remove language in child care facility and day care facility definitions to align the definitions for day care facility in 52-2-703, MCA. The department uses the term "child care facility" interchangeably with day care facility.

The department proposes to change the number of children for whom a Family, Friend, and Neighbor (FFN) license can provide child care. The department believes this increase will help to address lack of child care in Montana.

#### ARM 37.95.103

The department proposes to change ARM 37.95.103 to only include requirements for FFN providers. The list of requirements for an FFN provider has been listed out individually for ease of understanding.

The department proposes to change the number of children for whom an FFN license can provide child care. The department believes this increase will help to address lack of child care in Montana.

The department proposes to change the current requirement of first aid to pediatric first aid for FFN providers. Federal regulations, 45 CFR Part 98, 98.41(a)(1), require child care facility staff take pediatric first aid as a health and safety requirement. The current rule lists first aid as a general course, which may only include first aid for adults. The department proposes to require pediatric first aid to clarify this inconsistency.

#### ARM 37.95.106

The department proposes to remove the address for the Quality Assurance Division (QAD). Applications are available online for any interested individual, agency, or group. The Child Care Licensing Program is now part of the Early Childhood and Family Support Division (ECFSD).

ARM 37.95.108, 37.95.115, and 37.95.117

The department proposes to remove the reference to the QAD. The Child Care Licensing Program is now part of the ECFSD.

ARM 37.95.140

The department proposes to add a 30-day grace period as to immunizations for children experiencing homelessness and children in foster care. Federal regulations, 45 CFR Part 98, 98.41(a)(1)(i)(C), require a grace period that allows children experiencing homelessness and children in foster care to receive services under this part while providing their families (including foster families) a reasonable time to take any necessary action to comply with immunization and other health and safety requirements.

ARM 37.95.160

The department proposes to change requirements to child care facility staff records. The department proposes to change the first aid training requirement to pediatric first aid training. This will align with ARM 37.95.103, 37.95.622, 37.95.703, and 37.95.704. The department proposes to add acknowledgment of and agreement to follow a child care facility's policy identifying and preventing shaken baby syndrome and abusive head trauma. This will align with proposed New Rule II.

ARM 37.95.163

The department proposes to change the current requirement of first aid to pediatric first aid. Federal regulations, 45 CFR Part 98, 98.41(a)(1), require child care facility staff take pediatric first aid as a health and safety requirement. The current rule lists first aid as a general course, which may only include first aid for adults. The department proposes to require pediatric first aid to clarify this inconsistency.

ARM 37.95.622

The department proposes to change the current requirement of first aid to pediatric first aid for child care center facility staff. Federal regulations, 45 CFR Part 98, 98.41(a)(1), require child care facility staff take pediatric first aid as a health and safety requirement. The current rule lists first aid as a general course, which may only include first aid for adults. The department proposes to require pediatric first aid to clarify this inconsistency.

ARM 37.95.703 and 37.95.704

The department proposes to change the current requirement of first aid to pediatric first aid for family and group home facility staff. Federal regulations, 45 CFR Part 98, 98.41(a)(1), require child care facility staff take pediatric first aid as a health and safety requirement. The current rule lists first aid as a general course, which may only include first aid for adults. The department proposes to require pediatric first aid to clarify this inconsistency.

ARM 37.95.718

The department proposes to change the number of children a group day care home can provide child care for. The number of children increased from eight to ten, following changes from SB 142.

ARM 37.95.1005

The department proposes to remove the address for the Child Care Licensing Program. Requirements for full-size baby cribs and non-full-size baby cribs can be found on the Consumer Product Safety Commission's website.

Fiscal Impact

The department does not anticipate any fiscal impact associated with these proposed rule adoptions and amendments.

The department intends for the proposed adoptions and amendments to be effective retroactively to October 1, 2021.

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: Heidi Clark, 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., November 5, 2021.

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, apply and have been fulfilled. The primary bill sponsor was notified by email on September 27, 2021.

10. 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 significantly and directly impact small businesses.

As of June 2021, there were a total of 1,041 child care providers in Montana. This includes 274 licensed child care centers, 205 licensed family providers, 394 licensed

group providers, 37 Family, Friend, and Neighbor (FFN) providers, and 131 Relative Care Exempt (RCE) providers.

As of June 2021, there was a licensed capacity of 19,921 children that could be served by licensed child care centers, family providers, and group providers. The number of children served by FFN and RCE providers varies with each family served.

Child care providers are small business owners. The proposed licensed capacity increases may have a fiscal impact for a child care provider. A child care provider decides on how many children to provide child care for, up to the licensed capacity of the child care provider type. Since a child care provider can determine the number of children he or she provides care for, the small business could increase revenue by providing care for an increased number of children.

There may be a negative impact if a current child care center is participating in the Best Beginnings STARS to Quality Program. The impact only applies to a small number of child care centers. For a negative impact to occur, the child care center must be STAR 2 to STAR 5 level and will now meet criteria for a group day care home rather than a child care center. This would affect a child care center currently licensed to serve 13 to 16 children. Annually, the decrease in incentive monies could be as follows:

- 1) STAR Level 2: \$1,500
- 2) STAR Level 3: \$2,000
- 3) STAR Level 4: \$2,500
- 4) STAR Level 5: \$3,500

The proposed change to training will not have a fiscal impact because there will not be an increase in the cost for training. A first aid course is currently a required course for some child care facility staff. The focus of the course will change but not the cost.

/s/ Heidi Sanders

Heidi Sanders  
Rule Reviewer

/s/ Adam Meier

Adam Meier, Director  
Public Health and Human Services

Certified to the Secretary of State September 28, 2021.

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

In the matter of the adoption of New     ) NOTICE OF PUBLIC HEARING ON  
Rules I through V pertaining to public     ) PROPOSED ADOPTION  
participation                                     )

TO: All Concerned Persons

1. On October 28, 2021, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed adoption of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/82080243305>; meeting ID: 820 8024 3305; or

(b) Dial by telephone +1 646 558 8656; meeting ID: 820 8024 3305. Find your local number: <https://mt-gov.zoom.us/u/koP4MBt35>.

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 October 14, 2021, to advise us of the nature of the accommodation that you need. Please contact Heidi Clark, 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](mailto:dphhslegal@mt.gov).

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

NEW RULE I MODEL PROCEDURAL RULES (1) The Department of Public Health and Human Services, for purposes of establishing department public participation procedures, adopts and incorporates by reference the Attorney General's model procedural rules ARM 1.3.101 and 1.3.102.

AUTH: 2-3-103, 2-4-201, MCA

IMP: 2-3-103, 2-4-201, MCA

NEW RULE II PUBLIC PARTICIPATION (1) Public participation is encouraged and assisted to the fullest extent practicable. Participation must be consistent with other requirements of state law and the rights and requirements of personal privacy. The major objectives of such participation include:

(a) greater responsiveness of governmental actions to public concerns and priorities; and

(b) improved public understanding of official programs and actions.

(2) Prior to the adoption, amendment, or repeal of a rule or policy, the department shall, where the decision is of significant public interest, give adequate notice and opportunity to participate in the decision-making process.

AUTH: 2-3-103, 2-4-201, MCA

IMP: 2-3-103, 2-4-201, MCA

NEW RULE III ACTIONS CONSIDERED TO BE OF SIGNIFICANT PUBLIC INTEREST (1) The adoption, amendment, or repeal of any regulation or written policy that implements, interprets, or prescribes law or policy, or practice requirements of the department, are considered actions of significant public interest to require notice and opportunity for public participation in the decision-making process.

(2) In all other cases, whether the decision is one of significant public interest will be determined by the person within the department who is proposing the decision according to the following considerations:

- (a) the decision regards a matter which is controversial;
- (b) the number of persons who will be affected by the decision;
- (c) the fiscal impact the decision will have; or
- (d) the department has witnessed a high level of citizen interest.

AUTH: 2-3-103, 2-4-201, MCA

IMP: 2-3-103, 2-4-201, MCA

NEW RULE IV NOTICE AND MEANS FOR PUBLIC PARTICIPATION (1) If it is determined that significant public interest is involved, one or more of the following steps, as applicable, shall be taken to assist public participation in the decision-making process:

- (a) a proceeding or hearing is held in compliance with the provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, MCA;
- (b) a public hearing, after appropriate notice is given, is held pursuant to any other provision of state law, a local ordinance, or regulation; or
- (c) a news release, legal advertisement, or other method of publication will be given to news media within the area to be affected which shall include the name of a person within the department most familiar with the proposed action, that person's departmental address, and a telephone number where interested persons may submit their data, views, or arguments, orally or in written form, concerning the proposed action. This information will also be posted on the department's website.

AUTH: 2-3-103, 2-4-201, MCA

IMP: 2-3-103, 2-4-201, MCA

NEW RULE V PUBLIC REQUESTS FOR INFORMATION (1) Citizens desiring information about anything mentioned in these rules or about anything concerning the department and public participation should contact the Public Information Officer, Department of Public Health and Human Services, P.O. Box

4210, Helena, Montana 59604-4210, or visit the department's website at [dphhs.mt.gov](http://dphhs.mt.gov).

AUTH: 2-3-103, 2-4-201, MCA

IMP: 2-3-103, 2-4-201, MCA

#### 4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) is proposing to adopt New Rules I through V which will develop procedures for permitting and encouraging public participation in agency decisions that are of significant interest to the public, therefore complying with 2-3-101 and 2-3-103(1)(a), MCA.

##### NEW RULE I

In this rule, the department proposes to adopt the attorney general model rules ARM 1.3.101 and 1.3.102 for public participation.

##### NEW RULE II

This rule outlines the major objectives for public participation.

##### NEW RULE III

This rule provides guidance on what actions are considered to be of significant public interest.

##### NEW RULE IV

This rule outlines the method of notice and means for public participation.

##### NEW RULE V

This rule provides contact information for the department's public information officer and directs the public to contact them with questions.

##### Fiscal Impact

The department anticipates no fiscal impact with the proposed rulemaking.

The department intends for these proposed new rules to be effective January 1, 2022.

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: Heidi Clark, 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., November 5, 2021.

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 adoption of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Ashley D. Morigeau  
Ashley D. Morigeau  
Rule Reviewer

/s/ Adam Meier  
Adam Meier, Director  
Public Health and Human Services

Certified to the Secretary of State September 28, 2021.

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

In the matter of the adoption of New     ) NOTICE OF PUBLIC HEARING ON  
Rule I pertaining to health emergency     ) PROPOSED ADOPTION  
waiver     )

TO: All Concerned Persons

1. On October 28, 2021, at 2:00 p.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed adoption of the above-stated rule. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/84546337141>, meeting ID: 845 4633 7141; or

(b) Dial by telephone +1 646 558 8656, meeting ID: 845 4633 7141. Find your local number: <https://mt-gov.zoom.us/u/kbvrrDUfU>.

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 October 14, 2021, to advise us of the nature of the accommodation that you need. Please contact Heidi Clark, 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](mailto:dphhslegal@mt.gov).

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

**NEW RULE I EXERCISE OF REGULATORY DISCRETION DURING EMERGENCY** During the period of time set forth in (8), the department will exercise regulatory discretion and waive strict compliance with the following categories of administrative rules to the limited extent that they conflict with the department's implementation of federal COVID-19-related guidance, waivers, or rules, as follows:

(1) Training and other training-related annual recertification requirements in congregate care facilities:

(a) provisions of ARM Title 37, chapter 34, related to services of the developmental disabilities program and the home and community-based services program (HCBS);

(b) provisions of ARM Title 37, chapter 40, related to home and community-based services for elderly and physically disabled persons;

(c) provisions of ARM Title 37, chapter 97, related to the licensure of youth care facilities;

(d) provisions of ARM Title 37, chapter 100, related to community residences; and

(e) provisions of ARM Title 37, chapter 106, related to the licensure of health care facilities.

