

MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 11

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 ADMINISTRATION
OF THE STATE OF MONTANA

| | | |
|--------------------------------------|---|--------------------|
| In the matter of the amendment of |) | NOTICE OF PROPOSED |
| ARM 2.59.104 and 2.59.401 |) | AMENDMENT |
| pertaining to semiannual |) | |
| assessments and supervisory fees for |) | NO PUBLIC HEARING |
| banks and credit unions |) | CONTEMPLATED |

TO: All Concerned Persons

1. On July 23, 2022, the Department of Administration proposes to amend the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on June 22, 2022, to advise us of the nature of the accommodation that you need. Please contact Julie James, Department of Administration, P.O. Box 200101, Helena, Montana 59620-0101; telephone (406) 444-2460; Montana Relay Service 711; facsimile (406) 444-6194; or e-mail to Julie.James2@mt.gov.

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

2.59.104 SEMIANNUAL ASSESSMENT (1) through (5) remain the same.
(6) ~~For the assessment billed in December 2021 and collected in January 2022, calculate the assessment as set forth in (2) and divide by 2. For this period only, the semiannual assessment shall not exceed \$150,000. The assessment billed in December 2022 and collected in January 2023 is waived.~~

AUTH: 32-1-213, 32-1-218, MCA
IMP: 32-1-213, 32-1-218, MCA

GENERAL STATEMENT OF REASONABLE NECESSITY: The department proposes to waive the December 2022 bank and credit union assessments in order to reduce its fund balance which will be sufficient despite the decrease in revenue. This amendment will reduce assessments the department will receive from banks from approximately \$1,463,513 to zero and reduce fees the department will receive from credit unions from approximately \$211,961 to zero.

The division's special fund balance continues to grow despite numerous efforts to reduce it. While the division tries to keep its bank and credit union assessments in proportion to the costs it spends on supervising Montana banks and credit unions, it has been challenging to predict the surge in asset growth among these regulated institutions. Asset size is the primary factor by which bank and credit union assessments are calculated. Bank and credit union asset growth has

been unpredictable due to mergers and acquisitions and a steady growth in customer deposits related to pandemic-related stimulus. The division estimates that on a semiannual basis, based on current costs and estimates of assessments, not collecting an assessment for one-half year will bring the amount of revenue it collects closer to the cost of supervision.

The division will re-evaluate the assessments prior to 2023 and again attempt to align the revenue with costs of supervision of Montana's state-chartered banks and credit unions.

2.59.401 CREDIT UNIONS - SUPERVISORY FEE (1) through (3) remain the same.

~~(4) For the assessment billed in December 2021 and collected in January 2022, calculate the assessment as set forth in (2) and divide by 2.~~ The assessment billed in December 2022 and collected in January 2023 is waived.

AUTH: 32-3-201, MCA

IMP: 32-3-201, MCA

4. Concerned persons may present their data, views, or arguments concerning the proposed action to the person listed in paragraph 2 above. Comments must be received no later than 5:00 p.m., July 8, 2022.

5. If persons who are directly affected by the proposed actions 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 person listed in paragraph 2 above no later than 5:00 p.m., June 22, 2022.

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 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 four persons based on the 36 state-chartered banks and 10 state-chartered credit unions.

7. An electronic copy of this proposal notice is available through the department's website at <http://doa.mt.gov/administrativerules>. The department strives to make its online version of the notice conform to the official published version but advises all concerned persons that if a discrepancy exists between the official version and the department's online version, only the official text will be considered. In addition, although the department works to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this division. Persons who wish to have their name added to the mailing list shall make a written request that includes the name, mailing address, and e-mail address of the person to receive notices and specifies that the person wishes to receive notices regarding division rulemaking actions. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written requests may be mailed or delivered to the person listed in paragraph 2 above or may be made by completing a request form at any rules hearing held by the department.

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

10. The department has determined that under 2-4-111, MCA, the proposed amendment of the above-stated rules will not significantly and directly impact small businesses.

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 May 31, 2022.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

| | | |
|--|---|------------------------|
| In the matter of the adoption of New |) | NOTICE OF PROPOSED |
| Rule I pertaining to the Motor Carrier |) | ADOPTION AND AMENDMENT |
| Services vehicles authorized to |) | |
| bypass weigh stations and the |) | |
| amendment of ARM 18.8.101 and |) | NO PUBLIC HEARING |
| 18.8.1301 pertaining to Motor Carrier |) | CONTEMPLATED |
| Services definitions and compliance |) | |
| with weigh station bypass |) | |

TO: All Concerned Persons

1. On July 11, 2022, the Department of Transportation proposes to adopt and amend the above-stated rules.

2. The Department of Transportation 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 Transportation no later than 5:00 p.m. on July 1, 2022, to advise us of the nature of the accommodation that you need. Please contact Russ Christoferson, Department of Transportation, Motor Carrier Services Division, P.O. Box 201001, Helena, Montana, 59620-1001; telephone (406) 444-0454; fax (406) 444-9263; TTY Service (800) 335-7592 or through the Montana Relay Service at 711; or e-mail rchristoferson@mt.gov.

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

NEW RULE I VEHICLES AUTHORIZED TO BYPASS WEIGH STATIONS

(1) The requirements contained in 61-10-141, MCA, and ARM 18.8.1301 for vehicles stopping at stations do not apply to:

- (a) vehicles being operated by carriers enrolled in electronic weigh station bypass programs. In-cab signals at equipped weigh station sites shall be followed, subject to jurisdictional bypass restrictions;
- (b) vehicles receiving notification indicating a bypass from electronic signs on the mainline or through other means of communication;
- (c) vehicles owned and operated by the Federal Government, a State, any subdivision of a State, or a Tribal Government;
- (d) Montana based school buses operating to or from school, or a school sponsored activity;
- (e) scheduled transit system buses travelling on a regular route;
- (f) super-loads operating under a special permit which are unable to enter a weigh station due to size or safety concerns that have obtained prior authorization from the division administrator or designee.

(2) Vehicles meeting the following criteria may request weigh station bypass authorization from the division administrator or designee:

- (a) empty vehicles making multiple trips, such as logging vehicles and harvesting support vehicles;
 - (b) vehicles operating to, from, or within a construction project; or
 - (c) other vehicles as determined on a case-by-case basis.
- (3) Carriers with weigh station bypass authorization are subject to roadside enforcement stops.
- (4) Authorized bypasses may be rescinded at the discretion of the department.

AUTH: 61-10-141, 61-10-155, MCA

IMP: 61-10-141, MCA

REASON: The 2021 Legislature enacted House Bill 77, Ch. 89, L. 2021, an act generally revising the laws related to motor carrier services that included among other revisions, expanding the types of vehicles that may bypass weigh stations. As amended by HB 77, 61-10-141, MCA, allows the department to exempt types of vehicles by rule. The proposed new rule is necessary to implement the bill and identify which vehicles may bypass an open weigh station. Proposed New Rule I will create efficiencies for the traveling public by allowing those vehicles which are prescreened, not regulated, or otherwise exempted to bypass open weigh stations.

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

18.8.101 DEFINITIONS The following definitions shall apply throughout this chapter.

(1) through (8) remain the same.

(9) "Multiple trips" means travelling by a weighing location more than once on either a daily, weekly, or monthly basis as approved by the department.

(9) through (12) remain the same but are renumbered (10) through (13).

(14) "Regular route" means the scheduled transportation of passengers between designated points, over designated routes, and under time schedules that provide a regularity of service.

(13) remains the same but is renumbered (15).

(16) "School bus" has the definition set forth in 20-10-101, MCA.

(14) through (16) remain the same but are renumbered (17) through (19).

AUTH: 61-3-710, 61-10-141, 61-10-155, MCA

IMP: 61-3-708, 61-3-709, 61-10-107, 61-10-121, 61-10-122, 61-10-123, 61-10-124, 61-10-125, 61-10-141, 61-10-201, MCA

REASON: The proposed amendment is necessary to include definitions for multiple trips and regular route for the purposes of implementing 61-10-141, MCA and New Rule I implementing that statute.

18.8.1301 COMPLIANCE WITH ~~WEIGHING LOCATION~~ WEIGH STATION SIGNS - JURISDICTIONAL BYPASS RESTRICTIONS (1) ~~Drivers of vehicles~~

Vehicles meeting the requirements of 61-10-141(1) and (3), MCA, are required to stop at all ~~weighing locations~~ weigh stations displaying an open sign unless authorized to bypass within [New Rule I].

~~(2) Drivers operating vehicles for~~ Vehicles being operated by carriers enrolled in electronic weigh station bypass programs ~~may follow in cab signals at equipped weigh station sites which signals shall include whether the vehicle must stop,~~ are subject to jurisdictional bypass restrictions.

~~(3) Jurisdictional bypass restrictions require that~~ and regardless of receiving a bypass signal, a driver must enter an open ~~weighing location~~ weigh station when any of the following conditions apply:

- (a) overweight (including permitted loads);
- (b) ~~overwide width exceeding greater than ten~~ 10 feet (including permitted loads);
- (c) ~~overheight greater than~~ height exceeding 15 feet 6 inches (including permitted loads);
- (d) ~~overlength greater than~~ length exceeding ~~140~~ 120 feet (including permitted loads);
- (e) oversize in excess of legal dimensions as outlined in 61-10-102, 61-10-103, and 61-10-104, MCA, without a valid permit.

~~(4)~~ (3) A violation of this rule is punishable as provided by law.

AUTH: 61-10-141, 61-10-155, MCA

IMP: 61-10-141, MCA

REASON: The proposed amendment to (1) is necessary because all the vehicles that may bypass scales will be identified in proposed New Rule I. The proposed amendments to (2) and (3) are necessary to make the rule easier to read and to make the rule internally consistent with other administrative rules.

5. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: Russ Christoferson, Department of Transportation, Motor Carrier Services Division, P.O. Box 201001, Helena Montana, 59620-1001; telephone (406) 444-0454; fax (406) 444-9263; or e-mail rchristoferson@mt.gov, and must be received no later than 5:00 p.m., July 8, 2022.

6. If persons who are directly affected by the proposed actions 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 Russ Christoferson at the above address no later than 5:00 p.m., July 8, 2022.

7. 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 904 persons based on the currently active 9040 U.S. DOT accounts in Montana.

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

9. An electronic copy of this proposal notice is available through the Department of Transportation website at www.mdt.mt.gov.

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by email and U.S. mail on February 17, 2022.

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

12. With regard to the requirements of 2-15-142, MCA, the department has determined that the adoption and amendment of the above-referenced rules will not have direct tribal implications.

/s/ Valerie A. Balukas
Valerie A. Balukas
Alternate Rule Reviewer

/s/ Malcolm "Mack" Long
Malcolm "Mack" Long
Director Department of Transportation

Certified to the Secretary of State May 31, 2022.

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

| | | |
|-------------------------------------|---|-----------------------------|
| In the matter of the repeal of ARM |) | NOTICE OF PUBLIC HEARING ON |
| 24.22.501, 24.22.504, 24.22.507, |) | PROPOSED REPEAL |
| 24.22.510, 24.22.513, 24.22.516, |) | |
| 24.22.519, and 24.22.522 pertaining |) | |
| to the Montana Employment |) | |
| Advancement Right Now (EARN) |) | |
| Program Act |) | |

TO: All Concerned Persons

1. On July 6, 2022, at 10:00 a.m., the Department of Labor and Industry (department) will hold a public hearing via remote conferencing to consider the proposed repeal 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/88394278849>;
Meeting ID: 883 9427 8849, Passcode: 444068; or
- b. Dial by telephone, +1 406 444 9999 or +1 646 558 8656;
Meeting ID: 883 9427 8849, Passcode: 444068.

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 June 29, 2022, to advise us of the nature of the accommodation that you need. Please contact Brandon Kirchgasler, Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728; telephone (406) 444-3359, facsimile (406) 444-4140, or Montana Relay Service at 711; or e-mail laborlegal@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: These rules were adopted to implement the process and procedure for the Montana Employment Advancement Right Now (EARN) Program Act, codified at 39-11-301, MCA *et seq.* The EARN Program Act terminated by operation of law on June 30, 2021. House Bill 631, Section 12, Laws of Montana 2019 Ch. 366. Because the statutes implemented by these rules are no longer valid, the rules are no longer necessary.

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

24.22.501 DEFINITIONS

AUTH: 39-11-305, MCA
IMP: 39-11-302, 39-11-304, 39-11-305, MCA

24.22.504 GRANT APPLICATION SUBMISSION

AUTH: 39-11-305, MCA
IMP: 39-11-305, MCA

24.22.507 GRANT APPLICATION CONTENTS

AUTH: 39-11-305, MCA
IMP: 39-11-305, MCA

24.22.510 EVALUATION CRITERIA FOR GRANT APPLICATION

AUTH: 39-11-305, MCA
IMP: 39-11-305, MCA

24.22.513 AWARD OF GRANTS AND PAYMENTS

AUTH: 39-11-305, MCA
IMP: 39-11-305, MCA

24.22.516 GRANT REPORTING REQUIREMENTS

AUTH: 39-11-305, MCA
IMP: 39-11-305, MCA

24.22.519 REVOCATION OF GRANT AWARDS

AUTH: 39-11-305, MCA
IMP: 39-11-305, MCA

24.22.522 DISPUTE RESOLUTION

AUTH: 39-11-305, MCA
IMP: 39-11-305, MCA

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728; facsimile (406) 444-4140; or e-mail laborlegal@mt.gov, and must be received no later than 5:00 p.m., July 8, 2022.

6. 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.

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

8. Pursuant to 2-4-111, MCA, the department has determined that the rule changes proposed in this notice will not have a significant and direct impact upon small businesses.

9. 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 May 31, 2022.

BEFORE THE BOARD OF ARCHITECTS AND LANDSCAPE ARCHITECTS,
BOARD OF ATHLETIC TRAINERS, BOARD OF BARBERS AND
COSMETOLOGISTS, BOARD OF BEHAVIORAL HEALTH, BOARD OF
CHIROPRACTORS, BOARD OF CLINICAL LABORATORY SCIENCE
PRACTITIONERS, STATE ELECTRICAL BOARD, BOARD OF MEDICAL
EXAMINERS, BOARD OF NURSING, BOARD OF NURSING HOME
ADMINISTRATORS, BOARD OF OPTOMETRY, BOARD OF PHYSICAL THERAPY
EXAMINERS, BOARD OF PRIVATE SECURITY, BOARD OF PUBLIC
ACCOUNTANTS, BOARD OF REALTY REGULATION, BOARD OF
RESPIRATORY CARE PRACTITIONERS, BOARD OF VETERINARY MEDICINE,
BOARD OF PERSONNEL APPEALS, HUMAN RIGHTS COMMISSION, AND
UNEMPLOYMENT INSURANCE APPEALS BOARD
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 24.7.101, 24.9.101, 24.26.201,) PROPOSED AMENDMENT AND
24.114.201, 24.114.202, 24.118.101,) ADOPTION
24.118.201, 24.121.102, 24.121.201,)
24.126.101, 24.126.201, 24.126.202,)
24.129.101, 24.129.201, 24.129.202,)
24.141.101, 24.141.201, 24.141.202,)
24.156.202, 24.159.101, 24.159.201,)
24.159.202, 24.162.101, 24.162.201,)
24.162.202, 24.168.101, 24.168.201,)
24.168.202, 24.177.101, 24.177.201,)
24.177.202, 24.182.101, 24.182.202,)
24.201.201, 24.201.202, 24.210.101,)
24.210.201, 24.210.202, 24.213.101,)
24.213.201, 24.213.202, 24.219.201,)
24.219.204, 24.225.101, 24.225.201,)
and 24.225.202, and the adoption of)
NEW RULES I, II, and III, regarding)
organizational, procedural, and public)
participation rules)

TO: All Concerned Persons

1. On July 7, 2022, at 10:00 a.m., the Department of Labor and Industry (department) will hold a public hearing via remote conferencing to consider the proposed amendment and adoption 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/82327314819>;
Meeting ID: 823 2731 4819, Passcode: 432828; or
- b. Dial by telephone, +1 406 444 9999 or +1 646 558 8656;
Meeting ID: 823 2731 4819, Passcode: 432828.

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 June 30, 2022, to advise us of the nature of the accommodation that you need. Please contact Brandon Kirchgasler, Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728; telephone (406) 444-3359, facsimile (406) 444-4140, or Montana Relay Service at 711; or e-mail laborlegal@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: In 2001, the Montana Legislature transferred professional and occupational licensing functions from the Department of Commerce (DOC) to the Department of Labor and Industry (department) via Senate Bill 445. With the transfer, the professional and occupational licensing boards and programs became allocated to the department for administrative purposes. Because the department had not previously promulgated public participation rules, and to maintain procedural continuity and afford licensees, license applicants, and the public the right of public participation per 2-3-103, MCA, all references to DOC's citizen participation rules remained in place in the boards' administrative rules. Following the transfer to the department, the professional and occupational licensing boards and programs have continuously operated so as to permit and encourage the public to participate in agency decisions that are of significant interest to the public.

The department proposed to adopt three new rules regarding public participation to fully comply with the requirements of 2-3-103, MCA, and meet the needs of the department, its customers, and the Montana public. MAR Notice No. 24-2-390 was published April 29, 2022, and public comments were accepted through May 27, 2022. The department intends to file the final notice in this project on May 31, 2022, adopting the three rules exactly as proposed. These new rules will be effective June 11, 2022.

The department determined it is reasonably necessary to combine the boards' related rule amendments into two rulemaking notices for timeliness, efficiency, and cost effectiveness. Implementing the rules simultaneously for as many boards as possible will reduce confusion regarding the rulemaking process and ensure that most boards operate under the same public participation rules at the same time. Therefore, 20 of the boards administratively attached to the department are amending their rules to incorporate and align with the department's new public participation rules at this time. Where necessary, authority and implementation citations are amended to accurately reflect all statutes implemented through a rule and provide the complete sources of a board's rulemaking authority. Where additional specific bases for a proposed action exist, the individual board will identify those reasons immediately following that rule.

4. The department is proposing to amend the following rules. The rules proposed to be amended are as follows, stricken matter interlined, new matter underlined:

UNEMPLOYMENT INSURANCE APPEALS BOARD

24.7.101 ORGANIZATION AND PUBLIC PARTICIPATION OF THE UNEMPLOYMENT INSURANCE APPEALS BOARD

(1) remains the same.

(2) The board adopts the public participation rules of the Department of Labor and Industry as listed in chapter 2 of this title to the extent they do not conflict with statute or rule.

