

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 20

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 print publication of the adoption notice unless otherwise specified in the final notice. The Interpretation Section contains the Attorney General's opinions and state declaratory rulings. Special notices and tables are found at the end of each Register.

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

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BEFORE THE PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF PROPOSED
ARM 2.43.1306 pertaining to actuarial	)	AMENDMENT
rates, assumptions, and methods for)	
valuation purposes and actuarial	)	NO PUBLIC HEARING
equivalence for the Board-	)	CONTEMPLATED
administered defined benefit)	
retirement systems)	

TO: All Concerned Persons

1. On December 23, 2011, the Public Employees' Retirement Board (PER Board) proposes to amend the above-stated rule.

2. The PER Board 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 PER Board no later than 5:00 p.m. on November 14, 2011, to advise us of the nature of the accommodation that you need. Please contact Dena Helman, Montana Public Employee Retirement Administration, 100 North Park Avenue, Suite 200, P.O. Box 200131, Helena, Montana 59620-0131; telephone (406) 444-2578; TDD (406) 444-1421; fax (406) 444-5428; or e-mail dhelman@mt.gov.

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

2.43.1306 ACTUARIAL RATES AND ASSUMPTIONS (1) The actuary will present the actuarial data and recommend the board adopt specific rates and assumptions. The board in its discretion will adopt rates and assumptions and publish them in a board policy. The board adopts and incorporates by reference BOARD Admin 09 Actuarial Valuation Assumptions and Methods (approved October 13, 2011) and BOARD Admin 10 Actuarial Equivalence Option Factor Determination (approved June 10, 2010), providing actuarial rates, assumptions, and methods used for valuation purposes and actuarial equivalence purposes, ~~respectively, that were approved by the board on June 10, 2010.~~ BOARD Admin 09 also contains the early retirement factor tables applicable to PERS, HPORS, and SRS.

(2) remains the same.

AUTH: 19-2-403, MCA

IMP: 19-2-405, 19-3-906, 19-6-503, 19-7-502, 19-17-107, MCA

REASON: Chapter 369 Montana Session Laws of 2011 amended 19-3-906, MCA, replacing the PERS early retirement reduction formula that was based on outdated early retirement reduction factors with a reduction based on the actuarially equivalent factors from the most recent valuation of the system. PERS participants

need to be aware of how their early retirement benefit is calculated and the factors used in that calculation. Because the reduction is no longer based on a statutory formula the PER Board determined to adopt the current factors in board policy, Board Admin 09, which ARM 2.43.1306, adopts by reference.

The Highway Patrol Officers' Retirement System and the Sheriffs' Retirement System, pursuant to 19-6-503 and 19-7-502, MCA, also rely on actuarially equivalent factors to calculate early retirement benefit amounts. The PER Board has thus determined to adopt the current factors for those systems in the same board policy.

Because the PER Board has previously determined to adopt Board Admin 09 by reference, 2-4-307(3), MCA, requires that changes to the policy also be adopted by reference. Therefore, this rule amendment is necessary to adopt the amended policy by reference.

4. Concerned persons may present their data, views, or arguments concerning the proposed amendments in writing to Roxanne M. Minnehan, Executive Director, Montana Public Employee Retirement Administration, 100 North Park Avenue, Suite 200, P.O. Box 200131, Helena, Montana 59620-0131; telephone (406) 444-5459; fax (406) 444-5428; or e-mail rminnehan@mt.gov and must be received no later than 5:00 p.m., November 25, 2011.

5. If persons who are directly affected by the proposed amendments 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 they have to Dena Helman at the above address no later than 5:00 p.m., November 25, 2011.

6. If the board receives requests for a public hearing on the proposed amendment from either 10 percent or 25, whichever is less, of the persons directly affected by the proposed amendment; 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 302 persons based on approximately 28,834 active PERS participants in the Defined Benefit Plan, 230 HPORS participants and 1,181 SRS participants as of December 2010, for a total 30,245 participants.

7. The PER Board 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 PER Board.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that if a discrepancy exists between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ Melanie A. Symons
Melanie A. Symons
Chief Legal Counsel
and Rule Reviewer

/s/ John Nielsen
John Nielsen
President
Public Employees' Retirement Board

Certified to the Secretary of State October 17, 2011.

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 6.6.6501, 6.6.6502, 6.6.6503,) PROPOSED AMENDMENT
6.6.6504, 6.6.6505, 6.6.6508, and)
6.6.6509, pertaining to Actuarial)
Opinions)

TO: All Concerned Persons

1. On November 16, 2011, at 10:30 a.m., the Office of the Commissioner of Securities and Insurance, Montana State Auditor, Monica J. Lindeen, will hold a public hearing in the 2nd floor conference room, at the Office of the Commissioner of Securities and Insurance, Montana State Auditor, 840 Helena Ave., Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Office of the Commissioner of Securities and Insurance, Montana State Auditor 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., November 10, 2011, to advise us of the nature of the accommodation that you need. Please contact Darla Sautter, Office of the Commissioner of Securities and Insurance, Montana State Auditor, 840 Helena Avenue, Helena, Montana, 59601; telephone (406) 444-2726; TDD (406) 444-3246; fax (406) 444-3499; or e-mail dsautter@mt.gov.

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

6.6.6501 PURPOSE (1) remains the same.

AUTH: 33-1-313, 33-2-521, MCA
IMP: 33-2-521, 33-2-522, 33-2-523, 33-2-524, 33-2-525, 33-2-526, 33-2-527, 33-2-528, 33-2-529, 33-2-531, 33-2-532, 33-2-533, 33-2-534, 33-2-535, 33-2-537, 33-7-118, 33-7-411, MCA

6.6.6502 AUTHORITY (1) remains the same.

AUTH: 33-1-313, 33-2-521, MCA
IMP: 33-2-521, 33-2-522, 33-2-523, 33-2-524, 33-2-525, 33-2-526, 33-2-527, 33-2-528, 33-2-529, 33-2-531, 33-2-532, 33-2-533, 33-2-534, 33-2-535, 33-2-537, 33-7-118, 33-7-411, MCA

6.6.6503 SCOPE (1) through (3) remain the same.

AUTH: 33-1-313, 33-2-521, MCA

IMP: 33-2-521, 33-2-522, 33-2-523, 33-2-524, 33-2-525, 33-2-526, 33-2-527, 33-2-528, 33-2-529, 33-2-531, 33-2-532, 33-2-533, 33-2-534, 33-2-535, 33-2-537, 33-7-118, 33-7-411, MCA

6.6.6504 DEFINITIONS (1) through (8) remain the same.

AUTH: 33-1-313, 33-2-521, MCA

IMP: 33-2-521, 33-2-522, 33-2-523, 33-2-524, 33-2-525, 33-2-526, 33-2-527, 33-2-528, 33-2-529, 33-2-531, 33-2-532, 33-2-533, 33-2-534, 33-2-535, 33-2-537, 33-7-118, 33-7-411, MCA

6.6.6505 GENERAL REQUIREMENTS (1) through (5) remain the same.

AUTH: 33-1-313, 33-2-521, MCA

IMP: 33-2-521, 33-2-522, 33-2-523, 33-2-524, 33-2-525, 33-2-526, 33-2-527, 33-2-528, 33-2-529, 33-2-531, 33-2-532, 33-2-533, 33-2-534, 33-2-535, 33-2-537, 33-7-118, 33-7-411, MCA

6.6.6508 STATEMENT OF ACTUARIAL OPINION BASED ON AN ASSET ADEQUACY ANALYSIS (1) through (2)(a)(i) remain the same.

(ii) For a consulting actuary, the opening paragraph should contain a sentence such as: "I, [name], a member of the American Academy of Actuaries, am associated with the firm of [name of consulting firm]. I have been appointed by, or by the authority of, the Board of Directors of [name of company] to render this opinion as stated in the letter to the Commissioner dated [insert date]. I meet the Academy qualification standards for rendering the opinion and am familiar with the valuation requirements applicable to life and disability insurance companies." ~~The scope paragraph should include a statement such as the following: "I have examined the actuarial assumptions and actuarial methods used in determining reserves and related actuarial items listed below, as shown in the annual statement of the company, as prepared for filing with state regulatory officials, as of December 31, [year]. Tabulated below are those reserves and related actuarial items which have been subjected to asset adequacy analysis."~~

(b) remains the same.

(c) If the appointed actuary has relied on other experts to develop certain portions of the analysis, the reliance paragraph should include a statement such as the following: "I have relied on [name], [title] for [e.g., "anticipated cash flows from currently owned assets, including variations in cash flows according to economic scenarios" or "certain critical aspects of the analysis performed in conjunction with forming my opinion"], as certified in the attached statement. "I have reviewed the information relied upon for reasonableness." A statement of reliance on other experts should be accompanied by a statement by each of the experts in the form prescribed by ARM 6.6.6508(5).

(d) through (3) remain the same.

(4) If the appointed actuary is unable to form an opinion, then he or she shall refuse to issue a statement of actuarial opinion. If the ~~appointee~~ appointed actuary's opinion is adverse or qualified, then he or she shall issue an adverse or qualified

actuarial opinion explicitly stating the reason(s) for such opinion. This statement should follow the scope paragraph and precede the opinion paragraph.

(5) remains the same.

(6) ~~The Standard Valuation Law gives~~ Under 33-2-521, MCA, the commissioner has broad authority to accept the valuation of a foreign insurer when that valuation meets the requirements applicable to a company domiciled in this state in the aggregate. As an alternative to the requirements of (2)(f)(iii), the commissioner may make one or more of the following additional approaches available to the opining actuary:

(a) remains the same.

(b) a statement that the reserves "meet the requirements of the insurance laws and regulations of the state of [state of domicile] and I have verified that the company's request to file an opinion based on the law of ~~the~~ [state of domicile] has been approved and that any conditions required by the commissioner for approval of that request have been met." If the commissioner chooses to allow this alternative, a formal written statement of such allowance shall be issued no later than March 31 of the year it is first effective. It shall remain valid until rescinded or modified by the commissioner. The rescission or modifications shall be issued no later than March 31 of the year they are first effective. Subsequent to that statement being issued, if a company chooses to use this alternative, the company shall file a request to do so, along with justification for its use, no later than April 30 of the year of the opinion to be filed. The request shall be deemed approved on October 1 of that year if the commissioner has not denied the request by that date.

(c) through (c)(v) remain the same.

(d) Notwithstanding the above, the commissioner may reject an opinion based on the laws and regulations of the [state of domicile] and require an opinion based on the laws of Montana. If a company is unable to provide the opinion within 60 days of the request or such other period of time as determined by the commissioner after consultation with the company, the commissioner may contract an independent actuary at the company's expense to prepare and file the opinion.

AUTH: 33-1-313, 33-2-521, MCA

IMP: 33-2-521, 33-2-522, 33-2-523, 33-2-524, 33-2-525, 33-2-526, 33-2-527, 33-2-528, 33-2-529, 33-2-531, 33-2-532, 33-2-533, 33-2-534, 33-2-535, 33-2-537, 33-7-118, 33-7-411, MCA

6.6.6509 DESCRIPTION OF ACTUARIAL MEMORANDUM INCLUDING AN ASSET ADEQUACY ANALYSIS AND REGULATORY ASSET ADEQUACY ISSUES SUMMARY (1) through (2)(c)(v) remain the same.

(d) summary of material changes in methods, procedures, or assumptions from the prior year's asset adequacy analysis;

(e) through (3)(c) remain the same.

(d) comments on any interim results that may be of significant concern to the appointed actuary, for example, the impact of the insufficiency of assets to support:

(i) the payment of benefits and expenses; or

(ii) the establishment of statutory reserves during one or more interim periods;

(e) through (7) remain the same.

AUTH: 33-1-313, 33-2-521, MCA

IMP: 33-2-521, 33-2-522, 33-2-523, 33-2-524, 33-2-525, 33-2-526, 33-2-527, 33-2-528, 33-2-529, 33-2-531, 33-2-532, 33-2-533, 33-2-534, 33-2-535, 33-2-537, 33-7-118, 33-7-411, MCA

4. REASONABLE NECESSITY STATEMENT: The Commissioner of Securities and Insurance, Montana State Auditor, Monica J. Lindeen (commissioner), is the statewide elected official responsible for administering the Montana Insurance Department and regulating insurers. The commissioner is a member of the National Association of Insurance Commissioners (NAIC). The NAIC is an organization of insurance regulators from the 50 states, the District of Columbia, and the U.S. territories. The NAIC provides a forum for the development of uniform policy and regulation when uniformity is appropriate.

Insurer solvency is a principal area in which uniformity is efficient and effective for insurers and regulators. Through development of model laws and rules, the NAIC promotes the standard valuation of liability reserves (reserves) held by life insurers and fraternal benefit societies. In this regard, the NAIC has promulgated model rules about actuarial opinions and supporting memorandums pertaining to reserves held by life insurers and fraternal benefit societies. Actuarial opinions regarding the adequacy of reserves, and thereby measuring solvency, are required to be submitted to the commissioner annually by life insurers and fraternal benefit societies.

The existing rules at ARM 6.6.6501 through 6.6.6510 are based on the NAIC's Actuarial Opinion and Memorandum Regulation model (2001). The commissioner is proposing to amend the existing rules for consistency with the current NAIC model (2009). Additionally, the commissioner is proposing amendments to make corrections to the existing rules.

With regard to the history section for each rule, the commissioner is proposing to add references to 33-7-118 and 33-7-411, MCA, pertaining to fraternal benefit societies, to the list of statutes implemented. The commissioner is also proposing to add a reference to 33-1-313, MCA, regarding rulemaking authority. The current rules and the NAIC model rules indicate applicability to fraternal benefit societies and MCA 33-7-118 and 33-7-411 provide that fraternal benefit societies must submit actuarial opinions regarding the adequacy of reserves; however, these statutes are not referenced in the list of statutes implemented. Additionally, while 33-2-521, MCA, grants the commissioner rulemaking authority regarding actuarial opinions pertaining to the adequacy of reserves held by life insurers, there is not a similar statute in Title 33, chapter 7, regarding the actuarial opinions pertaining to the adequacy of reserves held by fraternal benefit societies. Therefore, the commissioner will rely on the grant of rulemaking authority in 33-1-313, MCA, in regard to fraternal benefit societies. These amendments are necessary for

consistency with the NAIC model rule and to correct the omissions from the history section of the rules.

The commissioner is proposing to amend ARM 6.6.6508(2)(a)(ii) to remove language that is duplicative of ARM 6.6.6508(2)(b). This amendment is necessary for consistency with the NAIC model rule and to correct duplicate language in the current rules.

The proposed amendment to ARM 6.6.6508(2)(c) would correct an unmatched quotation mark. This amendment is necessary to correct the existing rule and is consistent with the NAIC model rule.

The proposed amendment to ARM 6.6.6508(4) would change "appointee actuary's opinion" to "appointed actuary's opinion." This amendment is necessary to correct a typographical error in the current rule and for consistency with the NAIC model rule.

The commissioner is proposing to amend ARM 6.6.6508(6) to change the reference from "The Standard Valuation Law" to the specific statute in the Montana Insurance Code and make grammatical changes. The applicable standard valuation statute is 33-2-521, MCA. These amendments are necessary to reference the specific statute and are consistent with the NAIC model rule.

The proposed amendment to ARM 6.6.6508(6)(b) would remove the word "the" in the third line to correct the phrase to read "based on the law of [state of domicile]." This amendment is necessary to correct the existing rule and is consistent with the NAIC model rule.

The proposed amendment to ARM 6.6.6508(6)(d) would remove the parentheses around the phrase "state of domicile" and make grammatical changes. These amendments are necessary to correct the existing rule and are consistent with the NAIC model rule.

The commissioner is proposing to amend ARM 6.6.6509 to add the phrase "and regulatory asset adequacy issues summary" to the title. This amendment is necessary to include additional information in the title and is consistent with the NAIC model rule.

The proposed amendment to ARM 6.6.6509(2)(d) would change the phrase "from prior years asset adequacy analysis" to "from the prior year's asset adequacy analysis." The summary of material changes is intended to be required for the prior year, not all prior years. This amendment is necessary to correct the existing rule and is consistent with the NAIC model rule.

The commissioner is proposing to amend ARM 6.6.6509(3)(d) to include examples of interim results that may be of significant concern to the appointed actuary; specifically, the insufficiency of assets to support the payment of benefits and expenses or to support the establishment of statutory reserves during one or more

interim periods. The addition of these examples provides necessary guidance to the appointed actuary preparing the asset adequacy analysis and is consistent with the NAIC model rule.

5. Concerned persons may submit their data, views, or arguments concerning the proposed actions either in writing or orally at the hearing. Written data, views, or arguments may also be submitted to Jennifer L. Massman, Staff Attorney, Office of the Commissioner of Securities and Insurance, Montana State Auditor, 840 Helena Ave., Helena, Montana, 59601; telephone (406) 444-2040; fax (406) 444-3499; or e-mail jmassman@mt.gov, and must be received no later than 5:00 p.m., November 25, 2011.