(2) Staffing-related licensing and certification requirements in congregate care facilities:

(a) provisions of ARM Title 37, chapter 40, related to home and community-based services for elderly and physically disabled persons;

(b) provisions of ARM Title 37, chapter 90, related to the home and community-based services waiver for adults with severe and disabling mental illness;

(c) provisions of ARM Title 37, chapter 97, related to the licensure of youth care facilities;

(d) provisions of ARM Title 37, chapter 100, related to community residences; and

(e) provisions of ARM Title 37, chapter 106, related to the licensure of health care facilities.

(3) Licensing and certification requirements related to permissible premises, settings, or construction standards in situations:

(a) provisions of ARM Title 37, chapter 97, related to the licensure of youth care facilities;

(b) provisions of ARM Title 37, chapter 100, related to community residences; and

(c) provisions of ARM Title 37, chapter 106, related to the licensure of health care facilities.

(4) Telehealth face-to-face requirements for the provision of medical services:

(a) ARM 37.27.102(9);

(b) ARM 37.27.902(2) and (3), to the extent that provider manuals require face-to-face interactions;

(c) ARM 37.27.517(1)(b);

(d) ARM 37.34.3005(2), to the extent that the rates manual requires face-to-face interactions;

(e) ARM 37.40.702(8) and (9);

(f) ARM 37.40.805(1) through (3), to the extent Medicare normally requires face-to-face encounters;

(g) ARM 37.40.1005(4), to the extent such provision requires in-person meetings;

(h) ARM 37.40.1114(4), to the extent such provision requires in-person meetings;

(i) ARM 37.86.901(2);

(j) ARM 37.86.902(2)(b);

(k) ARM 37.86.3405(2);

(l) ARM 37.86.4402(1);

(m) ARM 37.87.703(1)(h), to the extent that such provision requires face-to-face interactions for home support services;

(n) ARM 37.87.903(7), to the extent the provider manual requires face-to-face interactions;

(o) ARM 37.87.1410(6)(b);

(p) ARM 37.88.101(2), to the extent the provider manual requires face-to-face interactions;

(q) ARM 37.89.501(2);

(r) ARM 37.106.1916(5);

(s) ARM 37.106.1935(4), to the extent such provision requires in-person or face-to-face contacts for targeted case management services; and

(t) ARM 37.106.2011(3), to the extent such provision requires in-person, in-home meetings.

(5) Any provision of ARM 37.82.205 and 37.84.107, to the extent that the rule would end eligibility for any individual enrolled as of March 18, 2020, unless the individual ceases to be a state resident or requests a voluntary disenrollment. Waiver of such requirements and provisions shall not exceed the end of the month in which the nationwide COVID-19 public health emergency ends.

(6) Licensing or certification requirements for congregate care facilities that require background checks, as long as the facility has submitted fingerprint background checks to the appropriate authority and has conducted other background checks, including but not limited to name background checks:

(a) provisions of ARM 37.97.132 and 37.97.140, related to the licensure of youth care facilities; and

(b) provisions of ARM 37.100.138(1) and (2) and 37.100.165(5), related to community residences.

(7) If the intensive care unit of a licensed hospital, critical access hospital, or licensed medical assistance facility is 70% occupied, swing-bed requirements in:

(a) ARM 37.40.402(1)(b)(i)(A) through (D); and

(b) ARM 37.40.405(1)(b) and (2), to the extent necessary to facilitate payment under Medicaid.

(8) This rule is intended to be of limited duration to provide flexibilities to the state's health care industry and related human service organizations as they respond to the COVID-19 pandemic. The rule is repealed and the provisions of this rule expire upon the expiration or rescinding of the nationwide COVID-19 public health emergency determination, issued under section 319 of the Public Health Service Act, 42 U.S.C. § 247d, initially on January 31, 2020, and subsequently renewed by the secretary of the U.S. Department of Health and Human Services, or at the conclusion of any transition period or of phase-down requirements relating to federal waivers issued by the Centers for Medicare and Medicaid Services in response to the COVID-19 pandemic, whichever is later.

AUTH: 50-5-103, 50-5-215, 52-2-111, 52-2-603, 53-2-201, 53-6-113, 53-6-402, 53-24-204, 53-24-209, MCA

IMP: 50-5-103, 50-5-202, 50-5-203, 50-5-204, 50-5-215, 52-2-603, 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-131, 53-6-142, 53-6-402, 53-24-204, 53-24-208, 53-24-209, MCA

#### 4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) proposes this administrative rule to continue the flexibilities available to health care providers,

health care facilities, and other entities with regulatory relationships to the department, as the state's health care industry and related human services organizations continue to respond to the COVID-19 pandemic and the recent emergence of the Delta variant as the predominant strain of the disease in Montana. The proposed rule will continue the flexibilities authorized by the emergency administrative rule adopted in MAR Notice No. 37-955, which will expire October 29, 2021, by operation of 2-4-303, MCA, which provides that an emergency rule may be effective for a period of no longer than 120 days. The statute provides further that, at the conclusion of 120 days, a new emergency rule with the same or substantially the same text may not be adopted.

The adoption of a similar rule under the non-emergency administrative rulemaking process is permitted, and the department now proposes this rule to continue, during the current nationwide COVID-19 public health emergency, the regulatory flexibilities for health care providers, health care facilities, and other entities with regulatory relationships to the department. In addition to the flexibilities in MAR Notice No. 37-955, this proposed rule includes the provisions of another emergency rule, MAR Notice No. 37-964, relating to the management of hospital swing-beds which will expire in mid-December by operation of the 120-day limit on emergency rules.

These regulatory flexibilities ensure compliance with federal waivers granted by the Centers for Medicare and Medicaid (CMS), including an 1135 Waiver, Appendix K to 1915(c) Home and Community-Based Services Waiver, and blanket waivers issued to all states by CMS. The regulatory flexibilities available under these federal waivers remain necessary for Montana to effectively continue its response to the COVID-19 pandemic and to ensure compliance with federal authorities.

The department intends for the flexibilities contained in this rule to be in effect until the end of the nationwide COVID-19 public health emergency, in coordination with requirements of federal waivers. Thus, by operation of (8), the rule's provisions will expire upon the conclusion of the nationwide public health emergency, as declared and renewed by the secretary of the U.S. Department of Health and Human Services, or at the conclusion of any phase-down of federal waivers issued by the Centers for Medicare and Medicaid Services in response to the COVID-19 pandemic, whichever is later.

The proposed rule provides for flexibilities in the following areas related to congregate care facilities, including services of the developmental disabilities program and the home and community-based services program (HCBS), the HCBS program for elderly and physically disabled persons, community residences, and health care facilities:

- Training and other training-related annual recertification requirements;
- Staffing related licensing and certification requirements; and
- Licensing, and certification requirements related to permissible premises, settings or construction standards in youth care facilities, community residences, and health care facilities.

The department proposes to continue flexibilities relating to telehealth to permit health care providers to serve Medicaid members by means of audio, video, or other telecommunications technology or media, including audio-only. Senate Bill (SB) 537 of the 67th Legislature (2021 regular session) authorizes Medicaid providers to administer medically necessary services to Medicaid members by means of telehealth and ensures that providers can receive Medicaid reimbursement. The bill provides that the services must be: a) clinically appropriate for delivery by telehealth as specified by the department by rule or policy; b) comport with guidelines of the applicable provider manual; and c) not specifically required to occur face-to-face. Because there are administrative rules that specifically require face-to-face appointments, the department must continue the telehealth flexibilities to ensure that providers can deliver and be reimbursed for services by means of telehealth, even with the passage of SB 537. The proposed rule does not include two administrative provisions referenced in MAR Notice No. 37-955 relating to telehealth in the Children's Mental Health Services Bureau because recent rule amendments have rendered those references out of date and the needed flexibilities are provided for in other provisions in this rule.

The proposed rule also ensures that the state can extend eligibility for individuals who may otherwise not be eligible if they were enrolled in Medicaid as of March 18, 2020, unless the individual ceases to be a state resident or requests voluntary disenrollment. This comports with a federal waiver granted by CMS to ensure continued Medicaid coverage through the end of the nationwide public health emergency.

The rule also includes flexibilities for licensed hospitals, critical access hospitals, and licensed medical assistance facilities in the management of swing-beds, which refers to a bed approved under federal regulations to provide either acute care or extended skilled nursing care to a patient. The purpose of this provision is to relieve a hospital of the administrative burden of determining whether a bed is available in any nursing care facility located within a 25-mile radius of the hospital before the hospital can transfer a patient to a swing-bed. The flexibility, which is available to a hospital if its intensive care unit is 70% occupied, also relieves the hospital of maintaining written documentation of inquiries made to nursing care facilities about the unavailability of an appropriate bed. Although a technically broader flexibility was provided in an emergency rule adopted in MAR Notice No. 37-964, which was filed on September 17, 2021, the provision proposed in this notice is consistent with the emergency rule given hospital circumstances at the time the emergency rule was filed. The department intends to repeal the emergency rule in MAR Notice No. 37-964 at the same time that the department adopts the proposed rule in this notice.

The department proposes to continue the flexibility relating to fingerprint background checks for employees of youth care facilities, and community residences. The flexibility granted here is limited to allowing new employees to begin working at the facilities before the results of the fingerprint background check are completed and received by the department, as long as the youth facility also conducts additional

background checks, including but not limited to name background checks. The facilities must continue to require fingerprint background checks of employees and must take appropriate action when notified of results by the department. The department does not believe that it is necessary to extend this same flexibility with respect to youth foster homes because of fingerprint technology currently available to such programs.

#### Fiscal Impact

Montana Medicaid receives an enhancement of 6.2% in the federal medical assistance percentage (FMAP) on Medicaid expenditures during the nationwide COVID-19 public health emergency as long as the state follows federal guidance regarding continuous eligibility for Medicaid members enrolled as of March 18, 2020. (Section (5) in the proposed rule.) The enhanced FMAP on Medicaid expenditures equates to an estimated savings to state funds (general fund and state special revenue) of approximately \$18 million per quarter during the nationwide public health emergency. Apart from the savings attributed to the enhanced FMAP, the department does not anticipate any fiscal impact.

The department intends to apply the proposed new rule retroactively to October 30, 2021.

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: Heidi Clark, 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., November 5, 2021.

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 adoption of the above-referenced rule may significantly and directly impact small businesses to the extent that health care and related human

service organizations will have fewer regulatory obstacles in the care and treatment of those affected by COVID-19.

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.

/s/ Brenda K. Elias  
Brenda K. Elias  
Rule Reviewer

/s/ Adam Meier  
Adam Meier, Director  
Public Health and Human Services

Certified to the Secretary of State September 28, 2021.

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PUBLIC HEARING ON
ARM 42.21.154, 42.21.155,	)	PROPOSED AMENDMENT AND
42.21.158, and 42.22.1311 and the	)	REPEAL
repeal of ARM 42.21.125 pertaining	)	
to 2022 Personal Property	)	
Depreciation Schedules and Trend	)	
Tables and updated business	)	
equipment exemption	)	

TO: All Concerned Persons

1. On November 4, 2021, at 10:00 a.m., the Department of Revenue will hold a public hearing in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, located at 125 North Roberts, Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules. The conference room is most readily accessed by entering through the east doors of the building.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, please advise the department of the nature of the accommodation needed, no later than 5 p.m. on October 15, 2021. Please contact Todd Olson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or [todd.olson@mt.gov](mailto:todd.olson@mt.gov).