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

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

UNEMPLOYMENT INSURANCE
APPEALS BOARD
LAURA FIX, CHAIR

HUMAN RIGHTS COMMISSION

24.9.101 ORGANIZATION AND PUBLIC PARTICIPATION OF THE HUMAN RIGHTS COMMISSION (1) and (2) remain the same.

(3) The commission adopts the public participation rules of the Department of Labor and Industry as listed in chapter 2 of this title to the extent they do not conflict with statute or rule.

AUTH: 2-3-103, 2-4-201, 49-2-204, 49-3-106, MCA

IMP: 2-3-103, 2-4-201, 49-2-501, 49-2-505, 49-2-510, 49-2-511, 49-3-315,
MCA

HUMAN RIGHTS COMMISSION
PETER M. DAMROW, CHAIR

BOARD OF PERSONNEL APPEALS

24.26.201 ADOPTION OF ATTORNEY GENERAL MODEL RULES ORGANIZATIONAL AND PUBLIC PARTICIPATION RULES (1) ~~To the extent that they do not conflict with statute or rule, the Board of Personnel Appeals of the Department of Labor and Industry adopts the model rules proposed by the Attorney General as adopted by the Department of Labor and Industry.~~

(1) The Board of Personnel Appeals adopts the organizational rules of the Department of Labor and Industry as listed in chapter 1 of this title.

(2) The Board of Personnel Appeals adopts procedural rules and public participation rules of the Department of Labor and Industry as listed in chapter 2 of this title to the extent they do not conflict with statute or rule.

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

BOARD OF PERSONNEL APPEALS
BRIAN HOPKINS, PRESIDING OFFICER

5. Several boards administratively attached to the department are proposing to adopt and amend specific board rules to align with the department's proposed new public participation rules within this notice and correct references from the Department of Commerce to the Department of Labor and Industry. The proposed amendments and new rules are presented in alphabetical order and grouped according to each board or program for clarity, readability, and ease of reference within this notice. The rules proposed to be adopted or amended provide as follows, stricken matter interlined, new matter underlined:

BOARD OF ARCHITECTS AND LANDSCAPE ARCHITECTS

24.114.201 PROCEDURAL RULES (1) remains the same.

AUTH: 2-4-201, ~~37-65-204~~, MCA
IMP: 2-4-201, MCA

24.114.202 PUBLIC PARTICIPATION (1) The Board of Architects and Landscape Architects adopts and incorporates ~~by this reference~~ the public participation rules of the Department of ~~Commerce~~ Labor and Industry as listed in ~~ARM Title 8, chapter 2 of this title, except that the board does not adopt ARM 8.2.202(1)(b), which allows for public participation in the granting or denying of a license for which a hearing is required. The public is entitled to observe, but not participate in the licensing decisions and other contested cases as allowed by law.~~

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

BOARD OF ARCHITECTS AND
LANDSCAPE ARCHITECTS
MAIRE EITHNE O'NEILL, PRESIDENT

BOARD OF ATHLETIC TRAINERS

24.118.101 BOARD ORGANIZATION (1) remains the same.

AUTH: 2-4-201, ~~37-36-102~~, MCA
IMP: 2-4-201, MCA

24.118.201 PROCEDURAL RULES (1) The Board of Athletic Trainers adopts and incorporates ~~by this reference~~ the public participation procedural rules of

the Department of Labor and Industry as listed in ~~ARM chapter 101, subchapters 3 and 4~~ chapter 2 of this title.

AUTH: 2-4-201, ~~37-36-102~~, MCA

IMP: 2-4-201, MCA

NEW RULE I PUBLIC PARTICIPATION (1) The Board of Athletic Trainers adopts and incorporates the public participation rules of the Department of Labor and Industry as listed in chapter 2 of this title.

AUTH: 2-3-103, MCA

IMP: 2-3-103, MCA

NEW RULE II FEE ABATEMENT (1) The Board of Athletic Trainers adopts and incorporates the fee abatement rule of the Department of Labor and Industry as found at ARM 24.101.301.

AUTH: 37-1-131, 37-36-102, MCA

IMP: 17-2-302, 17-2-303, 37-1-134, MCA

REASON: The Board of Athletic Trainers is proposing New Rule II to adopt and incorporate the department's fee abatement rule. This board was established in 2007, but delayed the adoption of this rule to coincide with the department's public participation rules notice for cost savings and efficiency. Most other licensure boards already have this rule in place.

BOARD OF ATHLETIC TRAINERS
JOHN WEIDA, CHAIR

BOARD OF BARBERS AND COSMETOLOGISTS

24.121.102 BOARD ORGANIZATION (1) The Board of Barbers and Cosmetologists adopts and incorporates the organizational rules of the Department of Labor and Industry (~~department~~) as listed in chapter 1 of this title.

AUTH: 2-4-201, ~~37-31-203~~, MCA

IMP: 2-4-201, MCA

24.121.201 PROCEDURAL RULES (1) The Board of Barbers and Cosmetologists adopts and incorporates the procedural rules of the ~~department~~ Department of Labor and Industry as listed in chapter 2 of this title.

AUTH: 2-4-201, ~~37-31-203~~, MCA

IMP: 2-4-201, ~~37-31-203~~, MCA

NEW RULE III PUBLIC PARTICIPATION (1) The Board of Barbers and Cosmetologists adopts and incorporates the public participation rules of the Department of Labor and Industry as listed in chapter 2 of this title.

AUTH: 2-3-103, MCA
IMP: 2-3-103, MCA

BOARD OF BARBERS AND
COSMETOLOGISTS
ANGELA PRINTZ, PRESIDENT

BOARD OF CHIROPRACTORS

24.126.101 BOARD ORGANIZATION (1) The Board of Chiropractors ~~hereby~~ adopts and incorporates the organizational rules of the Department of Labor and Industry as listed in chapter 1 of this title.

AUTH: 2-4-201, ~~37-12-201~~, MCA
IMP: 2-4-201, MCA

24.126.201 PROCEDURAL RULES (1) The Board of Chiropractors ~~hereby~~ adopts and incorporates the procedural rules of the Department of Labor and Industry as listed in chapter 2 of this title.

AUTH: 2-4-201, ~~37-12-201~~, MCA
IMP: 2-4-201, MCA

24.126.202 PUBLIC PARTICIPATION RULES (1) The Board of Chiropractors ~~hereby~~ adopts and incorporates ~~by this reference~~ the public participation rules of the ~~department of commerce~~ Department of Labor and Industry as listed in chapter 2 of this title.

AUTH: 2-3-103, ~~37-12-201~~, MCA
IMP: 2-3-103, MCA

BOARD OF CHIROPRACTORS
MARCUS NYNAS, D.C., PRESIDENT

BOARD OF CLINICAL LABORATORY SCIENCE PRACTITIONERS

24.129.101 BOARD ORGANIZATION (1) ~~The board of clinical laboratory science practitioners hereby~~ Board of Clinical Laboratory Science Practitioners adopts and incorporates the organizational rules of the ~~department of labor and industry~~ Department of Labor and Industry as listed in chapter 1 of this title.

AUTH: 2-4-201, ~~37-34-201~~, MCA
IMP: 2-4-201, MCA

24.129.201 PROCEDURAL RULES (1) ~~The board of clinical laboratory science practitioners hereby~~ Board of Clinical Laboratory Science Practitioners adopts and incorporates the procedural rules of the ~~department of labor and industry~~ Department of Labor and Industry as listed in chapter 2 of this title.

AUTH: 2-4-201, ~~37-34-201~~, MCA
IMP: 2-4-201, MCA

24.129.202 PUBLIC PARTICIPATION RULES (1) ~~The board of clinical laboratory science practitioners hereby~~ Board of Clinical Laboratory Science Practitioners adopts and incorporates ~~by this reference~~ the public participation rules of the ~~department of commerce~~ Department of Labor and Industry as listed in chapter 2 of this title.

AUTH: 2-3-103, ~~37-34-201~~, MCA
IMP: 2-3-103, MCA

BOARD OF CLINICAL LABORATORY
SCIENCE PRACTITIONERS
MATTHEW KALANICK, CLS, CHAIR

STATE ELECTRICAL BOARD

24.141.101 BOARD ORGANIZATION (1) ~~The state electrical board hereby~~ State Electrical Board adopts and incorporates the organizational rules of the Department of Labor and Industry as listed in chapter 1 of this title.

AUTH: 2-4-201, ~~37-68-201~~, MCA
IMP: 2-4-201, MCA

24.141.201 PROCEDURAL RULES (1) ~~The state electrical board hereby~~ State Electrical Board adopts and incorporates the procedural rules of the ~~department of labor and industry~~ Department of Labor and Industry as listed in chapter 2 of this title.

AUTH: 2-4-201, ~~37-68-201~~, MCA
IMP: 2-4-201, MCA

24.141.202 PUBLIC PARTICIPATION (1) ~~The state electrical board hereby~~ State Electrical Board adopts and incorporates ~~by this reference~~ the public participation rules of the ~~department of commerce~~ Department of Labor and Industry as listed in chapter 2 of ~~ARM Title 8~~ this title.

AUTH: 2-3-103, ~~37-68-201~~, MCA
IMP: 2-3-103, MCA

STATE ELECTRICAL BOARD
DERRICK HEDALEN, PRESIDENT

BOARD OF MEDICAL EXAMINERS

24.156.202 CITIZEN PUBLIC PARTICIPATION RULES (1) The ~~Montana State~~ Board of Medical Examiners hereby adopts and incorporates by this reference the public participation rules of the Department of ~~Commerce~~ Labor and Industry as listed in chapter 2 of ~~Title 8~~ this title.

AUTH: 2-3-103, MCA
IMP: 2-3-103, MCA

BOARD OF MEDICAL EXAMINERS
CHRISTINE EMERSON, R.D.,
PRESIDENT

BOARD OF NURSING

24.159.101 BOARD ORGANIZATION (1) The Board of Nursing hereby adopts and incorporates the organizational rules of the Department of Labor and Industry as listed in chapter 1 of this title.

AUTH: 2-4-201, ~~37-8-202~~, MCA
IMP: 2-4-201, MCA

24.159.201 PROCEDURAL RULES (1) The Board of Nursing hereby adopts and incorporates the procedural rules of the Department of Labor and Industry as listed in chapter 2 of this title.

AUTH: 2-4-201, ~~37-8-202~~, MCA
IMP: 2-4-201, MCA

24.159.202 PUBLIC PARTICIPATION (1) The Board of Nursing hereby adopts and incorporates by this reference the public participation rules of the Department of ~~Commerce~~ Labor and Industry as listed in chapter 2 of ~~Title 8~~ this title.

AUTH: 2-3-103, ~~37-8-202~~, MCA
IMP: 2-3-103, MCA

BOARD OF NURSING
SARAH SPANGLER, R.N., PRESIDENT

BOARD OF NURSING HOME ADMINISTRATORS

24.162.101 BOARD ORGANIZATION (1) The Board of Nursing Home Administrators ~~hereby~~ adopts and incorporates the organizational rules of the Department of Labor and Industry as listed in chapter 1 of this title.

AUTH: 2-4-201, ~~37-9-201~~, MCA
IMP: 2-4-201, MCA

24.162.201 PROCEDURAL RULES (1) The Board of Nursing Home Administrators ~~hereby~~ adopts and incorporates the procedural rules of the Department of Labor and Industry as listed in chapter 2 of this title.

AUTH: 2-4-201, ~~37-9-201~~, MCA
IMP: 2-4-201, MCA

24.162.202 PUBLIC PARTICIPATION RULES (1) The Board of Nursing Home Administrators ~~hereby~~ adopts and incorporates ~~by this reference~~ the public participation rules of the Department of ~~Commerce~~ Labor and Industry as listed in chapter 2 of ~~Title 8~~ this title.

AUTH: 2-3-103, ~~37-9-201~~, MCA
IMP: 2-3-103, MCA

BOARD OF NURSING HOME
ADMINISTRATORS
KATHRYN BEATY, PRESIDING OFFICER

BOARD OF OPTOMETRY

24.168.101 BOARD ORGANIZATION (1) The Board of Optometry ~~hereby~~ adopts and incorporates the organizational rules of the Department of Labor and Industry as listed in Chapter 1 of this title.

AUTH: 2-4-201, ~~37-10-202~~, MCA
IMP: 2-4-201, MCA

24.168.201 PROCEDURAL RULES (1) The Board of Optometry ~~hereby~~ adopts and incorporates the procedural rules of the Department of Labor and Industry as listed in Chapter 2 of this title.

AUTH: 2-4-201, ~~37-10-202~~, MCA
IMP: 2-4-201, MCA

24.168.202 CITIZEN PUBLIC PARTICIPATION RULES (1) The Board of Optometry ~~hereby~~ adopts and incorporates ~~by this reference~~ the public participation rules of the Department of ~~Commerce~~ Labor and Industry as listed in ~~Chapter~~ chapter 2 of this title.

AUTH: 2-3-103, ~~37-10-202~~, MCA
IMP: 2-3-103, MCA

BOARD OF OPTOMETRY
DR. DOUGLAS KIMBALL, PRESIDENT

BOARD OF PHYSICAL THERAPY EXAMINERS

24.177.101 ORGANIZATIONAL RULE BOARD ORGANIZATION (1) The Board of Physical Therapy Examiners adopts and incorporates the organizational rules of the Department of Labor and Industry as listed in chapter 1 of this title.

AUTH: 2-4-201, ~~37-11-201~~, MCA
IMP: 2-4-201, MCA

24.177.201 PROCEDURAL RULES (1) remains the same.

AUTH: 2-4-201, ~~37-11-201~~, MCA
IMP: 2-4-201, MCA

24.177.202 PUBLIC PARTICIPATION RULES (1) The Board of Physical Therapy Examiners adopts and incorporates ~~by this reference~~ the public participation rules of the Department of ~~Commerce~~ Labor and Industry as listed in chapter 2 of ~~Title 8~~ this title.

AUTH: 2-3-103, ~~37-11-201~~, MCA
IMP: 2-3-103, MCA

BOARD OF PHYSICAL THERAPY
EXAMINERS
HOLLY CLAUSSEN, PT,
PRESIDING OFFICER

BOARD OF PRIVATE SECURITY

24.182.101 BOARD ORGANIZATION (1) remains the same.

AUTH: 2-4-201, MCA
IMP: 2-4-201, MCA

24.182.202 PUBLIC PARTICIPATION (1) The Board of Private Security adopts and incorporates the public participation rules of the Department of ~~Commerce~~ Labor and Industry as ~~set out~~ listed in chapter 2 of ~~ARM Title 8~~ this title.

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

BOARD OF PRIVATE SECURITY
HOLLY DERSHEM-BRUCE, PRESIDENT

BOARD OF PUBLIC ACCOUNTANTS

24.201.201 PROCEDURAL RULES (1) ~~The board of public accountants~~
Board of Public Accountants adopts and incorporates the procedural rules of the
~~department of labor and industry~~ Department of Labor and Industry as listed in
chapter 2 of this title.

AUTH: 2-4-201, ~~37-50-201~~, ~~37-50-203~~, MCA
IMP: 2-4-201, MCA

24.201.202 PUBLIC PARTICIPATION RULES (1) The Board of Public
Accountants adopts and incorporates ~~by this reference~~, the public participation rules
of the department of commerce Department of Labor and Industry as listed in ~~Title 8,~~
chapter 2 of this title, ~~except that the board does not adopt ARM 8.2.202(1)(b), which~~
~~allows for public participation in the granting or denying of a license for which a~~
~~hearing is required. The public is entitled to observe, but not participate in the~~
~~licensing decisions and other contested cases as allowed by law.~~

AUTH: 2-3-103, ~~37-50-201~~, ~~37-50-203~~, MCA
IMP: ~~2-3-102~~, 2-3-103, MCA

BOARD OF PUBLIC ACCOUNTANTS
DAN VUCKOVICH, CPA,
PRESIDING OFFICER

BOARD OF REALTY REGULATION

24.210.101 BOARD ORGANIZATION (1) ~~The board of realty regulation~~
~~hereby~~ Board of Realty Regulation adopts and incorporates the organizational rules
of the ~~department of labor and industry~~ Department of Labor and Industry as listed in
chapter 1 of this title.

AUTH: 2-4-201, ~~37-51-203~~, MCA
IMP: 2-4-201, MCA

24.210.201 PROCEDURAL RULES (1) ~~The board of realty regulation~~
~~hereby~~ Board of Realty Regulation adopts and incorporates the procedural rules of
the ~~department of labor and industry~~ Department of Labor and Industry as listed in
chapter 2 of this title.

AUTH: 2-4-201, ~~37-51-203~~, MCA
IMP: 2-4-201, MCA

24.210.202 PUBLIC PARTICIPATION (1) The Board of Realty Regulation adopts and incorporates by ~~reference~~ the public participation rules of the Department of ~~Commerce~~ Labor and Industry, as listed in chapter 2 of this title ARM Title 8, chapter 2, ~~except that the board does not adopt ARM 8.2.202(1)(b), which allows for public participation in the granting or denying of a license for which a hearing is required. The public is entitled to observe, but not participate in licensing decisions and other contested cases as allowed by law.~~

AUTH: 2-3-103, ~~37-51-203~~, MCA
IMP: 2-3-103, MCA

BOARD OF REALTY REGULATION
DAN WAGER, PRESIDING OFFICER

BOARD OF RESPIRATORY CARE PRACTITIONERS

24.213.101 BOARD ORGANIZATION (1) The ~~board of respiratory care practitioners (hereinafter "board") hereby~~ Board of Respiratory Care Practitioners adopts and incorporates the organizational rules of the ~~department of labor and industry~~ Department of Labor and Industry as listed in chapter 1 of this title.

AUTH: 2-4-201, ~~37-28-104~~, MCA
IMP: 2-4-201, MCA

24.213.201 PROCEDURAL RULES (1) The ~~board~~ Board of Respiratory Care Practitioners hereby adopts and incorporates the procedural rules of the ~~department of labor and industry~~ Department of Labor and Industry as listed in chapter 2 of this title.

AUTH: 2-4-201, ~~37-28-104~~, MCA
IMP: 2-4-201, MCA

24.213.202 PUBLIC PARTICIPATION RULES (1) The ~~board~~ Board of Respiratory Care Practitioners hereby adopts and incorporates the public participation rules of the ~~department of commerce~~ Department of Labor and Industry as listed in chapter 2 of this title.