6. Jennifer L. Massman, Staff Attorney, has been designated to preside over and conduct this hearing.

7. The department maintains a list of concerned 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 and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Such written request may be mailed or delivered to Darla Sautter, Office of the Commissioner of Securities and Insurance, Montana State Auditor, 840 Helena Ave., Helena, Montana, 59601; telephone (406) 444-2726; fax (406) 444-3499; or e-mail dsautter@mt.gov or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

9. Pursuant to 2-4-302, MCA, the bill sponsor contact requirements do not apply.

/s/ Brett O'Neil
Brett O'Neil
Rule Reviewer

/s/ Jesse Laslovich
Jesse Laslovich
Chief Legal Counsel

Certified to the Secretary of State October 17, 2011.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the adoption of NEW	)	NOTICE OF PUBLIC HEARING
RULE I concerning change in business	)	ON PROPOSED ADOPTION AND
entity type, and amendment of ARM	)	AMENDMENT
23.16.117, 23.16.125, 23.16.126,)	
23.16.1101, 23.16.1713, 23.16.1901,)	
and 23.16.1908, concerning transfer of)	
interest to a new owner; change of liquor)	
license type; change of location for a)	
licensed manufacturer, distributor, or)	
route operator; card game tournaments;)	
licensure of sports tab sponsors; video)	
gambling machine bill acceptors; and)	
software specifications for video keno)	
machines)	

TO: All Concerned Persons

1. On November 17, 2011, at 9:00 a.m., the Montana Department of Justice will hold a public hearing in the conference room at the Gambling Control Division, 2550 Prospect Avenue, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The Department of Justice will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on November 10, 2011, to advise the department of the nature of the accommodation that you need. Please contact Rick Ask, Gambling Control Division, 2550 Prospect Avenue, P.O. Box 201424, Helena, MT 59620-1424; telephone (406) 444-1971; fax (406) 444-9157; Montana Relay Service 711; or e-mail rask@mt.gov.

3. The proposed new rule provides as follows:

NEW RULE I CHANGE IN BUSINESS ENTITY TYPE (1) Except as otherwise required by ARM 23.16.116 or ARM 23.16.117, when the owner of a gambling operator license proposes a change in business entity, the owner must submit an amended gambling license application on Form 39 and obtain department approval.

(2) The department may conduct an investigation to determine whether the proposed change meets the licensure requirements in 23-5-176, MCA, and department rules.

(3) The applicant may continue to operate during the time the amended application is being processed.

AUTH: 23-5-115, MCA
IMP: 23-5-115, 23-5-118, MCA

RATIONALE AND JUSTIFICATION: In its continued efforts to streamline licensing processes, the department proposes this new rule to reduce the paperwork necessary to be filed by a licensee proposing only to change its business entity-type. This proposed new rule is reasonable and necessary because it will coordinate processes with the Department of Revenue, Liquor Control Division, to implement a new short form application (Form 39), and will allow licensees to apply for approval of a change in business entity-type using an abbreviated application form, rather than the current long form application, thus reducing unnecessary paperwork.

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

23.16.117 TRANSFER OF INTEREST TO NEW OWNER (1) through (7) remain the same.

(8) Transfers of ownership in a ~~gambling operator license~~ licensed gambling operation resulting from foreclosure on a contract for deed or other instrument of transfer require ~~an amended application~~ submission of an application as described as follows:

(a) remains the same.

(i) the party foreclosing has had no change in ownership since last licensed, and is the licensee's immediate predecessor;

(ii) ~~the foreclosure takes place within five years or half the term of the contract, whichever is less; an amended license application is required up to two years following the sale; after two years, a new license application is required including all applicable fees, but the business will be allowed to operate as long as the owner meets the criteria contained in (8)(a)(i), (iii), and (v);~~

~~(iii)~~ the foreclosing party is suitable for licensure;

~~(iv)~~ (iii) all applicable permit fees are paid; and

~~(v)~~ (iv) the former licensee has notified the department of the foreclosure at the time the foreclosure is executed; notification must be made within five working days of execution and an application must be received by the department within 30 working days following notification; failure to notify the department within this time frame may result in department action to cause gambling operations to cease immediately, and:

(A) the foreclosure takes place within two years following the sale, in which case an amended license application may be submitted on a Form 37, together with a personal history statement (Form 10) for each person applying for licensure, and a complete set of fingerprints (Form FD-258) obtained and certified by a local law enforcement agency, the department, or a private security company approved by the department, for each person required to complete a personal history statement, and a copy of the licensee's most recent financial statements or tax returns; or

(B) the foreclosure takes place more than two years but fewer than five years following the sale, a new license application is required, including all applicable fees, as long as the owner meets the criteria contained in (8)(a)(i), (ii), (iii), and (iv).

(b) through (9) remain the same.

AUTH: 23-5-115, MCA

IMP: 23-5-115, 23-5-118, 23-5-176, MCA

RATIONALE AND JUSTIFICATION: These proposed rule amendments are part of the department's effort to streamline licensing processes for gambling licensees. The proposed amendments are reasonable and necessary to allow a party who forecloses on a security interest within two years of a sale of a licensed gambling operation to use the department's abbreviated application form (Form 37), together with necessary personal history and financial documents, in order to apply for transfer of ownership of the business to the former owner(s). Currently, a party who forecloses in the first two years uses a standard amended application form. This amendment will allow those applicants to use the shorter Form 37, instead of the standard amended application form. This change is intended to result in reduced paperwork for the applicant and the department.

The amendments correct the mistaken reference to the transfer of ownership in a "gambling operator license." Because gambling licenses are nontransferable, the proposed amendment to the rule will change the reference to a transfer of ownership in a "licensed gambling operation," as properly stated elsewhere in the rule.

Additionally, the proposed amendments include stylistic and structural changes to the rule which are designed only to clarify the current distinction in application process depending on the timing of the foreclosure; these amendments do not signal any change to department policies or processes.

23.16.125 CHANGE OF LIQUOR LICENSE TYPE (1) Except as otherwise required by ARM 23.16.116 or ARM 23.16.117, when an owner of a gambling operator license changes the type of alcoholic beverage license, the owner must submit an amended gambling license application on Form 39 and obtain department approval.

(2) and (3) remain the same.

AUTH: 23-5-115, MCA

IMP: ~~23-5-115~~, 23-5-119, MCA

RATIONALE AND JUSTIFICATION: Similar to the purpose of New Rule I of this notice, the department proposes this rule amendment to reduce the paperwork to be filed by a licensee who proposes only to change its liquor license type. This proposed new rule is reasonable and necessary because it will coordinate the application process with the Department of Revenue, Liquor Control Division's requirements, and will implement a new short form application (Form 39), that will allow the use of an abbreviated application form. This rule change is intended to result in reduced paperwork for the licensee and the department.

23.16.126 CHANGE OF LOCATION (1) remains the same.

(2) A licensed manufacturer, distributor, or route operator may report a change of location on a Form 37 amended application.

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

AUTH: 23-5-115, MCA

IMP: 23-5-117, MCA

RATIONALE AND JUSTIFICATION: Similar to the purpose of New Rule I of this notice, this rule amendment is reasonable and necessary to reduce unneeded paperwork. The department recognizes that these particular licensees are not subject to the Liquor Control Division's reporting requirements, unlike most gambling licensees. This proposed rule amendment will allow manufacturers, distributors, and route operators to report a change of location to the department using an abbreviated application form. This rule change is intended to result in reduced paperwork for the licensee and the department.

23.16.1101 CARD GAME TOURNAMENTS (1) through (8) remain the same.

(9) Winners are determined by at the conclusion of the tournament based upon points or chips accumulated during throughout the course of a game the tournament. Prizes may only be awarded at the conclusion of the tournament.

(10) through (15) remain the same.

AUTH: 23-5-115, 23-5-311, MCA

IMP: 23-5-445, 23-5-311, 23-5-317, MCA

RATIONALE AND JUSTIFICATION: The proposed amendments to this rule are reasonable and necessary to clarify that individual card game tournaments must be conducted as a single tournament, with prizes awarded only at the conclusion of the tournament. The Legislature has limited licensees to 12 card game tournaments each year, and a permit must be obtained from the department for each tournament. The department discovered a licensee who paid prizes multiple times throughout a scheduled tournament, which is the same as offering a series of tournaments under a single tournament permit. These amendments are intended to clarify that prizes may be awarded and paid only at the conclusion of the tournament, and enforce the Legislature's restriction on the number of card game tournaments.

23.16.1713 PURCHASE AND SALE OF SPORTS TABS BY SPONSOR – LICENSURE (1) through (3) remain the same.

(4) Except for the owner of the licensed premises under (2) who holds a gambling operator's license, every sports tab game sponsor must possess a current Montana Associated Gambling Business License.

AUTH: 23-5-115, 23-5-178, MCA

IMP: 23-5-178, 23-5-502, 23-5-503, MCA

RATIONALE AND JUSTIFICATION: This proposed rule is reasonable and necessary to require that sports tabs be sold only by a person or entity licensed by the department. In 2011, the department discovered illegal sports tabs being sold on the premises of a licensed gambling operator. The operator claimed to have no knowledge of the illegal activity occurring on its premises, because the seller was not the operator's employee, but an independent sports tab seller (sponsor). The sports tab sponsor, who made gambling devices available to the public, was unknown to the department and had not been vetted by the department because he was not required to possess any kind of gambling license.

This proposed rule requires sports tabs be sold only by a gambling licensee, either a licensed gambling operator, or an Associated Gambling Business licensee. The 2009 Legislature enacted 23-5-178, MCA which grants the department authority to adopt rules for licensing associated gambling businesses. This proposed rule will require licensure for sports tab sponsors to enable the department to ensure that anyone who sells sports tabs meets the department's suitability requirements.

23.16.1901 GENERAL SPECIFICATIONS OF VIDEO GAMBLING MACHINES (1) through (1)(d)(v)(A) remain the same.

(B) a mechanism that accepts cash in the form of bills that do not exceed ~~\$20~~ \$100;

(1)(d)(vi) through (3) remain the same.

AUTH: 23-5-115, 23-5-602, 23-5-621, MCA

IMP: ~~23-5-115~~, 23-5-136, 23-5-602, 23-5-603, ~~23-5-606~~, 23-5-608, ~~23-5-609~~, 23-5-610, 23-5-621, 23-5-637, MCA

RATIONALE AND JUSTIFICATION: The Gaming Advisory Council recommended the department amend this rule to allow video gambling machines to accept the same dollar denominations as accepted by Montana Lottery kiosks. This proposed rule amendment is reasonable and necessary to implement the Gaming Advisory Council recommendation to allow bill acceptors in video gambling machines that accept bills up to a \$100 denomination.

23.16.1908 SOFTWARE SPECIFICATIONS FOR VIDEO KENO MACHINES

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

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

~~(ii) game marked spots in combination with a keno win can be used to trigger bonus games, award multipliers, or award additional credit that can be redeemed for cash;~~

(iii) remains the same but is renumbered (ii).

(e) remains the same.

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

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

RATIONALE AND JUSTIFICATION: The 2011 Legislature enacted SB 361, which in part amended 23-5-602, MCA, to define a "bonus game" as a prize for achieving a "defined outcome," rather than for achieving a "win." This proposed rule amendment is therefore reasonable and necessary to amend the rule establishing keno software specifications to recognize that bonus games may be awarded as the result of a defined outcome, specifically, an outcome resulting from game marked spots, as opposed to a win which results only from player marked spots.

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 Rick Ask, Gambling Control Division, 2550 Prospect Avenue, P.O. Box 201424, Helena, MT 59620-1424; fax (406) 444-9157; or e-mail rask@mt.gov, and must be received no later than November 25, 2011.

6. An electronic copy of this Notice of Proposed Amendment is available through the Department of Justice's web site at <http://doj.mt.gov/resources/administrativerules.asp>. The department strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Department of Justice works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

7. The Department of Justice maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices of rules regarding the Crime Control Division, the Central Services Division, the Forensic Sciences Division, the Gambling Control Division, the Highway Patrol Division, the Law Enforcement Academy, the Division of Criminal Investigation, the Legal Services Division, the Consumer Protection Division, the Motor Vehicle Division, the Justice Information Systems Division, or any combination thereof. Such written request may be mailed or delivered to Rick Ask, 2550 Prospect Avenue, P.O. Box 201424, Helena, MT 59620-1424; fax (406) 444-9157; or e-mail rask@mt.gov, or may be made by completing a request form at any rules hearing held by the Department of Justice. A copy of the interested persons request form may be printed from the Department of Justice's web site at <http://www.doj.mt.gov/resources/forms/interestedperson.pdf>, and mailed to the rule reviewer.

8. Cregg Coughlin, Assistant Attorney General, Gambling Control Division, has been designated to preside over and conduct the hearing.

9. The bill sponsor contact requirements of 2-4-302, MCA, do apply and the primary bill sponsor was initially contacted on September 8, 2011 by U.S. Postal mail.

By: /s/ Steve Bullock
STEVE BULLOCK
Attorney General, Department of Justice

/s/ J. Stuart Segrest
J. STUART SEGREST
Rule Reviewer

Certified to the Secretary of State October 17, 2011.

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

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 24.126.301 definitions,) PROPOSED AMENDMENT
24.126.704 interns and preceptors,)
24.126.901 applications for)
certification, 24.126.2101 renewals,)
and 24.126.2103 and 24.126.2105)
continuing education)

TO: All Concerned Persons

1. On November 18, 2011, at 10:00 a.m., a public hearing will be held in room B-07, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

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 Chiropractors (board) no later than 5:00 p.m., on November 10, 2011, to advise us of the nature of the accommodation that you need. Please contact Dennis Clark, Board of Chiropractors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2390; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdcchi@mt.gov.

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

24.126.301 DEFINITIONS (1) and (2) remain the same.

(3) "Dietetic methods" as used in 37-12-104, MCA, shall mean any service, when performed, or ordered to be performed, by any licensed chiropractor, for therapeutic effects, which may employ recommending, and/or giving of any food, vitamin, mineral, herb, enzyme, glandular product, homeopathic preparation, diet plan, or other nutritional substance not requiring a medical prescription.

(4) remains the same.

(5) "Nonroutine application" means an application submitted to the division in which the application is defined as nonroutine either by ARM 24.101.402 or by these rules.

(a) A nonroutine application means that according to the application, the applicant reveals that one or more of the following scenarios apply to the applicant:

(i) they have voluntarily surrendered, cancelled, forfeited, or failed to renew a license as a result of any of the following:

(A) a complaint filed against them;

(B) a consent agreement; or

(C) an investigation or disciplinary proceedings;

(ii) they have voluntarily or involuntarily surrendered their privileges to provide services to health maintenance organizations, Medicare/Medicaid, or other payers, or have voluntarily or involuntarily surrendered hospital privileges, health maintenance organization participation, Medicare/Medicaid, or other payers during a pending investigation or in anticipation of an investigation, or have had such privileges reprimanded, denied, restricted, suspended, placed on probation, revoked, or subjected to other sanction or action;

(iii) they have been expelled from or asked to resign from any professional organization, or have been censured by a professional organization;

(iv) they have had civil or criminal charges pending or have pleaded guilty, forfeited bond, or been convicted of a crime (including plea of no contest or deferred prosecution), whether or not an appeal is pending, with the exception of the following:

(A) minor-in-possession charges or convictions;

(B) one misdemeanor committed more than five years ago; or

(C) traffic offenses, unless the illegal use or possession of alcohol or drugs are involved;

(v) the applicant's health care professional license was disciplined or was voluntarily surrendered in another state or jurisdiction; and

(vi) there are inconsistencies in the application or in the supporting documentation of the application, or any substantive irregularity deemed by department staff to warrant board review and approval prior to issuance of the license.

~~(5)~~ (6) "Physiotherapy" as used in 37-12-104, MCA, shall mean any service, when performed, or ordered to be performed, by any licensee, employing for therapeutic effects, physiological measures, activities, and devices for preventive and therapeutic purposes, physiological agents including, but not limited to, mechanical devices, heat, air, light, water, electricity, sound, exercise, rehabilitative procedures, massage, and mobilization, when performed for the purpose of diagnosis, evaluation, treatment, and instruction of the human body to detect, assess, correct, alleviate, prevent, and limit physical disability, injury, body malfunction, pain, mental condition by the aforementioned agents, or any other procedure taught in chiropractic colleges for the purpose of preventing, correcting, or alleviating a physiological or mental disability or condition.

AUTH: 37-1-131, 37-1-319, 37-12-201, MCA

IMP: 37-1-131, 37-12-104, 37-12-201, MCA

REASON: Per 37-1-101, MCA, department staff can issue and renew routine licenses on behalf of the boards. The board is adding the definition of nonroutine application to clarify which applications need full board review and which can be processed by staff.