3. GENERAL STATEMENT OF REASONABLE NECESSITY. The department proposes to amend ARM 42.21.155 and 42.22.1311 to update the authority of the web-based Personal Property Depreciation Schedules and Trend Tables publication (publication), adopted and incorporated by reference in the rules, to the 2022 version. The publication is updated annually, effective January 1, and is located within the department's website at <http://www.mtrevenue.gov>. The 2022 publication reflects changes in personal property and industrial machinery and equipment depreciation and trend factoring data in the department's valuation manuals and guides since last year. Both the 2021 publication and the proposed 2022 publication are available for review.

The department proposes to amend ARM 42.21.158 to implement changes made to the business equipment tax exemption amount under House Bill 303 (2021) (HB 303). HB 303 increased the \$100,000 exemption to \$300,000 which reduces the number of small business owners required to report their business equipment for taxation. The amendments propose to defer, by cross reference, to the statutory exemption provided in 15-6-138, MCA, instead of providing the exemption amount. The proposed amendments eliminate the need for future updates to the rule merely for exemption amount changes.

The department also proposes to amend ARM 42.21.154 by transferring content from ARM 42.21.125(5) to ARM 42.21.154(3) for improved organization of rule content pertaining to personal property valuation of leased or rental equipment.

Based on the proposed amendments to ARM 42.21.154, the department proposes the repeal of ARM 42.21.125, as the majority of the rule is provided in 15-6-202, MCA, ARM 42.21.154, and 42.21.159.

While this general statement of reasonable necessity covers the basis for the following proposed rulemakings, it is supplemented below, where necessary, to explain rule-specific changes.

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

42.21.154 ANNUAL VALUATION OF PERSONAL PROPERTY

(1) and (2) remain the same.

(3) Leased or rental equipment that is not exempt under 15-6-202 or 15-6-219, MCA, is taxable and is valued in the same manner as similar non-leased equipment. Property brought into the state that meets the requirements under 15-6-202, MCA, is not taxable unless it is sold or otherwise disposed of in the state.

(4) through (8) remain the same.

AUTH: 15-1-201, 15-23-108, MCA

IMP: 15-6-135, 15-6-138, 15-6-202, 15-6-207, 15-6-213, 15-6-219, 15-8-111, MCA

42.21.155 PERSONAL PROPERTY CATEGORIES AND TRENDED DEPRECIATION METHODOLOGIES (1) through (3) remain the same.

(4) The department shall post its trended depreciation schedules for the upcoming tax year for the categories of personal property described below on the department's internet website located at <http://www.mtrevenue.gov>. The department adopts and incorporates by reference its 2024 2022 Personal Property Depreciation Schedules and Trend Tables publication, effective January 1, 2024 2022. The Depreciation Schedules and Trend Tables publication contains the detailed schedules and tables the department uses for valuing personal property and industrial machinery and equipment. The personal property categories and trended depreciation methodologies that apply to the Depreciation Schedules and Trend Tables publication are as follows:

(a) through (h) remain the same.

AUTH: 15-1-201, 15-23-108, MCA

IMP: 15-6-135, 15-6-138, 15-6-202, 15-6-207, 15-6-213, 15-6-219, 15-8-111, MCA

42.21.158 PERSONAL PROPERTY REPORTING REQUIREMENTS

(1) through (6) remain the same.

(7) As determined by the department, if the statewide aggregate market value of an individual's or business entity's class eight property is ~~\$100,000 or less~~

than or equal to the exemption provided in 15-6-138, MCA, the individual's or business entity's class eight property is exempt from taxation. If the aggregate market value of an individual's or business entity's class eight property is greater than \$100,000 the exemption provided in 15-6-138, MCA, the market value of an individual's or business entity's class eight property that is greater than \$100,000 the exemption is subject to taxation.

(8) The department will apply the exemption and the applicable tax rates identified in (a) ~~through and (d)~~ (b) to an individual's or business entity's class eight property by adding together the statewide market value of class eight property owned by the individual or business entity to determine the aggregate market value. If the aggregate market value of class eight property is:

(a) ~~\$100,000 or less than or equal to the exemption provided in 15-6-138, MCA~~, the taxable market value of the property is zero; or

(b) greater than \$100,000 the exemption provided in 15-6-138, MCA, the department will apply the ~~\$100,000 exemption proportionally between among~~ each property owned; apply the 1.5 percent taxable rate to the first \$6,000,000 in excess of the exemption, and apply the 3 percent taxable rate to the remaining taxable market value.

~~(c) \$6,100,000 or less, the department will apply the \$100,000 exemption proportionally between each property owned and apply the 1.5 percent taxable rate to the remaining taxable market value; or~~

~~(d) greater than \$6,100,000 the department will apply the \$100,000 exemption proportionally between each property owned, apply the 1.5 percent taxable rate proportionally to the next \$6,000,000 of taxable market value, and apply the 3 percent taxable rate to the remaining taxable market value.~~

(9) and (10) remain the same.

(11) Personal property owners whose aggregate class eight market value is ~~\$100,000 or less~~ than or equal to the exemption provided in 15-6-138, MCA, as defined in (4), will have no further reporting obligation, except:

(a) if the property owner acquires new personal property, the value of which brings the aggregate market value of the personal property above the ~~\$100,000 exemption provided in 15-6-138, MCA~~, the taxpayer must notify the department and complete a personal property statement/reporting form for the applicable tax year; or

(b) remains the same.

(12) New businesses are not required to submit a personal property statement/reporting form if the entity's business equipment is valued at ~~\$100,000 or less~~ than or equal to the exemption provided in 15-6-138, MCA, unless requested by the department in accordance with (11).

(13) remains the same.

AUTH: 15-1-201, 15-9-101, MCA

IMP: 15-1-121, 15-1-123, 15-1-303, 15-6-138, 15-6-201, 15-6-202, 15-6-203, 15-6-206, 15-6-213, 15-6-215, 15-6-217, 15-6-218, 15-6-219, 15-6-220, 15-6-225, 15-6-228, 15-8-104, 15-8-301, 15-8-303, 15-8-309, 15-9-101, 15-24-3001, MCA

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity, the department proposes to implement HB 303 by amending

ARM 42.21.158 and striking (8)(c) and (8)(d) and consolidating (8)(a) and (8)(b). The net effect is the implementation of the legislation, and it clarifies the department's statewide market value aggregation process for class eight property.

42.22.1311 INDUSTRIAL MACHINERY AND EQUIPMENT TREND FACTORS (1) remains the same.

(2) The department shall post its trend factor tables for industrial machinery and equipment for the upcoming tax year on the department's internet website located at <http://www.mtrevenue.gov>. The department adopts and incorporates by reference its ~~2024~~ 2022 Personal Property Depreciation Schedules and Trend Tables publication, effective January 1, ~~2024~~ 2022. The Depreciation Schedules and Trend Tables publication contains the detailed schedules and tables the department uses for valuing personal property and industrial machinery and equipment.

(3) remains the same.

AUTH: 15-1-201, MCA

IMP: 15-6-135, 15-6-138, 15-8-111, MCA

5. The department proposes to repeal the following rule:

42.21.125 BUSINESS EQUIPMENT

AUTH: 15-1-201, MCA

IMP: 15-6-202, MCA

REASON: In addition to the general statement of reasonable necessity, the department proposes the repeal of ARM 42.21.125 to remove unnecessary redundancies which are already provided in 15-6-202, MCA, ARM 42.21.154 and 42.21.159. For instance, (1) is obsolete. Further, the department no longer requires a lessee to report the business equipment they rent; that is an obligation of the lessor. Section (6) is obsolete based on the passage of House Bill 52 (2021) (HB 52), which changed the quarterly reporting requirement to annual for all farm implement and construction equipment in a purchase incentive rental program. The last sentence in (6) is redundant as it is also provided in ARM 42.21.159(4)(b).

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 Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or e-mail [todd.olson@mt.gov](mailto:todd.olson@mt.gov) and must be received no later than 5:00 p.m., November 8, 2021.

7. Todd Olson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

8. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notice regarding particular subject matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. A written request may be mailed or delivered to the person in number 6 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

9. An electronic copy of this notice is available on the department's web site at [www.mtrevenue.gov](http://www.mtrevenue.gov), or through the Secretary of State's web site at [sosmt.gov/ARM/register](http://sosmt.gov/ARM/register).

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor, Representative Kassmier, was contacted by email on September 18, 2021 and September 27, 2021.

11. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment and repeal of the above-referenced rules may significantly and directly impact small businesses. However, the extent of any potential impact is fact-dependent on the circumstances of the taxpayer, and is not quantifiable by the department. With regard to the amendment of ARM 42.21.158, any significant and direct small businesses impact is attributable to the department through the implementation of HB 303.

/s/ Todd Olson  
Todd Olson  
Rule Reviewer

/s/ Brendan Beatty  
Brendan Beatty  
Director of Revenue

Certified to the Secretary of State September 28, 2021.

BEFORE THE SECRETARY OF STATE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 1.3.307, 1.3.309, and 1.3.312 ) PROPOSED AMENDMENT  
pertaining to legislative oversight of )  
administrative rules )

TO: All Concerned Persons

1. On October 28, 2021, at 8:30 a.m., the Secretary of State will hold a public hearing in the Secretary of State's Office conference room, Room 260, State Capitol, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Secretary of State 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 Secretary of State no later than 5:00 p.m., October 21, 2021, to advise us of the nature of the accommodation that you need. Please contact Ray Dagnall, Secretary of State's Office, P.O. Box 202801, Helena, MT 59620-2801; telephone (406) 444-9009; fax (406) 444-3976; TDD/Montana Relay Service (406) 444-9068; or e-mail RDagnall@mt.gov.

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

1.3.307 RULEMAKING, INTRODUCTION (1) through (3) remain the same.  
(4) Rulemaking under MAPA involves ~~four~~ five steps.  
(a) and (b) remain the same.  
(c) Notice to the appropriate administrative rule review committee pursuant to 2-4-302, MCA.  
(c) and (d) remain the same but are renumbered (d) and (e).  
(5) through (7) remain the same.

AUTH: 2-4-202, 2-15-401, MCA

IMP: 2-4-111, 2-4-202, 2-4-302, 2-4-303, 2-4-305, MCA

1.3.309 RULEMAKING, PROPOSAL NOTICE (1) Per 2-4-302, MCA, a notice of proposed rulemaking involves the following:

(a) remains the same.  
(b) An agency shall publish file for publication with the secretary of state a notice of intent to adopt, amend, or repeal a rule. On the same day, the agency shall send each member of the staff of the appropriate administrative rule review committee an electronic copy of the notice in accordance with 2-4-302, MCA.  
(c) through (4) remain the same.

AUTH: 2-4-202, MCA

IMP: 2-4-202, 2-4-302, 2-4-305, 2-4-307, MCA

1.3.312 RULEMAKING, AGENCY ACTION (1) through (5) remain the same.  
(6) An agency may not adopt, amend, or repeal rules from October 1 to December 31 in the year that precedes the year in which the legislature meets in regular session, except as provided in 2-4-305, MCA.

(6) remains the same but is renumbered (7).

AUTH: 2-4-202, MCA

IMP: 2-4-202, 2-4-305, 2-4-307, MCA

REASONABLE NECESSITY: On May 14, 2021, the Governor of Montana signed into law House Bill (HB) 447. HB 447 revised laws related to legislative oversight of administrative rules. The Office of the Secretary of State is proposing changes to ARM 1.3.307, 1.3.309, and 1.3.312 to reflect the changes in statute.

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: Angela Nunn, Secretary of State's Office, P.O. Box 202801, Helena, Montana 59620-2801, or by e-mailing [angela.nunn@mt.gov](mailto:angela.nunn@mt.gov), and must be received no later than 5:00 p.m., November 5, 2021.