AUTH: 2-3-103, ~~37-28-104~~, MCA
IMP: ~~2-4-201~~, 2-3-103, MCA

BOARD OF RESPIRATORY CARE
PRACTITIONERS
JUSTIN O'BRIEN, PRESIDING OFFICER

BOARD OF BEHAVIORAL HEALTH

24.219.201 PROCEDURAL RULES (1) remains the same.

AUTH: 2-4-201, ~~37-22-201~~, MCA
IMP: 2-4-201, MCA

24.219.204 PUBLIC PARTICIPATION (1) The Board of Behavioral Health adopts and incorporates ~~by this reference~~, the public participation rules of the Department of ~~Commerce~~ Labor and Industry as listed in chapter 2 of this title ~~ARM Title 8, chapter 2, except that the board does not adopt ARM 8.2.202(1)(b), which allows for public participation in the granting or denying of a license for which a hearing is required. The public is allowed to observe, but not participate in the licensing decisions and other contested cases as allowed by law.~~

AUTH: 2-3-103, MCA
IMP: 2-3-103, MCA

BOARD OF BEHAVIORAL HEALTH
ELAINE MARONICK, LCSW-LMFT, CHAIR

BOARD OF VETERINARY MEDICINE

24.225.101 BOARD ORGANIZATION (1) The Board of Veterinary Medicine ~~hereby~~ adopts and incorporates the organizational rules of the Department of Labor and Industry as listed in chapter 1 of this title.

AUTH: 2-4-201, ~~37-18-202~~, MCA
IMP: 2-4-201, MCA

24.225.201 PROCEDURAL RULES (1) The Board of Veterinary Medicine ~~hereby~~ adopts and incorporates the procedural rules of the Department of Labor and Industry as listed in chapter 2 of this title.

AUTH: 2-4-201, ~~37-18-202~~, MCA
IMP: 2-4-201, MCA

24.225.202 PUBLIC PARTICIPATION RULES (1) The Board of Veterinary Medicine ~~hereby~~ adopts and incorporates ~~by this reference~~ the public participation rules of the Department of ~~Commerce~~ Labor and Industry as listed in chapter 2 of ~~Title 8~~ this title.

AUTH: 2-3-103, ~~37-18-202~~, MCA
IMP: 2-3-103, MCA

BOARD OF VETERINARY MEDICINE
BARBARA CALM, DVM, PRESIDENT

6. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be

submitted to Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728; facsimile (406) 444-4140; or e-mail laborlegal@mt.gov, and must be received no later than 5:00 p.m., July 8, 2022.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and 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.

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

9. Pursuant to 2-4-111, MCA, the boards have determined that the rule changes proposed in this notice will not have a significant and direct impact upon small businesses.

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

/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 May 31, 2022.

BEFORE THE BOARD OF MEDICAL EXAMINERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

| | | |
|--------------------------------------|---|-----------------------------|
| In the matter of the amendment of |) | NOTICE OF PUBLIC HEARING ON |
| ARM 24.156.401, 24.156.409, |) | PROPOSED AMENDMENT, |
| 24.156.1306, 24.156.1403, and |) | ADOPTION, AND REPEAL |
| 24.156.2701, the adoption of NEW |) | |
| RULES I through V, and the repeal of |) | |
| ARM 24.156.501, 24.156.603, |) | |
| 24.156.619, 24.156.625, 24.156.629, |) | |
| 24.156.802, 24.156.1001, |) | |
| 24.156.1005, 24.156.1006, |) | |
| 24.156.1007, 24.156.1301, |) | |
| 24.156.1303, 24.156.1304, |) | |
| 24.156.1307, 24.156.1308, |) | |
| 24.156.1309, 24.156.1401, |) | |
| 24.156.1404, 24.156.1407, |) | |
| 24.156.1412, 24.156.1413, |) | |
| 24.156.1601, 24.156.1617, |) | |
| 24.156.1625, 24.156.1626, |) | |
| 24.156.2705, 24.156.2707, |) | |
| 24.156.2713, and 24.156.2775 |) | |
| pertaining to the board of medical |) | |
| examiners |) | |

TO: All Concerned Persons

1. On July 5, 2022, at 10:00 a.m., a public hearing will be held via remote conferencing to consider the proposed amendment, adoption, and repeal 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/85639923009>
Meeting ID: 856 3992 3009, Passcode: 900353

-OR-

b. Dial by telephone, +1 406 444 9999 or +1 646 558 8656
Meeting ID: 856 3992 3009, Passcode: 900353

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 Medical Examiners (board) no later than 5:00 p.m., on June 28, 2022, to advise us of the nature of the accommodation that you

need. Please contact Samuel Hunthausen, Board of Medical Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2360; Montana Relay 711; facsimile (406) 841-2305; or dlibsmed@mt.gov (board's e-mail).

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

24.156.401 MEDICAL ASSISTANT – DELEGATION AND SUPERVISION

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

(c) personally provide onsite or direct supervision as defined by ARM 24.156.501 [NEW RULE IV] to a medical assistant to whom the health care provider has delegated:

(i) through (4) remain the same.

AUTH: 37-3-104, 37-3-203, MCA

IMP: 37-3-102, 37-3-104, MCA

REASON: Reasonable necessity exists to amend the rule to correct the cross-reference, based on the proposed repeal of ARM 24.156.501 in this proposal notice. Necessity exists to insert "or" to adjust for the revised definitions of supervision proposed in this rulemaking.

24.156.409 FEE SCHEDULE (1) and (1)(a) remain the same.

(b) Physician letter of qualification for interstate compact 225 300

(c) through (2)(i) remain the same.

(j) Emergency medical responder 20

(k) Emergency medical technician 35

(l) Advanced emergency medical technician 55

(m) Paramedic 75

(3) through (6) remain the same.

AUTH: 37-1-134, 37-3-203, 37-3-307, 37-3-308, 37-3-356, 37-3-802, 37-3-804, 37-6-106, 37-13-201, 37-20-202, 37-25-201, 50-6-203, MCA

IMP: 37-1-134, 37-1-141, 37-3-305, 37-3-307, 37-3-308, 37-3-309, 37-3-313, 37-3-356, 37-3-804, 37-6-302, 37-13-302, 37-13-304, 37-20-302, 37-25-302, 50-60-203, MCA

REASON: There is reasonable necessity to amend (1)(b) because the board is without discretion to adopt a lower fee for the interstate compact than that fee set by the compact itself. There were approximately 50 compact license applications in the last year. As a result, this increase is expected to generate approximately \$3,750 in revenue. There is reasonable necessity to adopt (2)(j) through (m) to set rates for license renewals. These rates are identical to initial licensure fees but were inadvertently excluded from adoption in prior rulemaking. Because the rates for initial and renewal licensure are the same, the fees are expected to be revenue neutral for the board.

24.156.1306 PROFESSIONAL CONDUCT AND STANDARDS OF PROFESSIONAL PRACTICE (1) A licensee shall conform to generally accepted principles and the standards of dietetic practice which are those generally recognized by the profession as appropriate for the situation presented, including those promulgated or interpreted by or under the Academy of Nutrition and Dietetics or ~~commission~~ Commission on Dietetic Registration, and other professional or governmental bodies.

(2) A licensee who demonstrates appropriate education and experience may engage in the practice of diabetes education as defined and credentialed by the Academy of Nutrition and Dietetics and the American Association of Diabetes Educators.

~~(3) A licensee shall maintain knowledge and skills required for continuing professional competence.~~

AUTH: 37-1-131, 37-25-201, MCA

IMP: 37-1-131, 37-25-201, 37-25-301, MCA

REASON: Amendments to (1) and (2) are proposed to facilitate the repeal of ARM 24.156.1301, which includes definitions for "Academy" and "Commission." Because those terms are used only once in the administrative rules, it is more concise to include the full Academy and Commission names referred to, rather than define the term. Further, such definition required reading multiple rules to understand a single rule. Section (3) is proposed to be stricken because it is duplicative of New Rule III.

24.156.1403 REQUIREMENTS FOR LICENSURE (1) Applicants for licensure must ~~meet the prerequisites for and~~ pass the Foundations of Oriental Medicine, Acupuncture with Point Location, and Biomedicine examinations required for certification in acupuncture by the National Commission for the Certification of Acupuncture and Oriental Medicine, or its successor.

(2) Applicants for licensure must pass the examination in clean needle technique administered by the Council of Colleges for Acupuncture and ~~Oriental~~ Herbal Medicine, or its successor.

AUTH: 37-13-201, MCA

IMP: 37-13-201, MCA

REASON: There is reasonable necessity to amend the rule to reflect the currently accurate name of the Council for Colleges for Acupuncture and Herbal Medicine. The examination requirements are proposed to be updated in keeping with licensure requirements from other states as well as standard educational requirements.

24.156.2701 DEFINITIONS (1) For purposes of the rules set forth in this subchapter, the following definitions apply:

~~(a) "AEMT" means an individual licensed by the board at the level of advanced emergency medical technician.~~

~~(b) "Board" means the Board of Medical Examiners.~~

~~(c) "CIHC" means community integrated health care as defined under 37-3-102, MCA.~~

~~(d) through (f) remain the same but are renumbered (a) through (c).~~

~~(g) "ECP" means an emergency care provider as defined under 37-3-102, MCA.~~

~~(h) "EMR" means an individual licensed by the board at the level of emergency medical responder.~~

~~(i) "EMS" means an emergency medical service licensed by the Department of Public Health and Human Services pursuant to Title 50, chapter 6, MCA.~~

~~(j) "EMT" means an individual licensed by the board at the level of emergency medical technician.~~

~~(k) through (n) remain the same but are renumbered (d) through (g).~~

~~(o) "NPDB" means the National Practitioner Databank established by Public Law 99-660 (42 USC 11101, et seq.).~~

~~(p) "NREMT" means the National Registry of Emergency Medical Technicians.~~

~~(q) and (r) remain the same but are renumbered (h) and (i).~~

~~(s) "USDOT" means United States Department of Transportation.~~

AUTH: 37-3-203, 50-6-203, MCA

IMP: 37-3-102, 37-3-203, 50-6-101, 50-6-105, 50-6-201, 50-6-202, 50-6-203, 50-6-301, 50-6-302, MCA

REASON: The sections removed are proposed to be relocated in New Rule IV.

4. The proposed new rules are as follows:

NEW RULE I MANAGEMENT OF INFECTIOUS WASTES (1) Each person licensed by the board shall store, transport off premises, and dispose of infectious wastes, as defined in 75-10-1003, MCA, in accordance with the requirements set forth in 75-10-1005, MCA.

(2) Used sharps are properly packaged and labeled within the meaning of 75-10-1005, MCA, when this is done as required by the Occupational Safety and Health Administration (OSHA).

AUTH: 37-1-131, 37-6-106, 37-13-201, 37-25-201, 50-6-203 75-10-1006, MCA

IMP: 37-1-131, 50-6-203, 75-10-1006, MCA

REASON: There is reasonable necessity for the adoption of New Rule I to simplify and shorten the administrative rules. While presently multiple rules set forth virtually identical language to what is proposed here, these rules may be consolidated.

NEW RULE II APPLICATION FOR LICENSURE (1) Each application for licensure from the board must include:

- (a) a completed application form;
- (b) the initial license fee; and

- (c) verification of applicable educational requirements.
- (2) The board's designee will obtain a query from the National Practitioner Data Bank. Applicants for podiatric licensure shall cause a disciplinary report from the Federation of Podiatric Medical Boards to be transmitted directly to the board.
- (3) An applicant licensed in any other jurisdiction at any time shall cause the other jurisdictions to submit a current verification of licensure directly to the board.
- (4) An applicant may voluntarily withdraw their application by written request if the application has not appeared on a board agenda. Application fees are not refundable.

AUTH: 37-1-131, 37-3-203, 37-6-106, 37-20-202, 37-25-201, 50-6-203, MCA
IMP: 37-1-131, 37-6-302, 37-20-203, 37-20-302, 37-20-402, 37-25-302,
50-6-203, MCA

REASON: There is reasonable necessity to adopt New Rule II to shorten and simplify the administrative rules. Presently, the board has multiple rules governing license applications. This proposal seeks to simplify the rules by consolidating all such rules into one location, applicable to most all license types.

NEW RULE III UNPROFESSIONAL CONDUCT (1) It is unprofessional conduct for a licensee or applicant to violate any statute, rule, or standard of care governing their scope of practice.

- (2) In addition, the following is unprofessional conduct:
 - (a) failure to cooperate in any investigation of the board or to provide any information requested by the board or its agents;
 - (b) failure to report to the board within thirty days from the date of a final judgment, order, or agency action, all information related to malpractice, misconduct, criminal, or disciplinary action in which the licensee or applicant is a party;
 - (c) abusive billing practices;
 - (d) testifying in court on a contingency basis;
 - (e) administering, dispensing, prescribing, ordering, or otherwise diverting a controlled substance as defined by the federal Food and Drug Administration or its successors, otherwise than in the course of legitimate or reputable professional practice;
 - (f) regarding patient records, to fail to:
 - (i) appropriately secure records;
 - (ii) appropriately document patient care; or
 - (iii) transfer records to another licensed health care provider, the patient, or the patient's representative when requested to do so by the patient or the patient's legally designated representative;
 - (g) termination of an existing relationship with a patient for whatever reason without verifiable written notice prior to terminating the relationship, and sufficiently far in advance to allow other medical care to be secured;
 - (h) sexual abuse, sexual misconduct, or sexual exploitation by the licensee, whether or not related to the licensee's practice;
 - (i) failure to supervise, appropriately direct, or train individuals under the licensee's supervision according to applicable law, rule, or standards;

- (j) failure to comply with an agreement entered into by the licensee with the medical assistance program;
- (k) for physician assistants, failure to submit to the board a completed supervision agreement prior to commencing practice in Montana;
- (l) while under investigation or during a pending complaint, in Montana or elsewhere, but prior to a determination:
 - (i) withdrawing an application for licensure, certification, or registration; or
 - (ii) voluntarily relinquishing or surrendering of professional or occupational license, certification, or registration;
- (m) engaging in practice under a license issued by the board as the partner, agent, or employee of, or in joint venture with, a person who does not hold an equivalent license for practice. However, this rule does not prohibit:
 - (i) the incorporation of an individual licensee or group of licensees as a professional service corporation under Title 35, chapter 4, MCA, a professional limited liability company under Title 35, chapter 8, MCA, or a professional limited liability partnership under Title 35, chapter 10; or
 - (ii) practicing medicine as the partner, agent, or employee of, or in joint venture with, a hospital, medical assistance facility, or other licensed health care provider; however:
 - (A) there must be a written agreement that the relationship may not affect the independent judgment of the licensee;
 - (B) the independent judgment of the licensee must, in fact, not be affected by the relationship; and
 - (C) the licensee may not be required to refer any patient to a particular provider or supplier or take any other action that the physician or physician assistant determines not to be in the patient's best interest;
- (n) for physicians and physician assistants, failure to report to the board any loss of privileges within 30 days.

AUTH: 37-1-131, 37-1-319, 37-3-202, 37-6-106, 37-13-201, 37-25-201, 50-6-203, MCA

IMP: 37-1-131, 37-1-316, 37-1-319, 37-3-323, 37-3-401, 37-3-405, 37-6-311, 37-25-201, 50-6-203, MCA

REASON: The board presently has one unprofessional conduct rule for each license type. There is reasonable necessity, as part of ongoing efforts to shorten, simplify, and clarify the administrative rules, to consolidate these rules into this single new rule. This new rule further eliminates duplication of statutory provisions in rule.

NEW RULE IV DEFINITIONS AND ABBREVIATIONS (1) As used in this chapter, the following terms are defined:

(a) "Act" means the statutory provisions governing the licensee's scope of practice.

(b) "Applicant" means a person who has applied to take a licensing examination in Montana or who has applied for licensure in Montana.

(c) "Board" means the Board of Medical Examiners created by 2-15-1731, MCA.

(d) "Foreign medical graduate" means a graduate of a medical school that is listed in the World Health Directory of Medical Schools but is not located in a state or territory of the United States or the District of Columbia.

(e) "Health corps physician" means a physician who has applied to participate in the health corps and completed the registration requirements set by the board.

(f) "Intern," "in post-graduate year 1" or "PGY-1" means a person who:

(i) has graduated from an approved medical school;

(ii) is enrolled in a training program approved for first year post-graduates;

(iii) has passed USMLE Steps 1 and 2 or the AOA equivalent; and

(iv) is preparing for or awaiting the results of USMLE Step 3 or the AOA equivalent.

(g) "Licensee" means the current holder of an active license issued by the board.

(h) "Medical student" means a person currently enrolled in or who has graduated from an approved medical school who has not yet entered PGY-1.

(i) "Paramedic" means a level of emergency care provider as established in 50-6-202, MCA.

(j) "Resident" means a person who:

(i) has the degree of medical doctor or doctor of osteopathy from an approved medical school;

(ii) is in post-graduate year 2 (PGY-2) or above;

(iii) has either completed the USMLE Steps 1 and 2 or the AOA equivalent or holds a certificate from the ECFMG; and

(iv) is enrolled in an approved residency program.

(k) "Retired," applicable to the Montana Health Corps Act, means no longer maintaining a private, institutional, or governmental practice for the purposes of monetary remuneration within the United States. Occasional locum tenens work for monetary remuneration will not disqualify a physician from retired status.

(l) "Standards of dietetic practice" means Academy of Nutrition and Dietetics Standards of Practice in Nutrition Care and Standards of Professional Performance for Registered Dietitian Nutritionists and the Academy of Nutrition and Dietetics/Commission on Dietetic Registration Code of Ethics for the Nutrition and Dietetics Profession.

(m) "Supervision" may be of the following types:

(i) "Direct supervision" means the supervisor is physically present with the person being supervised;

(ii) "General supervision" means accepting responsibility for, and overseeing the medical services of, a physician assistant by telephone (voice or text), radio, video, or in person as frequently as necessary considering the location, nature of practice, and experience of the physician assistant;

(iii) "On-site supervision" means the supervisor must be in the facility and quickly available to the person being supervised.

(n) "Surgery" means any procedure in which human tissue is cut or altered by mechanical or energy forms, including electrical or laser energy or ionizing radiation.

(2) As used in this chapter, the following abbreviations are identified:

(a) "AEMT" means a licensed advanced emergency medical technician.

(b) "ABMS" means the American Board of Medical Specialties.

(c) "ACGME" means the Accreditation Council for Graduate Medical Education.

(d) "AOA" means the American Osteopathic Association.

(e) "CIHC" means community-integrated health care, as defined under 37-3-102, MCA.