24.126.704 INTERNS AND PRECEPTORS (1) remains the same.

(2) Prior to acting as an intern, a pregraduate student or postgraduate must apply to the board, and in so doing, must provide the following:

(a) through (6) remain the same.

(7) An intern license is valid for 12 consecutive months and is nonrenewable.

AUTH: 37-1-131, 37-12-201, MCA

IMP: 37-12-201, ~~37-12-304~~, MCA

REASON: The board is amending this rule to address questions on how long internships are valid. The board concluded that 12 months is sufficient for interns to submit school transcripts and complete and pass the required examination. The board believes internships should be a temporary status prior to full licensure and the board does not intend for interns to continuously renew their licenses. Implementation cites are being amended to accurately reflect all statutes implemented through the rule.

24.126.901 APPLICATIONS FOR CERTIFICATION OF IMPAIRMENT

EVALUATORS (1) remains the same.

(2) Applicants shall have been in active clinical practice in Montana for a minimum of ~~one year~~ 12 consecutive months, immediately preceding application.

(3) remains the same.

(a) successfully completing a board-approved program for education and training of certified chiropractic impairment evaluators, and passing the associated exam with a minimum of ~~75%~~ 75 percent; or

(b) successfully completing an educational and training program relating to chiropractic orthopedics, impairment ratings, or similar course work from a Council on Chiropractic Education (CCE) status chiropractic college or any other college or university approved by the board, and passing the associated exam with a minimum of ~~75%~~ 75 percent; or

(c) through (5) remain the same.

AUTH: 37-12-201, MCA

IMP: 37-12-201, MCA

REASON: The board is amending this rule to address applicant questions regarding the active practice requirement for impairment evaluator certification, including having active clinical practice in Montana for one year, but several years prior to making application. The board determined that actual recent practice is vital to becoming an impairment evaluator.

24.126.2101 RENEWALS (1) All chiropractors must renew their license with the board by submitting a renewal form and fee. The renewal date for a chiropractic license is set by ARM 24.101.413.

(2) remains the same.

(3) A license that is not renewed within two years of the most recent renewal date automatically terminates. The terminated license may not be reactivated, and a new original license must be obtained by submitting a new application and meeting all the requirements of ARM 24.126.501, and paying the appropriate fees in accordance with ARM 24.101.403. An applicant who has previously held a license

that is terminated, and who has not engaged in the practice of chiropractic for more than three years, will be considered a nonroutine application, and will be reviewed by the board.

(4) remains the same.

AUTH: ~~37-1-131, 37-1-319,~~ 37-12-201, MCA

IMP: 37-1-131, 37-1-141, ~~37-1-306, 37-1-319,~~ MCA

REASON: The board is amending this rule upon staff request to specify the steps for licensees to renew their licenses. Authority and implementation cites are being amended to accurately reflect all statutes implemented through the rule and provide the complete sources of the board's rulemaking authority.

24.126.2103 CONTINUING EDUCATION REQUIREMENTS (1) ~~Every~~ Beginning with the 2012 renewal, every licensee shall ~~complete~~ affirm that they have completed a minimum of ~~42~~ 13 hours of ~~board-approved~~ board-approved continuing education during each renewal period as defined in ARM 24.101.413. All active licensees shall affirm on all subsequent renewal applications that they have attended and successfully completed a minimum of ~~42~~ 13 hours of ~~board-approved~~ board-approved continuing education in the year preceding the application for renewal. Of the ~~42~~ 13 hours, no more than two hours can be in the subject area of philosophy and/or practice management. In addition, the board will require each licensee to demonstrate successful completion of a professional boundary and ethics continuing education course. ~~Four hours of professional boundaries and ethics continuing education will be in addition to the 12-hour continuing education annual requirement. Each licensee will be required to complete the course once every four years.~~ Of the 13 hours, one hour must be obtained in professional boundaries or ethics. The board will only grant credit for a maximum of one hour in professional boundaries or ethics. New licensees to the state of Montana have from the date of their original licensure in Montana until the end of their first renewal year to complete their first ~~42~~ 13 hours of continuing education, and shall affirm on their second renewal application that they have attended and successfully completed a minimum of ~~42~~ 13 hours of ~~board-approved~~ board-approved continuing education during that period.

(2) through (7) remain the same.

AUTH: ~~37-1-134, 37-1-319,~~ 37-12-201, MCA

IMP: ~~37-1-134, 37-1-141, 37-1-306, 37-1-319,~~ MCA

REASON: The board is amending this rule to address numerous questions from licensees and board staff regarding the time period to obtain professional boundaries or ethics credits, specifically when the four years begin and who keeps track of licensees' four-year intervals. The board concluded that the subjects of professional boundaries and ethics are too important to only require them every four years and is amending this rule to require the one hour of professional boundaries or ethics every renewal. Authority and implementation cites are being amended to accurately reflect all statutes implemented through the rule and provide the complete sources of the board's rulemaking authority.

24.126.2105 APPROVED CONTINUING EDUCATION (1) remains the same.

(2) From the date of their original licensure in Montana until the end of the first renewal period, new licensees can fulfill the continuing education requirement by attending one session of the "new doc seminar" in lieu of the ~~42-hour~~ 13-hour continuing education requirement.

(3) through (6) remain the same.

AUTH: 37-1-319, 37-12-201, MCA

IMP: 37-1-141, 37-1-306, 37-1-319, MCA

REASON: The board is amending this rule to align with the changes to CE hours in ARM 24.126.2103.

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Chiropractors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdcchi@mt.gov, and must be received no later than 5:00 p.m., November 28, 2011.

5. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at www.chiropractor.mt.gov. The department strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

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

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

8. Anjeanette Lindle, attorney, has been designated to preside over and conduct this hearing.

BOARD OF CHIROPRACTORS
JOHN SANDO, DC, PRESIDENT

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

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State October 17, 2011

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

In the matter of the adoption of New)
Rule I regarding the Horse Creek) NOTICE OF PUBLIC HEARING
Controlled Groundwater Area) ON PROPOSED ADOPTION

To: All Concerned Persons

1. On November 17, 2011, at 6:00 p.m., the Department of Natural Resources and Conservation will hold a public hearing at the Cobblestone Community Center, 242 South Woodard Avenue, Absarokee, Montana, to consider the proposed adoption of the above-stated rule.

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 November 10, 2011, to advise us of the nature of the accommodation that you need. Please contact Millie Heffner, Montana Department of Natural Resources and Conservation, 1424 Ninth Avenue, Helena, MT 59620, telephone (406) 444-9754, fax (406) 444-0533, e-mail mheffner@mt.gov.

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

NEW RULE I HORSE CREEK CONTROLLED GROUNDWATER AREA

(1) There is designated a Horse Creek Controlled Groundwater Area. Horse Creek Controlled Groundwater Area (HCCGWA) means an area of approximately 7995 acres or 12 square miles located southwest of Absarokee, Montana, and is generally described as follows:

(a) beginning at intersection of highway S-420 and Lower Grove Creek Road, proceeding southwest along Lower Grove Creek Road to intersection with Grove Creek Road, following Grove Creek Road to bridge over Fishtail Creek, following Fishtail Creek to confluence with West Rosebud Creek, following West Rosebud Creek to Ross-Flannigan Ditch diversion, following Ross-Flannigan Ditch to intermittent tributary to West Rosebud Creek in section 11, following intermittent tributary to its confluence with West Rosebud Creek, following West Rosebud Creek to bridge at highway S-420, following S-420 to starting point;

(b) the legal land descriptions are in the following table:

Quarter Section	Section	Township	Range
S2 SESE	33	3S	18E
S2 S2	36	3S	18E
All	10, 15, 16, 21	4S	18E
Portions of	9, 11, 12, 14, 20, 22, 29	4S	18E
W2	1	4S	18E
E2, E2SW	4	4S	18E

NWNW	23	4S	18E
N2	28	4S	18E
NE, NW NW	29	4S	18E
S2 SW, SW SE	36	4S	18E

(c) a map of the area within the HCCGWA is posted at http://www.dnrc.mt.gov/wrd/water_rts/cgwa/horsecreek/default.asp.

(2) The department shall accept a Notice of Completion of Groundwater Development, Form 602, within the HCCGWA if all of the following are met, otherwise an Application for Beneficial Water Use Permit, Form 600 must be filed.

(a) The groundwater development point of diversion is on a parent tract of land. A parent tract means a tract of land as it exists within the HCCGWA on October 27, 2011.

(b) The purpose is for domestic, multiple domestic, lawn and garden (which includes shelterbelts), or stock.

(c) The maximum appropriation is 35 gallons per minute or less.

(d) The volume used per year is not greater than one acre-foot (325,851 gallons) per year.

(e) The project does not include a reservoir.

(3) An Application for Beneficial Water Use Permit, Form 600 must include the following:

(a) a mitigation plan which will offset the rate, timing, and location of depletion calculated within the HCCGWA; and

(b) an Application to Change, Form 606, if the mitigation plan includes changing an existing water right for mitigation purposes.

(4) The department may also accept the following within the HCCGWA:

(a) Application to Change, Form 606;

(b) Replacement Well Notice, Form 634; or

(c) Redundant Well Construction Notice, Form 635.

(5) All new wells, whether a new appropriation or change of existing appropriation, must install a 0.75-inch access tube (preferably PVC) to within five feet above the pump to allow static water level measurements to be taken.

(a) The appropriator shall measure the static water level quarterly and record it on a form provided by the department.

(b) Records must be submitted to the department annually.

(6) All new wells shall have a department-approved in-line meter installed at a point approved by the department to measure the total volume of water diverted.

(a) Water must not be diverted until the required measuring device is in place and operating.

(b) Water use records shall be submitted annually to the department.

(7) Water use for lawn and garden irrigation under all water rights issued after the effective date of this rule that do not have mitigation will be discontinued when the three-month standard precipitation index (SPI) is less than or equal to -1.

(a) The three-month SPI will be calculated by the department using precipitation data from the National Weather Service station in Fishtail, Montana, which is available at <http://mesowest.utah.edu/index.html>.

(b) The department will post the three-month SPI at the beginning of each of the irrigation season months of May, June, July, August, and September at http://www.dnrc.mt.gov/wrd/water_rts/cgwa/horsecreek/default.asp.

(8) The department may, if circumstances change, propose to amend these rules accordingly after public notice and hearing.

AUTH: 85-2-506, 85-2-508, MCA

IMP: 85-2-506, 85-2-508, MCA

REASONABLE NECESSITY: 85-2-506, MCA, allows the department to designate temporary or permanent controlled groundwater areas. Data collected within the boundaries of the temporary Horse Creek Controlled Groundwater Area over approximately a four-year time period shows that springs in the Horse Creek drainage could dry up and the average annual flows in Horse Creek could be reduced by 25 percent during dry years if a platted subdivision (Crow Chief Meadows) is completed as intended. A Montana Department of Natural Resources and Conservation hydrogeologist evaluated the data and provided a report in 2009 (*Ground Water Conditions at the Horse Creek Temporary Controlled Ground Water Area*, April 2009), which shows that future water development within the Horse Creek Controlled Groundwater Area must be managed to protect senior water right users. These rules are needed to accomplish that protection.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted in writing to Millie Heffner, Department of Natural Resources and Conservation, 1424 Ninth Avenue, Helena, MT 59620; fax (406) 444-0533; or e-mail mheffner@mt.gov, and must be postmarked no later than November 25, 2011.

5. David Vogler, Department of Natural Resources and Conservation, has been designated to preside over and conduct the public hearing.

6. An electronic copy of this Notice of Public Hearing on Proposed Adoption is available through the department's web site at <http://www.dnrc.mt.gov>. The department strives to make the electronic copy of this Notice of Public Hearing on Proposed Adoption conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered.

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 that the person wishes to receive notices regarding conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources, or a combination thereof. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be sent or delivered to

the contact person in 4 above or may be made by completing a request form at any rules hearing held by the department.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The bill sponsor was contacted by e-mail on October 4, 2011.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

/s/ Mary Sexton

MARY SEXTON

Director

Natural Resources and Conservation

/s/ Anne W. Yates

ANNE W. YATES

Rule Reviewer

Certified to the Secretary of State on October 17, 2011.

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 37.5.304, 37.85.512, and) PROPOSED AMENDMENT
37.85.513 pertaining to Medicaid)
credible allegation of fraud)

TO: All Concerned Persons

1. On November 16, 2011, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing in Room 207, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on November 9, 2011, to advise us of the nature of the accommodation that you need. Please contact Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.5.304 DEFINITIONS For purposes of this subchapter, unless the context requires otherwise, the following definitions apply:

(1) through (1)(p)(ii) remain the same.

(iii) order corrective action to be taken at a swimming pool, spa, or other water feature.

(2) through (5) remain the same.

(6) "Credible allegation of fraud" may be an allegation, which has been verified by the State, from any source. Allegations are considered to be credible when they have indicia of reliability and the state Medicaid agency has reviewed all allegations, facts, and evidence carefully and acts judiciously on a case-by-case basis. Allegations may include, but are not limited to, the following:

(a) fraud hotline complaints;

(b) claims data mining; or

(c) patterns identified through provider audits, civil false claims cases, and law enforcement investigations.

(6) through (12) remain the same but are renumbered (7) through (13).

AUTH: ~~2-4-204, 41-3-208, 41-3-1142, 50-53-103, 52-2-111, 52-2-112, 52-2-403, 52-2-622, 52-2-704, 52-3-304, 52-3-804, 53-2-201, 53-2-606, 53-2-803, 53-3-102, 53-3-~~

407, 53-4-111, 53-4-212, 53-4-403, 53-4-503, 53-5-304, 53-5-504, 53-6-111, 53-6-113, 53-7-102, 53-20-305, MCA

IMP: 2-4-204, 41-3-202, 41-3-208, 41-3-1103, 50-53-101, 50-53-102, 50-53-103, 50-53-104, 50-53-106, 50-53-107, 52-2-603, 52-2-704, 52-2-726, 53-2-201, 53-2-306, 53-2-606, 53-2-804, 53-3-107, 53-4-112, 53-4-404, 53-4-503, 53-4-513, 53-5-304, 53-6-101, 53-6-107, 53-6-111, 53-6-113, 53-20-305, MCA

37.85.512 NOTICE OF ADVERSE ACTION (1) As provided in this rule, the department must notify a provider of any adverse action it will take ~~on a determination~~ when the department has determined that the provider has engaged in fraud, improper billing, waste, ~~or abuse,~~ or has received payment to which the provider is not entitled, or where the department has verified a credible allegation of fraud, as that term is defined at ARM 37.5.304. The ~~notification~~ notice must include address all of the following:

(a) a description of the fraud, allegation, improper billing, waste, abuse, or overpayments;

(b) the dollar value of any overpayment; ~~and~~

(c) the adverse action to be taken or sanction to be imposed by the department;

(d) explanation of any actions required of the provider; and

(e) the provider's right to submit written evidence for consideration by the department, an administrative review, and a fair hearing.

(2) The department is not required to notify a provider pursuant to (1) until after the department has determined that fraud, a credible allegation of fraud, improper billing, waste, abuse, or an overpayment has occurred, ~~the dollar amount of any overpayment and that a particular adverse action will be taken by the department against the provider, such as recovery of an overpayment or imposition of a sanction.~~ The department is not required to notify the provider when the department merely suspects or has information which suggests that fraud, abuse, or an overpayment has occurred or when the department has not determined to take a particular adverse action in response to the fraud, abuse, or overpayment.

(3) ~~Subject to the provisions of (4), the department must notify the provider as required in this rule within 45 days after the department has determined that fraud, abuse or an overpayment has occurred, the dollar amount of any overpayment and the adverse action that will be taken against the provider.~~ Subject to the provisions of (4) and (5), and excepting suspensions of payment under ARM 37.85.513(3), the department must notify the provider as required in this rule within 45 days after the department has determined that fraud, improper billing, waste, abuse, or an overpayment has occurred. The department's failure to notify a provider as required by this rule is not a defense to recovery of the overpayment or imposition of the sanction, but the department may be required to provide a new notice in compliance with this rule.

(4) and (5) remain the same.

AUTH: 53-2-201, 53-6-111, 53-6-113, MCA

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

37.85.513 SUSPENSION OR WITHHOLDING OF PAYMENTS PENDING FINAL DETERMINATION (1) Where the department has notified a provider of a violation, sanction, or an overpayment pursuant to ARM 37.85.512, the department may withhold payments on pending and subsequently received claims in an amount reasonably calculated to approximate the amounts in question or may suspend all payments pending a ~~final determination~~ the outcome of a departmental or law enforcement investigation.

(2) Where the department intends to withhold or suspend payments not regarding a credible allegation of fraud, as that term is defined at ARM 37.5.304, it shall notify the provider in writing at least ten days prior to commencement of withholding and shall include a statement of the provider's right to request an informal reconsideration of such decision as provided in ARM 37.5.305. This rule does not require that an informal reconsideration or any hearing be conducted prior to the withholding or suspension of payments.