5. Austin James, Secretary of State's Office, has been designated to preside over and conduct the hearing.

6. The Secretary of State maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding administrative rules, corporations, elections, notaries, records, uniform commercial code, or combination thereof. A written request may be mailed or delivered to the Secretary of State's Office, Administrative Rules Services, 1301 E. 6th Avenue, P.O. Box 202801, Helena, MT 59620-2801, or emailed to the office at [sosarm@mt.gov](mailto:sosarm@mt.gov).

7. With regard to the requirements of 2-4-302(2)(d), MCA, the primary bill sponsor, Representative Mercer, was contacted by mail and email on September 23, 2021.

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

/s/ AUSTIN JAMES  
Austin James  
Rule Reviewer

/s/ CHRISTI JACOBSEN  
Christi Jacobsen  
Secretary of State

Dated this 28th day of September, 2021.

BEFORE THE SECRETARY OF STATE  
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PUBLIC HEARING ON
ARM 44.3.2002, 44.3.2005,	)	PROPOSED AMENDMENT
44.3.2011, 44.3.2015, 44.3.2102,	)	
44.3.2110, 44.3.2302, 44.3.2303, and	)	
44.3.2304 pertaining to Voter	)	
Registration Requirements,	)	
Provisional Registration, Late	)	
Registration Procedures, Voter	)	
Identification, and Related Definitions	)	

TO: All Concerned Persons

1. On October 28, 2021, at 10:00 a.m., the Secretary of State will hold a public hearing in the Secretary of State's Office conference room, Room 260, State Capitol, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Secretary of State 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 Secretary of State no later than 5:00 p.m., October 21, 2021, to advise us of the nature of the accommodation that you need. Please contact Ray Dagnall, Secretary of State's Office, P.O. Box 202801, Helena, MT 59620-2801; telephone (406) 444-9009; fax (406) 444-3976; TDD/Montana Relay Service (406) 444-9068; or e-mail RDagnall@mt.gov.

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

44.3.2002 DEFINITIONS As used in this subchapter, unless the context clearly indicates otherwise, the following definitions apply:

(1) remains the same.

~~(2) "Driver's license number" means a number provided by the Montana motor vehicle division on either a Montana motor vehicle division driver's license or a Montana motor vehicle division identification card.~~

(3) through (5) remain the same but are renumbered (2) through (4).

~~(6)~~ (5) "Identification" for the purposes of registration means ~~any of the~~ following:

~~(a) current and valid photo identification including, but not limited to, a valid driver's license, a school district or postsecondary education photo identification, or a tribal photo identification with the individual's name; or~~ a Montana driver's license number, Montana state identification card number issued pursuant to 61-12-501, MCA, or the last four digits of the applicant's social security number;

(b) if unable to provide the items in (5)(a), the following alternative forms of

identification:

(i) military identification card, tribal photo identification card, United States passport, or Montana concealed carry permit; or

(b) (ii) a current utility bill, bank statement, paycheck, government check, or other government document that shows the individual's name and current address and photo identification that shows the individual's name. The photo identification may include a school district photo identification, postsecondary education photo identification, or any other identification that includes the name and photo of the individual.

~~(c) For the purposes of this subchapter, identification is presumed to be current and valid unless proved otherwise. A driver's license or identification card is presumed to be current and valid if it is issued by any motor vehicle agency, regardless of its status. Any other photo identification is sufficient if it includes the name and photo of the individual.~~

~~(7) (6) "Legally registered electors" include but are not limited to means an electors who were was properly registered prior to January 1, 2003, and or these one who registered on or after that date whose applications for voter registration were was accepted, processed, and verified as provided by law.~~

~~(8) "Notice by the most expedient method available" means notification that shall occur by any of the following, at the discretion of the election administrator:~~

- ~~(a) telephone;~~
- ~~(b) mail;~~
- ~~(c) facsimile machine;~~
- ~~(d) in person; or~~
- ~~(e) e-mail or other electronic means.~~

AUTH: 13-2-109, MCA

IMP: 13-2-110, MCA

REASON: On April 19, 2021, the Governor of Montana signed into law Senate Bill (SB) 169. SB 169 revises certain identification requirements for voter registration, voting, and provisional voting. The Office of the Secretary of State is proposing changes to ARM 44.3.2002 to reflect the changes in statute. The proposed rules incorporate the legislature's amendments to 13-2-110, MCA, in the definitions rule of ARM Title 44, subchapter 20, Voter Registration. Additional changes include a proposal to remove two unnecessary definitions – "Driver's license number" and "Notice by the most expedient method available" that define terms unused in the subchapter. Additionally, the proposed amendment changes "Legally registered electors" from plural to singular to reflect use of the term in this subchapter.

44.3.2005 VOTER REGISTRATION APPLICATION INFORMATION

REQUIREMENTS (1) An applicant for voter registration must provide all required information on the voter registration application, and county election officials shall enter the information from each completed voter registration application into the statewide voter registration system as provided in this chapter.

(2) An election official processing and entering the information from an application for voter registration into the statewide voter registration system shall:

(a) enter the Montana driver's license number, Montana state identification card number, or the last four digits of the social security number when provided by the applicant on the voter registration application into the voter registration system maintained by the election administrator in a field provided for the number; or

(b) if the applicant was unable to provide one of the numbers in (2)(a), select the description of the form of identification required in ARM 44.3.2002, provided by the applicant on the voter registration application, in the voter registration system maintained by the election administrator; and

(b) (c) with respect to confidential or private numbers or information protected from disclosure under ARM 44.3.1102(1)(e) and (3), ensure that the numbers or information provided pursuant to (2)(a) and (b) remains private and accessible only by authorized county or state election officials in the discharge of their official duties and, when applicable, by the authorized staff of the Office of the Secretary of State; and.

(c) (3) An election official shall utilize the applicant's Montana driver's license number, Montana state identification card number, or the last four digits of the applicant's social security number when provided in the voter registration application use the number as a unique identifier for voting purposes in addition to the voter registration number assigned to the elector.

(3) (4) An applicant for voter registration who does not complete all required fields on the application or does not provide the applicant's driver's license number, the last four digits of the applicant's social security number, or a form of identification, as defined required in ARM 44.3.2002, shall be registered as a provisionally registered elector, pending receipt and verification, at any time up to and including on election day, of one of the required numbers or, if the applicant has not been issued either number, receipt of a form of identification required.

(a) If a provisionally registered elector's incomplete application does not contain the current residential address or other geographic information from which the location of the provisionally registered elector's residence can be easily identified, the applicant shall be entered as "pending – incomplete" in the statewide voter registration system until the required information is provided.

(b) If a provisionally registered elector's incomplete application does contain the provisionally registered elector's current residential address, or it can be easily ascertained from the information provided on the incomplete application, an election official shall use best efforts to contact the provisionally registered elector and request the information or documentation missing from the voter registration application.

(c) Upon receipt and verification as required under ARM 44.3.2011 of the information or documentation missing from a provisionally registered elector's voter registration application, the election administrator shall complete the registration as provided in this subchapter and shall change the elector's status to active.

(4) If an applicant does not provide all required information and the election administrator is unable to obtain that information, except for the information in (2) on the form prescribed by the secretary of state, the applicant may be entered as "pending – incomplete" status in the statewide voter registration system until the required information is provided.

AUTH: 13-2-109, MCA  
IMP: 13-2-110, 13-2-208, MCA

REASON: On April 19, 2021, the Governor of Montana signed into law Senate Bill (SB) 169. SB 169 revises certain identification requirements for voter registration, voting, and provisional voting. The Office of the Secretary of State is proposing changes to ARM 44.3.2005 to revise voter registration application processes and procedures to reflect the changes in statute. In addition, the proposed amendment clarifies the process for handling incomplete voter registration applications. Finally, the proposed amendments incorporate clerical changes to improve readability.

44.3.2011 PROVISIONAL REGISTRATION PENDING VERIFICATION

(1) All applicants for voter registration who apply under this subchapter shall be registered provisionally pending verification by an election administrator or their designee of the applicant's Montana driver's license number, Montana state identification card number, or, if the applicant does not have a driver's license number, the last four digits of the applicant's social security number. If the applicant is unable to provide a Montana does not have a driver's license number, Montana state identification card number, or the last four digits of the applicant's social security number, the applicant shall provide a form of identification required under 13-2-110, MCA, and shall be registered provisionally until the identification information provided by the applicant is which, if accepted, shall be sufficient for verification under these rules verified by an election administrator.

(2) Identification information is verified for registration if it is a Montana driver's license number, a Montana state identification card number, or the last four digits of a social security number validated through the statewide voter registration system. Other forms of identification allowed for voter registration in ARM 44.3.2002 are verified if an election administrator determines that the identification information identifies the applicant, satisfies the requirements of ARM 44.3.2002, and appears to be genuine and authentic.

(3) If an election administrator or their designee cannot verify the identification information submitted by an applicant, the election administrator shall notify the applicant as provided by ARM 44.3.2013(2).

AUTH: 13-2-109, MCA  
IMP: 13-2-110, MCA

REASON: On April 19, 2021, the Governor of Montana signed into law Senate Bill (SB) 169. SB 169 revises certain identification requirements for voter registration, voting, and provisional voting. The Office of the Secretary of State is proposing changes to ARM 44.3.2011 to reflect the changes in statute and to clarify the identification verification process applicable to provisionally registered electors. The proposed rules clarify the identification process to verify an applicant with provisionally registered status pending verification of the applicant's identity pursuant to law. The proposal includes changes to improve rule readability. Lastly, (3) proposes a notification requirement.

44.3.2015 LATE REGISTRATION PROCEDURES (1) In addition to and consistent with the procedures specified in the Montana Code Annotated, and due to administrative necessity, the following shall apply to late registration:

(a) Any prospective elector ~~wishing to may register or change the existing elector's voter information after noon on the day before election day the close of regular registration and be eligible to vote in the election if the election administrator in the county where the elector resides receives and verifies the elector's voter registration information prior to noon the day before the election. may submit a voter registration application at the county election administrator's office, but the elector must appear at the county election office by 8 p.m. on election day in order to complete the late registration process and receive an absentee ballot.~~

(b) After the close of late registration, an elector may:

(i) change their residence to a different county within Montana but may only vote in their previous county of residence pursuant to 13-2-514, MCA.

(ii) change their residence to a different precinct within the county, and may vote in the new precinct, old precinct, or a central location designated by the county election administrator.

(iii) change their name and may vote under the elector's former name unless the registration was cancelled.

(iv) reactivate their registration pursuant to 13-2-222, MCA, but may only vote on election day at the county election administrator's office or a central location designated by the county election administrator.

(2) through (5) remain the same.

AUTH: 13-2-108, MCA

IMP: 13-2-304, 13-2-514, MCA

REASON: On April 19, 2021, the Governor of Montana signed into law House Bill (HB) 176. HB 176 provides for the closing of late voter registration at noon the day before the election. The Office of the Secretary of State is proposing changes to ARM 44.3.2015 to reflect the changes in statute and to clarify what changes an elector may make after the close of the late registration period. The amendment also proposes changes to improve clarity and readability of the rule.

44.3.2102 DEFINITIONS As used in this subchapter, unless the context clearly indicates otherwise, the following definitions apply:

(1) remains the same.

(2) ~~"Driver's license number" means a number provided by the Montana motor vehicle division on either a Montana motor vehicle division driver's license or a Montana motor vehicle division identification card.~~

(3) through (5) remain the same but are renumbered (2) through (4).