(f) "ECFMG" means the Educational Commission for Foreign Medical Graduates.

(g) "ECP" means a licensed emergency care provider.

(h) "EMR" means a licensed emergency medical responder.

(i) "EMS" means a licensed emergency medical service.

(j) "EMT" means a licensed emergency medical technician.

(k) "NPDB" means the National Practitioner Databank established by Public Law 99-660 (42 U.S.C. 11101, et seq.).

(l) "NREMT" means the National Registry of Emergency Medical Technicians.

(m) "USDOT" means the United States Department of Transportation.

(n) "USMLE" means the United States Medical Licensing Examination or its successor.

AUTH: 37-1-131, 37-3-203, 37-3-301, 37-3-802, 37-13-201, 37-25-201, 50-6-203, MCA

IMP: 37-1-131, 37-3-102, 37-3-201, 37-3-203, 37-3-301, 37-3-305, 37-3-307, 37-3-325, 37-3-326, 37-3-802, 37-3-804, 37-13-201, 37-13-302, 37-25-201, 37-25-302, 50-6-101, 50-6-105, 50-6-201, 50-6-202, 50-6-203, 50-6-301, 50-6-302, MCA

REASON: Reasonable necessity exists to adopt this new rule as part of the effort to simplify and shorten the administrative rules. Presently, the board has multiple definitions sections. This proposal consolidates those definitions into a single rule for ease of use by the public.

NEW RULE V POINT INJECTION EDUCATION AND TRAINING (1) Point injection is the subcutaneous, intramuscular, and intradermal injection of substances consistent with the practice of acupuncture to stimulate acupuncture points, ashi points, trigger points, motor points, and pathways. Point injection includes trigger points as a subset of acupuncture points and ashi points as recognized in the current practice of acupuncture and Eastern medicine.

(a) Substances for point injection include, but are not limited to, saline, sterile water, and herbs, vitamins in liquid, and homeopathic and nutritional substances which are specifically manufactured for injection by means of hypodermic needles.

(b) Point injection also includes injection of local anesthetics, such as lidocaine and procaine, for reduction of pain during point injection, consistent with the practice of acupuncture and Eastern medicine and training requirements as defined in rule.

(2) To perform point injection, an acupuncturist must be trained in point injection. Only acupuncturists who have NCCAOM Oriental Medicine Certification, which includes specific herbal training requirements and testing, may perform point injection with herbs.

(3) Point injection training requires:

(a) twenty-four contact hours of training including at least eight hours of in person, hands-on experience;

(b) indications, contraindications, and universal precautions;

(c) compounding and administration of the substances authorized for point injection, including aseptic technique, recordkeeping, and storage;

(d) emergency procedures, such as administration of oxygen and responding to adverse reactions and including the use of intramuscular epinephrine. Up to two hours of training in the use of intramuscular epinephrine may be counted toward point injection training. An acupuncturist who holds an additional active license with a scope of practice that includes the authority to prescribe, dispense, or administer epinephrine does not need to meet the requirements of this subsection;

(e) an instructor with the following credentials:

(i) a health care license in good standing with a scope of practice that includes point injection; and

(ii) at least five years of experience in a health care practice that includes point injection; and

(f) providing a successful candidate with:

(i) a certificate of successful completion of the training; and

(ii) a course syllabus which outlines the schedule and curriculum of the training.

(4) Acupuncturists shall order and use traditional oriental and modern medical diagnostic techniques to assist in acupuncture diagnosis, corroboration, monitoring of an acupuncture treatment plan, or referral of a patient to other health care providers.

AUTH: 37-13-201, MCA

IMP: 37-13-103, 37-13-302, MCA

REASON: Reasonable necessity exists to adopt this rule to define the scope of training and education required to perform point injection. This rule implements the requirements of Senate Bill 121 (2021), which are included within the definition of acupuncture point injection. To ensure the safe practice of this technique and to protect public safety and health, the board proposes this new rule.

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

24.156.1006 MANAGEMENT OF INFECTIOUS WASTES

AUTH: 37-1-131, 37-6-106, 75-10-1006, MCA
IMP: 37-1-131, 75-10-1006, MCA

24.156.1308 MANAGEMENT OF INFECTIOUS WASTES

AUTH: 37-1-131, 37-25-201, 75-10-1006, MCA
IMP: 37-1-131, 75-10-1006, MCA

24.156.1413 MANAGEMENT OF INFECTIOUS WASTES

AUTH: 37-1-131, 37-13-201, 75-10-1006, MCA
IMP: 37-1-131, 75-10-1006, MCA

24.156.1626 MANAGEMENT OF INFECTIOUS WASTES

AUTH: 37-1-131, 75-10-1006, MCA
IMP: 37-1-131, 75-10-1006, MCA

24.156.2775 MANAGEMENT OF INFECTIOUS WASTES

AUTH: 50-6-203, MCA
IMP: 37-1-131, 50-6-203, MCA

REASON: There is reasonable necessity to repeal the foregoing rules because they are substantively identical and are proposed to be replaced with New Rule I. Repeal of these rules furthers the interests of the Red Tape Relief Initiative of simplicity, shortening, and clarification of administrative rules.

24.156.603 APPLICATIONS – EXPEDITED LICENSURE

AUTH: 37-1-131, 37-3-203, MCA
IMP: 37-1-131, 37-3-101, 37-3-202, 37-3-305, 37-3-306, 37-3-309, MCA

24.156.1001 APPLICATION FOR LICENSURE

AUTH: 37-3-203, 37-6-106, MCA
IMP: 37-6-302, MCA

24.156.1303 LICENSURE APPLICATION

AUTH: 37-1-131, 37-25-201, MCA
IMP: 37-25-302, MCA

24.156.1304 APPLICATION FOR LICENSURE

AUTH: 37-1-131, 37-25-201, MCA
IMP: 37-1-131, 37-25-302, MCA

24.156.1404 APPLICATION FOR LICENSURE

AUTH: 37-13-201, MCA

IMP: 37-13-201, 37-13-302, MCA

24.156.1617 APPLICATION FOR PHYSICIAN ASSISTANT LICENSE

AUTH: 37-1-131, 37-20-202, MCA

IMP: 37-1-131, 37-20-203, 37-20-302, 37-20-402, MCA

24.156.2713 ECP LICENSE APPLICATION

AUTH: 37-1-131, 50-6-203, MCA

IMP: 37-1-131, 50-6-203, MCA

REASON: Reasonable necessity exists to repeal the foregoing rules because they are incorporated into New Rule II. Repeal of these rules furthers the interests of the Red Tape Relief Initiative of simplicity, shortening, and clarification of administrative rules. In addition, ARM 24.156.603 is no longer necessary because it predates and duplicates the intent of the physician licensure compact. Its continuing relevant provisions are therefore duplicative of 37-3-356, MCA.

24.156.619 OBLIGATION TO REPORT TO BOARD

AUTH: 37-1-131, 37-1-319, 37-3-202, MCA

IMP: 37-1-131, 37-1-319, 37-3-323, 37-3-401, 37-3-405, MCA

24.156.1007 OBLIGATION TO REPORT TO BOARD

AUTH: 37-1-131, 37-1-319, 37-6-106, MCA

IMP: 37-1-131, 37-1-319, 37-6-311, MCA

24.156.1309 OBLIGATION TO REPORT TO THE BOARD

AUTH: 37-1-131, 37-25-201, MCA

IMP: 37-1-131, 37-25-201, MCA

24.156.1407 OBLIGATION TO REPORT TO THE BOARD

AUTH: 37-1-131, 37-13-201, MCA

IMP: 37-1-131, MCA

24.156.2707 REPORTING TO THE BOARD

AUTH: 50-6-203, MCA

IMP: 50-6-203, MCA

REASON: Reasonable necessity exists to repeal the foregoing rules because they are incorporated by reference into New Rule III. Repeal of these rules furthers the interests of the Red Tape Relief Initiative of simplicity, shortening, and clarification of administrative rules.

24.156.625 UNPROFESSIONAL CONDUCT

AUTH: 37-1-319, 37-3-203, MCA

IMP: 37-1-131, 37-1-316, 37-3-202, 37-3-305, 37-3-309, 37-3-323, MCA

24.156.1005 UNPROFESSIONAL CONDUCT

AUTH: 37-1-319, 37-6-106, MCA

IMP: 37-1-316, 37-6-311, MCA

24.156.1307 UNPROFESSIONAL CONDUCT

AUTH: 37-1-319, 37-25-201, MCA

IMP: 37-1-316, 37-25-308, MCA

24.156.1412 UNPROFESSIONAL CONDUCT

AUTH: 37-1-136, 37-1-319, 37-13-201, MCA

IMP: 37-1-308, 37-1-309, 37-1-310, 37-1-311, 37-1-312, 37-1-316, 37-1-319, 37-13-201, MCA

24.156.1625 UNPROFESSIONAL CONDUCT

AUTH: 37-1-319, 37-20-202, MCA

IMP: 37-1-316, 37-1-319, 37-3-202, 37-20-403, MCA

24.156.2705 UNPROFESSIONAL CONDUCT

AUTH: 50-6-203, MCA

IMP: 50-6-203, MCA

REASON: The foregoing rules are proposed to be repealed in favor of a consolidated unprofessional conduct rule applicable to all license types (New Rule III). Additionally, these rules contained a variety of unprofessional conduct types which were duplicative of statute.

24.156.501 DEFINITIONS

AUTH: 37-3-203, MCA

IMP: 37-3-102, 37-3-201, 37-3-305, 37-3-307, 37-3-325, 37-3-326, MCA

REASON: The definitions in this rule are consolidated into New Rule IV.

24.156.629 DEFINITIONS

AUTH: 37-1-131, 37-3-203, 37-3-802, MCA

IMP: 37-1-131, 37-3-802, 37-3-804, MCA

REASON: The terms "board," "health corps physician," "licensee," and "retired" have been recodified in New Rule IV. Transferring these rules serves the interests of shortening, clarifying, and simplifying the administrative rules so that all definitions are centralized, and terms defined in multiple rules are defined only once. The term "Montana Health Corps" was not used in the administrative rules and was therefore unnecessary.

24.156.802 DEFINITIONS

AUTH: 37-3-203, 37-3-301, MCA

IMP: 37-3-102, 37-3-301, MCA

REASON: The definitions in this rule were unnecessary or have been recodified in New Rule IV. Though defined, "in-person encounter" was the plain language meaning of the term. As such, further definition was unnecessary. The defined term "physician-patient relationship" is duplicative of the requirements set forth in ARM 24.156.813 for the establishment of such relationship. The term "practice of telemedicine" solely adopted the statutory definition of the term. Administrative rules are not to duplicate statute unnecessarily. The term "licensee" is incorporated in New Rule IV.

24.156.1301 DEFINITIONS

AUTH: 37-1-131, 37-25-201, MCA

IMP: 37-25-201, 37-25-302, MCA

REASON: Definitions set forth in this rule were unnecessary. The terms Academy and Commission could be readily included in their entirety in ARM 24.156.1306, which was the only rule reliant on the terms. The term "act," though defined, was nowhere used. The definition for standards of dietetic practice is recodified in New Rule IV.

24.156.1401 DEFINITIONS

AUTH: 37-1-131, 37-13-201, MCA

IMP: 37-13-201, 37-13-302, MCA

REASON: The definition of "examinations" is not needed because the term is not used without defining it more specifically in rule. The definition of "Council of Colleges for Acupuncture and Oriental Medicine" is not needed because the

definition defines the substantive work of the organization, which is set forth elsewhere in rule. Definitions (2) and (4) merely set forth predecessor organizations. It is unnecessary to state in rule these predecessor organizations.

24.156.1601 DEFINITIONS

AUTH: 37-20-202, MCA

IMP: 37-20-101, 37-20-301, 37-20-403, MCA

REASON: The definitions from this rule are proposed to be consolidated into New Rule IV.

6. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Medical Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or e-mail to dlibsmed@mt.gov, and must be received no later than 5:00 p.m., July 8, 2022.

7. An electronic copy of this notice of public hearing is available at <http://boards.bsd.dli.mt.gov/med>. Although the department strives to keep its websites accessible at all times, concerned persons should be aware that websites may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing a website do not excuse late submission of comments.

8. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons wishing to have their name added to the list shall make a written request that includes the name and e-mail or mailing address of the person to receive notices and specifies the intent to receive notices of all board administrative rulemaking proceedings or a particular subject matter. The request must indicate whether e-mail or standard mail is preferred and may be sent or delivered to the Board of Medical Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to (406) 841-2305; e-mailed to dlibsmed@mt.gov; or by completing a request form at any rules hearing held by the board.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled by telephonic communication on March 7, 2022, and by electronic communication on March 7, 2022, March 8, 2022, and April 18, 2022.

10. Pursuant to 2-4-111, MCA, the board has determined that the rule changes proposed in this notice will not have a significant and direct impact upon small businesses.

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

BOARD OF MEDICAL EXAMINERS
CHRISTINE EMERSON, NUTRITIONIST,
PRESIDENT

/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 May 31, 2022.

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 37.8.311 pertaining to changing) PROPOSED AMENDMENT
the identification of sex on birth)
certificates)

TO: All Concerned Persons

1. On June 30, 2022, at 9:00 a.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/81839335993?pwd=emVld1VrQ1N4QnIPY0RjRkpGdVMvUT09>, meeting ID: 818 3933 5993; or

(b) Dial by telephone +1 646 558 8656, meeting ID: 818 3933 5993. Find your local number: <https://mt-gov.zoom.us/j/81839335993>.

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 June 16, 2022, to advise us of the nature of the accommodation that you need. Please contact Kassie Thompson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.8.311 ADOPTIONS, NAME CHANGES, AND SEX CHANGES

(1) through (4) remain the same.

(5) For any period in which the department is subject to an injunction against enforcement of S.B. 280, codified at 50-15-224, MCA, or S.B. 280 is held invalid, (5)(b) applies. Otherwise, (5)(a) applies.

(5) (a) The sex of a registrant as cited on a certificate may be amended only if the department receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of an individual born in Montana has been changed by surgical procedure. The order must contain sufficient information for the department to locate the original record. If the registrant's name is also to be changed, the order must indicate the full name of the registrant as it appears on the original birth certificate and the full name to which it is to be amended. If the order directs the issuance of a new certificate that does not show amendments, the new

certificate will not indicate on its face that it was amended. If the sex of an individual was listed incorrectly on the original certificate, refer to ARM 37.8.108.

(b) The sex of a registrant as cited on a certificate may be corrected only if:

(i) the sex of an individual was listed incorrectly on the original certificate as a result of a scrivener's error or a data entry error, and the department receives a correction affidavit and supporting documents, consistent with ARM 37.8.108(4), (5), and (6), including a copy of the records of the health care facility or attending health care professional, contemporaneous to the birth, that identify the sex of the individual, with an affidavit from the health care facility or professional attesting to the date and accuracy of the records; or

(ii) the sex of the individual was misidentified on the original certificate and the department receives a correction affidavit and supporting documents, consistent with ARM 37.8.108(4) and (5), including a copy of the results of chromosomal, molecular, karyotypic, DNA, or genetic testing that identify the sex of the individual, together with an affidavit from the health care facility, health care professional, or laboratory testing facility that conducted the test and/or analyzed the test results, attesting to the test results and their accuracy.

AUTH: 50-15-102, 50-15-103, 50-15-204, 50-15-208, 50-15-223, MCA

IMP: 50-15-102, 50-15-103, 50-15-203, 50-15-204, 50-15-208, 50-15-223, 50-15-224, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) has an obligation to ensure the accuracy of vital records. As with the emergency rule, this proposed rule obeys the preliminary injunction currently in place with respect to enforcement of S.B. 280, addresses a critical regulatory gap, and remains consistent with current law, as well as the science.

The department is proposing to amend ARM 37.8.311(5) to provide for the accurate identification of sex on birth certificates, consistent with its statutory authority and any injunction against the enforcement of S.B. 280, codified at 50-15-224, MCA, to which it may be subject (or any potential invalidation of S.B. 280).

On May 23, 2022, the department adopted a temporary emergency rule pertaining to changing the identification of sex on birth certificates. See MAR Notice No. 37-1001. By law, the temporary emergency rule cannot remain in effect for a period of more than 120 days. 2-4-303, MCA. The department is proposing this rulemaking to ensure a regulatory framework remains in place for changing the identification of sex on birth certificates following expiration of the temporary emergency rule.

Under Montana law, the department is charged with establishing a statewide system of vital statistics and with adopting rules for gathering, recording, using, amending, and preserving vital statistics and vital records, relating to births, deaths, fetal deaths, marriages, and dissolutions of marriage. See, e.g., 50-15-102 and 50-15-103, MCA. Montana statutes contemplate that the birth certificates and other

records of birth include the sex of the child. See, e.g., 50-15-203, MCA (written report which constitutes a birth certificate for a child of unknown parentage shall contain the sex of the child); 50-15-224, MCA (amendment of the sex of a person cited on a birth certificate); 50-15-304, MCA (substitute birth certificate for an adopted person shall contain the sex of such person). Under regulations promulgated by the department, each certificate of birth and certified copy of a birth record (as well as of a birth that resulted in a stillbirth) has to include the sex of the registrant. ARM 37.8.128(2)(e) and (4)(e); 37.8.301(4) (if birth occurs other than in a health care facility, birth certificate must be filed along with an affidavit including the child's sex); and 37.8.311 (amendment of birth certificate for sex changes).

In 2007, the department adopted a new rule (ARM 37.8.311(5)) that the sex of a registrant (the individual about whom a birth certificate pertains) as cited on a certificate may be amended only if the department receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the individual born in Montana has been changed by surgical procedure, and providing certain information. See 2007 MAR page 2127 (Dec. 20, 2007), corrected, 2008 MAR page 169 (Jan. 31, 2008). It cross-referenced another ARM provision with respect to situations where the sex of an individual was listed incorrectly on the original birth certificate. *Id.*¹ Subsequently, in 2017, the department amended ARM 37.8.311(5). Apparently purporting to change the "sex" data element on birth certificates to a "gender" data element, the amended rule provided that the gender of a registrant could be corrected if the department received a correction affidavit, accompanied by (1) "a completed gender designation form issued by the department certifying under penalty of perjury that the individual had undergone gender transition or has an intersex condition and that the gender designation on the person's birth certificate should be changed accordingly, and the request . . . is not for any fraudulent or other unlawful purpose"; (2) "presentation of a government-issued identification displaying the correct gender designation"; or (3) "a certified copy of an order from a court with appropriate jurisdiction indicating that the gender of an individual born in Montana has been changed." 2017 MAR page 2436 (Dec. 22, 2017). The 2021 Montana legislature enacted S.B. 280, which was signed into law on April 30, 2021, was immediately effective, and, essentially, adopted into the Montana Code the provisions of the 2007 rule. See 50-15-224, MCA. Pursuant to legislative direction, the department amended its rules to re-adopt the version of the provision in effect prior to the 2017 rulemaking and to repeal the provisions adopted in the 2017 rulemaking.² The proposed rule was published on May 28, 2021, and the notice of adoption was published on July 23, 2021, with the effective date of July 24, 2021.