(3) Where the department suspends payments based on a credible allegation of fraud in accordance with 42 CFR 455.23, the department may suspend payments without first notifying the provider.

(a) The department must send notice of its suspension of payments within the following timeframes:

(i) five days of taking such action unless requested in writing by a law enforcement agency to temporarily withhold such notice;

(ii) thirty days if requested by law enforcement in writing to delay sending such notice, which request for delay may be renewed in writing up to twice and in no event exceed 90 days.

(b) In addition to the noticing requirements of ARM 37.85.512(1), the notice must state that the suspension is in accordance with 42 CFR 455.23 and is for a temporary period and cite the circumstances under which the withholding will be terminated. Suspension of payment will not continue after either of the following:

(i) the agency or the prosecuting authorities determine that there is insufficient evidence of fraud or willful misrepresentation by the provider; or

(ii) legal proceedings related to the provider's alleged fraud are completed.

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

AUTH: 53-2-201, 52-2-211, 53-2-803, 53-4-111, 53-6-111, 53-6-113, MCA

IMP: 52-2-112, 53-2-201, 53-2-306, 53-2-804, 53-4-112, 53-6-111, MCA

4. STATEMENT OF REASONABLE NECESSITY

In order to comply and implement portions of the Affordable Care Act, ARM 37.5.304, 37.85.512, and 37.85.513 must be amended to reflect new statutory requirements. In addition, Montana underwent a Comprehensive Program Integrity (PI) Review in August of 2010. One of the regulatory compliance issues cited by the Centers for Medicare and Medicaid Services' (CMS) Medicaid Integrity Group (MIG) was the state's notice of payment withholding letter. The letter did not include all required information as required by 42 CFR 455.23(b). In order to comply with the federal rule, the department must update rules to reflect the federal language

defining credible allegation of fraud, timeframe for notifying providers, and the content of the withholding letter notice.

Section 6402(h)(2) of the Affordable Care Act, Suspension of Medicaid Payments Pending Investigation of Credible Allegations of Fraud amended section 1903(i)(2) of the Social Security Act to provide that federal financial participation (FFP) in the Medicaid program will not be made with respect to any amount expended for items or services (other than an emergency item or service, not including items or services furnished in an emergency room of a hospital) furnished by an individual or entity to whom a state has failed to suspend payments under the plan during any period when there is pending an investigation of a credible allegation of fraud against the individual or entity as determined by the state, unless the state determines that good cause exists not to suspend such payments. On February 2, 2011, CMS published its final rule implementing this provision found at the following web site: <http://edocket.access.gpo.gov/2011/pdf/2011-1686.pdf>.

CMS-6028-FC allows Medicare payments to be suspended from providers or suppliers if there is a credible allegation of fraud pending an investigation or final action. The law also requires states to suspend payments to Medicaid providers where there is a credible allegation of fraud. This enhanced authority will help prevent taxpayer dollars from being used to pay fraudulent providers and suppliers.

States must suspend Medicaid payments to providers when an investigation of a "credible allegation of fraud" against an individual or entity is pending, unless the state has determined that there is good cause not to suspend. If a state fails to suspend, 42 CFR 477.90 provides that the state will not receive FFP payments.

In the final rule, CMS provides certain bounds around the definition of "credible allegation of fraud" at 42 CFR 455.2. Generally, a "credible allegation of fraud" may be an allegation that has been verified by a state and that has indicia of reliability that comes from any source. Further, CMS recognizes that different states may have different considerations in determining what may be a "credible allegation of fraud." Accordingly, CMS believes states should have the flexibility to determine what constitutes a "credible allegation of fraud" consistent with individual state law. However, a "credible allegation of fraud," for example, could be a complaint made by an employee of a physician alleging that the physician is engaged in fraudulent billing practices, i.e., the physician repeatedly bills for services at a higher level than is actually justified by the services rendered to beneficiaries. Upon state review of the physician's billings, the state may determine that the allegation has indicia of reliability and is, in fact, credible.

According to 42 CFR 455.23, Medicaid payments may be suspended without prior notice, but providers must receive notice (unless law enforcement requests the state to temporarily withhold the notice) of the suspension within five days after the state initiates it. However, ARM 37.85.513 currently requires that the provider receive notice of withholding or suspension of payments ten days prior to the withholding of suspension. This is conflicting with the federal requirement. In addition, ARM

37.85.513 requires that the provider must have received notice of the adverse action as required by ARM 37.85.512. Currently ARM 37.85.512 and 37.85.513 do not contain the correct language and must be updated. The state's notice must include or address all requirements found in 42 CFR 455.23(b).

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: Kenneth Mordan, 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., November 25, 2011.

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. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ Kurt R. Moser
Rule Reviewer

/s/ Mary E. Dalton acting for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State October 17, 2011.

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 37.86.2207 pertaining to) PROPOSED AMENDMENT
EPSDT services reimbursement)

TO: All Concerned Persons

1. On November 16, 2011, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on November 9, 2011, to advise us of the nature of the accommodation that you need. Please contact Kenneth Mordan, 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:

37.86.2207 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT (EPSDT) SERVICES, REIMBURSEMENT (1) through (3) remain the same.

(4) Reimbursements for school-based health related services are specified in the School-Based Health Service Fee Schedule ~~dated August 2011, which is adopted and incorporated by reference.~~ A copy of the School-Based Health Service Fee Schedule is posted at <http://medicaidprovider.hhs.mt.gov>. Rates are adjusted to reimburse these services at the federal ~~matching~~ medical assistance percentage (FMAP) rate.

(5) remains the same.

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

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

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (the department) is proposing the amendment of ARM 37.86.2207 pertaining to early and periodic screening diagnostic and treatment services reimbursement for school-based services.

ARM 37.86.2207

The proposed amendments are necessary to correct a clerical mistake and to simplify administration.

The term "matching" would be changed to "medical" to accurately reflect the correct term used in the Code of Federal Regulation (CFR) for this acronym.

The school-based fee schedule is entirely dependent upon other department reimbursement rules, namely audiology, speech language pathology, physical therapy, occupational therapy, private duty nursing, and mental health. Providers have the opportunity to comment on provider-specific fee changes when those rules are amended. Once the provider-specific rules are adopted and incorporated by reference in other rules the fees automatically apply to the school-based providers. Therefore, the department is proposing that the school-based health service fee schedule no longer be incorporated by reference. This will make it easier to maintain. The department intends to keep the school-based services fee schedule up-to-date for the convenience of providers and department staff, but it will no longer have the effect of law. The right of providers and the public to comment on proposed rate changes will not be affected because rates for school-based services will continue to be set in other rules.

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: Kenneth Mordan, 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., November 25, 2011.

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. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed

text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ John Koch
Rule Reviewer

/s/ Mary E. Dalton acting for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State October 17, 2011.

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 37.86.805, 37.86.1802, and) PROPOSED AMENDMENT
37.86.1807 pertaining to durable)
medical equipment and hearing aids)

TO: All Concerned Persons

1. On November 16, 2011, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on November 9, 2011, to advise us of the nature of the accommodation that you need. Please contact Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.86.805 HEARING AID SERVICES, REIMBURSEMENT (1) The department will pay the lowest of the following for covered hearing aid services and items:

(a) remains the same.

(b) the amount specified for the particular service or item in the department's fee schedule. The department adopts and incorporates by reference the department's Hearing Aid Fee Schedule dated ~~August 2011~~ January 2012. A copy of the department's fee schedule is posted at <http://medicaidprovider.hhs.mt.gov> and may be obtained from the Department of Public Health and Human Services, Health Resources Division, 1401 East Lockety, P.O. Box 202951, Helena, MT 59620-2951; or

(c) through (2) remain the same.

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

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-141, MCA

37.86.1802 PROSTHETIC DEVICES, DURABLE MEDICAL EQUIPMENT, AND MEDICAL SUPPLIES, GENERAL REQUIREMENTS (1) remains the same.

(2) Reimbursement for prosthetic devices, durable medical equipment, and medical supplies shall be limited to items delivered in the most appropriate and cost effective manner. Montana Medicaid adopts Medicare coverage criteria for Medicare covered durable medical equipment as outlined in the Region D Supplier Manual, local coverage determinations (LCDs) and national coverage determinations (NCDs) dated January 2014 2012. For prosthetic devices, durable medical equipment, and medical supplies not covered by Medicare coverage will be determined by the department. The items must be medically necessary and prescribed in accordance with (2)(a) by a physician or other licensed practitioner of the healing arts within the scope of his practice as defined by state law.

(a) The prescription must indicate the diagnosis, the medical necessity, and projected length of need for prosthetic devices, durable medical equipment, and medical supplies. The original prescription must be retained in accordance with the requirements of ARM 37.85.414. Prescriptions may be transmitted by an authorized provider to the durable medical equipment provider by electronic means or pursuant to an oral prescription made by an individual practitioner and promptly reduced to hard copy by the durable medical equipment provider containing all information required. Prescriptions for durable medical equipment, prosthetics, and orthotics (DMEPOS) shall follow the Medicare criteria outlined in chapters 3 and 4 of the Region D Medicare Supplier Manual (January 1, 2014 2012), which is adopted and incorporated by reference. A copy of the Region D Medicare Supplier Manual may be obtained from the Department of Public Health and Human Services, Health Resources Division, 1401 East Lockey, P.O. Box 202951, Helena, MT 59620-2951. For items requiring prior authorization the provider must include a copy of the prescription when submitting the prior authorization request.

(i) remains the same.

(b) Subject to the provisions of (3), medical necessity for oxygen is determined in accordance with the Medicare criteria outlined in the Medicare Durable Medical Equipment Regional Carrier (DMERC) Region D Supplier Manual, (January 1, 2014 2012), Local Coverage Determination (LCD) and policy articles (January 1, 2014 2012), and National Coverage Determination (NCD) (January 1, 2014 2012), which are adopted and incorporated by reference. The Medicare criteria specify the health conditions and levels of hypoxemia in terms of blood gas values for which oxygen will be considered medically necessary. The Medicare criteria also specify the medical documentation and laboratory evidence required to support medical necessity. A copy of the Medicare criteria may be obtained from the Department of Public Health and Human Services, Health Resources Division, 1401 East Lockey, P.O. Box 202951, Helena, MT 59620-2951.

(c) through (7) remain the same.

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

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-141, MCA

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

(2) Prosthetic devices, durable medical equipment, and medical supplies shall be reimbursed in accordance with the department's Durable Medical

Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Fee Schedule, effective January 2011 ~~2012~~, which is adopted and incorporated by reference. A copy of the department's fee schedule is posted at the Montana Medicaid provider web site at <http://medicaidprovider.hhs.mt.gov>. A copy of the department's Prosthetic Devices, Durable Medical Equipment, and Medical Supplies Fee Schedule may also be obtained from the Department of Public Health and Human Services, Health Resources Division, 1401 East Lockey, P.O. Box 202951, Helena, MT 59620-2951.

(3) and (4) remain the same.

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

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-141, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (the department) is proposing the amendment of ARM 37.86.805, 37.86.1802, and 37.86.1807 pertaining to durable medical equipment and hearing aids to reflect updated Medicare fees and updated Medicaid fee schedule rates of reimbursement. The proposed rule amendments will communicate the program rules and guidelines set forth by Medicare. The amendments proposed by the department are necessary to maintain compliance with Medicare requirements. Failure to remain in compliance can result in loss of federal funding for Medicaid services.

ARM 37.86.805

The department is proposing these amendments to change fee schedule dates to January 2012 to reflect changes in Medicare rates.

ARM 37.86.1802

The department is proposing these amendments because the Medicare Supplier Manual and Local Coverage Determinations (LCD), policy articles and National Coverage Determinations (NCD) are being updated to January 1, 2012 to reflect changes in Medicare policy.

ARM 37.86.1807

The department is proposing these amendments to update Medicare reimbursement rates. Montana Medicaid has adopted the use of these fees and coverage criteria.

Fiscal Impact

The fiscal impact for state fiscal year (SFY) 2012 is \$95 for hearing aid services (\$32 state funds, \$63 federal funds) and \$152,537 for durable medical equipment (\$51,573 state funds, \$100,964 federal funds).

The department estimates that there are 513 DME providers; 40 hearing aid providers; 37 audiology providers and 97,210 Medicaid recipients.

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: Kenneth Mordan, 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., November 25, 2011.

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. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ John Koch
Rule Reviewer

/s/ Mary E. Dalton acting for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State October 17, 2011.

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

In the matter of the amendment of)
ARM 37.88.901 and 37.88.908)
pertaining to the mental health)
services for adults program of)
assertive community treatment)
(PACT))

NOTICE OF PUBLIC HEARING ON
PROPOSED AMENDMENT

TO: All Concerned Persons

1. On November 16, 2011, at 1:30 p.m., the Department of Public Health and Human Services will hold a public hearing in Room 207 of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on November 9, 2011, to advise us of the nature of the accommodation that you need. Please contact Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.88.901 MENTAL HEALTH CENTER SERVICES FOR ADULTS.
DEFINITIONS (1) through (3) remain the same.

(a) Community-based psychiatric rehabilitation and support includes, but is not limited to, the following services:

(i) and (ii) remain the same.

(iii) assisting the individual to develop daily living skills and behaviors necessary for maintenance of a home, family relationships and responsibilities, an appropriate education, employment or vocational situation, and productive leisure and social activities; and

(iv) through (11) remain the same.

(12) "Program of assertive community treatment (PACT)" ~~or "PACT"~~ ~~means a self-contained clinical team that~~ is a client-centered, recovery-oriented mental health service delivery model that has received substantial empirical support for facilitating community living, psychosocial rehabilitation, and recovery for persons who have the most severe and disabling mental illnesses. Individuals served in PACT have severe symptoms and impairments, and have not benefited from traditional

outpatient programs. A PACT must meets the requirements of ARM 37.88.908. (13) through (18) remains the same.

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

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

37.88.908 MENTAL HEALTH CENTER SERVICES FOR ADULTS, PROGRAM OF ASSERTIVE COMMUNITY TREATMENT (PACT) (1) A "program of assertive community treatment (PACT)" ~~is a self-contained clinical treatment: defined in ARM 37.88.901.~~

- ~~(a) provides needed treatment, rehabilitation, and support services to identified individuals with severe disabling mental illness;~~
- ~~(b) minimally refers individuals to services outside the program;~~
- ~~(c) provides services on a long term basis;~~
- ~~(d) delivers 75% or more of team service time outside program offices;~~
- ~~(e) serves individuals with severe disabling mental illness who are at least 18 years old, have severe symptoms and impairments not effectively treated by other available, less intensive services, or who have a history of avoiding mental health services;~~
- ~~(f) provides psychiatric services at the rate of at least 20 hours per week for each 70 persons served;~~
- ~~(g) maintains a ratio of at least one staff person, not including a psychiatrist, or peer specialist for each nine persons served.~~

(2) Assertive community treatment teams must be approved by the Addictive and Mental Disorders Division; ~~and~~

~~(h)~~ (3) Assertive community treatment teams must be approved by the Addictive and Mental Disorders Division, and comply with the Montana Program of Assertive Community Treatment (PACT) Standards. The department adopts and incorporates by reference the Montana PACT Standards ~~(2009)~~ (2011) which set forth the standards of treatment for adults with a severe disabling mental illness (SDMI). A copy of the standards may be obtained from the Addictive and Mental Disorders Division, P.O. Box 202905, Helena, MT 59620-2905 or the following web site: <http://www.dphhs.mt.gov/amdd/services/index.shtml>.

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

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

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (the department) is proposing to amend the above-stated administrative rules pertaining to Mental Health Services for Adults, Program of Assertive Community Treatment (PACT). These rule changes are necessary because some PACT programs have misinterpreted the standards. Updating and clarifying program standards will ensure consistent and effective application of program requirements and standards across agencies. PACT providers and department program staff have collaborated on the revisions to

develop appropriate language and terminology. The following is a description of each proposed rule amendment.

ARM 37.88.901

The department is proposing to amend the definition of "program of assertive community treatment (PACT)" to one that is descriptive of the program's service delivery model, purpose, and targeted population.

ARM 37.88.908

A reference to the amended definition of PACT services from ARM 37.88.901 is now included in this rule.

The amendment also incorporates the 2011 standards by reference. The 2011 standards were added to update those from 2009. Current rule identifies several program requirements that are included in the standards. The department is proposing to delete these program requirements describing staffing, services, and eligibility. The 2011 standards are available at the following web site:
<http://www.dphhs.mt.gov/amdd/services/index.shtml>.

Fiscal Impact

There is no fiscal impact due to amending these rules.

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: Kenneth Mordan, 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., November 25, 2011.

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. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version

of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ Michelle Maltese
Rule Reviewer

/s/ Mary E. Dalton acting for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State October 17, 2011.