~~(6)~~ (5) "Identification" for the purposes of voting at the polling place, means any of the following:

(a) ~~a current photo identification showing an elector's name including, but not limited to, a valid driver's license, a school district or postsecondary education photo identification, or a tribal photo identification~~ Montana driver's license, Montana state identification card issued pursuant to 61-12-501, MCA, military identification card,

tribal photo identification card, United States passport, or Montana concealed carry permit; or

(b) ~~a current utility bill, bank statement, paycheck, notice of confirmation of voter registration issued pursuant to 13-2-207, MCA, government check, or other government document that shows the elector's name and current address; and~~

(c) photo identification that shows the elector's name, including but not limited to a school district or postsecondary education photo identification. ~~For the purposes of this subchapter, identification is presumed to be current and valid unless proved otherwise. A driver's license or identification card is presumed to be current and valid if it is issued by any motor vehicle agency, regardless of its status. Any other photo identification is sufficient if it includes the name and photo of the individual.~~

~~(7) (6) "Legally registered electors" include but are not limited to means an electors who were was properly registered prior to January 1, 2003, and or those one who registered on or after that date whose applications for voter registration were was accepted, processed, and verified as provided by law.~~

~~(8) "Notice by the most expedient method available" means notification that shall occur by any of the following, at the discretion of the election administrator:~~

~~(a) telephone;~~

~~(b) mail;~~

~~(c) facsimile machine;~~

~~(d) in person; or~~

~~(e) e-mail or other electronic means.~~

~~(9) (7) "Polling place elector identification form" means a form prescribed by the Secretary of State and printed by the election administrator that:~~

~~(a) requires an elector to provide the elector's current Montana residential address, current mailing address, date of birth, signature, and date;~~

~~(b) requires an elector to provide the elector's Montana driver's license number, or Montana state identification card number, or the last four digits of the elector's social security number; and~~

~~(c) is permitted to be used by an elector at the polling place as a government document meeting the requirements of identification under (6), if the number provided under (8)(7)(b) is verified validated through the statewide voter registration system by an election official and the elector's information is consistent with the information provided pursuant to (7)(a).~~

~~(10) and (11) remain the same but are renumbered (8) and (9).~~

~~(10) "Reasonable impediment declaration form" means the form allowed by 13-15-107(4), MCA, and prescribed by the Secretary of State.~~

AUTH: 13-13-603, MCA

IMP: 13-13-114, 13-13-601, 13-15-107, MCA

REASON: On April 19, 2021, the Governor of Montana signed into law Senate Bill (SB) 169. SB 169 revises certain identification requirements for voter registration, voting, and provisional voting. The Office of the Secretary of State is proposing changes to ARM 44.3.2102 in order to ensure the definition of terms used in ARM Title 44, subchapter 21 reflect recent changes in statute. The Office of the Secretary

of State proposes a definition of "reasonable impediment declaration form" to clarify use in the subchapter. The amendment provides for the process and use of polling place elector identification forms in accordance with current law. Additional changes include a proposal to remove two unnecessary definitions – "Driver's license number" and "Notice by the most expedient method available" and a proposal to change "Legally registered electors" from plural to singular to match the way it is used in this subchapter.

44.3.2110 PROCEDURES AT THE POLLING PLACE FOR DETERMINING THE SUFFICIENCY OF IDENTIFICATION - PRIOR TO CASTING A BALLOT

- (1) remains the same.
- (2) An election official shall allow an elector whose name appears on the precinct register, but who does not provide a required form of identification, to do the following:
  - (a) return to the polling place with a required form of identification; or
  - (b) complete cast a provisional ballot ~~polling place elector identification form, as defined in ARM 44.3.2102.~~
- (3) and (4) remain the same.

AUTH: 13-13-603, MCA  
IMP: 13-1-116, 13-13-114, MCA

REASON: The Office of the Secretary of State is proposing clerical changes to ARM 44.3.2110 to align with Title 13, MCA provisions.

44.3.2302 DEFINITIONS As used in this subchapter, unless the context clearly indicates otherwise, the following definitions apply:

- (1) remains the same.
- (2) ~~"Driver's license number" means a number provided by the Montana motor vehicle division on either a Montana motor vehicle division driver's license or a Montana motor vehicle division identification card.~~
- (3) through (5) remain the same but are renumbered (2) through (4).
- (6) (5) "Identification" for the purposes of voting by absentee and mail ballot means any of the following:
  - (a) the elector's Montana driver's license number, the elector's Montana state identification card number issued pursuant to 61-12-501, MCA, or the last four digits of the elector's social security number ~~a current photo identification showing the elector's name, including, but not limited to, a valid driver's license, a school district or postsecondary education photo identification, or a tribal photo identification; or~~
  - (b) a readable copy of the elector's military identification card, tribal photo identification card, United States passport, Montana concealed carry permit, or a photo identification card issued to the elector by a Montana college or university; or a current utility bill, bank statement, paycheck, government check, or other government document that shows the elector's name and current address.
  - (c) any other form of readable photo identification with the individual elector's name together with a copy of a current utility bill, bank statement, paycheck, notice of confirmation of voter registration issued pursuant to 13-2-207, MCA, government

check, or other government document that shows the elector's name and current address. ~~For the purposes of this subchapter, identification is presumed to be current and valid unless proved otherwise. A driver's license or identification card is presumed to be current and valid if it is issued by any motor vehicle agency, regardless of its status. Any other photo identification is sufficient if it includes the name and photo of the individual.~~

~~(7)~~ (6) "Legally registered electors" ~~include but are not limited to~~ means an electors who ~~were~~ was properly registered prior to January 1, 2003, and ~~or~~ one who registered on or after that date whose applications for voter registration ~~were~~ was accepted, processed, and verified as provided by law.

~~(8) "Notice by the most expedient method available" means notification that shall occur by any of the following, at the discretion of the election administrator:~~

- ~~(a) telephone;~~
- ~~(b) mail;~~
- ~~(c) facsimile machine;~~
- ~~(d) in person; or~~
- ~~(e) e-mail or other electronic means.~~

AUTH: 13-13-603, MCA

IMP: 13-13-201, 13-13-214, 13-13-241, 13-13-602, 13-15-107, MCA

REASON: On April 19, 2021, the Governor of Montana signed into law Senate Bill (SB) 169. SB 169 revises certain identification requirements for voter registration, voting, and provisional voting. The Office of the Secretary of State is proposing changes to ARM 44.3.2302 to reflect the changes in statute. The proposed changes to ARM 44.3.2302 incorporate statutory changes to the definitions of terms used in ARM Title 44, subchapter 23, Voter Identification and Provisional Voting by Absentee and Mail Ballot. Additional changes include a proposal to remove two unnecessary definitions – "Driver's license number" and "Notice by the most expedient method available" and a proposal to change "Legally registered electors" from plural to singular to match the way it is used in this subchapter.

44.3.2303 ABSENTEE OR MAIL BALLOT ELECTOR IDENTIFICATION FORM (1) An election official or election worker shall enclose with the materials sent to each provisionally registered elector instructions in the form prescribed by the secretary of state notifying the elector of the requirement to provide one of the forms of required identification defined in ARM 44.3.2302~~(6)~~.

AUTH: 13-1-202, 13-13-603, MCA

IMP: 13-1-202, 13-13-201, 13-13-603, MCA

REASON: The Office of the Secretary of State is proposing a change to ARM 44.3.2303 to update a reference impacted by the proposed renumbering in ARM 44.3.2302.

44.3.2304 PROCEDURES FOR ABSENTEE AND MAIL BALLOT VOTING - DETERMINING THE SUFFICIENCY OF IDENTIFICATION OF PROVISIONALLY

REGISTERED ELECTORS (1) After completion of the signature verification procedures in 13-13-241 or 13-19-309, MCA, as applicable, the election administrator shall determine prior to an election whether a provisionally registered absentee or mail ballot elector has enclosed in the outer signature envelope, together with the voted ballot in the secrecy envelope, provided sufficient identification as defined in ARM 44.3.2302 or eligibility information to allow a the ballot to be counted:.

(a) If the identification enclosed in the outer signature envelope or eligibility information is insufficient, an election official or election worker shall follow procedures described in 13-13-241, MCA, and these rules to allow a provisionally registered absentee or mail ballot elector who failed to provide proper identifying information in the outer signature envelope to verify eligibility to vote:

(i) a ballot cast by an elector whose eligibility or voter identification information is insufficient or whose name does not appear on the precinct register must be handled as a provisional ballot under 13-15-107, MCA;

(ii) an election official or election worker shall notify the absentee or mail ballot elector by mail or by the most expedient method available that the elector's identification or eligibility information was insufficient and that the elector's ballot will be treated as a provisional ballot until the elector provides sufficient identification information under ARM 44.3.2302 13-13-114, MCA;

(iii) if the elector is notified by mail, an election official or election worker shall provide a self-addressed signature envelope along with a description in the form prescribed by the secretary of state of the information identification necessary for the absentee or mail ballot elector to reclassify the provisional ballot as a regular ballot; and

(iv) to the extent applicable, an election official or election worker shall handle absentee and mail ballot elector provisional ballots in the same manner as specified under the procedures for provisional ballots cast at the polling place in ARM 44.3.2113, 44.3.2114, and 44.3.2115.

(b) Upon receipt of eligibility information or of one of the forms of required identification defined in ARM 44.3.2302, if the identification form provided is verified through a voter verification process or another form of identification provided in ARM 44.3.2302 is sufficient:

(i) an election official or election worker shall mark on the absentee or mail ballot signature envelope that sufficient eligibility information or identification was provided by the elector; and

(ii) the county election administrator or designee shall register the elector as a legally registered elector.

(c) An election official or election worker who receives identification information shall retain in a sealed package the copy of identification provided by the provisionally registered absentee or mail ballot elector. The sealed package containing the copy of identification may not be opened without a court order.

AUTH: 13-13-603, MCA

IMP: 13-13-114, 13-13-201, 13-13-241, MCA

REASON: On April 19, 2021, the Governor of Montana signed into law Senate Bill (SB) 169. SB 169 revises certain identification requirements for voter registration, voting, and provisional voting. The Office of the Secretary of State is proposing changes to ARM 44.3.2304 to reflect the changes in statute and remove references to "eligibility information" which the Office of the Secretary of State has deemed unnecessary as used in this rule. Lastly, the proposed amendments incorporate clerical changes to increase clarity and readability of the rule.

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: Angela Nunn, Secretary of State's Office, P.O. Box 202801, Helena, Montana 59620-2801, or by e-mailing [angela.nunn@mt.gov](mailto:angela.nunn@mt.gov), and must be received no later than 5:00 p.m., November 5, 2021.

5. Austin James, Secretary of State's Office, has been designated to preside over and conduct the hearing.

6. The Secretary of State maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding administrative rules, corporations, elections, notaries, records, uniform commercial code, or combination thereof. A written request may be mailed or delivered to the Secretary of State's Office, Administrative Rules Services, 1301 E. 6th Avenue, P.O. Box 202801, Helena, MT 59620-2801, or emailed to the office at [sosarm@mt.gov](mailto:sosarm@mt.gov).

7. With regard to the requirements of 2-4-302(2)(d), MCA, the primary bill sponsors, Senator Cuffe and Representative Greef, were contacted by mail, email, and phone on May 26, 2021, and by email and phone (confirmed receipt) on September 20, 2021.

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

/s/ AUSTIN JAMES

Austin James  
Rule Reviewer

/s/ CHRISTI JACOBSEN

Christi Jacobsen  
Secretary of State

Dated this 28th day of September, 2021.