The constitutionality of S.B. 280 was challenged in a lawsuit filed against the State of Montana, the Governor, the department and the director in Montana's Thirteenth Judicial District Court, Yellowstone County, as well as in complaints filed with the

¹ In 2015, the department made nonsubstantive revisions to the regulation. See MAR Notice No. 37-714, 2015 MAR page 1492 (Sept. 24, 2015).

² The 2021 rule maintained the nonapplicability of the provision with respect to situations where the sex of the person was designated incorrectly on the original birth certificate due to data entry error.

State Human Rights Bureau; plaintiffs also pled claims for discrimination under the Montana Civil Rights Act. Plaintiffs sought a preliminary injunction against enforcement of S.B. 280 on July 19, 2021. The defendants sought dismissal of the lawsuit on August 17, 2021.

On April 21, 2022, the district court issued its Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss and Granting Plaintiffs' Motion for a Preliminary Injunction (decision). While dismissing plaintiffs' claim under the Montana Human Rights Act, the court concluded that plaintiffs had adequately pled their other claims. The district court granted plaintiffs' request for a preliminary injunction, finding that "Plaintiffs here established a prima facie case that SB 280 impermissibly [sic] vague in all of its applications and thereby unconstitutionally violates Plaintiffs' fundamental right to due process because it is unconstitutionally void." Apr. 21, 2022 Decision at ¶ 170. "[F]or the purposes of [the] preliminary injunction," the court expressly "declined to analyze whether SB 280 reaches constitutionally protected conduct." Decision at ¶ 157a. The court granted plaintiffs' motion for preliminary injunction and enjoined the department and the other defendants "from enforcing any aspect of SB 280 during the pendency of this action according to the prayer of the Plaintiffs' motion and complaint." Decision at 35.³

The court's decision leaves this department in an ambiguous and uncertain situation. The court's preliminary injunction means that, pending final resolution of the litigation, the department's Office of Vital Records (OVR) cannot accept and process birth certificate sex designation amendment applications according to the procedures set forth in S.B. 280 and the department rules that implement S.B. 280. Yet the effect of the 2021 rulemaking was to eliminate the 2017 rule, just as one effect of the 2017 rule was to eliminate the 2007 rule. The court did not issue a mandatory injunction directing the department to re-implement the 2017 rule. Accordingly, aside from the department's temporary emergency rule under MAR Notice No. 37-1001, there is currently no non-enjoined regulatory mechanism by which the department can accept and process birth certificate sex identification amendment applications.⁴ While the court's preliminary injunction currently

³ Although plaintiffs amended their complaint long after the 2021 rules were published, neither their initial complaint, their amended complaint nor their other pleadings ever requested any relief related to the 2021 rulemaking. Instead, plaintiffs' amended complaint requested that the court:

- Declare S.B. 280 unconstitutional on its face and as applied;
- Declare S.B. 280 illegal under the Montana Human Rights Act;
- Declare S.B. 280 illegal under the Code;
- Preliminarily and permanently enjoin Defendants, as well as their agents, employees, representatives, and successors, from enforcing S.B. 280, directly or indirectly;
- Award Plaintiffs' the reasonable attorney's fees and costs incurred in bringing this action; and
- Grant any other relief the Court deems just.

⁴ Such an order would be improper because plaintiffs did not seek a mandatory injunction or otherwise request that the department re-implement the 2017 rule. Even if plaintiffs had requested this relief, they did not meet the standard for a mandatory injunction, which is a different and higher standard than the standard for a preliminary injunction. Notably, despite the fact that S.B. 280 was effective upon passage and approval, plaintiffs did not immediately file suit nor did they seek a

precludes OVR from accepting and processing birth certificate sex designation amendment applications pursuant to the procedures set forth in S.B. 280, there is a perception that OVR should be accepting birth certificate sex designation amendment applications and – regardless of where such applications would ordinarily stand in OVR's backlog of applications for changes to Montana vital records – immediately process such applications pursuant to the non-existent 2017 rule. The department needs to correct this confusion and clearly set forth the standards, through ordinary rulemaking, under which such applications will continue to be processed.

The department's 2007 rule, as well as SB 280 (which largely codified in statute that rule), was premised on the proposition that an individual's sex could be changed by surgery. But, in the decision finding plaintiffs had established a prima facie case that S.B. 280 is impermissibly vague and violates due process, the court found that "Plaintiffs provided un rebutted evidence describing that neither gender-affirming surgery nor any other medical treatment that a transgender person undergoes changes that person's sex" – that "no surgery changes a person's sex" – but that surgery "aligns a person's body and lived in experience with the person's gender identity," which the court found is "a person's fundamental internal sense of belonging to a particular gender." Decision at ¶¶ 161, 42.

The court's finding that "no surgery changes a person's sex" has caused the department to consider the issue. The National Institutes of Health (NIH), a component of the U.S. Department of Health and Human Services, matter-of-factly explains that

"Sex" is a biological classification encoded in our DNA. Males have XY chromosomes, and females have XX chromosomes. Sex makes us male or female. Every cell in your body has a sex—making up tissues and organs, like your skin, brain, heart, and stomach. Each cell is either male or female, depending on whether you are a man or a woman.⁵

In 2014, recognizing that there were differences in disease manifestation and response to treatment between men and women and that research about such differences may be critical to the interpretation, validation, and generalizability of research findings – and may inform clinical interventions – NIH issued a policy on sex as a biological variable in research.⁶ In guidance issued on that policy, NIH

temporary restraining order after they filed the suit but before the department had concluded the 2021 rulemaking. Nor would it be appropriate to grant plaintiffs, at this preliminary stage of the litigation, the relief to which they would only be entitled if they obtain final relief on the merits. See *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963) ("it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial."); see also *United States v. Barrows*, 404 F.2d 749, 752 (9th Cir. 1968).

⁵ NIH, Office of Research on Women's Health, *How Sex and Gender Influence Health and Disease*, https://orwh.od.nih.gov/sites/orwh/files/docs/SexGenderInfographic_11x17_508.pdf.

⁶ See NIH, *Consideration of Sex as a Biological Variable in NIH-funded Research*, NOT-OD-15-102, issued June 9, 2015, <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-15-102.html>.

noted that "[s]ex is a biological variable defined by characteristics encoded in DNA."⁷ An NIH leader further explained, "'[s]ex' originates from an organism's sex chromosome complement—XX or XY chromosomes in humans, and is reflected in the reproductive organs. Each cell has a sex."⁸ An Endocrine Society scientific statement notes that "[s]ex is a biological concept" and that "[h]uman biological sex is often assessed by examining the individual's complement of sex chromosomes as determined by karyotypic analysis."⁹ Thus, as some scientists have noted, "[h]uman sex is an observable, immutable and important biological classification"; it is biological (and, thus, genetic), binary, and immutable.¹⁰ The department agrees.

⁷ NIH Guidance, Consideration of Sex as a Biological Variable in NIH-funded Research (NIH Guidance) at 1 (2017), https://orwh.od.nih.gov/sites/orwh/files/docs/NOT-OD-15-102_Guidance.pdf; see also Journal of Women's Health, *Sex as a Biological Variable: A 5-Year Progress Report and Call to Action* (June 2020), <https://pubmed.ncbi.nlm.nih.gov/31971851/>.

⁸ Janine A. Clayton, *Applying the new SABV (Sex as a Biological Variable) policy to research and clinical care*, *Physiology & Behavior* 187 (2018) 2-5 (published online Aug. 17, 2017), <https://doi.org/10.1016/j.phybeh.2017.08.012>; see also Leah R. Miller, Cheryl Marks, et al., *Considering sex as a biological variable in preclinical research*, 31 *Federation of American Societies for Experimental Biology Journal* 29-34 (Sept. 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6191005> (defining "Sex" as "being XY or XX"). In contrast, NIH defines "gender" as the "social, cultural, and psychological traits linked to human males and females through social context." See NIH Guidance, *supra*, at 1; Janine Clayton, *supra*, at 2. Other sources describe gender as "psychological or cultural rather than biological," or as including "perception of the individual as male, female, or other, both by the individual and by society." See Robert J. Stoller, *Sex and Gender: On the Development of Masculinity and Femininity* 9 (1968) (describing gender as "psychological or cultural rather than biological"); Adhi Bhargava, Arthur P. Arnold, et al., *Considering Sex as a Biological Variable in Basic and Clinical Studies: An Endocrine Society Scientific Statement*, *Endocrine Review* (June 2021) 42(3):219-258, 220-221, 228 (published online Mar. 11, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8348944/> ("The terms sex and gender should not be used interchangeably. Sex is dichotomous, with sex determination in the fertilized zygote, stemming from unequal expression of sex chromosomal genes. By contrast, gender includes perception of the individual as male, female, or other, both by the individual and by society."); see also "Gender," *Lexico*, <https://www.lexico.com/en/definition/gender> ("Gender" means "[e]ither of the two sexes ... when considered with reference to social and cultural differences rather than biological ones"); Alberto Frigerio, Lucia Ballerini, et al., *Structural, Functional and Metabolic Brain Differences as a Function of Gender Identity or Sexual Orientation: A Systematic Review of the Human Neuroimaging Literature*, *Archives of Sexual Behavior* (2021) 50:3329-3352, 3329 (published online May 6, 2021), <https://doi.org/10.1007/s10508-021-02005-9> ("we refer to 'sex' to the biological condition (chromosomal, gonadal, and phenotypic), 'gender' to the inner psychological perception of one's own identity (gender identity) and to the outer cultural perception in behavior and habits attributed to and assumed by masculinity and femininity (gender role) . . ."); World Health Organization, "Gender and Health," <https://www.who.int/news-room/questions-and-answers/item/gender-and-health> ("Gender interacts with but is different from sex. The two terms are distinct and should not be used interchangeably. It can be helpful to think of sex as a biological characteristic and gender as a social construct."). With respect to the relationship between sex and gender, it is important to note that "[s]ex is an essential part of vertebrate biology, but gender is a human phenomenon; sex often influences gender, but gender cannot influence sex." Adhi Bhargava, Arthur Arnold et al., *supra*, at 228.

⁹ Adhi Bhargava, Arthur Arnold, et al., *supra*.

¹⁰ Emma Hilton, Pam Thompson, et al., Letter to the Editor, *The reality of sex*, *Irish Journal of Medical Science* (2021) 190:1647 (published online Jan. 15, 2021), <https://doi.org/10.1007/s11845-020-02464-4> (rejecting as "entirely without scientific merit" the claim that "sex is neither fixed nor binary": "there are two sexes, male and female, and in humans, sex is immutable (disorders of sexual development are very rare and, in any event, do not result in any additional sexes)"); see also Georgi

The department has now considered the Montana system for issuing (and amending) birth certificates in light of the foregoing. The department disagrees with the district court in the above-referenced litigation that plaintiffs established a prima facie case that SB 280 is "impermissibly vague in all of its applications and thereby unconstitutionally violates Plaintiffs' fundamental right to due process." However, because sex is a biological concept that is encoded in an individual's DNA and, thus, is genetic and immutable, the department agrees with the district court that "no surgery changes a person's sex." The department, thus, concludes that the premise upon which it based its 2007 rule (which, in turn, appears to have been the basis for S.B. 280) – that an individual's sex could be changed through surgery – was mistaken. As a result, and consistent with the court's preliminary injunction order with respect to S.B. 280, the department does not re-impose the S.B. 280 requirements/2007 rule requirements for amendment of the cited sex on birth certificates in this proposed rulemaking for the period of time injunctive relief remains in effect.

As noted above, when the statutory provisions governing Montana birth certificates and vital records identify the data elements to be collected and included in a Montana birth certificate, one of those data elements is the sex of the person/infant.¹¹ Such statutory provisions use the word "sex,"¹² not "gender" or

K. Marinov, *In Humans, Sex is Binary and Immutable*, Acad. Quest. (2020) 33:279-288 (published online May 9, 2020), <https://doi.org/10.1007/s12129-020-09877-8> ("the objective truth is that sex in humans is strictly binary and immutable, for fundamental reasons that are common knowledge to all biologists taking the findings of their discipline seriously"); Lucy Griffith, Katie Clyde et al., *Sex, Gender, and Gender Identity: A Re-Evaluation of the Evidence*, BJPsych Bulletin (2021) 45:291-299, 293, <https://doi.org/10.1192/bjb.2020.73> ("Humans are sexually dimorphic; there are only two viable gametes and two sexes Sex is determined at fertilization and revealed at birth or, increasing, in utero. The existence of rare and well-described 'disorders (differences) of sexual differentiation' does not negate the fact that sex is binary.").

¹¹ While the specific provision on the creation of a birth certificate or record of birth does not identify the data elements to be collected and recorded, it is clear from the statutory context that the sex of the person is to be recorded because another provision refers to the issuance of substitute birth certificates as including the sex of the person: It would not make sense to have such a provision if the legislature did not intend for the original birth to include the person's sex. See, e.g., 50-15-304, MCA (substitute birth certificate for an adopted person shall contain the sex of such person). And yet another provision establishes that the written report which constitutes a birth certificate for a child of unknown parentage contain the sex of the child. § 50-15-203, MCA. The U.S. standard certificate of birth, see <https://www.cdc.gov/nchs/data/dvs/birth11-03final-ACC.pdf> (last visited May 19, 2022), includes the sex of the infant (male or female), and states uniformly collect and record the sex of the infant on their birth certificates. This vital statistic is important for historical, demographic, public policy and public health reasons.

¹² Both at the time that the vital records provisions in the Montana Code were first adopted and today, and especially in the context of vital records, the term "sex" was (and is) understood to mean biological differences between males and females. Compare American Heritage Dictionary 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); Webster's Third New International Dictionary 2081 (1971) ("[T]he sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change"); 9 Oxford English Dictionary 578 (1961) ("The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished

"gender identity." Because "sex" and "gender" are different concepts, the department would not read the statutory provisions concerning birth certificates or records of births as including "gender" in the requirement to record the sex of the person. This interpretation is consistent with the context: The birth certificate generally records only facts that are known (or knowable) at the time of the person's birth. Sex is one of those facts: A person's sex can be determined – by observation, examination, or testing – at the time of birth. Gender/gender identity, as a social, psychological, and/or cultural construct, cannot.¹³ Consequently, the department has determined that the proper interpretation of the statutory provisions governing birth certificate/vital records and the vital records system is that the person's sex, not his or her gender or gender identity, is required to be recorded on the birth certificate. Thus, the proposed rule amendments do not redesignate, substitute, or conflate the "sex" data element as a "gender" data element on birth certificates, as the 2017 rule did, but maintains it as the "sex" data element in accordance with the relevant statutory directives and scientific evidence.

The 2017 rule permitted the department to "correct" such "gender" data element upon receipt of a correction affidavit accompanied by a "gender designation form" attesting that the individual had undergone gender transition, a copy of a government-issued identification with the correct gender identification, or a copy of a court order that the individual's gender had been changed. As previously established, sex is different from gender and is an immutable genetic fact, which is not changeable, even by surgery. Accordingly, the proposed rule amendments do not authorize the amendment of the sex identified/cited on a birth certificate based on gender transition, gender identity, or change of gender.

The department does acknowledge that there may be some instances in which it would be appropriate for the sex of a person as cited/identified on the birth certificate to be corrected or amended. In this proposed rulemaking, the department recognizes, as it did in the 2007, 2017, and 2021 rules, that there may be data entry errors (or scrivener's errors) that result in the sex of a person being listed incorrectly

as male and female, and of the other physiological differences consequent on these.") with Webster's New World College Dictionary 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions").

¹³ The Office of Vital Records permits changes to correct mistaken or incomplete birth certificates. A new birth certificate can be issued, for instance, that identifies the father when the father was not identified on the original birth certificate. See 50-15-223(1)(b), (5), MCA. Paternity, after all, is a fact that is known or knowable (for example, through genetic testing) at the time of birth. Separate and apart from these corrections, the Montana Legislature enacted specific laws to allow a person to update information reflecting changes to their legal identity. For example, an individual may amend his/her birth certificate to reflect a legal name change. See 27-31-101, MCA; ARM 37.8.311; *In re Marriage of Rager*, 263 Mont. 361, 365, 868 P.2d 625, 627 (1994) ("[T]he child's legal name ... remains so for all purposes unless it is changed by adoption, through a statutory petition for a name change, or by other legal means."). Montana law also authorizes issuance of a new birth certificate that reflects a child's adoptive parents, when the department receives a certificate of adoption provided for by law. See 50-15-223(1)(a), MCA (referencing 50-15-311, MCA). Unlike these changes that reflect historical as well as legal facts, sex—as reported on a birth certificate—records an immutable, unalterable historic fact.

on the original birth certificate. Thus, in this proposed rulemaking, the department provides for the correction of the sex of a person if it was listed incorrectly on the original birth certificate due to a data entry error (or other scrivener's error) in the same way as in those rules, except that the department specifies some of the documentation that is required to support such correction.

The department similarly recognizes that, although likely infrequent, there could be instances in which a person's sex, as a biological, immutable fact, is misidentified at birth and the wrong sex is then cited on the birth certificate – with the misidentification only being discovered later, such as through DNA/genetic testing. Because a person's sex is immutable/unchangeable, the person's correct sex would have been known at birth if testing had been done at the time. In such circumstances, the department has determined that the birth certificate should be corrected. Accordingly, this proposed rulemaking provides for the correction of the birth certificate if the person's sex was misidentified on the original birth certificate and the person supplies documentary proof consisting of, among other things, the results of appropriate testing that establishes the person's sex.

The department notes that a birth certificate is, first and foremost, a vital record which records the facts concerning the birth of a person in Montana. There are important departmental and public health interests in the collection and maintenance of accurate vital statistics and records such as these. It is, therefore, critical that the department's Office of Vital Records has clear direction so that it can administer the vital records program in such a way that ensures the accuracy of such vital records.

ARM 37.8.311

The department proposes that current ARM 37.8.311(5) remain unchanged, but be redesignated as ARM 37.8.311(5)(a).