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 37.81.304 pertaining to) PROPOSED AMENDMENT
maximum Big Sky Rx premium)
change)

TO: All Concerned Persons

1. On November 16, 2011, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing in auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on November 9, 2011, to advise us of the nature of the accommodation that you need. Please contact Kenneth Mordan, 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:

37.81.304 AMOUNT OF THE BIG SKY RX BENEFIT (1) An applicant eligible for the Big Sky Rx PDP premium assistance may receive a benefit not to exceed ~~\$37.47~~ \$36.02 per month. The benefit amount will not exceed ~~\$37.47~~ \$36.02 regardless of the cost of the premium for the PDP the individual chooses.

(a) If a portion of the applicant's PDP premium is paid through the Extra Help Program, the Big Sky Rx Program will pay the applicant's portion of the PDP premium up to ~~\$37.47~~ \$36.02 per month.

(b) Big Sky Rx does not pay for the cost of an enrollee's drugs or the cost of an enrollee's deductible, coinsurance, or copayments.

(c) All expenditures are contingent on legislative appropriation. The amount of the monthly benefit, ~~\$37.47~~ \$36.02, extends the Social Security Extra Help benefit amount to Montana residents with income up to 200% FPL. The department's total expenditure for the program will be based on appropriation and the number of enrolled applicants.

AUTH: 53-2-201, 53-6-1004, MCA

IMP: 53-2-201, 53-6-1001, 53-6-1004, 53-6-1005, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (the department) is proposing the amendment of ARM 37.81.304 pertaining to the Big Sky Rx monthly benefit payment. These rules are being updated to match the Low Income Subsidy (LIS) for Medicare Part D for this region.

ARM 37.81.304

Changes are necessary to this rule to ensure the monthly benefit does not exceed the Low Income Subsidy (LIS) set for this region. Since the inception of Big Sky Rx the benefit has mirrored the LIS to ensure a reasonable and prudent monthly benefit for enrolled members.

This rule will now match the federal monthly benefit benchmark as set forth in the Centers for Medicaid and Medicare Services (CMS) letter dated August 3, 2011. The department is attempting to clearly communicate to the public, through this rule amendment, program rules and guidelines. This amendment was proposed only after extensive consideration of its impact on providers and recipients.

Fiscal Impact

The number of people affected by the decrease of the maximum premium from \$37.47 to \$36.02 is 2,298. This will reduce the monthly benefit by \$3,332.10 and yearly benefit by \$39,985.20.

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: Kenneth Mordan, 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., November 25, 2011.

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. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of

State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ John Koch
Rule Reviewer

/s/ Mary E. Dalton acting for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State October 17, 2011.

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 37.86.2803, 37.86.2907, and) PROPOSED AMENDMENT
37.86.2925 pertaining to Medicaid)
inpatient hospital services)

TO: All Concerned Persons

1. On November 16, 2011, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on November 9, 2011, to advise us of the nature of the accommodation that you need. Please contact Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.86.2803 ALL HOSPITAL REIMBURSEMENT, COST REPORTING

(1) Allowable costs will be determined in accordance with generally accepted accounting principles as defined by the American Institute of Certified Public Accountants. Such definition of allowable costs is further defined in accordance with the Medicare Provider Reimbursement Manual, CMS Publication 15 Transmittal 24-25 last updated ~~January 2010~~ April 2011, subject to the exceptions and limitations provided in the department's administrative rules. The department adopts and incorporates by reference Pub. 15, which is a manual published by the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), which provides guidelines and policies to implement Medicare regulations which set forth principles for determining the reasonable cost of provider services furnished under the Health Insurance for Aged Act of 1965, as amended. A copy of Publication 15 may be obtained through the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

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

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

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-149, MCA

37.86.2907 INPATIENT HOSPITAL PROSPECTIVE REIMBURSEMENT, APR-DRG PAYMENT RATE DETERMINATION (1) The department's APR-DRG prospective payment rate for inpatient hospital services is based on the classification of inpatient hospital discharges to APR-DRGs. The procedure for determining the APR-DRG prospective payment rate is as follows:

(a) Effective ~~July~~ January 1st of each year, the department will assign an APR-DRG to each Medicaid client discharge in accordance with the current APR-grouper program version, as developed by 3M Health Information Systems. The assignment and reimbursement of each APR-DRG is based on:

(i) through (b) remain the same.

(c) The department computes a Montana average base price per case. This base price includes in-state and out-of-state distinct part rehabilitation units and long term care (LTC) facilities. Effective ~~August 1, 2011~~ January 1, 2012 the average base price, including capital expenses, is ~~\$4,129~~ \$4,200. Disproportionate share payments are not included in this price.

(i) The average base price for Center of Excellence hospitals, including capital expenses, is ~~\$6,890~~ \$6,900. Disproportionate share payments are not included in this price.

(d) and (e) remain the same.

(2) The Montana Medicaid APR-DRG relative weight values, average national length of stay (ALOS), and outlier thresholds are contained in the APR-DRG Table of Weights and Thresholds (effective ~~July 1, 2010~~ January 1, 2012) published by the department. The department adopts and incorporates by reference the APR-DRG Table of Weights and Thresholds (effective ~~July 1, 2010~~ January 1, 2012). Copies may be obtained from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

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

IMP: 2-4-201, 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

37.86.2925 INPATIENT HOSPITAL REIMBURSEMENT, DISPROPORTIONATE SHARE HOSPITAL (DSH) PAYMENTS (1) through (3) remain the same.

(a) The department will submit an independent certified audit to CMS for each completed Medicaid state plan rate year, consistent with 42 CFR Part 455, Subpart D.

(b) To the extent that audit findings demonstrate that disproportionate share hospital (DSH) payments exceed the documented hospital-specific limits, the department will collect overpayments and redistribute DSH payments.

(c) Beginning with state fiscal year (SFY) 2011, based on audit findings, should the department determine that there is an overpayment to a provider, the department will:

(i) recover the overpayment from the provider;

(ii) redistribute the amount in overpayment to providers that had not exceeded the hospital-specific limit during the period in which the DSH payments were determined; and

(iii) ensure all payments will be subject to hospital-specific limits.

(d) Should the DSH overpayment exceed the aggregate hospital-specific limit, the federal amount of overpayment will be returned to the Center for Medicare and Medicaid Services (CMS).

(e) Beginning with SFY 2011, facilities choosing nonparticipation in the annual DSH audit will forfeit 100% of their DSH payment allocated for that year. This allocation will be deemed an overpayment and will be recovered from the provider.

(f) Disproportionate share payments must not exceed the DSH state allotment, except as otherwise required by the Social Security Act. In no event is the department obligated to use state Medicaid funds to pay more than the state Medicaid allotment of DSH payments due a provider.

(4) Eligibility for routine ~~disproportionate share hospital~~ DSH and supplemental ~~disproportionate share hospital~~ DSH payments will be determined based on a provider's year-end reimbursement status.

(5) If at any time during an audit, the department discovers evidence suggesting fraud or abuse by a provider, that evidence, in addition to the department's final audit report regarding that provider, will be referred to the Medicaid Fraud Unit.

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

IMP: 2-4-201, 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (the department) is proposing amendments to ARM 37.86.2803, 37.86.2907, and 37.86.2925 pertaining to Medicaid Inpatient Hospital Services.

ARM 37.86.2803

The department is updating this rule because the Centers for Medicare and Medicaid Services (CMS) publication, Medicare Provider Reimbursement Manual, was updated to the current transmittal number (25), and current effective date of April, 2011. The proposed amendments to ARM 37.86.2803 are necessary to update a reference to a federal publication. It is necessary to refer to the most recent version of the publication to ensure that the department and providers are utilizing the most current federal standards and are in compliance with these requirements.

ARM 37.86.2907

The department is making the following changes to this rule: the date, July 1, is being changed to January 1 of each year. This is the date the department assigns

an "all patient refined diagnosis related groups" (APR-DRG) to each Medicaid client discharge in accordance with the current APR-grouper; the Montana average base rate is changing from \$4,129 to \$4,200; and the base rate for hospitals designated as Centers of Excellence is changing from \$6,890 to \$6,900.

It is necessary for the department to change the date as to when the department will assign an APR-DRG to each Medicaid client discharge as this change in date will coincide with the update to the APR grouper. The APR grouper is updated in January of each year and is the tool used to assign each APR-DRG to each discharge.

The department finds it is necessary to change the hospital base rates which will offset the reduced weights that take effect with the new APR grouper.

ARM 37.86.2925

Language was added to clarify how the department will collect "disproportionate share payments" (DSH) overpayments and redistribute DSH payments based upon audit findings. It is necessary for the department to add this language to rule as DSH audits are required by CMS. The added language will clarify to providers how the department will collect any overpayments and address the redistribution of these overpayments.

Fiscal Impact

The department proposes to increase inpatient hospital base rates effective January 1, 2012. Even though rate increases are proposed, these proposed increases will have a budget neutral effect on the Medicaid budget for state fiscal year (SFY) 2012. For each APR-DRG, the department determines a relative weight using a national data base. These relative weights will be re-centered to offset the proposed increase in base rates. Because of this, there will not be any fiscal impact. The revisions in ARM 37.86.2803 and 37.86.2925 will also have no fiscal impact.

The proposed changes will affect approximately 372 inpatient hospital providers both in and out of state. Services provided to Medicaid clients will not be affected.

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: Kenneth Mordan, 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., November 25, 2011.

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. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ John Koch
Rule Reviewer

/s/ Mary E. Dalton acting for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State October 17, 2011.

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 37.78.102, 37.78.430,) PROPOSED AMENDMENT
37.78.505, and 37.78.812, pertaining)
to TANF policy revisions)

TO: All Concerned Persons

1. On November 17, 2011, at 1:30 p.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendments of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on November 9, 2011, to advise us of the nature of the accommodation that you need. Please contact Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.78.102 TANF: FEDERAL REGULATIONS ADOPTED BY REFERENCE

(1) remains the same.

(2) The "Montana TANF Cash Assistance Manual" dated ~~July 1, 2011~~ January 1, 2012 is adopted and incorporated by this reference. A copy of the Montana TANF Cash Assistance Manual is available for public viewing at each local Office of Public Assistance, and at the Department of Public Health and Human Services, Human and Community Services Division, 111 N. Jackson St., 5th Floor, P.O. Box 202925, Helena, MT 59620-2925. Manual updates are also available on the department's web site at www.dphhs.mt.gov.

AUTH: 53-4-212, MCA

IMP: 53-4-211, 53-4-601, MCA

37.78.430 TANF: UNDERPAYMENTS AND OVERPAYMENTS (1) through (3)(c)(ii) remain the same.

(iii) In the case of an individual or assistance unit currently receiving assistance, if the household was determined to have committed an Intentional Program Violation (IPV) the department may recover an overpayment by reducing

the current cash assistance amount by 20% or \$20, whichever is higher, and retaining the sum by which the cash assistance has been reduced to repay the overpayment. At the department's option, recovery may also be made by voluntary payments by a member of the overpaid assistance unit or any other legal means available to collect a debt, including the use of offset against any monies which the state of Montana owes or may owe to a member of the filing unit.

(iii) remains the same, but is renumbered (iv).

(4) remains the same.

AUTH: 53-2-201, 53-4-212, MCA

IMP: 53-2-108, 53-2-201, 53-4-211, MCA

37.78.505 TANF: TANF CASH ASSISTANCE; INTENTIONAL PROGRAM VIOLATION AND DISQUALIFICATION HEARINGS (1) remains the same.

(2) If a TANF participant appears to have committed an IPV as defined in (1), ~~the local Office of Public Assistance (OPA)~~ the department must initiate administrative disqualification hearing (ADH) procedures to determine if the person should be disqualified from receiving cash assistance.

(3) The individual subject to the ADH must be ~~contacted in writing and requested to appear for a prehearing meeting at the local Office of Public Assistance.~~ During the prehearing meeting, the individual sent written notification and will be presented with the following:

(a) an explanation of the charges against the individual;

~~(b) the total amount of the overpayment and the time period for which the claim was established;~~

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

(4) If the individual does not sign a waiver of the right to an ADH ~~at the prehearing meeting in the local office,~~ an within ten days of the date of the written notification, ADH procedures shall be scheduled initiated and the individual alleged to have committed an IPV shall be sent a written notice of the hearing at least 30 days prior to the date of the hearing.

(a) through (7)(c) remain the same.

(8) After the ADH, the hearing officer shall issue a written decision to the participant and the department no later than 90 days after written notice is given to the participant of the hearing, unless the hearing has been postponed, in which case the 90-day period shall be extended for as many days as the hearing was postponed. If the written decision is adverse to the participant the decision will notify the participant of the right to appeal to the Board of Public Assistance.

(a) and (b) remain the same.

(9) If the hearing officer determines after an ADH has been held that the individual committed an IPV, the department must provide the individual with a written notice of disqualification prior to the commencement of the disqualification period. The notice must contain the following information:

(a) remains the same.

(b) the date the disqualification shall take effect; and

(c) if the individual is not currently participating in the program, notice that the period of disqualification shall be deferred until the individual applies for and is found eligible for assistance again;

(d) (c) the amount of assistance the remaining household members, if any, will receive during the disqualification period.

(10) through (14) remain the same.

AUTH: 53-4-212, MCA

IMP: 53-2-201, 53-4-211, 53-4-601, MCA

37.78.812 TANF: PARTICIPATION CRITERIA UNDER PARENTS AS SCHOLARS PROGRAM (1) ~~Based on current federal TANF participation rates, the department will set and allow a limited number of TANF recipients to continue postsecondary education activities under the Parents as Scholars Program if:~~

(a) ~~the participant has completed an assessment/screening which includes 12 months of successful postsecondary school attendance as a TANF recipient;~~

(b) ~~the participant's course work will lead to a degree or certificate in the approved program;~~

(c) ~~the participant does not have a baccalaureate degree or a certification in a field for which a degree or certificate was previously awarded;~~

(d) ~~the participant is enrolled full time in an approved educational program in a unit of the Montana university system as provided in 20-25-201, MCA, or any other accredited college in Montana, or enrolled online with an accredited college whose credits are transferable in their entirety to an approved educational program in Montana, or is enrolled in an accredited high school or training program approved by the department by rule;~~

(e) ~~the participant is making satisfactory progress in accordance with the requirements of the institution the participant is attending;~~

(f) ~~the participant has developed a comprehensive plan for the completion of the course of study and the attainment of a degree or certificate, regardless of the number of months remaining on the individual's TANF time clock;~~

(g) ~~the training provides skills that will lead to gainful employment in Montana in an area where the participant lives, or the participant is willing to relocate to an area within the United States where the acquired skills will lead to gainful employment;~~

(h) ~~the participant is cooperating with paternity and child support enforcement requirements; and~~

(i) ~~the participant completes a 180-hour work activity requirement in a 12-month period that may include work study, internships, or paid employment.~~

(2) ~~If applicants for the Parents as Scholars Program exceed the number of available openings as determined by the department, applicants will be chosen on the basis of merit determined on the basis of:~~

(a) ~~proximity to graduation with a degree or certification;~~

(b) ~~probability of the degree or certification leading to gainful employment in the state;~~

(c) ~~academic history, including but not limited to grade point average and any history of academic probation;~~

(d) any sanctions history; and

(e) chronology of application.

(1) The department will allow a maximum of 25 TANF recipients to continue postsecondary education activities under the Parents as Scholars Program (PAS).

(2) Twenty-five slots will be available statewide. Slots will be awarded through an application process and regional lottery as described in the Temporary Assistance for Needy Families (TANF) policy manual, section 701-3(a). Once a slot has been awarded to a participant, the participant will be entitled to retain the slot as long as the participant continues to meet the PAS requirements outlined in (3).

(3) A TANF recipient is eligible to participate in PAS if the recipient:

(a) meets all basic eligibility requirements for TANF;

(b) is a full-time vocational training/post secondary education student enrolled in an approved education program at least 12 credit hours each semester or 30 credit hours per year, or is in an Adult Basic Education (ABE) program providing full-time enrollment leading to a General Equivalency Diploma (GED);

(c) is in an approved program whose course work will lead to a degree or certificate;

(d) does not have a baccalaureate degree or a certification in a field for which a degree or certificate was previously awarded;

(e) is enrolled full time in an approved educational program in a unit of the Montana university system as provided in 20-25-201, MCA, or any other accredited college in Montana, or enrolled online with an accredited college whose credits are transferable in their entirety to an approved educational program in Montana, or is enrolled in an accredited high school or training program approved by the department by rule;

(f) maintains a cumulative GPA of 2.0 on a 4.0 scale and provides verification of current GPA at the end of each semester as well as verification of registration for classes for the next semester with a minimum of 12 credits or is making satisfactory progress in accordance with the requirements of the institution the participant is attending;

(g) has developed a comprehensive plan for the completion of the course of study and the attainment of a degree or certificate, regardless of the number of months remaining on the individual's TANF time clock;

(h) has successfully completed 12 months of Short Term Training while on TANF and is in good standing with the educational program; and

(i) maintains monthly face-to-face contact with the WoRC case manager and school counselor throughout the PAS participation period to ensure ongoing case management, compliance with FIA/EP requirements and satisfactory progress in educational activities outlined in the comprehensive plan.