BEFORE THE DEPARTMENT OF ADMINISTRATION  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 2.59.104 and 2.59.401 pertaining )  
to semiannual assessments and )  
supervisory fees for banks and credit )  
unions )

TO: All Concerned Persons

1. On August 27, 2021, the Department of Administration published MAR Notice No. 2-59-617 pertaining to the proposed amendment of the above-stated rules at page 1004 of the 2021 Montana Administrative Register, Issue Number 16.

2. No comments were received.

3. The department has amended ARM 2.59.104 and 2.59.401 exactly as proposed.

By: /s/ Misty Ann Giles  
Misty Ann Giles, Director  
Department of Administration

By: /s/ Don Harris  
Don Harris, Rule Reviewer  
Department of Administration

Certified to the Secretary of State September 28, 2021.

BEFORE THE DEPARTMENT OF ADMINISTRATION  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 2.59.1738 pertaining to renewal )  
fees of mortgage brokers, mortgage )  
lenders, mortgage servicers, and )  
mortgage loan originators )

TO: All Concerned Persons

1. On August 27, 2021, the Department of Administration published MAR Notice No. 2-59-618 pertaining to the proposed amendment of the above-stated rule at page 1007 of the 2021 Montana Administrative Register, Issue Number 16.
2. No comments were received.
3. The department has amended ARM 2.59.1738 exactly as proposed.

By: /s/ Misty Ann Giles  
Misty Ann Giles, Director  
Department of Administration

By: /s/ Don Harris  
Don Harris, Rule Reviewer  
Department of Administration

Certified to the Secretary of State September 28, 2021.

BEFORE THE BOARD OF OCCUPATIONAL THERAPY PRACTICE  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT AND  
ARM 24.165.302 definitions, and the ) REPEAL  
repeal of 24.165.505 deep modality )  
endorsement )

TO: All Concerned Persons

1. On May 28, 2021, the Board of Occupational Therapy Practice (board) published MAR Notice No. 24-165-25 regarding the public hearing on the proposed amendment and repeal of the above-stated rules, at page 593 of the 2021 Montana Administrative Register, Issue No. 10.

2. On June 24, 2021, a public hearing was held on the proposed amendment and repeal of the above-stated rules via the remote conferencing platform. One comment was received by the June 25, 2021, deadline.

3. The board has considered the comment received. A summary of the comment and the board response are as follows:

COMMENT: One commenter asked whether the amendment to ARM 24.165.302 and repeal of ARM 24.165.505 will change the additional training required for occupational therapists (OTs) to perform modalities.

RESPONSE: As explained in the reasonable necessity statement for the changes, the elimination of the deep modality endorsement does not affect licensed occupational therapists' scope of practice. Licensed OTs may still obtain endorsements in "superficial" and "topical medications" modalities, as the only modalities allowed by statute. The board is amending and repealing the rules exactly as proposed.

4. The board has amended ARM 24.165.302 and repealed ARM 24.165.505 exactly as proposed.

BOARD OF OCCUPATIONAL THERAPY  
PRACTICE  
TWYLLA KIRCHEN, OTR/L  
PRESIDING OFFICER

/s/ DARCEE L. MOE  
Darcee L. Moe  
Rule Reviewer

/s/ LAURIE ESAU  
Laurie Esau, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State September 28, 2021.

BEFORE THE BOARD OF REAL ESTATE APPRAISERS  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 24.207.203 incorporation by )  
reference of the Real Property )  
Appraiser Qualification Criteria )

TO: All Concerned Persons

1. On July 9, 2021, the Board of Real Estate Appraisers (board) published MAR Notice No. 24-207-45 regarding the public hearing on the proposed amendment of the above-stated rule, at page 845 of the 2021 Montana Administrative Register, Issue No. 13.

2. On August 4, 2021, a public hearing was held on the proposed amendment of the above-stated rule via the videoconference and telephonic platform. No comments were received by the August 6, 2021, deadline.

3. The board has amended ARM 24.207.203 exactly as proposed.

BOARD OF REAL ESTATE APPRAISERS  
PETER FONTANA  
CERTIFIED RESIDENTIAL APPRAISER  
PRESIDING OFFICER

/s/ DARCEE L. MOE  
Darcee L. Moe  
Rule Reviewer

/s/ LAURIE ESAU  
Laurie Esau, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State September 28, 2021.

BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the adoption of New	)	NOTICE OF ADOPTION
Rule I relating to the Categorical	)	
Exclusion of the State Revolving Fund	)	
Grant Issuance Under the Montana	)	
Environmental Policy Act	)	

To: All Concerned Persons

1. On July 23, 2021, the Department of Natural Resources and Conservation (department) published MAR Notice No. 36-22-212 pertaining to the public hearing on the proposed adoption of the above-stated rule at page 889 of the 2021 Montana Administrative Register, Issue Number 14.

2. The department has adopted New Rule I (36.17.614) as proposed.

3. The department received no comments or testimony on the proposed adoption.

/s/ Amanda Kaster  
Amanda Kaster  
Director  
Natural Resources and Conservation

/s/ Mark Phares  
Mark Phares  
Rule Reviewer

Certified to the Secretary of State on September 28, 2021.

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

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 37.85.104, 37.85.105, and )  
37.85.106 pertaining to updating )  
Medicaid and non-Medicaid provider )  
rates, fee schedules, and effective )  
dates )

TO: All Concerned Persons

1. On June 11, 2021, the Department of Public Health and Human Services (department) published MAR Notice No. 37-944 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 687 of the 2021 Montana Administrative Register, Issue Number 11.

On July 9, 2021, the department published an amendment to MAR Notice No. 37-944 pertaining to a second public hearing and extension of comment period on the proposed amendment of the above-stated rules at page 853 of the 2021 Montana Administrative Register, Issue Number 13.

2. The department has amended the following rules as originally proposed: ARM 37.85.104 and 37.85.106.

3. The department has amended the following rule as originally proposed and subsequently amended, but with the following changes from the original proposal notice and the subsequent amended notice, new matter underlined, deleted matter interlined:

37.85.105 EFFECTIVE DATES, CONVERSION FACTORS, POLICY ADJUSTERS, AND COST-TO-CHARGE RATIOS OF MONTANA MEDICAID PROVIDER FEE SCHEDULES (1) remains as proposed.

(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) through (h) remain as proposed.

(i) Optometric services receive a ~~114.79%~~ 117.50% provider rate of reimbursement adjustment to the reimbursement for allied services as provided in ARM 37.85.105(2) effective ~~July 1, 2024~~ July 1, 2020.

(j) and (k) remain as proposed.

(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) through (s) remain as proposed.

(t) The optometric services fee schedule, as provided in ARM 37.86.2005, is effective ~~July 1, 2024~~ January 1, 2021. The optometric services fee schedule does

not incorporate the July 1, 2021 proposed amendments to (2)(a) through (i), (3)(k), and (3)(v), as proposed in MAR Notice No. 37-944.  
(u) through (6) remain as proposed.

AUTH: 53-2-201, 53-6-113, MCA, MCA

IMP: 53-2-201, 53-6-101, 53-6-125, 53-6-402, MCA

4. For reasons set forth below, the department has removed from the adoption notice portions relating to optometric rate changes, policy adjustors, and rate of reimbursement percentage.

The department has fully considered written and oral submissions respecting the proposed amendments that are the subject of this rule notice. The principal reasons for the adoption of the amendments are to incorporate the legislatively approved provider rate increases, adopt updates to the federal register for the Resource-Based Relative Value Scale reimbursement methodology, adopt policy adjustors for certain services to offset the Medicare increases in the Relative Value Units, and adopt provider rate of reimbursement percentages to ensure that the department stays within the legislative appropriation for Medicaid services. Additional justification for adoption of the amendments can be found in the statement of reasonable necessity in the Notice of Public Hearing on Proposed Amendment and in the Notice of Public Hearing and Extension of Comment Period on Proposed Amendment. The department received several comments in support of the provider rate increases. The department also received and responded to comments that were neither in favor nor opposed to the rule notice but asked questions about specific provisions, including the maternity policy adjustor changes to which the department responded below.

In addition to comments supporting the proposal, the department received comments against adoption of the rule notice. In response to commenters requesting rate increases greater than the 1% approved by the legislature, the department responded that it must stay within the legislatively approved appropriation for Medicaid services.

Because substantial differences exist between the rule amendments as proposed and as adopted with respect to one discrete set of services, the department now explains why it removed portions of the notice pertaining to that discrete set of services, namely optometry services. The principal reason for removing these provisions is due to a disagreement on the intent of the optometric service changes. By removing these changes, the department is able to work with optometric providers on the proposed amendments to optometric service rates, while allowing all other provider rate changes to be implemented. The department will, thus, engage in a separate rulemaking to make any appropriate adjustments to optometric service rates, and anticipates that such adjustments would be retroactive to July 1, 2021.

Additionally, the Children, Families, Health, and Human Services Interim Committee lodged an objection to the portion of the rule notice pertaining to optometry services. The interim committee originally lodged a general objection to the rule notice on July 6, 2021, and renewed its objections in subsequent meetings, with the final objection relating to portions of the rule pertaining to optometry services. The interim committee's objections have delayed the final adoption of the Medicaid provider rate increases, and the longer the delay remains in effect, the greater the burden on the department to implement the rate increase retroactive to July 1, 2021, the start of the state fiscal year and when provider rate changes take effect.

The department intends to meet with representatives from the optometric providers in an effort to reach an understanding about the rates of reimbursement for optometry services for the current fiscal year.

The comments received by the department are summarized and responded to below.

COMMENT #1: The department received several comments requesting a rate increase greater than the 1% approved by the Montana 2021 Legislature.

RESPONSE #1: The department proposed rate increases pursuant to the provider rate increases provided for in House Bill 2.

COMMENT #2: Comments were received expressing concern with the maternity policy adjustor changes.

RESPONSE #2: The department appreciates the feedback. The adjustment of the maternity policy adjustor is necessary to meet legislative appropriations for Medicaid.

COMMENT #3: Several comments were received supporting the legislatively approved provider rate increases.

RESPONSE #3: The department appreciates the support.

COMMENT #4: The department received 19 comments from optometrists and the Montana Optometric Association stating that optometrists should receive the same amount of reimbursement as ophthalmologists (medical doctors and doctors of osteopathy) for performing the same services. Many of the commenters stated the department does not follow 37-10-104, MCA, in reimbursing optometrists and asserted the department is illegally discriminating against optometrists.

RESPONSE #4: This issue is being litigated in the Montana Eighth Judicial District Court, Cascade County, in the matter of *Vincent, Benner and Hoch v. State of Montana, Montana Department of Public Health and Human Services*, Cause No. CDV-19-0314, which was filed by plaintiffs in May 2019. The department has responded to this lawsuit, and the district court will decide the issue.

COMMENT #5: Several optometrists opposed the proposed rule amendments and stated that the department failed to demonstrate how the proposed rule amendments represented an increase in rates of reimbursement for optometrists. One commenter said the proposed rule is inconsistent with legislative intent.

RESPONSE #5: The department disagrees with these assertions and has removed the optometric services changes from this rule filing to allow the department and optometric providers to further discuss the proposed changes.

5. The department intends to apply these rules retroactively to July 1, 2021. 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/ Adam Meier  
Adam Meier, Director  
Public Health and Human Services

Certified to the Secretary of State September 28, 2021.

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

In the matter of the amendment of	)	NOTICE OF AMENDMENT AND
ARM 37.114.701, 37.114.703,	)	REPEAL
37.114.704, 37.114.705, 37.114.708,	)	
37.114.715, 37.114.716, and the	)	
repeal of ARM 37.114.720 and	)	
37.114.721 pertaining to school	)	
immunization requirements	)	

TO: All Concerned Persons

1. On August 6, 2021, the Department of Public Health and Human Services (department) published MAR Notice No. 37-956 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 984 of the 2021 Montana Administrative Register, Issue Number 15.