In new ARM 37.8.311(5), the department proposes that ARM 37.8.311(5), as redesignated ARM 37.8.311(5)(a), apply when and to the extent that the department is not subject to an injunction against enforcement of S.B. 280, codified at 50-15-224, MCA, and S.B. 280 remains valid. The department desires to execute the will of the legislature as set forth in S.B. 280, continues to vigorously defend the legislation in the courts of Montana, and will implement and enforce it, to the extent not enjoined from doing so by the courts. The department is currently subject to such a preliminary injunction. Because of the exigencies of the situation and the fact that, with the imposition of the preliminary injunction, there was currently no non-enjoined regulatory mechanism by which the department could accept and process birth certificate sex identification amendments, it issued an emergency rule (MAR Notice No. 37-1001) to adopt a standard pursuant to which the department's Office of Vital Records would accept and process applications for changes to the sex of a registrant, as identified on the registrant's birth certificate. Recognizing that the emergency rule may expire prior to the resolution of the litigation in which the preliminary injunction was imposed, the department proposes to amend ARM 37.8.311(5) to adopt the provisions of the emergency rule, for as long as the

department is enjoined from enforcing S.B. 280, or S.B. 280 is held invalid. The department clarifies that it relies upon 50-15-224, MCA, enacted by S.B. 280, only with respect to ARM 37.8.311(5)(a).

Consistent with the emergency rule issued in MAR Notice No. 37-1001, the department proposes in new (5)(b), that the sex of a registrant, as cited on a certificate may be corrected only if (i) the sex of the individual was listed incorrectly as a result of a scrivener's error or a data entry error; or (ii) the sex of the individual was misidentified at birth and the wrong sex was identified on the original certificate, with the misidentification only being discovered later. In each case, the department would require the submission of a correction affidavit and supporting documents. The department proposes that the Office of Vital Records be able to determine the amount and type of supporting documentation required in each instance (by cross-reference to the relevant provisions in ARM 37.8.108), but would require the correction affidavit be supported by, respectively, (i) records of the health care facility or attending health care professional, contemporaneous to the birth, that identify the sex of the individual, with an affidavit from the health care facility or professional attesting to the date and accuracy of the records; or (ii) the results of chromosomal, molecular, karyotypic, DNA, or genetic testing that identify the sex of the individual, together with an affidavit from the health care facility, health care professional, or laboratory testing facility that conducted the test and/or analyzed the test results, attesting to the test results and their accuracy. Identification in the rule of specific documentation that will be required to support applications for the correction of the sex identification on an individual's birth certificate will help ensure the accuracy of the birth certificate as a vital record and that the Office of Vital Records only receives applications which meet the standard for the correction of the identification of an individual's sex on the birth certificate.

Finally, the department proposes to amend the listing of MCA provisions that authorize this rulemaking, to include 50-15-208, MCA, and of implementing MCA provisions, to include 50-15-203 and 50-15-208, MCA.

Fiscal Impact

There is no anticipated fiscal impact associated with the proposed amendments to ARM 37.8.311.

The proposed amendments are intended to be effective upon the day after the date of publication of the adoption notice.

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: Kassie Thompson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., July 8, 2022.

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.

/s/ Robert Lishman
Robert Lishman
Rule Reviewer

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

Certified to the Secretary of State May 31, 2022.

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 8.94.3728 pertaining to the)
administration of the Federal)
Community Development Block Grant)
(CDBG) Program – Planning Grants)

TO: All Concerned Persons

1. On April 29, 2022, the Department of Commerce published MAR Notice No. 8-94-198 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 550 of the 2022 Montana Administrative Register, Issue Number 8.

2. No comments or testimony were received.

3. The department has amended the above-stated rule as proposed.

/s/ Amy Barnes
Amy Barnes
Rule Reviewer

/s/ Adam Schafer
Adam Schafer
Deputy Director
Department of Commerce

Certified to the Secretary of State May 31, 2022.

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

| | | |
|--|---|----------------------|
| In the matter of the amendment of |) | NOTICE OF AMENDMENT, |
| ARM 24.2.101, the adoption of NEW |) | ADOPTION, AND REPEAL |
| RULES I through III, and the repeal of |) | |
| ARM 24.2.105, 24.11.905, 24.11.906, |) | |
| and 24.29.201 pertaining to public |) | |
| participation and model rules |) | |

TO: All Concerned Persons

1. On April 29, 2022, the Department of Labor and Industry (department) published MAR Notice No. 24-2-390 pertaining to the public hearing on the proposed amendment, adoption, and repeal of the above-stated rules at page 557 of the 2022 Montana Administrative Register, Issue Number 8.

2. The department held a public hearing in Helena on May 25, 2022, over the Zoom videoconference and telephonic platform at which no members of the public commented. Written comments were received during the public comment period.

3. The department has thoroughly considered the comments made. A summary of the comments and the department's responses are as follows:

COMMENT #1: A commenter suggested the public participation rules are futile and that rules should be shortened at a ratio of four to one.

RESPONSE #1: The department acknowledges the comment that participation rules are futile, but respectfully disagrees. The department is dedicated to public participation in its processes to the extent feasible. The adoption of these new rules will ensure standardization of considerations for public participation and protect the public's right to know and participate. With respect to the notion of shortening rules, the department is engaged in Red Tape Relief efforts geared toward clarifying, simplifying, and, where possible, shortening the administrative rules of Montana. Nonetheless, the comment is outside the scope of the present rulemaking.

COMMENT #2: A commenter suggested that the proposal is problematic because it does not require public comment on all agenda items, instead only requiring comment on items not on the agenda.

RESPONSE #2: The comment is noted, but the department respectfully disagrees. Initially, the rules do not limit public comment to items not on the agenda. Instead, the rules as proposed establish a framework for consideration as to when public comment should be received for items on an agenda—including whether the issue is controversial, the number of individuals affected, the fiscal impact, or whether the public has expressed an interest. The department understands public participation

is essential to its processes and looks forward to continuing to receive comments regarding matters of interest to the public.

4. The department has amended ARM 24.2.101 as proposed.

5. The department has adopted New Rule I (24.2.301), New Rule II (24.2.305), and New Rule III (24.2.309) as proposed.

6. The department has repealed ARM 24.2.105, 24.11.905, 24.11.906, and 24.29.201 as proposed.

/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 May 31, 2022.

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

In the matter of the amendment of) NOTICE OF AMENDMENT AND
ARM 24.38.101, 24.38.105, and) ADOPTION
24.38.111, and the adoption of NEW)
RULES I and II pertaining to)
professional employer organizations)

TO: All Concerned Persons

1. On April 29, 2022, the Department of Labor and Industry (department) published MAR Notice No. 24-38-391 pertaining to the public hearing on the proposed amendment and adoption of the above-stated rules at page 561 of the 2022 Montana Administrative Register, Issue Number 8.

2. The department held a public hearing in Helena on May 24, 2022, over the Zoom videoconference and telephonic platform at which members of the public commented. Written comments were received during the public comment period.

3. The department has thoroughly considered the comments made. A summary of the comments and the department's responses are as follows:

COMMENT #1: One association commented in support of the rules as providing needed clarification for PEOs.

RESPONSE #1: The department acknowledges and appreciates the comment.

COMMENT #2: One commenter questioned whether the rules took into account electronic applications for licensure.

RESPONSE #2: The department appreciates the comment. The rules do not specify the means of application for licensure. As they have been previously, applications may continue to be received electronically.

4. The department has amended ARM 24.38.101, 24.38.105, and 24.38.111 as proposed.

5. The department has adopted New Rule I (24.38.103) and New Rule II (24.38.125) as proposed.

/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 May 31, 2022.

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 and 24.207.504)
pertaining to real property appraiser)
qualification and continuing education)

TO: All Concerned Persons

1. On April 15, 2022, the Board of Real Estate Appraisers (board) published MAR Notice No. 24-207-46 regarding the public hearing on the proposed amendment of the above-stated rules, at page 457 of the 2022 Montana Administrative Register, Issue No. 7.

2. On May 9, 2022, a public hearing was held on the proposed amendment of the above-stated rules via the videoconference and telephonic platform. No comments were received by the May 13, 2022, deadline.

3. The board has amended ARM 24.207.203 and 24.207.504 exactly as proposed.

BOARD OF REAL ESTATE APPRAISERS
PETER FONTANA, CRA
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 May 31, 2022.

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

| | | |
|---------------------------------------|---|-------------------------|
| In the matter of the amendment of |) | NOTICE OF AMENDMENT AND |
| ARM 24.301.109, 24.301.131, |) | REPEAL |
| 24.301.138, 24.301.142, 24.301.146, |) | |
| 24.301.154, 24.301.161, 24.301.171, |) | |
| 24.301.172, 24.301.173, 24.301.175, |) | |
| and 24.301.181 pertaining to building |) | |
| codes incorporation by reference; |) | |
| 24.301.201, 24.301.202, 24.301.204, |) | |
| 24.301.205, 24.301.206, 24.301.207, |) | |
| 24.301.208, 24.301.210, 24.301.212, |) | |
| 24.301.213, and 24.301.231 |) | |
| pertaining to local government |) | |
| enforcement; 24.301.301, 24.301.351, |) | |
| and 24.301.371 pertaining to plumbing |) | |
| requirements; 24.301.401, |) | |
| 24.301.411, 24.301.431, and |) | |
| 24.301.451 pertaining to electrical |) | |
| requirements; 24.301.602, |) | |
| 24.301.603, 24.301.606, and |) | |
| 24.301.607 pertaining to the elevator |) | |
| code; and the repeal of 24.301.209 |) | |
| special reports |) | |

TO: All Concerned Persons

1. On April 15, 2022, the Department of Labor and Industry (department) published MAR Notice No. 24-301-351 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 460 of the 2022 Montana Administrative Register, Issue Number 7.

2. The department held a public hearing in Helena on May 6, 2022, over the Zoom videoconference and telephonic platform. Comments were received during the public comment period.

3. The department has thoroughly considered the comments made. A summary of the comments and the department's responses are as follows:

COMMENT 1: One commenter opposed the Uniform Plumbing Code (UPC) requirements for hot water piping insulation in residential homes, asserting that they add considerable cost to a new home.

RESPONSE 1: A requirement for piping insulation existed in the International Energy Conservation Code (IECC) version 2018 with modifications in ARM 24.301.161. The department has proposed changes to reflect that the requirements

for water pipe insulation reside with the area of responsibility, which is the UPC. The department recognizes the need to balance cost with energy efficiency and will continue to review for possible amendment in the future.

COMMENT 2: Numerous commenters supported the department's adoption of the 2021 IECC and requested an expansion to allow local certified jurisdictions to set their own energy efficiency goals.

RESPONSE 2: The department agrees in the necessity of the 2021 IECC. As allowed in 50-60-301(2)(b), MCA, a local certified jurisdiction may adopt energy conservation standards that exceed the minimum standards contained in the state building code, as long as they are part of a voluntary incentive-based program.

COMMENT 3: Three commenters supported the 2021 IECC adoption and were interested in seeing additional stretch codes like the zero energy residential codes Appendix RC, the Electric Vehicle Readiness stretch code, and the Grid-interactive Efficient Building codes.

RESPONSE 3: The department recognizes a need to continually review and approve modern technologies that can provide a reduction in construction costs while balancing life safety and energy efficiency. The department will review the suggested stretch codes for possible addition in the future.

COMMENT 4: One commenter requested the department amend the 2021 International Mechanical Code (IMC) to allow new A2L refrigerants to be used in heating, ventilation, and air conditioning (HVAC) units. The commenter provided data showing an anticipated shortage of currently approved refrigerants expected, and the intention to approve A2L refrigerants in the 2024 IMC.

RESPONSE 4: The department is responsible under 50-60-103(4), MCA, to recommend tests or require the testing and approval of materials, devices, and methods of construction to ascertain their acceptability under the requirements of the state building code and issue certification of the acceptability. As these new refrigerants have been tested and will be approved in the near future, the department can issue a certification of acceptability to allow the use in Montana upon application for review. That review can be requested by submitting a request with supporting data to buildingcodes@mt.gov.

COMMENT 5: One commenter was concerned about the International Wildland Urban Interface Code (IWUI), its applicability, and a need for education.

RESPONSE 5: The department originally adopted the IWUI in 2016 for optional use by local certified building code programs. The IWUI has been slow to catch on, and the department recognizes the need for additional education and review of the code to facilitate its effective implementation. The department will reach out to the building industry, certified building programs, and other interested parties to form a work group for this purpose.

COMMENT 6: A commenter proposed an exception to the 2020 National Electrical Code Subsection 210.8(A)(2) to allow a dedicated non-ground fault circuit interrupter (GFCI) outlet in garages for freezers. The commenter stated they hear two to three stories a year about people going on vacation and their freezer outlet tripping, losing all their frozen goods, and having a big mess.

RESPONSE 6: The department did not propose any changes to Subsection 210.8 and cannot do so in the final notice. The department will review and monitor issues related to GFCI requirements in garages for possible future necessary amendments.

COMMENT 7: One commenter proposed striking amendments to ARM 24.301.301(1)(q) and (v) as they are contained in the 2021 UPC word for word.

RESPONSE 7: The department did not propose changes to ARM 24.301.301(1)(q) and (v) and cannot do so in the final notice. The department will continue to review the state building code and possibly address these changes in the future.

COMMENT 8: One commenter suggested adding the word "vertical" to ARM 24.301.301(1)(ad) as it would then be the same as the 2021 UPC.

RESPONSE 8: The department did not propose changes to ARM 24.301.301(1)(ad) and cannot do so in the final notice. The department notes that (1)(ad) was specifically added and worded to allow for both horizontal and vertical wet venting. The department will continue to review for possible necessary changes in the future.

COMMENT 9: Several commenters proposed amending ARM 24.301.401, to exempt laundry areas from Arc Fault Circuit Interrupter (AFCI) requirements in the National Electrical Code (NEC) 2020 210.12, AFCI Protection.

RESPONSE 9: The department did not propose changes to the NEC 2020 Subsection 210.12(A), AFCI Protection Dwelling Units related to laundry units and cannot do so in this final notice. As this issue is ongoing with manufacturers of equipment, AFCI producers, and contractors, the department will review this proposed change for possible future amendment.

COMMENT 10: One commenter suggested the department amend ARM 24.301.401, to exempt HVAC equipment from GFCI requirements and provided supporting data to justify the amendment.

RESPONSE 10: The department did not propose changes to the NEC 2020 Subsection 210.8, Ground-Fault Circuit-Interrupter Protection for Personnel and cannot do so in this final notice. The department does acknowledge potential issues with compatibility between HVAC equipment and GFCI protection devices and believes more research is warranted. The department will review this proposed change for possible future amendment.

4. The department received numerous comments both in support of and opposition to the striking of the existing "kitchen" amendment to National Electrical Code (NEC) Subsection 210.12 Arc Fault Circuit Interrupter Protection (AFCI) at ARM 24.301.401(2). In response to the commenters and their concerns, and because this issue remains ongoing with manufacturers of equipment, AFCI producers, and contractors, the department is not proceeding with the proposed striking of (2) and will review this matter for possible future amendment.

5. The department has amended ARM 24.301.109, 24.301.131, 24.301.138, 24.301.142, 24.301.146, 24.301.154, 24.301.161, 24.301.171, 24.301.172, 24.301.173, 24.301.175, 24.301.181, 24.301.201, 24.301.202, 24.301.204, 24.301.205, 24.301.206, 24.301.207, 24.301.208, 24.301.210, 24.301.212, 24.301.213, 24.301.231, 24.301.301, 24.301.351, 24.301.371, 24.301.411, 24.301.431, 24.301.451, 24.301.602, 24.301.603, 24.301.606, and 24.301.607 as proposed.

6. The department has repealed ARM 24.301.209 as proposed.

7. The department has amended ARM 24.301.401 with the following changes, stricken matter interlined, new matter underlined:

24.301.401 INCORPORATION BY REFERENCE OF NATIONAL ELECTRICAL CODE (1) remains as proposed.

(2) Subsection 210.12, Arc-Fault Circuit-Interrupter Protection, is amended to delete all references to "kitchen" or "kitchens."

(2) remains as proposed but is renumbered (3).

AUTH: 50-60-203, 50-60-603, MCA

IMP: 50-60-201, 50-60-203, 50-60-601, 50-60-603, MCA

/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 May 31, 2022.

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

| | | |
|------------------------------------|---|--------------------------|
| In the matter of the adoption of a |) | NOTICE OF ADOPTION OF |
| Temporary Emergency Rule |) | TEMPORARY EMERGENCY RULE |
| pertaining to changing the |) | |
| identification of sex on birth |) | |
| certificates |) | |

TO: All Concerned Persons

1. The Department of Public Health and Human Services (department) adopts the following temporary emergency rule because it desires to provide for the accurate identification of sex on birth certificates. As a result of an April 21, 2022 preliminary injunction issued against the department with respect to enforcement of S.B. 280, codified at 50-15-224, MCA, it is necessary to adopt this emergency rule to govern the procedures of the Office of Vital Records and to inform the public concerning when the Office of Vital Records will change the identification of an individual's sex on the birth certificate, to ensure such accuracy.

2. Under Montana law, the department is charged with establishing a statewide system of vital statistics and with adopting rules for gathering, recording, using, amending, and preserving vital statistics and vital records, relating to births, deaths, fetal deaths, marriages, and dissolutions of marriage. See, e.g., 50-15-102 and 50-15-103, MCA. Montana statutes contemplate that the birth certificates and other records of birth include the sex of the child. See, e.g., 50-15-203, MCA (written report which constitutes a birth certificate for a child of unknown parentage shall contain the sex of the child); 50-15-224, MCA (amendment of the sex of a person cited on a birth certificate); 50-15-304, MCA (substitute birth certificate for an adopted person shall contain the sex of such person). Under regulations promulgated by the department, each certificate of birth and certified copy of a birth record (as well as of a birth that resulted in a stillbirth) has to include the sex of the registrant. ARM 37.8.128(2)(e) and (4)(e); 37.8.301(4) (if birth occurs other than in a health care facility, birth certificate must be filed along with an affidavit including the child's sex); and 37.8.311 (amendment of birth certificate for sex changes).