AUTH: 53-4-212, MCA

IMP: 53-4-209, 53-4-211, 53-4-601, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (the department) is proposing amendments to ARM 37.78.102, 37.78.430, 37.78.505, and 37.78.812, pertaining to

TANF policy revisions including: Parents of Scholars Program, incorporating by reference the TANF policy manual, overpayment grant reduction option, and administrative disqualification hearing procedure.

ARM 37.78.102

ARM 37.78.102 currently adopts and incorporates by reference the TANF policy manual effective July 1, 2011. The department proposes to make some revisions to this manual that will take effect on January 1, 2012. The proposed amendments to ARM 37.78.102 are necessary to incorporate into the Administrative Rules of Montana the revised versions of the policy manual and to permit all interested parties to comment on the department's policies and to offer suggested changes. It is estimated that changes to the TANF manual could affect approximately 8461 TANF recipients, which is the average of the total number of recipients between February 2011 – April 2011.

No controversy is anticipated over this change.

Fiscal impact: No fiscal impact is anticipated due to this rule change.

Following is a brief overview of the TANF manual sections with substantive changes related to the above ARM changes.

TANF 701-1 Family Investment Agreement/WoRC Employability Plan

Incorporated TANF Bulletin 56 to reflect the change in the requirement to print and renegotiate a Family Investment Agreement (FIA) with the participant at the annual redetermination. Current policy allows a participant to complete a face-to-face or phone interview to complete the annual redetermination of TANF benefits, which includes the printing and renegotiation of the FIA. By removing the requirement to print and renegotiate a FIA at redetermination, it will expedite the redetermination process when completed by phone by eliminating the additional time to mail the FIA for signature and have it returned to the OPA. The section regarding Family Investment agreement/Employability Plan (FIA/EP) Renewal was removed from the manual.

TANF 801-2 At-Risk Interview, Plan, and Follow-up Incorporated TANF Bulletin 58

Current policy requires that the Office of Public Assistance (OPA), County Director, conduct a separate at-risk interview with participants that are within 12 months of meeting their 60-month time limit on TANF benefits. Based on comments from the OPA and WoRC program regarding the ineffectiveness of a formal At-Risk Interview with the OPA director, and the fact that WoRC Programs are currently providing the majority of case management activities, which include discussion of TANF time clock months, it was determined that At-Risk Interviews will no longer be conducted as a separate interview by the OPA County Director. The WoRC program will continue to

address participants at risk of exhausting their 60-month time limit on benefits during case management meetings.

Timeclock At-Risk reports, listing current open cases that are within 12 months of meeting their 60-month time limit on benefits, will be sent to the Office of Public Assistance County Directors, Work Readiness Component Supervisors and the TANF unit by the 10th of each month.

Section 801-2 will be removed from the manual material.

TANF 1502-1 Redetermination

Incorporated TANF Bulletin 56 to reflect the change in the requirement to print and renegotiate a Family Investment Agreement (FIA) with the participant at redetermination. Current policy allows a participant to complete a face-to-face or phone interview to complete the annual redetermination of TANF benefits, which includes the printing and renegotiation of the FIA. By removing the requirement to print and renegotiate a FIA at redetermination, it will expedite the redetermination process when completed by phone by eliminating the additional time to mail the FIA for signature and have it returned to the OPA.

ARM 37.78.430

ARM 37.78.430 has been changed to increase the rate in which an overpayment resulting from an Intentional Program Violation (IPV) may be recovered by grant reduction from the current rate of 10% or \$10, whichever is higher, to 20% or \$20, whichever is higher.

This policy is being changed to align the TANF policy with the Supplemental Nutrition Assistance Program (SNAP) policy regarding IPVs.

Possible controversy is anticipated over this change from participants and advocacy groups as it will reduce the TANF grant amount the client is currently receiving, if the department chooses the option of recovery by grant reduction.

Fiscal impact: No fiscal impact is anticipated due to this rule change. The department will recover an overpayment due to an IPV sooner because of the increased percentage or minimum amount, but the total recovery will be the same.

Following is a brief overview of the TANF manual sections with substantive changes related to the above ARM changes.

TANF 1504-1 Overpayments

This manual section was updated to include the change in the rate an overpayment resulting from an IPV will be recovered by grant reduction. The amount was changed from 10% or \$10, whichever is higher, to 20% or \$20, whichever is higher.

ARM 37.78.505

The Intentional Program Violation (IPV) and Disqualification Hearings rule has been updated to remove the requirement of an Administrative Disqualification Hearing (ADH) prehearing meeting. If a TANF participant appears to have committed an IPV, the department will now initiate the ADH procedure by sending the individual written notification of the ADH rather than conducting a prehearing meeting. This change is proposed because it is more efficient and less time-consuming for both the department's employees and the TANF participant to conduct this step by mail rather than in person. The individual will have ten days from the date of the written notification to respond before ADH procedures will be initiated. The department proposes to delete references to the offices of public assistance because the department's Quality Assurance Division (QAD) now investigates and processes IPV's, rather than the offices of public assistance.

No controversy is anticipated over this change.

Fiscal impact: No fiscal impact is anticipated due to this rule change.

ARM 37.78.812

ARM 37.78.812, Parents As Scholars (PAS), has been updated to incorporate revisions made by Senate Bill 385. This revision will allow no more than 25 eligible participants at any one time, that have exhausted the 12 months of allowable Short Term Training (STT) as an activity, to continue in a STT type of activity above and beyond the 12 months. These participants will count against the state's work participation rate.

TANF participants will need to complete an application to determine if they meet the eligibility criteria outlined in the bill. To be eligible for PAS a participant must also meet all basic eligibility requirements for TANF. The 25 slots will be awarded through an application process and regional lottery as outlined in the Temporary Assistance for Needy Families (TANF) policy manual, section 701-3 (a). Once awarded, slots will be retained as long as the participant continues to meet PAS eligibility requirements.

Federal regulations do not allow for SST as an activity beyond 12 months. Therefore, it is necessary to put these revisions of the current PAS program into the administrative rules to allow SST under state regulation.

Fiscal impact: This policy change would result in continuation of TANF benefits for up to 25 participants who under present policy would likely have their cases closed if they continued full-time education.

None of the families in the PAS program could have a household size of less than two persons. Using the monthly benefit for a family of three of \$504, times 12

months, times 25 participants, the additional benefit would be \$151,200 per year. The increased cash benefit would reduce the TANF block grant fund balance faster.

If a penalty is imposed for failure to meet the work participation rate, the state will be required to use MOE funds at 80% versus the current 75%. The department does not expect it will fail to meet the work participation rate.

Following is a brief overview of the TANF manual sections with substantive changes related to the above ARM changes.

TANF 701-3 (a) Parents as Scholars

This department has revised this section to reflect the revisions to the Parents As Scholars (PAS) program based on Senate Bill 385. It has also been revised to include additional eligibility criteria and the criteria for the approved PAS recipient to continue participating in the PAS program. Finally, this section has been revised to limit the number of participants to no more than 25 slots statewide and provide that slots will be awarded through a regional lottery. Approved slots can be retained during the summer months and school breaks as long as the student/participant continues to meet the PAS criteria.

5. The department intends to apply the amendments to ARM 37.78.812 retroactively to August 1, 2011, based on the provision of Senate Bill 385 (SB 385), passed by the 62nd Montana Legislature. All other amendments will be effective on January 1, 2012.

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Kenneth Mordan, 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., November 25, 2011.

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

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 6 above or may be made by completing a request form at any rules hearing held by the department.

9. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of

State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by telephone on October 14, 2011.

/s/ Barbara B. Hoffmann
Rule Reviewer

/s/ Mary E. Dalton acting for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State October 17, 2011.

BEFORE THE DEPARTMENT OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PROPOSED
ARM 38.5.1010, pertaining to electric) AMENDMENT
standards for utilities and ARM)
38.5.2202 and 38.5.2302, pertaining) NO PUBLIC HEARING
to pipeline safety) CONTEMPLATED

TO: All Concerned Persons

1. On December 2, 2011, the Department of Public Service Regulation (PSC) proposes to amend the above-stated rules.

2. The PSC will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or who need an alternative accessible format of this notice. If you require an accommodation, contact the PSC no later than 4:00 p.m. on November 22, 2011, to advise us of the nature of the accommodation you need. Please contact Aleisha Solem, PSC Secretary, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601; telephone (406) 444-6170; TTD (406) 444-6199; fax (406) 444-7618; or e-mail ASolem@mt.gov.

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

38.5.1010 INCORPORATION BY REFERENCE OF NATIONAL ELECTRICAL SAFETY CODE (1) Pursuant to 69-4-201, MCA, the commission is empowered to implement and enforce construction standards for utility lines and facilities and for that purpose the commission adopts and incorporates by reference the ~~2007~~ 2012 edition of the National Electrical Safety Code (NESC). A copy of the NESC may be obtained from the American National Standards Institute, 25 West 43rd Street, 4th Floor, New York, New York 10036, or may be reviewed at the Public Service Commission Offices, 1701 Prospect Avenue, Helena, Montana 59620-2601.

AUTH: 69-4-201, MCA

IMP: 69-4-201, MCA

REASON: Amendment of ARM 38.5.1010 (periodic update) is necessary to allow the PSC to administer the most recent version of the National Electrical Safety Code. The PSC is required to update the utility electric standards to the most recent edition of the National Electrical Safety Code to comply with the statutory mandate in 69-4-201(2), MCA. A copy of The National Electrical Safety Code may be reviewed at the PSC offices or is available online at <http://standards.ieee.org/findstds/standard/NESC-2012.html>.

38.5.2202 INCORPORATION BY REFERENCE OF FEDERAL PIPELINE SAFETY REGULATIONS (1) The commission adopts and incorporates by reference the U.S. Department of Transportation (DOT) Pipeline Safety Regulations, Code of Federal Regulations (CFR), Title 49, chapter 1, subchapter D, parts 191, 192, and 193, including all revisions and amendments enacted by DOT on or before ~~October 31, 2010~~ September 30, 2011. A copy of the referenced regulations may be obtained from United States Department of Transportation, Office of Pipeline Safety, Western Region, 12300 West Dakota Avenue, Suite 110, Lakewood, Colorado 80228, or may be reviewed at the Public Service Commission Offices, 1701 Prospect Avenue, Helena, Montana 59620-2601.

AUTH: 69-3-207, MCA
IMP: 69-3-207, MCA

38.5.2302 INCORPORATION BY REFERENCE OF FEDERAL PIPELINE SAFETY REGULATIONS -- DRUG AND ALCOHOL TESTING AND PREVENTION PROGRAMS (1) Except as otherwise provided in this subchapter, the commission adopts and incorporates by reference the DOT Pipeline Safety Regulations, Drug and Alcohol Testing, 49 CFR 199, including all revisions and amendments enacted by DOT on or before ~~October 31, 2010~~ September 30, 2011. A copy of the referenced CFRs is available from the United States Department of Transportation, Office of Pipeline Safety, Western Region, 12300 West Dakota Avenue, Suite 110, Lakewood, Colorado 80228, or may be reviewed at the Public Service Commission Offices, 1701 Prospect Avenue, Helena, Montana 59620-2601.

AUTH: 69-3-207, MCA
IMP: 69-3-207, MCA

REASON: Amendment of ARM 38.5.2202 and 38.5.2302 (annual update) is necessary to allow the PSC to administer the most recent version of federal rules applicable in the PSC's administration of all federal aspects of Montana's pipeline safety programs. A copy of the referenced regulations may be reviewed at the PSC offices or are available online at <http://www.access.gpo.gov/cgi-bin/cfrassemble.cgi?title=200349>.

4. Concerned persons may submit their written data, views, or arguments (original and ten copies) to Legal Division, Public Service Commission, 1701 Prospect Avenue, P.O. Box 202601, Helena, MT 59620-2601, and must be received no later than November 28, 2011, 5:00 p.m., or may be submitted to the PSC through the PSC's web-based comment form at <http://psc.mt.gov> (go to "Contact Us," "Comment on Proceedings Online," then complete and submit the form) no later than November 28, 2011. (PLEASE NOTE: When filing comments pursuant to this notice please reference "Docket No. L- 11.10.1-RUL.")

5. The Montana Consumer Counsel, 111 North Last Chance Gulch, Helena, Montana 59620-1703, telephone (406) 444-2771, is available and may be contacted to represent consumer interests in this matter.

6. If persons who are directly affected by the proposed amendment wish to express their data, views, or arguments either 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 Justin Kraske, Legal Division, Public Service Commission, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601, or e-mail jkraske@mt.gov to be received no later than 5:00 p.m., November 28, 2011.

7. If the PSC receives requests for a public hearing on the proposed action from either 10% 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 two entities based on the 27 entities affected.

8. The PSC maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the PSC. Persons who wish to have their name added to the list shall make a written request which includes that name, e-mail address, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: electric utilities, providers, and suppliers; natural gas utilities, providers, and suppliers; telecommunications utilities and carriers; water and sewer utilities; common carrier pipelines; motor carriers; rail carriers; and/or administrative procedures. Such written request may be mailed or delivered to Public Service Commission, Legal Division, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601, faxed to Aleisha Solem at (406) 444-7618, e-mailed to ASolem@mt.gov, or may be made by completing a request form at any rules hearing held by the PSC.

9. An electronic copy of this Proposal Notice is available on the PSC's web site and also through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register. However, the PSC advises that it will decide any conflict between the official version and the electronic version in favor of the official printed version. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ Travis Kavulla
Travis Kavulla, Chairman
Public Service Commission

/s/ Dennis Lopach
Dennis Lopach
Rule Reviewer

Certified to the Secretary of State, October 17, 2011.

BEFORE THE DEPARTMENT OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 38.5.1902 pertaining to) PROPOSED AMENDMENT
qualifying facilities)

TO: All Concerned Persons

1. On November 18, 2011, at 10:00 a.m., the Department of Public Service Regulation will hold a public hearing in the Bollinger Room at 1701 Prospect Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The Department of Public Service Regulation 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 Public Service Regulation no later than 4:00 p.m. on November 16, 2011, to advise us of the nature of the accommodation that you need. Please contact Aleisha Solem, Department of Public Service Regulation, 1701 Prospect Ave., Helena, Montana, 59620; telephone (406) 444-6170; fax (406) 444-7618; TDD/Montana Relay Service (406) 444-4212; or e-mail asolem@mt.gov.

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

38.5.1902 GENERAL PROVISIONS (1) through (4) remain the same.

(5) All purchases and sales of electric power between a utility and a qualifying facility shall be accomplished according to the terms of a written contract between the parties or in accordance with the standard tariff provisions as approved by the commission. A long-term contract for purchases and sales of energy and capacity between a utility and a qualifying facility greater than ~~40MW~~ 2MW in size shall be contingent upon selection of the qualifying facility by a utility through ~~an all-source~~ a competitive solicitation conducted in accordance with the provisions of ARM 38.5.2001 through 38.5.2012 and 38.5.8201 through 38.5.8229. Between competitive solicitations, purchases, and sales of energy and capacity between a utility and a qualifying facility greater than ~~40MW~~ 2MW in size shall be accomplished in accordance with the short-term standard avoided cost tariff approved by the commission or through negotiation of a short-term written contract. The utility shall recompute the short-term and long-term standard tariffed avoided cost rates following ~~public review and comment on each~~ submission of its least cost plan filing, ARM 38.5.2001 through 38.5.2012, or procurement plan filing, ARM 38.5.8201 through 38.5.8229. ~~The recomputed avoided cost rates should reflect any amendments to the plan due to the comments of the commission and the public.~~ If the qualifying facility is not selected, or does not participate, in the first available competitive solicitation, purchases and sales of energy and capacity shall continue

only according to the terms of a newly negotiated short-term written contract or in accordance with the newly computed, short-term standard tariffed avoided cost rates. Long-term contracts for purchases and sales of energy and capacity between a utility and a qualifying facility ~~40MW~~ 2MW or less may be accomplished according to standard tariffed rates as approved by the commission. The contract shall specify:

- (a) the nature of the purchases and sales;
- (b) the applicable rate schedule or negotiated rates for the purchases and sales;
- (c) the amount and manner of payment of interconnection costs;
- (d) the means for measurement of the energy or capacity purchased or sold by the utility;
- (e) the method of payment by the utility for purchases, and the method of payment by the facility for utility sales;
- (f) any installation and performance incentives to be provided by the utility to the qualifying facility;
- (g) the services to be provided or discontinued by either party during system emergencies;
- (h) the term of the contract;
- (i) applicable operating safety and reliability standards with which the qualifying facility must comply;
- (j) appropriate insurance indemnity and liability provisions.

(6) All purchases and sales of electric power between a utility and a qualifying facility shall be compatible with the goal of the commission's integrated least cost resource planning and acquisition guidelines, ARM 38.5.2001 through 38.5.2012, and the commission's procurement plan guidelines, ARM 38.5.8201 through 38.5.8229.