2. The department has amended ARM 37.114.701, 37.114.703, 37.114.704, 37.114.705, 37.114.708, 37.114.715, and 37.114.716 as proposed.

3. The department has repealed ARM 37.114.720 and 37.114.721 as proposed.

4. 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 primary bill sponsor of House Bill (HB) 334 provided comment stating the proposed rule amendments should include language making clear that student immunization records are federally protected under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g et seq. (FERPA), and that sharing of these records without parental consent is illegal under FERPA. The commenter also stated the rule amendments should include language to clarify that medical and religious exemptions to student immunization requirements apply to postsecondary schools.

RESPONSE #1: The department believes the rules as proposed appropriately address the application of FERPA to student immunization records. HB 334 provides that student immunization records are considered part of the student's education record and are protected from disclosure under FERPA. The department has implemented this statutory requirement by proposing to repeal existing rules requiring general reporting of the immunization status of all students. The department believes the rules as proposed are sufficiently clear and it is unnecessary to repeat the language of HB 334. Additionally, FERPA provides a limited exception under which student immunization records may be shared without

parental consent in cases of an emergency if knowledge of the information is necessary to protect the health or safety of a student or other individuals. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.31(a)(10) and 99.36.

The department believes the proposed rules already make clear that the medical and religious exemptions to student immunizations under 20-5-405, MCA, apply to postsecondary schools. The proposed rule amendments use the term "school" in reference to application of the exemptions. The term "school" is defined under 20-5-402(8), MCA, and includes postsecondary schools.

COMMENT #2: Two commenters expressed opposition to the repeal of ARM 37.114.720 and 721, relating to the reporting of immunization status for all students and reporting of students who fail to meet the requirements of conditional enrollment. These commenters indicated repeal of the rules would adversely affect public health and that sharing of student immunization records should be permitted.

RESPONSE #2: The department believes repeal of these rules is required under HB 334. Please also see the response to comment #1.

COMMENT #3: A commenter asked how the proposed rules would impact Montana's Immunization Information System (imMTrax).

RESPONSE #3: The proposed rules do not impact Montana's Immunization Information System (imMTrax). The imMTrax system is an opt-in system requiring specific consent for participation.

/s/ Robert Lishman  
Robert Lishman  
Rule Reviewer

/s/ Adam Meier  
Adam Meier, Director  
Public Health and Human Services

Certified to the Secretary of State September 28, 2021.

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

In the matter of the adoption of                    ) NOTICE OF ADOPTION OF  
Temporary Emergency Rule I                    ) TEMPORARY EMERGENCY RULE  
pertaining to waiver of swing-bed            )  
requirements                                        )

TO: All Concerned Persons

1. The Department of Public Health and Human Services (department) is adopting the following emergency rule to optimize the department's, providers', and other stakeholders' continued response to COVID-19, and to ensure access to services and supports to meet the needs of Montanans affected by COVID-19.

2. Because the process for the promulgation of administrative rules under the Montana Administrative Procedure Act (Title 2, chapter 4, MCA) is inflexible in terms of certain mandated timelines, the typical process for promulgating administrative rules to change current regulatory requirements would result in a situation where the department's ability to adequately respond to the pandemic would be temporarily disrupted.

3. Since August 2021, the number of newly diagnosed COVID-19 cases has increased significantly in Montana.<sup>1</sup> This has led to a significant increase in the number of hospitalizations and deaths statewide. The increased number of individuals with COVID-19 requiring hospitalization is creating significant challenges to Montana's hospital systems, which are reaching or exceeding their bed capacity limits (e.g., acute care and intensive care beds) and the availability of equipment/supplies (e.g., ventilators).<sup>2</sup> Additionally, hospitals across the state are experiencing significant staffing shortages (e.g., nurses, nurses' aides). Because of these challenges, Montana hospitals need to be able to efficiently discharge patients when they otherwise become eligible for discharge to other care settings.

4. A swing-bed hospital is a licensed hospital, critical access hospital, or licensed medical assistance facility that has federal approval to provide post-hospital, skilled nursing care to patients. A swing-bed is a bed approved under

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<sup>1</sup> Montana Department of Public Health and Human Services. Interim Analysis of COVID-19 cases in Montana (as of 9/3/2021)  
[https://dphhs.mt.gov/assets/publichealth/CDEpi/DiseasesAtoZ/2019-nCoV/EpiProfile/EPIPROFILE\\_09032021\\_final.pdf](https://dphhs.mt.gov/assets/publichealth/CDEpi/DiseasesAtoZ/2019-nCoV/EpiProfile/EPIPROFILE_09032021_final.pdf)

<sup>2</sup> Montana Department of Public Health and Human Services. COVID-19 Hospital Occupancy and Capacity in Montana Status Report (as of 9/13/2021)  
<https://dphhs.mt.gov/assets/publichealth/CDEpi/DiseasesAtoZ/2019-nCoV/Reports/HospitalReport09132021.pdf>

federal regulations to provide either acute care or extended skilled nursing care to a patient. A swing-bed is used to transition a patient from acute care to skilled nursing care without the patient leaving the hospital.

5. Under ARM 37.40.402 and 37.40.405, before transferring a Medicaid member to a swing-bed, the swing-bed hospital must determine that no appropriate nursing facility bed is available to the patient within a 25-mile radius of the hospital, and the hospital must maintain written documentation of inquiries made to nursing facilities about the unavailability of an appropriate bed. When a nursing facility bed within a 25-mile radius of the hospital becomes available, the administrative rules require that the hospital discharge the Medicaid patient to the appropriate nursing facility bed within 72 hours of the nursing facility bed becoming available.

6. Hospital systems, including critical access hospitals that serve rural populations in Montana, are experiencing a surge of demand for medical services by Montanans infected with the COVID-19 virus, in particular the highly contagious Delta variant which is now the predominant strain in Montana. In addition to facing the demand for medical services, hospitals are experiencing staff shortages and need to reduce administrative burden on staff in the management of available beds and services. The department has received communications from hospital systems and other stakeholders that the administrative swing-bed requirements impose a significant burden on hospitals in this challenging time.

7. For the foregoing reasons, the department adopts this emergency rule. Promulgation of this emergency rule is necessary because no other administrative action can be taken that would alleviate the burden imposed by the requirements being waived and enable hospitals and critical access hospitals to continue to address the COVID-19 public health emergency in an effective and efficient manner. EMERGENCY RULE I provides a statement of department intent to exercise regulatory discretion related to, and waive compliance with, specific administrative rules of Montana to address the problems identified above. This rule will remain in effect no longer than 120 days after the date of adoption.

8. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you require an accommodation, contact Heidi Clark at the 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](mailto:dphhslegal@mt.gov).

9. The emergency rule is effective immediately, September 17, 2021.

10. The text of the emergency rule provides as follows:

**EMERGENCY RULE I WAIVER OF SWING-BED REQUIREMENTS**  
**DURING EMERGENCY** (1) The department will exercise regulatory discretion and waive compliance with:

- (a) swing-bed requirements in ARM 37.40.405(1)(b) and (2); and
- (b) to the extent necessary to facilitate payment under Medicaid, ARM 37.40.402 (1)(b)(i)(A) through (D).

AUTH: 2-4-303, 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

11. The rationale for the temporary emergency rule is set forth in paragraphs 1 through 7.

12. It is presently unknown whether a standard rulemaking procedure will be undertaken prior to the expiration of this temporary emergency rule. The necessity and efficacy of the emergency rule will be continuously evaluated as the effort to combat the COVID-19 pandemic in Montana develops.

13. 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 8 or may be made by completing a request form at any rules hearing held by the department.

14. The bill sponsor contact requirements of 2-4-302, MCA, do not apply to this rulemaking. Special notice, pursuant to 2-4-303, MCA, was made to each member of the Children, Families, Health, and Human Services Interim Committee and each member of the committee staff using electronic mail on September 17, 2021.

/s/ Chad G. Parker

Chad G. Parker  
Rule Reviewer

/s/ Adam Meier

Adam Meier, Director  
Public Health and Human Services

Certified to the Secretary of State September 17, 2021.

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the adoption of New	)	NOTICE OF ADOPTION AND
Rules I and II pertaining to marijuana	)	AMENDMENT
provider canopy tier size increases	)	
and the amendment of ARM	)	
42.39.123 pertaining to limitations on	)	
advertising	)	

TO: All Concerned Persons

1. On July 23, 2021, the Department of Revenue (department) published MAR Notice No. 42-1032 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 908 of the 2021 Montana Administrative Register, Issue Number 14.

2. On August 13, 2021, the department held a public hearing to consider the proposed adoption and amendment. There were no commenters present to provide testimony or commentary in support of the rulemaking. The following commenters appeared and provided oral testimony in opposition to the proposed rulemaking: Melissa Lewis; Kate Cholewa, Montana Cannabis Industry Association (MTCIA); Clyde Broughton, Starrbuds; Josh Gosney, Infinity Wellness; Christopher Young, Young Law Office; Tayln Lang, Heirloom Remedies; Joanna Barney, Sacred Sun Farms; Katrina Farnum, Garden Mother; Josh Vandewetering, Lionheart Caregiving Dispensary; Antonette Lininger, Sacred Sun Farms; Dave Lewis, Montana Cannabis Guild; Pepper Peterson, Montana Cannabis Guild; Elliot Lindsay, Grizzly Pine Dispensary; Evan Kajander, Apogee Gardens; Dan Metzger, Montana Reserve Dispensary; and Mariah Bond, Euphoria Wellness. The department received written comments from interested persons in support of the proposed restrictions on marijuana advertising, and also received written comments submitted by interested persons in opposition.

3. On September 10, 2021, the department published an amended notice of public hearing on the proposed adoption and amendment (amended proposal notice) of the above-stated rules at page 1127 of the 2021 Montana Administrative Register, Issue Number 17. The amended proposal notice contained the department's amendments to the original proposal notice described in paragraph 1. The amendments attempted to resolve the majority of the commenter's concerns, comments, and testimony, which were provided in writing or at the August 13, 2021 administrative rules hearing.

4. No additional public hearing was held to consider the amended proposal notice. The department extended the comment period for the proposed rulemaking in accordance with 2-4-305, MCA, until September 20, 2021.

5. The department has adopted NEW RULE I (42.39.109) and NEW RULE II (42.39.110) as proposed.

6. The department has amended ARM 42.39.123 as presented in the September 10, 2021 amended proposal notice.

7. 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: Several of the comments received on the proposed amendments to ARM 42.39.123 could be summarized as contentions that the department misconstrued or exceeded its rulemaking authority conferred to it under House Bill 249 (HB 249) or that the amendments are not consistent with legislative intent with HB 249.

Ms. Lewis offered relevant testimony that HB 249 allows the legal market a very small and discreet avenue to reach the legal consumers, and if state law did not allow the legal market a small advertising concession, consumers will be put at a disadvantage to determine the legal market from the illicit market. Technology is a central pillar of consumer practices in the 21st century, and cannabis policies should support these discreet customer-facing technologies in order to shift consumption from the illicit market to the legal market.

Ms. Cholewa concurred and commented that MAR Notice No. 42-1032 reaches far beyond anything discussed as the objective or the goal of HB 249 during the legislative hearings. The bill was sold on allowing for a directory that enables customers to be sure they are reaching the licensed and legal market. Keeping those businesses from being able to distinguish themselves in any manner we believe goes against that objective.