3. In 2007, the department adopted a new rule (ARM 37.8.311(5)) that the sex of a registrant (the individual about whom a birth certificate pertains) as cited on a certificate may be amended only if the department receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the individual born in Montana has been changed by surgical procedure, and providing certain information. See 2007 MAR page 2127 (Dec. 20, 2007), corrected, 2008 MAR page 169 (Jan. 31, 2008). It cross-referenced another ARM provision with respect to situations where the sex of an individual was listed incorrectly on the

original birth certificate. *Id.*¹ Subsequently, in 2017, the department amended ARM 37.8.311(5). Apparently purporting to change the "sex" data element on birth certificates to a "gender" data element, the amended rule provided that the gender of a registrant could be corrected if the department received a correction affidavit, accompanied by (1) "a completed gender designation form issued by the department certifying under penalty of perjury that the individual had undergone gender transition or has an intersex condition and that the gender designation on the person's birth certificate should be changed accordingly, and the request . . . is not for any fraudulent or other unlawful purpose"; (2) "presentation of a government-issued identification displaying the correct gender designation"; or (3) "a certified copy of an order from a court with appropriate jurisdiction indicating that the gender of an individual born in Montana has been changed." 2017 MAR page 2436 (Dec. 22, 2017). The 2021 Montana legislature enacted S.B. 280, which was signed into law on April 30, 2021, was immediately effective, and, essentially, adopted into the Montana Code the provisions of the 2007 rule. See MCA 50-15-224, MCA. Pursuant to legislative direction, the department amended its rules to re-adopt the version of the provision in effect prior to the 2017 rulemaking and to repeal the provisions adopted in the 2017 rulemaking.² The proposed rule was published on May 28, 2021, and the notice of adoption was published on July 23, 2021, with the effective date of July 24, 2021.

4. The constitutionality of S.B. 280 was challenged in a lawsuit filed against the State of Montana, the Governor, the department and the director in Montana's Thirteenth Judicial District Court, Yellowstone County, as well as in complaints filed with the State Human Rights Bureau; plaintiffs also pled claims for discrimination under the Montana Civil Rights Act. Plaintiffs sought a preliminary injunction against enforcement of S.B. 280 on July 19, 2021. The defendants sought dismissal of the lawsuit on August 17, 2021.

5. On April 21, 2022, the district court issued its Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss and Granting Plaintiffs' Motion for a Preliminary Injunction (decision). While dismissing plaintiffs' claim under the Montana Human Rights Act, the court concluded that plaintiffs had adequately pled their other claims. The district court granted plaintiffs' request for a preliminary injunction, finding that "Plaintiffs here established a prima facie case that SB 280 impermissibly [sic] vague in all of its applications and thereby unconstitutionally violates Plaintiffs' fundamental right to due process because it is unconstitutionally void." Apr. 21, 2022 Decision at ¶ 170. "[F]or the purposes of [the] preliminary injunction," the court expressly "declined to analyze whether SB 280 reaches constitutionally protected conduct." Decision at ¶ 157a. The court granted plaintiffs' motion for preliminary injunction and enjoined the department and the other defendants "from enforcing any aspect of SB

¹ In 2015, the department made nonsubstantive revisions to the regulation. See MAR Notice No. 37-714, 2015 MAR page 1492 (Sept. 24, 2015).

² The 2021 rule maintained the nonapplicability of the provision with respect to situations where the sex of the person was designated incorrectly on the original birth certificate due to data entry error.

280 during the pendency of this action according to the prayer of the Plaintiffs' motion and complaint." Decision at 35.³

6. The court's decision leaves this department in an ambiguous and uncertain situation. The court's preliminary injunction means that, pending final resolution of the litigation, the department's Office of Vital Records (OVR) cannot accept and process birth certificate sex designation amendment applications according to the procedures set forth in S.B. 280 and the department rules that implement S.B. 280. Yet the effect of the 2021 rulemaking was to eliminate the 2017 rule, just as one effect of the 2017 rule was to eliminate the 2007 rule. The court did not issue a mandatory injunction directing the department to re-implement the 2017 rule. Accordingly, there is currently no non-enjoined regulatory mechanism by which the department can accept and process birth certificate sex identification amendment applications.⁴ While the court's preliminary injunction currently precludes OVR from accepting and processing birth certificate sex designation amendment applications pursuant to the procedures set forth in S.B. 280, there is a perception that OVR should be accepting birth certificate sex designation amendment applications – and regardless of where such applications would ordinarily stand in OVR's backlog of applications for changes to Montana vital records – immediately process such applications pursuant to the non-existent 2017 rule. The department needs, immediately, to correct this confusion and clearly set forth the standards under which such applications will be processed. Montanans deserve to know how such applications will be handled in this period. OVR has received several such applications and also has received a number of inquiries about how to submit such applications and on the status of currently pending applications. All of these facts combine to require immediate action on the part of the department.

³ Although plaintiffs amended their complaint long after the 2021 rules were published, neither their initial complaint, their amended complaint nor their other pleadings ever requested any relief related to the 2021 rulemaking. Instead, plaintiffs' amended complaint requested that the court:

- Declare S.B. 280 unconstitutional on its face and as applied;
- Declare S.B. 280 illegal under the Montana Human Rights Act;
- Declare S.B. 280 illegal under the Code;
- Preliminarily and permanently enjoin Defendants, as well as their agents, employees, representatives, and successors, from enforcing S.B. 280, directly or indirectly;
- Award Plaintiffs' the reasonable attorney's fees and costs incurred in bringing this action; and
- Grant any other relief the Court deems just.

⁴ Such an order would be improper because plaintiffs did not seek a mandatory injunction or otherwise request that the department re-implement the 2017 rule. Even if plaintiffs had requested this relief, they did not meet the standard for a mandatory injunction, which is a different and higher standard than the standard for a preliminary injunction. Notably, despite the fact that S.B. 280 was effective upon passage and approval, plaintiffs did not immediately file suit nor did they seek a temporary restraining order after they filed the suit but before the department had concluded the 2021 rulemaking. Nor would it be appropriate to grant plaintiffs, at this preliminary stage of the litigation, the relief to which they would only be entitled if they obtain final relief on the merits. See *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963) ("it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial."); see also *United States v. Barrows*, 404 F.2d 749, 752 (9th Cir. 1968).

7. The department's 2007 rule, as well as SB 280 (which largely codified in statute that rule), was premised on the proposition that an individual's sex could be changed by surgery. But, in the decision finding plaintiffs had established a prima facie case that S.B. 280 is impermissibly vague and violates due process, the court found that "Plaintiffs provided un rebutted evidence describing that neither gender-affirming surgery nor any other medical treatment that a transgender person undergoes changes that person's sex" – that "no surgery changes a person's sex" – but that surgery "aligns a person's body and lived in experience with the person's gender identity," which the court found is "a person's fundamental internal sense of belonging to a particular gender." Decision at ¶¶ 161, 42.

8. The court's finding that "no surgery changes a person's sex" has caused the department to consider the issue. The National Institutes of Health (NIH), a component of the U.S. Department of Health and Human Services, matter-of-factly explains that

"Sex" is a biological classification encoded in our DNA. Males have XY chromosomes, and females have XX chromosomes. Sex makes us male or female. Every cell in your body has a sex—making up tissues and organs, like your skin, brain, heart, and stomach. Each cell is either male or female, depending on whether you are a man or a woman.⁵

In 2014, recognizing that there were differences in disease manifestation and response to treatment between men and women and that research about such differences may be critical to the interpretation, validation, and generalizability of research findings – and may inform clinical interventions – NIH issued a policy on sex as a biological variable in research.⁶ In guidance issued on that policy, NIH noted that "[s]ex is a biological variable defined by characteristics encoded in DNA."⁷ An NIH leader further explained, "[s]ex' originates from an organism's sex chromosome complement—XX or XY chromosomes in humans, and is reflected in the reproductive organs. Each cell has a sex."⁸ An Endocrine Society scientific

⁵ NIH, Office of Research on Women's Health, *How Sex and Gender Influence Health and Disease*, https://orwh.od.nih.gov/sites/orwh/files/docs/SexGenderInfographic_11x17_508.pdf.

⁶ See NIH, *Consideration of Sex as a Biological Variable in NIH-funded Research*, NOT-OD-15-102, issued June 9, 2015, <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-15-102.html>.

⁷ NIH Guidance, *Consideration of Sex as a Biological Variable in NIH-funded Research* (NIH Guidance) at 1 (2017), https://orwh.od.nih.gov/sites/orwh/files/docs/NOT-OD-15-102_Guidance.pdf; see also Journal of Women's Health, *Sex as a Biological Variable: A 5-Year Progress Report and Call to Action* (June 2020), <https://pubmed.ncbi.nlm.nih.gov/31971851/>.

⁸ Janine A. Clayton, *Applying the new SABV (Sex as a Biological Variable) policy to research and clinical care*, *Physiology & Behavior* 187 (2018) 2-5 (published online Aug. 17, 2017), <https://doi.org/10.1016/j.phybeh.2017.08.012>; see also Leah R. Miller, Cheryl Marks, *et al.*, *Considering sex as a biological variable in preclinical research*, 31 *Federation of American Societies for Experimental Biology Journal* 29-34 (Sept. 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6191005> (defining "Sex" as "being XY or XX"). In contrast, NIH defines "gender" as the "social, cultural, and psychological traits linked to human males and females through social context." See NIH Guidance, *supra*, at 1; Janine Clayton, *supra*, at 2. Other sources describe gender as "psychological or cultural rather than biological," or as including

statement notes that "[s]ex is a biological concept" and that "[h]uman biological sex is often assessed by examining the individual's complement of sex chromosomes as determined by karyotypic analysis."⁹ Thus, as some scientists have noted, "[h]uman sex is an observable, immutable and important biological classification"; it is biological (and, thus, genetic), binary, and immutable.¹⁰ The department agrees.

9. The department now considers the Montana system for issuing (and amending) birth certificates in light of the foregoing. The department disagrees with the district court in the above-referenced litigation that plaintiffs established a prima facie case that SB 280 is "impermissibly vague in all of its applications and thereby unconstitutionally violates Plaintiffs' fundamental right to due process." However, because sex is a biological concept that is encoded in an individual's DNA and, thus, is genetic and immutable, the department agrees with the district court that "no surgery changes a person's sex." The department, thus, concludes that the premise upon which it based its 2007 rule (which, in turn, appears to have been the basis for S.B. 280) – that an individual's sex could be changed through surgery – was mistaken. As a result, and consistent with the court's preliminary injunction order with respect to S.B. 280, the department does not re-impose the S.B. 280 requirements/2007 rule requirements for amendment of the cited sex on birth certificates in this emergency rule.

10. As noted above, when the statutory provisions governing Montana birth certificates and vital records identify the data elements to be collected and included in a Montana birth certificate, one of those data elements is the sex of the

"perception of the individual as male, female, or other, both by the individual and by society." See Robert J. Stoller, *Sex and Gender: On the Development of Masculinity and Femininity* 9 (1968) (describing gender as "psychological or cultural rather than biological"); Adhi Bhargava, Arthur P. Arnold, et al., *Considering Sex as a Biological Variable in Basic and Clinical Studies: An Endocrine Society Scientific Statement*, 42 *Endocrine Review* 219-258, 228 (June 2021) (published online Mar. 11, 2021), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8348944/>; see also "Gender," *Lexico*, <https://www.lexico.com/en/definition/gender> ("Gender" means "[e]ither of the two sexes ... when considered with reference to social and cultural differences rather than biological ones"). With respect to the relationship between sex and gender, it is important to note that "[s]ex is an essential part of vertebrate biology, but gender is a human phenomenon; sex often influences gender, but gender cannot influence sex." Adhi Bhargava, Arthur Arnold et al., *supra*, at 228.

⁹ Adhi Bhargava, Arthur Arnold, et al., *supra*.

¹⁰ Emma Hilton, Pam Thompson, et al., Letter to the Editor, *The reality of sex*, *Irish Journal of Medical Science* (2021) 190:1647 (published online Jan. 15, 2021), <https://doi.org/10.1007/s11845-020-02464-4> (rejecting as "entirely without scientific merit" the claim that "sex is neither fixed nor binary": "there are two sexes, male and female, and in humans, sex is immutable (disorders of sexual development are very rare and, in any event, do not result in any additional sexes)"); see also Georgi K. Marinov, *In Humans, Sex is Binary and Immutable*, *Acad. Quest.* (2020) 33:279-288 (published online May 9, 2020), <https://doi.org/10.1007/s12129-020-09877-8> ("the objective truth is that sex in humans is strictly binary and immutable, for fundamental reasons that are common knowledge to all biologists taking the findings of their discipline seriously").

person/infant.¹¹ Such statutory provisions use the word "sex,"¹² not "gender" or "gender identity." Because "sex" and "gender" are different concepts, the department would not read the statutory provisions concerning birth certificates or records of births as including "gender" in the requirement to record the sex of the person. This interpretation is consistent with the context: The birth certificate generally records only facts that are known (or knowable) at the time of the person's birth. Sex is one of those facts: A person's sex can be determined – by observation, examination, or testing – at the time of birth. Gender/gender identity, as a social, psychological, and/or cultural construct, cannot.¹³ Consequently, the department has determined that the proper interpretation of the statutory provisions governing birth certificate/vital records and the vital records system is that the person's sex, not his or her gender or gender identity, is required to be recorded on the birth certificate. Thus, this emergency rule does not redesignate, substitute, or conflate

¹¹ While the specific provision on the creation of a birth certificate or record of birth does not identify the data elements to be collected and recorded, it is clear from the statutory context that the sex of the person is to be recorded because another provision refers to the issuance of substitute birth certificates as including the sex of the person: It would not make sense to have such a provision if the legislature did not intend for the original birth to include the person's sex. See, e.g., 50-15-304, MCA (substitute birth certificate for an adopted person shall contain the sex of such person). And yet another provision establishes that the written report which constitutes a birth certificate for a child of unknown parentage contain the sex of the child. 50-15-203, MCA. The U.S. standard certificate of birth, see <https://www.cdc.gov/nchs/data/dvs/birth11-03final-ACC.pdf> (last visited May 19, 2022), includes the sex of the infant (male or female), and states uniformly collect and record the sex of the infant on their birth certificates. This vital statistic is important for historical, demographic, public policy and public health reasons.

¹² Both at the time that the vital records provisions in the Montana Code were first adopted and today, and especially in the context of vital records, the term "sex" was (and is) understood to mean biological differences between males and females. Compare American Heritage Dictionary 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); Webster's Third New International Dictionary 2081 (1971) ("[T]he sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . ."); 9 Oxford English Dictionary 578 (1961) ("The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these.") with Webster's New World College Dictionary 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions").

¹³ The Office of Vital Records permits changes to correct mistaken or incomplete birth certificates. A new birth certificate can be issued, for instance, that identifies the father when the father was not identified on the original birth certificate. See 50-15-223(1)(b), (5), MCA. Paternity, after all, is a fact that is known or knowable (for example, through genetic testing) at the time of birth. Separate and apart from these corrections, the Montana Legislature enacted specific laws to allow a person to update information reflecting changes to their legal identity. For example, an individual may amend his/her birth certificate to reflect a legal name change. See 27-31-101, MCA; ARM 37.8.311; *In re Marriage of Rager*, 263 Mont. 361, 365, 868 P.2d 625, 627 (1994) ("[T]he child's legal name . . . remains so for all purposes unless it is changed by adoption, through a statutory petition for a name change, or by other legal means."). Montana law also authorizes issuance of a new birth certificate that reflects a child's adoptive parents, when the department receives a certificate of adoption provided for by law. See 50-15-223(1)(a), MCA (referencing 50-15-311, MCA). Unlike these changes that reflect historical as well as legal facts, sex—as reported on a birth certificate—records an immutable, unalterable historic fact.

the "sex" data element as a "gender" data element on birth certificates, as the 2017 rule did, but maintains it as the "sex" data element in accordance with the relevant statutory directives and scientific evidence.

11. The 2017 rule permitted the department to "correct" such "gender" data element upon receipt of a correction affidavit accompanied by a "gender designation form" attesting that the individual had undergone gender transition, a copy of a government-issued identification with the correct gender identification, or a copy of a court order that the individual's gender had been changed. As previously established, sex is different from gender and is an immutable genetic fact, which is not changeable, even by surgery. Accordingly, this emergency rule does not authorize the amendment of the sex identified/cited on a birth certificate based on gender transition, gender identity, or change of gender.

12. The department does acknowledge that there may be some instances in which it would be appropriate for the sex of a person as cited/identified on the birth certificate to be corrected or amended. In this emergency rule, the department recognizes, as it did in the 2007, 2017, and 2021 rules, that there may be data entry errors (or scrivener's errors) that result in the sex of a person being listed incorrectly on the original birth certificate. Thus, in this emergency rule, the department provides for the correction of the sex of a person if it was listed incorrectly on the original birth certificate due to a data entry error (or other scrivener's error) in the same way as in those rules, except that the department specifies some of the documentation that is required to support such correction.

13. The department similarly recognizes that, although likely infrequent, there could be instances in which a person's sex, as a biological, immutable fact, is misidentified at birth and the wrong sex is then cited on the birth certificate – with the misidentification only being discovered later, such as through DNA/genetic testing. Because a person's sex is immutable/unchangeable, the person's correct sex would have been known at birth if testing had been done at the time. In such circumstances, the department has determined that the birth certificate should be corrected. Accordingly, in this emergency rule, the department provides for the correction of the birth certificate if the person's sex was misidentified on the original birth certificate and the person supplies documentary proof consisting of, among other things, the results of appropriate testing that establishes the person's sex.

14. The department notes that a birth certificate is, first and foremost, a vital record which records the facts concerning the birth of a person in Montana. There are important departmental and public health interests in the collection and maintenance of accurate vital statistics and records such as these. It is, therefore, critical that the department's Office of Vital Records has clear direction so that it can administer the vital records program in such a way that ensures the accuracy of such vital records.

15. 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 Kassie Thompson, 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.

16. The temporary emergency rule is effective immediately, May 23, 2022.

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

EMERGENCY RULE I CHANGES TO IDENTIFICATION OF SEX ON BIRTH CERTIFICATES (1) In order to provide accurately for the identification of sex on birth certificates, this emergency rule supersedes ARM 37.8.311(5).

(2) The sex of a registrant as cited on a certificate may be corrected only if:

(a) the sex of an individual was listed incorrectly on the original certificate as a result of a scrivener's error or a data entry error, and the department receives a correction affidavit and supporting documents, consistent with ARM 37.8.108(4), (5), and (6), including a copy of the records of the health care facility or attending health care professional, contemporaneous to the birth, that identify the sex of the individual, with an affidavit from the health care facility or professional attesting to the date and accuracy of the records; or

(b) the sex of the individual was misidentified on the original certificate and the department receives a correction affidavit and supporting documents, consistent with ARM 37.8.108(4) and (5), including a copy of the results of chromosomal, molecular, karyotypic, DNA, or genetic testing that identify the sex of the individual, together with an affidavit from the health care facility, health care professional, or laboratory testing facility that conducted the test and/or analyzed the test results, attesting to the test results and their accuracy.