AUTH: 69-3-103, 69-3-604, MCA

IMP: 69-3-102, 69-3-602, 69-3-603, 69-3-604, MCA

REASON: Pursuant to the Public Utility Regulatory Policies Act of 1978 regulations issued by the Federal Energy Regulatory Commission, state commissions are required to set rates for purchases from small qualifying facilities that are equal to the avoided cost of the utility. 18 C.F.R. § 292.304. State commissions have the discretion to increase or decrease the limit on design capacity but may not set the design capacity below 100KW. 18 C.F.R. § 292.304(c)(1) and (2). The commission has adopted and incorporated these federal regulations in its administrative rules. ARM 38.5.1901.

Amendment to ARM 38.5.1902 is reasonably necessary because certain provisions are inconsistent with federal and/or state laws and rules and need to be updated for economic and public policy reasons.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Aleisha Solem, Department of Public Regulation, 1701 Prospect Ave.,

Helena, Montana, 59620; telephone (406) 444-6170; fax (406) 444-7618; or e-mail asolem@mt.gov, and must be received no later than 5:00 p.m., November 25, 2011.

5. The commission, a commissioner, or a duly appointed presiding officer may preside over and conduct the hearing.

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 that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in #4 above or may be made by completing a request form at any rules hearing held by the department.

7. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ Dennis Lopach
Dennis Lopach
Rule Reviewer

/s/ Travis Kavulla
Travis Kavulla
Chairman
Public Service Regulation

Certified to the Secretary of State October 17, 2011.

BEFORE THE PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA

In the matter of the adoption of New	)	NOTICE OF ADOPTION AND
Rules I through III and amendment of	)	AMENDMENT
ARM 2.43.5002, 2.43.5006,)	
2.43.5007, and 2.43.5008, all)	
pertaining to the operation of)	
Volunteer Firefighters' Compensation)	
Act administered by the Montana)	
Public Employees' Retirement Board)	

TO: All Concerned Persons

1. On August 25, 2011 the Public Employees' Retirement Board (PER Board) published MAR Notice No. 2-43-457 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1572 of the 2011 Montana Administrative Register, Issue Number 16.

2. The PER Board has amended ARM 2.43.5002, 2.43.5006, 2.43.5007, and 2.43.5008 as proposed.

The PER Board has adopted the above-stated rules as proposed: New Rule I (2.43.5003), II (2.43.5004), and III (2.43.5005).

3. No comments or testimony were received.

/s/ Melanie A. Symons
 Melanie A. Symons
 Chief Legal Counsel
 and Rule Reviewer

/s/ John Nielsen
 John Nielsen
 President
 Public Employees' Retirement Board

Certified to the Secretary of State October 17, 2011.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 10.16.3803 and 10.16.3818)
pertaining to special education)

TO: All Concerned Persons

1. On September 8, 2011, the Superintendent of Public Instruction published MAR Notice No. 10-16-121 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1772 of the 2011 Montana Administrative Register, Issue Number 17.

2. The Superintendent has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

10.16.3803 DEFINITIONS The following definitions apply to rules affecting the funding of special education programs:

(1) through (10) remain as proposed.

(11) "Low incidence disability services" means services to students whose disability occurs in less than one percent of the statewide public school population, presents a need for very intensive special education services, and costs for the services exceed the average costs for other students with disabilities. ~~Low incidence disabilities include autism, deafness or hearing impairments, vision impairments, and emotional disturbance when the emotional disturbance requires a more intense program such as day treatment most effectively provided in a multidistrict program.~~

(12) through (16) remain as proposed.

10.16.3818 SPECIAL EDUCATION TUITION RATES (1) through (3)(c)(iii) remain as proposed.

(iv) the host district uses any ~~remaining~~ unreserved balance after operating the prior year's special education program for low incidence disabilities to defray the ~~following~~ ensuing year's program costs used to determine the tuition rate; and

(v) through (7) remain as proposed.

3. The Superintendent of Public Instruction has thoroughly considered the comments and testimony received. A summary of the comments received and the Superintendent's responses are as follows:

COMMENT #1: Tim Harris, Special Education Division Administrator recommended the addition of "statewide public" in ARM 10.16.3803 to clarify the school population involved and the deletion of the last sentence because it wasn't necessary to the definition and may result in excluding some students. Mr. Harris recommended changing the terms in ARM 10.16.3818 for clarity and consistency with other rules.

RESPONSE #1: The Superintendent concurs with the recommended changes.

/s/ Ann Gilkey
Ann Gilkey
Rule Reviewer

/s/ Denise Juneau
Denise Juneau
Superintendent of Public Instruction

Certified to the Secretary of State October 17, 2011.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM	)	NOTICE OF AMENDMENT,
17.74.301, 17.74.350 through 17.74.357,	)	ADOPTION, AND REPEAL
17.74.359, 17.74.360, 17.74.361,)	
17.74.364, and 17.74.365; the adoption of	)	(ASBESTOS)
New Rules I through IV; and the repeal of)	
ARM 17.74.303 pertaining to incorporation)	
by reference, OSHA preclusion, and)	
asbestos project management)	

TO: All Concerned Persons

1. On April 14, 2011, the Department of Environmental Quality published MAR Notice No. 17-317 regarding a notice of public hearing on the proposed amendment, adoption, and repeal of the above-stated rules at page 493, 2011 Montana Administrative Register, issue number 7. On May 12, 2011, the department published MAR Notice No. 17-317 regarding a notice of second public hearing and extension of comment period on the proposed amendment, adoption, and repeal of the above-stated rules at page 718, 2011 Montana Administrative Register, issue number 9.

2. The department has amended ARM 17.74.301, 17.74.350, 17.74.351, 17.74.352, 17.74.353, 17.74.356, 17.74.357, 17.74.359, 17.74.360, 17.74.361, 17.74.364, 17.74.365, adopted New Rules I (17.74.369), II (17.74.370), III (17.74.371), and IV (17.74.372), and repealed ARM 17.74.303 exactly as proposed, and has amended ARM 17.74.354 and 17.74.355 as proposed, but with the following changes, new matter underlined, stricken matter interlined:

17.74.354 INSPECTION REQUIREMENTS FOR DEMOLITION AND RENOVATION ACTIVITIES (1) remains as proposed.

(2) The owner or operator shall ensure that a copy of the inspection report is kept on site during the asbestos project; The owner shall ensure that the report is kept on site and during subsequent renovations or demolition. The inspection report must be made available to the department upon request.

(3) A department-accredited asbestos inspector conducting an inspection in accordance with this subchapter shall:

(a) through (c)(iii) remain as proposed.

(d) collect samples from thermal system insulation as follows:

(i) and (ii) remain as proposed.

(iii) no bulk samples where the accredited inspector has determined that the thermal system insulation is fiberglass, foam, glass, rubber, or other non-ACM;

(e) through (4)(c)(vi) remain as proposed.

(5) For the purposes of an inspection conducted under (3):

(a) a material is considered to be ACM if the analytical results of at least one sample collected from that material show that asbestos is present in an amount

greater than 4% one percent; and

(b) remains as proposed.

(6) For inspections conducted under (3), the asbestos inspector shall report the findings in a written inspection report to the owner of the building or the operator conducting the planned demolition or renovation activity. The asbestos inspection report must include:

(a) through (i) remain as proposed.

(j) a copy of the sample analytical report, specified in (4)(c), with the name and address of each laboratory performing an analysis, the date of analysis, and the name and signature of the person performing the analysis; and

(k) through (9) remain as proposed.

17.74.355 ASBESTOS PROJECT PERMITS (1) through (6) remain as proposed.

(7) A copy of the asbestos project permit application, permit, project design, ~~contract~~, and sketch must be posted and maintained on site in a conspicuous location during the asbestos project. A copy of the asbestos project contract must be maintained on site and be made available for examination by department employees or representatives.

(8) remains as proposed.

3. The following comments were received and appear with the department's responses:

COMMENT NO. 1: Comments were made asking the department to clarify why it inserted "certain" in ARM 17.74.301(2).

RESPONSE: The department added the word "certain" before "asbestos practices" to make it clear that the department does not regulate and establish criteria for all asbestos practices. Specifically, the department has no authority to regulate practices addressed by the Occupational Safety and Health Act (OSH Act) and its implementing regulations.

COMMENT NO. 2: One commentor suggested that the purpose of the department's asbestos rules as set forth in ARM 17.74.301(2) should not be to regulate and establish criteria, but to protect public and worker health.

RESPONSE: The department's authority to adopt rules to implement the Asbestos Control Act is derived from 75-2-503(1), MCA, which specifically directs the department to adopt rules "*establishing standards and procedures* for accreditation of asbestos-related occupations and control of the work performed by persons in asbestos-related occupations" (emphasis added). The specific items that the rules are to address are generally listed in 75-2-503(1), MCA, as "standards," "requirements," and "criteria." The department does make it a point to consider public health and welfare, as well as the environment, in crafting the rules it proposes to adopt, but the specific purpose of the rules is to regulate and establish criteria as mandated by the Asbestos Control Act. The department has no authority to address worker safety issues already addressed in the OSH Act and its

implementing regulations. Therefore, the department declines to modify ARM 17.74.301(2) in response to this comment.

COMMENT NO. 3: One commentor asked why 40 CFR 61.145(a)(1), and other sections of 40 CFR 145 that discuss quantities, are still incorporated by reference in ARM 17.74.351(1)(a).

RESPONSE: ARM 17.74.351 adopts by reference the asbestos National Emissions Standards for Hazardous Air Pollutants (NESHAP) (40 CFR 61, subparts A and M), except for 40 CFR 61.145(a)(2). The department has specifically excepted section 145(a)(2) because that entire provision is inapplicable to Montana's regulatory system in light of the fact that the Asbestos Control Act applies to all ACM over three square feet in surface area or three linear feet of pipe. All other provisions in the asbestos NESHAP that reference quantities of ACM or RACM are applicable in Montana because the quantities were changed to reflect Montana's jurisdictional amount in existing ARM 17.74.353(1)(a) and (b). The department believes it would be inappropriate to delete entire provisions of the asbestos NESHAP from adoption by reference when simply substituting the different jurisdictional quantities can reconcile the provisions with the provisions of the Asbestos Control Act.

COMMENT NO. 4: One commentor suggested that the prescribed testing methodologies adopted by reference in ARM 17.74.351 should include other methods as well.

RESPONSE: The department recognizes that testing methods other than those specifically adopted by reference in this rule may be as appropriate or even more appropriate in particular situations. The department has addressed this issue in ARM 17.74.354(4)(b) by allowing the use of other testing methods accepted by the department. Accordingly, the department declines to modify ARM 17.74.351 in response to this comment.

COMMENT NO. 5: One commentor asked if a standard could be created for the NIOSH 7402 analytical method for analyzing TEM samples incorporated by reference in ARM 17.74.351.

RESPONSE: The department recognizes that testing methods, other than those specifically incorporated by reference in this rule, may be as appropriate, or even more appropriate, in particular situations. The department has addressed this issue in ARM 17.74.354(4)(b) by allowing the use of other testing methods accepted by the department. Accordingly, the department declines to modify ARM 17.74.351 in response to this comment.

COMMENT NO. 6: One commentor suggested the addition of a hyphen between "asbestos" and "containing waste" in ARM 17.74.352(4).

RESPONSE: The rule was proposed with the hyphen in the original notice, so no changes are necessary in response to this comment.

COMMENT NO. 7: A commentor suggested adding the word "who" following "person" in the revised definition provided for in ARM 17.74.352(9).

RESPONSE: The existing definition in ARM 17.74.352(9) already includes the suggested wording, so no changes are necessary in response to this comment.

COMMENT NO. 8: One commentor suggested that the reference to 75-2-502(3), MCA, in the definition of "asbestos project" does not exist.

RESPONSE: The proposed rules do not change the definition of "asbestos project" and the reference to 75-2-502(3), MCA, remains the correct citation.

COMMENT NO. 9: One commentor suggested adding the word "abatement" in the last sentence between the words "asbestos" and "project" in the definition of "asbestos project contractor/supervisor."

RESPONSE: The term "asbestos project contractor/supervisor" contains the term "asbestos project," which is a term of art defined in 75-2-502, MCA. The definition of "asbestos project" in 75-2-502, MCA, does not include the term "abatement." Also, 40 CFR 61, subpart M, does not use the term "abatement." Accordingly, the department declines to include the word "abatement" as requested by the commentor.

COMMENT NO. 10: One commentor suggested changing the definition of "asbestos project worker" to add "containment construction" to the definition and delete "or transports or disposes of asbestos-containing waste material" unless supervised by a contractor/supervisor.

RESPONSE: As stated in the original notice, the United States Supreme Court held, in *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992), that, unless a state has adopted a comprehensive worker protection program that has been approved by the Occupational Safety and Health Administration OSHA (which Montana has not done), any state regulatory provisions that address standards already addressed by the OSH Act, or its implementing regulations, are preempted. Because containments are required by the OSH Act, but not by the Asbestos Control Act or the asbestos NESHAP, the department has determined that it has no authority to require containments in its rules. Since it has no authority to regulate containments, the department has determined it has no authority to designate who can construct containments. That must be left up to OSHA to regulate. Accordingly, the department declines to add "containment construction" to the definition as suggested by this comment.

Concerning transportation and disposal of asbestos-containing waste, see the Response to Comment No. 39.

COMMENT NO. 11: One commentor asked why the definitions of "category I non-friable ACM" and "category II non-friable ACM" were removed from the definitions.

RESPONSE: The definitions of "category I non-friable ACM" and "category II non-friable ACM" are proposed to be deleted because the terms are defined in the NESHAP regulations that were adopted by reference, and the only places where the terms appear are in those NESHAP regulations. The terms do not appear anywhere else in subchapter 3. For additional explanation, please refer to the Response to Comment No. 22.

COMMENT NO. 12: One commentor suggested that the definition of "encapsulation" should be changed to insert the word "and" between "previously painted" and "undamaged RACM."

RESPONSE: The rule was proposed with the "and" between "previously painted" and "undamaged RACM" in the original notice, so no changes are necessary in response to this comment.

COMMENT NO. 13: One commentor asked why the definition of "engaged in an asbestos-related occupation" is needed.

RESPONSE: The department proposed to define "engaged in an asbestos-related occupation" to clarify the meaning of the term, which is found in ARM 17.74.301 and in 75-2-511, MCA. The department has come across several instances where persons have conducted asbestos projects without being accredited, but have asserted that working on a single project does not mean they were "engaged in an asbestos-related occupation." This proposed definition clarifies the fact that a person is engaged in an asbestos-related occupation whenever a person engages in specified activities, even if those activities do not comprise the person's career.

COMMENT NO. 14: One commentor asked why the definition of "visible emissions" was removed.

RESPONSE: The term "visible emissions" is defined in the NESHAP regulations the department is proposing to adopt by reference and the term is not used elsewhere in subchapter 3 of the rules. For additional explanation, please refer to the Response to Comment No. 15.

COMMENT NO. 15: One commentor asked why the department does not include the full text of the definition of RACM and other terms whose definitions are in CFR sections that are incorporated by reference in these rules.

RESPONSE: When an outside source is adopted by reference into the ARM, that outside source becomes a part of the ARM, just as much as if it were actually written out in the ARM. Therefore, when a term is defined in a portion of the Code of Federal Regulations (CFR) that has been adopted by reference into the ARM, it would be duplicative and unnecessary to define the term again in the ARM. In addition, such a situation potentially could lead to confusion if one of the definitions is amended in the future while the other one is not. Accordingly, the department is repealing all definitions in its asbestos rules that are adopted by reference through the asbestos NESHAP.

COMMENT NO. 16: Comments were received questioning the project design posting requirements contained in ARM 17.74.355(7). In the first comment, the department's authority to require that a copy of the project design be posted on site during an asbestos project was challenged because no project design parameters are referenced or defined in subchapter 3 or in ARM 17.74.355. In a second related comment, the rule was challenged based on the notion that the contracts for asbestos projects are not subject to public disclosure.

RESPONSE: Although the existing rules require the owner or operator to submit to the department all of the documents described in ARM 17.74.355(7), other than the permit itself, the department is proposing to eliminate the submittal requirement in order to facilitate the move to electronic submission of permit applications. However, it is expected that a project plan and sketch still will be prepared in connection with all asbestos projects as described in NESHAP (40CFR, 61.145(xi)) and in the AHERA Model Accreditation Plan. As a best management practice and in compliance with approved training, the department has determined that it is important to have those documents made available at the work site to lessen the likelihood of ACM being overlooked and also as a reference for the department should any of its staff inspect the asbestos project. Accordingly, the department declines to make the requested change at this time. As for the contract, the department notes that existing rules require it to be submitted to the department and when it is received it becomes a public record. However, the department agrees that requiring the contract amount and its terms to be posted for public perusal would add little to protection of human health or the environment. Accordingly, the department has amended ARM 17.74.355(7) to delete the requirement that the contract be posted in a conspicuous place and replaced it with a requirement that the contract merely be maintained at the facility during the asbestos project and that it be made available for department employees or representatives to examine upon request.