Mr. Peterson discussed legislative intent of HB 249 and commented that multiple meetings had been held between the industry and legislators since the end of the legislature and the amendments to ARM 42.39.123 do not reflect legislative intent of (HB) 701 or of HB 249. The law does not say industry cannot advertise; it says industry cannot advertise marijuana products. Mr. Peterson characterized the advertising restrictions as a ban on advertising, not a ban on advertising marijuana products. The intent was to make sure that industry was not advertising products that are not legally available for a certain age group to talk about, just like a liquor store. The law says you cannot advertise marijuana products; it does not say you cannot advertise marijuana businesses; it does not say you cannot say where you are; it does not say you cannot sponsor things.

Mr. Kajander commented that the intent of the legislature was that providers cannot advertise "marijuana products," but these new rules instead prevent providers from advertising their marijuana businesses (not the intent of the legislature).

Mr. Gosney commented that the rulemaking exceeded statutory authority and is contrary to the intent of the legislature as he witnessed as cannabis legislation was going through the legislature. He stated that signage restrictions are untenable,

that social media restrictions are not realistic, and that charitable donation restrictions are just wrong.

Mr. Young, Ms. Farnum, Mr. Lang, and self-represented commenters who provided written comments also concurred with the other commenters.

RESPONSE 1: The department thanks all commenters for their comments. Based on the commentary and testimony received on the original proposal notice, the department proposed several additional amendments which were published in the amended proposal notice. To briefly summarize the amended proposal notice, new subsections were added to ARM 42.39.123 which affirm that a licensee may market its brand but may not advertise marijuana or marijuana products except in electronic advertising; clearly defines advertising; and defines billboards for the later-stated purpose in (9) that licensees may not use billboards to advertise. The amended proposal notice also removes provisions regarding outdoor sign restrictions and imagery; restrictions on the use of internet websites and social media accounts if they only permit persons 21 years of age or older to follow the account; former signage and external advertising requirements; former restrictions to sponsor a charitable, sports, or similar event; promotional items' restrictions; and former restrictions on placement of flyers for a marijuana business.

COMMENT 2: Several commenters commented on the original proposal notice that the proposed restrictions in the rule were unduly burdensome.

Ms. Cholewa commented that 16-12-112, MCA, provides that the department may not adopt any rule or regulation that is unduly burdensome or undermines the purpose of this chapter, and many of these advertising restrictions do just that.

Ms. Lewis commented similarly that there is no need for advertising limits. She agreed that there is a need for advertising limits to reduce public nuisance and to ensure that such advertising is not false, or misleading, or attempting to target children. However, the proposed rulemaking goes so far that it is difficult for consumers to find or differentiate between licensed and unlicensed operators.

Mr. Broughton commented that the proposed advertising restrictions completely take away the ability to brand our businesses and set ourselves apart from one another. Every dispensary in the state is different and unique, just like the people that visit them. Mr. Broughton also provided a mockup of a sign with the original proposed signage requirements. He commented that the sign is more offensive than any sign he had ever seen currently advertising cannabis.

Mr. Young submitted a detailed letter, commented at the hearing, and provided a form letter to individuals, who in turn, forwarded the letter as comments that the proposed changes in ARM 42.39.123 are overly burdensome. Both Mr. Young and the letter writers allege the proposed amendments may violate constitutional First Amendment protections for commercial free speech under *Central Hudson Gas & Elec. v. PSC*, 447 U.S. 557 (1980). Mr. Young and the commenters provide some suggested changes.

Another commenter stated that the proposed curtailments and regulations regarding the ability of cannabis businesses to advertise are an unacceptable burden on their freedom of speech and on free enterprise in this state. This

proposed regulation will seriously impede business' ability to attract customers and compete in the marketplace.

Ms. Farnum commented that the proposed rule changes are a very obvious ban on advertising which industry has been dealing with for a long time. She also commented on the inability to show any sort of cannabis symbol on anything that is visible to the public even if they are of legal age, so to have it be pushed even further out is very challenging.

The department also received several comments from individuals regarding the department's proposed sign restrictions, including size, color, and the proposed required warnings or disclaimers as being overly burdensome.

RESPONSE 2: The department appreciates the comments and directs the commenters to Response 1, which the department believes adequately responds to the comments.

As to Mr. Young's concerns regarding advertising restrictions' impact on corporate free speech and his contentions about the *Central Hudson* test, should federal law regarding cannabis or a substantive development in case law change, then the department will review the change in authority and respond accordingly in the administrative rules.

COMMENT 3: Several commenters commented via telephone, email, and at the August 13 hearing that the proposed advertising restrictions on charitable donations was not supported in HB 249 and urged the department to discontinue the proposed amendment and allow licensed marijuana dispensaries to continue to give back to their communities and allow them to support charitable causes.

RESPONSE 3: The department appreciates the comments and directs the commenters to Response 1, which the department believes adequately responds to the comments.

COMMENT 4: The department received several comments from individuals contending that marijuana advertising should contain the same restrictions as alcohol advertising. Several commenters are under the impression that alcoholic beverage advertising is less restrictive than the proposal for ARM 42.39.123.

RESPONSE 4: The department disagrees that the advertising restrictions placed on alcoholic beverage purveyors are substantively less restrictive than that for marijuana businesses. Advertising restrictions on alcoholic beverages are considerable and are administered on the federal level through the Alcohol and Tobacco Tax and Trade Bureau (TTB), a bureau under the federal Department of the Treasury, and fall under the authority of each state, and even local governments.

ARM 42.39.123, as adopted, makes a clear distinction between permissible advertising of marijuana businesses and impermissible advertising of marijuana or marijuana products. The department also refers these commenters to Response 1, which describes in greater detail the changes made throughout this rulemaking process.

Until such time as there is federal authority acceptance of cannabis, the Montana Legislature provides additional public policy guidance in the area of permissible advertising, or the department is granted additional authority by the legislature to promulgate different advertising guidelines, options for the advertising of marijuana and marijuana products will be limited.

COMMENT 5: The department received several comments from individuals in writing who support strict restrictions for marijuana advertising. Many commenters stated the belief that marijuana businesses will not be impacted by not being able to advertise and strict advertising restrictions are justifiable. Other comments received stated beliefs that allowing advertising for marijuana businesses would have negative societal impacts.

RESPONSE 5: The department appreciates the comments and directs the commenters to Response 1, which the department believes adequately responds to the comments as to why changes were made from the original proposal notice and why marijuana advertising will continue under ARM 42.39.123, as adopted. Changes like the commenters propose would require an act of the legislature to change what is permissible, what is restricted, and/or what authority the department has implementing any future legislation.

COMMENT 6: Based on the version of ARM 42.39.123 in the amended proposal notice, the department received written comments regarding the restriction of marijuana advertising on billboards. Currently, marijuana businesses are actively advertising on billboards, and the commenters contend that advertising on billboards should continue to be permitted.

Paul Dennehy and Seth Rogers from Lamar, Inc. commented that the billboard advertising their company provides has been compliant with the marijuana laws because no colloquial terms of the industry or objectionable imagery has been used. Messrs. Dennehy and Rogers submit that over 90 percent of the ads in place are on the interstate, and function as directional boards. Mr. Dennehy commented that he struggles with the department deciding what avenues of advertising a legal and legitimate business can use.

Stephanie Martino, owner of 710 Montana, comments that her business utilizes billboard advertising, that the billboards promote the business only, and she has entered into long-term contracts with billboard companies for advertising. If adopted as proposed, Ms. Martino's business will incur financial losses based on the required cancellation of advertising contracts.

The department did receive comments in favor of the billboard advertising restriction in the amended proposed notice.

RESPONSE 6: The department appreciates the comments provided and understands that the discontinuation of billboard advertising has impacts on the billboard companies and those marijuana businesses that have chosen to advertise in that medium, which is why ARM 42.39.123 has included a delayed enforcement date of January 1, 2022, notwithstanding the October 1 effective date of HB 249 and the October 9 effective date of this rulemaking.

HB 249 clearly does not permit the advertising of marijuana or marijuana products except for the limited exception of electronic advertising provided in 16-12-211(3), and 50-46-341(3), MCA. And in response to Mr. Dennehy's comments about the department's authority to regulate legal and legitimate businesses, the department counters that the issue is not about legitimacy of the businesses in Montana. The department was granted authority by the legislature to administer the marijuana laws of the state as a statutorily regulated industry, and advertising restrictions are an extension of that regulatory purview.

As to Messrs. Dennehy and Rogers, and Ms. Martino's input that their billboards only advertise the business and are directional in nature, the department appreciates the distinction. However, if the legislature wanted to permit billboard advertising in any context, it would have provided that in HB 249. The department has accommodated marijuana businesses' general advertising and brand marketing in ARM 42.39.123, as adopted. If the department were to amend the rule as the commenters suggest, industry compliance and the department's enforcement of billboard advertising would become untenable because so many marijuana businesses have opted for marijuana-centric or colloquially derived business names. The mere advertising of the business on a billboard constitutes advertising of marijuana or marijuana products, and the department lacks the resources to investigate complaints or licensee compliance absent the restriction.

If the marijuana industry and the legislature come together and a statutory amendment to the advertising restrictions is enacted, the department is prepared to perform its duty and implement that legislation. Until such time as the legislature provides additional clear direction regarding billboard advertising to the department, this advertising restriction will be sustained.

COMMENT 7: The department received a comment from Robert Hunt, publisher of the Montana Senior News, who believes the department is ruling against newspapers by restricting advertising from legal medical and recreational marijuana companies. Mr. Hunt asks, "Doesn't that eliminate traditional media unfairly?"

RESPONSE 7: The department appreciates the comments provided and understands Mr. Hunt's inquiry. As has been stated in similar context in the department's other responses, 16-12-211 and 50-46-341, MCA, as amended by HB 249, prohibit the advertising of marijuana or marijuana products except via select online means. Newspaper advertising, under HB 249 - whether in traditional print or through a newspaper's online version - is not a permissible activity.

The department also refers Mr. Hunt to Response 6 where the department describes advertising restrictions that also impact billboard advertising, which the department believes are analogous to newspaper advertising and adequately responds to the comments.

COMMENT 8: The department received comments from Reagan Mecham, Frenchtown Community Coalition Coordinator; Faith Price, Healthy Missoula Youth Coalition; and another individual expressing concern over the removal of the advertising restrictions in ARM 42.39.123 from its original proposed version to the

amended proposed - and adopted - version. The commenters believe children are at risk from the advertising exposure they will be subjected to without more restriction.

RESPONSE 8: The department appreciates and understands the commenters' concerns. The department amended its original proposal based on additional legal review of the issues and the legislative intent behind HB 249. HB 249 clearly does not permit the advertising of marijuana or marijuana products except for the limited exception of electronic advertising provided in 16-12-211(3) and 50-46-341(3), MCA. What HB 249 lacks in its text, but is present in legislative intent, is that the bill does not say industry cannot advertise; it only says they cannot advertise marijuana or marijuana products.

As the department stated in Response 6, until such time as the legislature provides additional direction regarding billboard advertising to the department, the advertising allowances in the rule, as adopted, will be sustained.

COMMENT 9: The department also received written comments from interested persons which the department can best describe as additional suggestions for the rules located in ARM Title 42, chapter 39, which were not included as a part of the department's proposals under MAR Notice No. 42-1032.

RESPONSE 9: While the department appreciates the comments and suggestions, it is unable to add those suggestions during the course of this specific rulemaking because of procedural constraints within the Montana Administrative Procedure Act. The department will consider all suggestions for inclusion in future rulemaking for the chapter.

/s/ Todd Olson  
Todd Olson  
Rule Reviewer

/s/ Brendan Beatty  
Brendan Beatty  
Director of Revenue

Certified to the Secretary of State September 28, 2021.

## **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 June 30, 2021. This table includes notices in which those rules adopted during the period April 16, 2021, through September 24, 2021, 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 June 30, 2021, 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 2021 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.

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