AUTH: 2-4-303, 50-15-102, 50-15-103, 50-15-204, 50-15-208, 50-15-223, MCA

IMP: 50-15-102, 50-15-103, 50-15-203, 50-15-204, 50-15-208, 5-15-223, MCA

18. The rationale for the temporary emergency rule is set forth in paragraphs 1 through 14 and 19.

19. The department issues this temporary emergency rule because of the position that it finds itself in as a result of the district court's order, precluding the department from enforcing S.B. 280 during the pendency of the lawsuit challenging S.B. 280. The department intends to pursue a standard rulemaking procedure prior to the expiration of this temporary emergency rule, to adopt a similar permanent rule that would apply only when and to the extent that the department is subject to an injunction against enforcement of S.B. 280, codified at 50-15-224, MCA, or S.B. 280 is held invalid; otherwise, current ARM 37.8.311(5) would apply. This would ensure that, consistent with the department's obligations both to carry out legislative directives and to comply with court orders, the Office of Vital Records has the directions that it requires to accept and process applications for changes to the sex identified on birth certificates, as well as to ensure the accuracy of such vital records.

20. 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 15 above or may be made by completing a request form at any rules hearing held by the department.

21. The bill sponsor notice requirements of 2-4-302, MCA, do not apply. Special notice, pursuant to 2-4-303, MCA, was made to each member of the Children, Families, Health, and Human Services Interim Committee and to each member of the committee's staff, using electronic mail on May 23, 2022.

/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 May 23, 2022.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I pertaining to marijuana and marijuana products packaging and labeling application and approval process) NOTICE OF ADOPTION
)
)
)
)

TO: All Concerned Persons

1. On February 25, 2022, the Department of Revenue (department) published MAR Notice No. 42-1048 pertaining to the public hearing on the proposed adoption of the above-stated rule (New Rule I) at page 274 of the 2022 Montana Administrative Register, Issue Number 4.

2. On March 22, 2022, the department held a public hearing to consider the proposed adoption of New Rule I. There were no commenters present to provide testimony or commentary in support of the rule. The following commenters appeared and provided oral testimony for informational purposes or in general opposition to New Rule I: Katrina Farnum, Garden Mother; Evan Kajander and Sarah Markman, Apogee Gardens; Geoffrey Erickson 1-Step Software Solutions; Kate Cholewa, Montana Cannabis Industry Association; Pepper Petersen, Montana Cannabis Guild; and Joanna Barney, Sacred Sun Farms. The department received written comments submitted by interested persons for informational purposes or in general opposition to New Rule I.

3. On April 29, 2022, the department published an amended notice of public hearing on the proposed adoption of New Rule I at page 594 of the 2022 Montana Administrative Register, Issue Number 8 (amended proposal notice). The amended proposal notice contained the department's amendments to the original proposal notice described in paragraph 1. The amendments attempted to resolve a majority of the commenters' issues or concerns which were provided to the department at the March 22, 2022 administrative rules hearing or during the initial public comment period.

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 May 6, 2022.

5. The department received additional written comments to the amended proposal notice submitted by interested persons regarding New Rule I.

6. The department has adopted New Rule I (42.39.320) as presented in the April 29, 2022 amended proposal notice.

7. The department has thoroughly considered all comments and testimony received from the public hearing, initial comment period, and extended comment period. A summary of the comments received and the department's responses are as follows:

COMMENT 1: Ms. Farnum commented that Garden Mother develops eighty-five distinct products (due to being vertically integrated for twelve years) and expressed concerns with the fees that potentially correspond to the number of packaging and labeling applications they will need to submit for approval.

Ms. Markman also made similar comments about the volume of labels for a vertically integrated licensee with many products.

Mr. Kajander appreciated the broader product categories and exit packaging. Mr. Kajander observes that the department may want to consider the addition of additional product subcategories from the ones listed in New Rule I, as proposed.

Other commenters expressed concern with the fee proposals expressed in the original proposal notice.

RESPONSE 1: At the March 22, 2022 rules hearing, the department provided clarification - applicable at the time - that the department sought label approvals for four product types: flower, ingestible products, non-ingestible products, and concentrates and extracts unless the licensee sold products in the medical market with increased THC content, which would require additional product label approvals.

New Rule I, as presented in the amended proposal notice and adopted, provides up to a maximum of eight total label applications - based on the applicant's sale of some or all of the adult-use or medical marijuana or marijuana product categories. As the department stated in the revised statement of reasonable necessity for the amended proposal notice, all current lawful marijuana or marijuana product types can be categorized as one of the listed types.

The department refers Ms. Farnum and all other commenters to the revised fee structure adopted in (15), which provides for zero fee application options and a maximum fee, all of which were provided and described in the amended proposal notice.

COMMENT 2: Ms. Farnum and Ms. Barney asked if the department was able to provide a guaranteed timeframe for the turnaround of its review and approval of label applications. Ms. Farnum's comments focus on her uncertainty of where to start because turnaround time for label manufacturers is six to eight weeks and with a volume of labels, any denial, rejection, or change - even if it is a very small change, could be very burdensome to meet the January 1, 2023 requirement. Ms. Farnum illustrated her concerns over application processing times through anecdotal examples of estimated industry need for product packages and labels subject to approval by the department.

Ms. Barney echoed Ms. Farnum's comments and emphasized that supply-side logistics have impacted vendor fulfillment of labels and packages.

Ms. Markman made similar comments to Ms. Farnum's relative to Apogee Gardens.

Mr. Petersen commented his concerns that application processing turnaround times under the original proposal, and amended proposal notice, will become punitive to applicants.

As a related comment, Colleen Powers, owner of Farm406, suggested the department include in the rule a provision that would state a procedural turnaround for the department, such as "The DOR will notify the applicant within 30 days. . . ." Ms. Powers also requested the department modify the timeline of ten days for an applicant to reapply when corrections or rejections are involved.

RESPONSE 2: The department cannot provide "guaranteed" timeframes for the review and approval of label applications because application processing and final approval is a fact-dependent analysis on a case-by-case basis. The department has also removed the 10-day period for application resubmission.

The department refers the commenters to Response 1 which the department believes greatly reduces label volume and approval logistics between the date of adoption of New Rule I, the amended application deadlines in New Rule I(20), and the final implementation of product packaging and labeling requirements in (23). The department will diligently pursue its regulatory obligations and encourages a proactive approach by applicants in the submission of all packaging and labeling applications. In the event of an unforeseen industry-wide complication that impacts the packaging and labeling requirements in (23), the department believes there is sufficient time to develop contingencies which it could propose to and resolve with industry to meet the requirements of statute and New Rule I.

COMMENT 3: Ms. Farnum and Ms. Barney provided commentary and asked about the definition of unique marijuana packaging and what would require a separate application. Ms. Farnum and Ms. Barney asked for more clarity in the terminology for packaging and labeling and their usage in New Rule I.

RESPONSE 3: Based on these comments, the department amended New Rule I(2) through (4) to clarify packaging and (6) through (10) to describe expanded product categories and to provide criteria for pre-approved template and custom label designs.

COMMENT 4: Ms. Barney requested the department provide a "reference guide" for packaging guidelines. She contends other states with legal cannabis, such as California, Colorado, Oregon, and Washington, all have one-page reference guides that include pictures or descriptions of what labels and packages look like and what is generally acceptable. Ms. Barney believes such a reference would be beneficial for regulatory consistency because she has, at times, received conflicting information from department personnel.

RESPONSE 4: The department thanks Ms. Barney for her comment and responds that it is developing a reference guide that will be accessible through the department's website to assist applicants with the packaging and labeling application process.

COMMENT 5: Mr. Kajander commented on the font size for packages and labels which requires legible font and lower case letter O must be at least 1/16th of an inch in height. He suggests the requirement be based in computer font size (i.e., eight-point or ten-point font) instead of fractional inches.

Mr. Erickson commented his opinion that the department should reduce the required font size on a label. He provided examples of packages and labels with current and his suggested font sizes, which he contends are still legible and are consistent with those of prescription drug labels issued by licensed pharmacies.

Ms. Cholewa provided similar commentary but added that combinations of font sizes could be possible to enhance label "warning messages" (i.e., impaired driving risks).

RESPONSE 5: While the department appreciates the commentary provided by Messrs. Kajander and Erickson and Ms. Cholewa, those requirements are specified under ARM 42.39.314, which is outside the scope of this current rulemaking. The department will take the recommendations under advisement for future amendment of ARM 42.39.314.

COMMENT 6: Mr. Erickson provided commentary about the department's proposed application review process. He opines that the initial process appears to be very time-consuming for the department because it would involve the review of each label submitted. This was a concern echoed by Mr. Petersen.

Mr. Erickson suggests the department adopt a "universal," preapproved label template, which the department could offer to applicants. An applicant would affirm its use of the template label - to be downloaded from the department - and the review process could be significantly streamlined and offered for little or no cost.

Mr. Petersen offered similar comments about universal labeling and that many applicants will be using labels provided by testing laboratories; a statement shared by other commenters. He suggested the department make allowances for both universal label types and requested the department streamline or automate the packaging and labeling approval process.

Similarly to Messrs. Erickson and Petersen, Ms. Powers commented her concern about the potential application processing bottleneck that could befall the department and believes existing statute and rule provide sufficient guidance, and packaging and labeling compliance could be enforced through department inspection and audit of licensees.

RESPONSE 6: The department has adopted into New Rule I a no-cost, preapproved label template option and provided the parameters for its use. The department concurs that use of a label template will expedite review and processing of packaging and labeling applications.

As to comments that packaging and labeling are often provided by testing laboratories and the use of those packages and labels should not be charged a fee, the department responds that the use of testing laboratories for generating labels is not universal. Some licensees that utilize testing laboratories to generate labels also include their unique logo, which would require department approval.

Regarding Ms. Powers' comments regarding sufficiency of existing authority and inspection and audit as the means to enforce packaging and labeling compliance, the department responds that while it agrees its inspection and audit functions can help ensure compliance, the packaging and labeling application and approval process is expressly required by 16-12-208(8), MCA.

COMMENT 7: Mr. Petersen commented extensively on the department's application fee structure and fiscal impact statement, as presented in the original proposal notice. Mr. Petersen contended the proposed fees amounted to a "green tax" and that the "fiscal note" in the original proposal notice was inadequate; the latter opinion was also shared by Ms. Barney.

Mr. Petersen commented that just because the legislature gave the department authority to set fees, the department should not set whatever fee it deems appropriate. Mr. Petersen also commented his opinion that, by loose calculation, the original proposed packaging and labeling fees could have a theoretical fiscal impact to industry of \$2.5 to \$4 million.

Mr. Petersen and Ms. Barney also question whether the application fees paid were based on a per-location or per-licensee basis.

RESPONSE 7: The department responds that it has adopted New Rule I as presented in the amended proposal notice and refers Mr. Petersen to it in response to a majority of his concerns. As for streamlining the application approval process, and providing zero cost application fee options, the department directs Mr. Petersen to the amended proposal notice and Response Nos. 1 through 4, and 6 (above).

As to the inadequacy of the department's "fiscal note," the department responds that the fiscal impact statement is not a fiscal note; the statement is required by 2-4-302, MCA, and met statutory requirements. The department also acknowledged in the statement that it could not accurately estimate total fiscal impact for the reasons stated, which is permitted by 2-4-302, MCA. However, with the adoption of the revised fee structures the department estimated minimum and maximum ranges of fiscal impact using necessary assumptions - a process which is often used in legislative fiscal notes - in an attempt to provide additional information and transparency about the fiscal impact of the application fees.

As for the establishment of fees, the legislature authorized the department to designate fees sufficient to administer and enforce the Montana Marijuana Regulation and Taxation Act (see 16-12-112(1)(q), MCA). New Rule I includes application fees that the department contends satisfies the needs and requirements of 16-12-112(1)(q), MCA. And certain fees were eliminated when the department's administration of the packaging and labeling application process was amended. The department acknowledges Mr. Petersen's continuing objection to fees which will likely be at odds with any department proposal regardless of its justification or merits.

Lastly, in response to Mr. Petersen's and Ms. Barney's comments about whether fees are paid per location or license, the department directs them to New Rule I(5) and (13) which confirm that applications (and corresponding fees) are based per licensee.

COMMENT 8: As stated in Comment 1, the department received several comments from interested persons opposing the application fees in New Rule I, both responsive to the original proposal and amended proposal notices. The comments can be generalized as general objection to fees which they state are excessive, will inflate the costs of product, and will lead customers to purchase through the illicit market.

Similarly, the department received comments from David Hiller, Yellowstone Buds, LLC, that industry needs time to catch up from implementation of the expanded market and he requests the department slow the implementation of new regulations - especially those that are fee-based - because of the burden placed on the industry.

RESPONSE 8: The department is sensitive to the concerns raised through these fees comments although they are somewhat speculative. The industry in Montana is not a new one, and the department has weighed legislative intent regarding fee structures (see Response 7) with the costs and benefits of the expanding marketplace and the need for administrative rules. The department believes the fees are appropriate, reasonable, and declines to change fee amounts from the revised fee amounts upon the adoption of New Rule I. As for administrative rules, the department agrees that only those rules that are necessary for the department to carry out its legislative mandate should be adopted and that is determinative when the department considers its rules proposals.

The department understands comments it received regarding marijuana and marijuana products testing costs but declines to respond as they are outside the scope of this rulemaking.

COMMENT 9: Mr. Petersen provided commentary during the March 22 public hearing regarding packaging and labeling for wholesalers. Mr. Petersen recognizes statutory packaging and labeling requirements are for product intended for ultimate sale to the consumer, but he asks for clarity in the rule for wholesalers who are packaging and labeling and then delivering the product to retail licensees who are the ones involved with the direct sale to consumers. Mr. Petersen contends marijuana or marijuana products for retail sale should only require one approval; if that is done by the wholesaler and that wholesaler supplies inventory to retailers, no additional application, fees, or department approval are necessary. The department can enforce packaging and labeling compliance through its inspectors.

Ms. Cholewa commented that the proposed required approval of the same product label at the wholesale and retail levels seems redundant at face value and does not appear to contribute to public safety or transparent function in that the same label may be subject to approval many times over, incurring the cost of submission but also the cost of staff time for both businesses and the department. Ms. Cholewa asks for elimination of this requirement or redirection to verification of label approvals on file at dispensaries carrying a wholesaler's products whose labels remain consistent between it and its retailers.

The department also received several comments from marijuana product wholesale representatives during the extended comment period for the amended proposal notice which can be generalized as supporting a "one approval" product

application process. The commenters contend the proposed process will be unduly burdensome on industry and the department alike with minimal benefit.

Similar to the general wholesale comments, the department received comments that oppose the non-transferability of packaging and labeling approvals, which the department has construed to mean to support the position that should a wholesaler apply for, and obtain, packaging and labeling approvals for all of its products, those approvals should be extended to a retail licensee that sells the product.

RESPONSE 9: The department appreciates the comments with respect to wholesale products. The department is unable to further amend New Rule I, upon adoption, to accommodate these concerns. Amending the rule to accommodate prepackaged wholesale product would require additional and extensive system rebuilds that would delay the implementation of the package and label review process which would, in turn, delay the department's ability to ensure licensee compliance with packaging and labeling requirements by January 1, 2023.

In addition, requiring a retail dispensary licensee to secure packaging and labeling approval before ultimate sale to consumer eliminates any uncertainty as to who is ultimately liable for non-compliant packaging and labeling.

COMMENT 10: The department received several comments that pertained to general operational concerns of the cannabis industry and the amount of administrative regulation promulgated by the department. Other comments raised issues that did not pertain to the proposed rulemaking.

RESPONSE 10: While the department appreciates the comments and suggestions, they are outside the scope of this specific rulemaking and the procedural constraints of 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 May 31, 2022.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 44.5.114, 44.5.115, 44.5.116,)
44.5.117, and 44.5.118 pertaining to)
the reduction of Business Services)
filing fees)

TO: All Concerned Persons

1. On April 29, 2022, the Secretary of State published MAR Notice No. 44-2-257 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 603 of the 2022 Montana Administrative Register, Issue Number 8.
2. On May 20, 2022, a public hearing was held on the proposed amendment of the above-stated rules.
3. No comments or testimony were received.
4. The Secretary of State amends ARM 44.5.114, 44.5.115, 44.5.116, 44.5.117, and 44.5.118 as proposed, effective July 1, 2022.

/s/ AUSTIN JAMES
Austin James
Rule Reviewer

/s/ CHRISTI JACOBSEN
Christi Jacobsen
Secretary of State

Dated this 31st day of May, 2022.

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee:

- Department of Agriculture;
- Department of Commerce;
- Department of Labor and Industry;
- Department of Livestock;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

Education and Local Government Interim Committee:

- State Board of Education;
- Board of Public Education;
- Board of Regents of Higher Education; and
- Office of Public Instruction.

Children, Families, Health, and Human Services Interim Committee:

- Department of Public Health and Human Services.

Law and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration and Veterans' Affairs Interim Committee:

- Department of Administration;
- Department of Military Affairs; and
- Office of the Secretary of State.

Environmental Quality Council:

- Department of Environmental Quality;
- Department of Fish, Wildlife and Parks; and
- Department of Natural Resources and Conservation.

Water Policy Interim Committee (where the primary concern is the quality or quantity of water):

- Department of Environmental Quality;
- Department of Fish, Wildlife and Parks; and
- Department of Natural Resources and Conservation.

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is P.O. Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: **Administrative Rules of Montana (ARM)** is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR or Register) is an online publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the Attorney General (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding Register.

Use of the Administrative Rules of Montana (ARM):

- | | |
|------------------|--|
| Known Subject | 1. Consult ARM Topical Index. Update the rule by checking recent rulemaking and the table of contents in the last Montana Administrative Register issued. |
| Statute | 2. Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers. |

RECENT RULEMAKING BY AGENCY

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 2022. This table includes notices in which those rules adopted during the period December 10, 2021, through May 27, 2022, occurred and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 2022, 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 or 2022 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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CHRISTI JACOBSEN
SECRETARY OF STATE

P.O. BOX 202801
HELENA, MONTANA 59620