COMMENT NO. 17: One commentor suggested that ARM 17.74.355(3) might conflict with ARM 17.74.353(1)(c).

RESPONSE: The department does not consider there to be conflict between ARM 17.74.355(3) and ARM 17.74.353(1)(c). ARM 17.74.353(1)(c) concerns the federal NESHAP notification requirement for intent to demolish or renovate. ARM 17.74.355(3) concerns an application for an asbestos project permit pursuant to the Montana Asbestos Control Act. Furthermore, the NESHAP notification requirement provides that the notice should be delivered *at least* ten working days before the asbestos project is to begin. There is no requirement that the asbestos project contractor/supervisor wait until ten working days before the proposed asbestos project start date to send either the NESHAP notice or the permit application. They can be sent earlier to ensure there is time to correct any deficiencies in the application. The department declines to modify any of the proposed rules in response to this comment.

COMMENT NO. 18: A comment was made suggesting that a comma be placed between the terms "foam" and "glass" in ARM 17.74.354(3)(d)(iii).

RESPONSE: The department agrees with the comment and has included the suggestion to aid in clarity.

COMMENT NO. 19: A comment was made suggesting an editorial change from the symbol % to "percent" in ARM 17.74.354(5)(a).

RESPONSE: The department agrees with the comment and has amended the rule as shown above.

COMMENT NO. 20: A comment was made requesting that the statement in ARM 17.74.354(6)(j) be amended to read, "a copy of the sample analytical report specified in (4)(c);".

RESPONSE: The department agrees with the comment and has amended the rule as shown above.

COMMENT NO. 21: One commentor stated that inspectors are not usually given enough up-front information to comply with the requirements set out in the definition of "thoroughly inspect."

RESPONSE: The department believes the definition of "thoroughly inspect" is sufficiently clear to allow an accredited inspector adequate information to ensure compliance with the asbestos program requirements, so no change will be made to the rule in response to the comment.

COMMENT NO. 22: One commentor suggested that because the definition of "asbestos" in 75-2-502, MCA, does not mention anything about greater or lesser than one percent, all asbestos should be regulated.

RESPONSE: The statutory authority granted the department through the provisions of the Asbestos Control Act (Act) contained in Title 75, chapter 2, part 5, MCA, states that the department shall adopt rules establishing occupational accreditation standards and procedures and control of the work performed by persons in asbestos-related occupations. Additionally, the department has chosen to adhere to the provisions of 40 CFR 61.141, which establish a minimum percentage of asbestos in a material, greater than one percent for regulatory coverage to apply. The combination of the authority derived from the Asbestos Control Act, the department's administrative rules implementing the Act, and the federal delegation of authority through NESHAP, establishes the specific regulatory framework regarding both the concentrations of asbestos and the types of structures to which the department's authority extends.

COMMENT NO. 23: One commentor has suggested that the heading for ARM 17.74.354 should be more informative of what is included in the section.

RESPONSE: The rule was proposed with the updated title language in the original notice, so no changes are necessary in response to this comment.

COMMENT NO. 24: Regarding ARM 17.74.354(2), a commentor suggested that the owner, not the operator, should be responsible for maintaining the inspection report on site, because the operator may not be involved in, or have any control over, the demolition or renovation activities other than the asbestos project itself.

RESPONSE: The department agrees with the comment and has amended the rule as shown above.

COMMENT NO. 25: One commentor suggested that the proficiency analytical testing (PAT) rounds required in ARM 17.74.354(4) uses the wrong method.

RESPONSE: The testing method referenced in ARM 17.74.354(4) applies to polarized light microscopy (PLM), rather than PAT rounds, and adheres to the standards established by the EPA and the department.

COMMENT NO. 26: One commentor asked if the department would define or list the other methods acceptable to the department as referenced in ARM 17.74.354(4)(b).

RESPONSE: The department proposes to allow other methods, if requested in writing, and the department finds the other method(s) to be at least as accurate as the method referenced in the proposed rule. No list of other acceptable methods is available at this time, but the department will consider preparing such a list and making it available in the event other methods are properly requested of the department and found to be acceptable.

COMMENT NO. 27: One commentor suggested that, if sampling required under ARM 17.74.354(5)(b) is completed using EPA's PLM method, any result showing less than one percent asbestos should be confirmed through further testing because of the PLM method's deviation of plus or minus ten percent. Another commentor asked if point counting is, or should be, required for samples that contain less than ten percent asbestos.

RESPONSE: EPA's PLM method details several methods for the quantitative analysis of asbestos fibers including comparison of the sample to calibration materials that have similar textures and fiber abundance and the point counting method. EPA's PLM method does not state a deviation of plus or minus ten percent but states that the range and sensitivity of the method are variable and dependent upon many factors, including matrix effects, diagnostic reflections selected and their relative intensities, preferred orientation, and instrumental limitations. The method states that a detection limit of one percent is feasible given certain sample characteristics. The EPA sampling methodology does not require point counting, but the technique may be used to quantify asbestos fibers in a sample in certain circumstances. The department believes the proposed changes to ARM 17.74.354(5)(b) adequately address sampling requirements during an inspection and declines to modify the provision.

COMMENT NO. 28: One commentor noted that the information required to comply with ARM 17.74.354(6)(b) may not be known at the time of the inspection.

RESPONSE: Please refer to the Response to Comment No. 21.

COMMENT NO. 29: One commentor suggested that ARM 17.74.354(7)(b) should indicate that air testing alone is not sufficient to determine the extent and cause of asbestos contamination.

RESPONSE: ARM 17.74.354(7)(b) specifically states that "air sampling may not be used by the department-accredited asbestos inspector as the sole means of evaluation whether asbestos is present;" (emphasis added).

COMMENT NO. 30: One commentor asked what would make an asbestos inspection deficient so as to justify the department conducting its own inspection

pursuant to ARM 17.74.354(8), what would be the qualifications of the department inspector, and what standards or protocols would be followed?

RESPONSE: The inspection referenced in ARM 17.74.354(8) is authorized by 75-2-518, MCA, and is not intended to be a substitute for the inspection referenced in ARM 17.74.354(7). The department inspection in (8) is intended to ensure that the inspection that was conducted under (7) complied with the applicable requirements. An inspection would be deemed deficient if the inspection report indicated that samples were not taken of materials that were known to have been impacted by the renovation or demolition activities, that an insufficient number of samples were taken, that proper procedures or sampling techniques were not followed, or that the inspection otherwise did not comply with the requirements of (7). The program staff are not required to maintain accreditation, but are trained in sampling protocols for the purposes of compliance inspections. The department inspection would employ the same sampling standards and protocols set forth in (7). However, the inspection may be limited to those areas where deficiencies were observed or suspected, and may not constitute as thorough an inspection as would be required in (7).

COMMENT NO. 31: One commentor asked what is meant by the term "complete" in the following sentence in ARM 17.74.353: "Delivery of the notice by U.S. Postal Service, commercial delivery service, or hand delivery is acceptable, and delivery of the notice will be considered *complete* when the department receives the notice."

RESPONSE: The explanation of when delivery of notice is "complete" is proposed to be included in the rule to clarify that the ten-working-day time period in 40 CFR 61.145(b)(3)(i) begins when the notice of the intention to demolish or renovate is received by the department. The term "complete" does not refer to whether the notification documents are complete according to the applicable notification requirements.

COMMENT NO. 32: One commentor asked, if work practices are preempted by the OSH Act and are no longer required by the Asbestos Control Program, then how can the program approve alternate work practices in ARM 17.74.353?

RESPONSE: The OSH Act does not preempt all work practices to be employed during asbestos projects. Rather, Section 18 of the OSH Act has been interpreted by the Supreme Court of the United States as prohibiting a state from regulating anything for which a standard has already been established under the OSH Act, except where the state has implemented a worker protection program approved by OSHA, which Montana has not done. In this rulemaking procedure, the department is proposing to eliminate all provisions in its rules that address standards already addressed under the OSH Act, except provisions that are expressly required by Montana's Asbestos Control Act or that appear in the NESHA, which the EPA has delegated to the department to enforce. In other words, the OSH Act does not preempt work practices that are not already addressed in the OSH Act or its implementing rules. Accordingly, the department declines to make any changes to the proposed rules in response to this comment.

COMMENT NO. 33: One commentor stated that ARM 17.74.353, 17.74.355, and 17.74.359 will impose a burden on annual facility permit holders, particularly to the extent such permit holders will have to submit notice ten days in advance of every asbestos project in the facility as small as three square or linear feet, which could result in several notices needing to be prepared and sent each day.

RESPONSE: The requirement to provide ten-working-days notice for every asbestos project is an existing rule. The proposed change establishes that the ten-working-day notice period for projects begins when the department receives the notification. Annual permit holders may make notice in their application for an annual permit of all anticipated removal projects during the coming year.

COMMENT NO. 34: One commentor suggested that ARM 17.74.356, as it is proposed to be amended, is duplicative, confusing, and redundant, and suggested that it be eliminated.

RESPONSE: The department is not aware of any other rules, existing or proposed, that include the same requirements as ARM 17.74.356. Without specific examples of redundancy, how the rule duplicates another regulatory requirement, or that the rule is confusing, the department declines to modify or eliminate ARM 17.74.356 in response to this comment.

COMMENT NO. 35: One commentor noted that ARM 17.74.356(2) states that the department may approve alternate control measures that are equivalent to those required under this chapter and asked if there is a list of control measures that are currently approved.

RESPONSE: The department does not have such a list at this time. Furthermore, control measures that may be appropriate for one asbestos project may be inappropriate for another project, so the department may not be able to compile a general list of acceptable alternate control measures. Rather, a written request to employ alternative control measures for a particular project should be submitted to the department in advance and the department will make a determination if the proposed alternate measures would be equivalent to those required, before allowing them to be employed in a specific asbestos project. This is intended to be similar to the waiver provision that was found at section 4.02 of the Montana Asbestos Work Practices and Procedures Manual.

COMMENT NO. 36: Another commentor asked if the provision for alternate control measures in ARM 17.74.356(2) infringes on "OSHA territory."

RESPONSE: The commentor is correct in that the department may not approve alternate control measures that are also required by the OSH Act unless the alternate control measure is also provided for in the asbestos NESHAP. The department believes the proposed amendment to ARM 17.74.356(2) is crafted to allow the department to approve alternative control measures that are within the department's delegated authority.

COMMENT NO. 37: One commentor stated that requiring that the owner or operator of a facility maintain an asbestos health and safety program in order to

qualify for an annual asbestos project permit, as described in ARM 17.74.359, is also an OSHA requirement.

RESPONSE: The requirement that the owner or operator of a facility maintain an asbestos health and safety program in order to qualify for an annual asbestos project permit was mandated by the Montana Legislature in 75-2-504, MCA. The department is required to comply with statutes enacted by the Legislature. Accordingly, the department declines to make any changes to ARM 17.74.359 in response to this comment.

COMMENT NO. 38: Concerning ARM 17.74.364, one commentor stated that the department should further examine the needs, training, and requirements for training providers, and that the department should look to Minnesota for guidance.

RESPONSE: The department establishes program performance objectives in its annual business plan. The department acknowledges the importance of administering effective training programs for providers and will take the comment into consideration in subsequent rulemaking proposals.

COMMENT NO. 39: One commentor suggested that New Rule I should not allow a worker to escort a load, as a contractor/supervisor would still need to be present.

RESPONSE: The definition of "asbestos project" found in 75-2-502, MCA, includes the transportation and disposal of asbestos-containing waste. ARM 17.74.356 requires that a contractor/supervisor must be present when regulated work is being conducted on an asbestos project. The intent behind the provisions of New Rule I is to ensure that the transportation of asbestos-containing waste is as protective of human health and the environment as is reasonably possible. The language of New Rule I is designed to require that transportation and disposal activities must be conducted by accredited workers or, in the event that an unaccredited worker is tasked with transportation and disposal, escorted and supervised by a contractor/supervisor or an accredited worker. This provision strikes a balance between allowing some flexibility during the course of an asbestos project and dictating on-site decisions based on the regulatory framework of the Asbestos Control Act, federal rules contained in NESHAP, and this subchapter. The department believes that the training required for accreditation of asbestos workers qualifies them to safely transport asbestos-containing waste and to respond appropriately to any incidents that could arise in the course of that transportation, and believes the language in New Rule I precludes a situation where an unaccredited worker would transport or dispose of asbestos containing waste. Additionally, the provisions of ARM 17.74.356(3), offer asbestos contractors the ability to propose for departmental approval any alternative control measures, if those alternative measures are equivalent to the written requirements in the rules. Accordingly, the department declines to modify New Rule I and believes the previous response clarifies the intent of the rule.

COMMENT NO. 40: One commentor suggested that New Rule I(3)(b)(ii) and (iii) are redundant and should be eliminated.

RESPONSE: The department believes it is important that the person transporting asbestos-containing waste take such steps as are within the transporter's control to ensure that all packaging and labeling requirements are met before transporting asbestos-containing waste from the work site. The transporter should not be allowed to ignore obvious errors or omissions by the operator that could result in a heightened risk of asbestos exposure to the general public or the environment. Accordingly, the department declines to make any changes to New Rule I in response to this comment.

COMMENT NO. 41: One commentor suggested that the language for "all" of the subsections in New Rule II(2) are the same, so why not combine them.

RESPONSE: The department agrees that New Rule II(2)(c) and (d) begin with the words "ensure that," but notes that all the subsections address entirely different issues. The standard protocol for drafting administrative rules is to separate different requirements into different sections or subsections. Furthermore, New Rule II(2)(a), (b), and (e) begin differently, so could not be combined in any event. Accordingly, the department declines to make any changes to New Rule II in response to this comment.

COMMENT NO. 42: One commentor suggested that New Rule III, "Encapsulation of Asbestos-Containing Material," is not necessary.

RESPONSE: Section 75-2-502(3), MCA, includes "encapsulation" in the definition of "asbestos project," and 75-2-503(1)(g), MCA, requires the department to adopt rules establishing "criteria to determine whether and what type of control measures are necessary for an asbestos project." Because the Montana Legislature has mandated that the department adopt rules governing control measures for asbestos projects, and the Legislature has stated that encapsulation of ACM is an asbestos project, the department declines to delete New Rule III in response to this comment.

COMMENT NO. 43: One commentor suggested that the department should reconsider repealing ARM 17.74.303, because the department does not appear to have sufficient resources to enforce asbestos-related requirements if all residences would be covered by the Asbestos Control Act and its implementing rules.

RESPONSE: The repeal of ARM 17.74.303 does not result in all residential buildings being subject to regulation under the Act. Rather, the existing definition of "facility" in the asbestos NESHAP regulations exempts from regulation all residential buildings having four or fewer dwelling units. Because the department has adopted by reference the NESHAP, including its definition of "facility," the provisions contained in ARM 17.74.303 have resulted in confusion about whether residential buildings having four or fewer dwelling units are regulated. Repealing ARM 17.74.303 clarifies that the NESHAP definition of "facility" governs what buildings are regulated by the department under the Asbestos Control Act, and that residential buildings having four or fewer dwelling units are not regulated.

COMMENT NO. 44: One commentor has stated that the requirement in ARM 17.74.357(3)(b)(iii), that the air be continually agitated before taking air clearance samples, is in excess of AHERA.

RESPONSE: AHERA is limited to identifying asbestos in schools and is not enforced by the department (EPA has delegated the administration of the AHERA Model Accreditation Plan to DEQ). However, 40 CFR 736.90(i)(2)(i), in the regulations implementing AHERA, specifically requires that air samples be collected using aggressive sampling conditions to dislodge any remaining dust.

COMMENT NO. 45: One commentor has suggested that aggressive sampling in the area where ACM was removed using a glove bag, as required in ARM 17.74.357(3)(d), could disturb a preexisting situation and that personal sampling is sufficient.

RESPONSE: The department recognizes that there are instances where a preexisting situation could bias the sampling results. The department has drafted the rule to allow asbestos workers a reasonable amount of flexibility in an effort to comply with sampling regulations. In the event of a preexisting situation that may bias results, a sampler may request an alternative method for clearing the project as provided for in ARM 17.74.357(10).

COMMENT NO. 46: One commentor suggested that asbestos workers should not be allowed to conduct final visual inspections pursuant to ARM 17.74.357(11)(a).

RESPONSE: Montana-accredited asbestos workers must have taken a department-approved training course for accreditation as an asbestos project worker. The course must meet the requirements of 40 CFR 763, subpart E, Appendix C, section B.1, Workers (ARM 17.74.365(1)) to be approved by the department. A person must be accredited as a worker to carry out a response action, with respect to friable asbestos, a maintenance activity, or a response action for a major fiber release episode (40 CFR Part 763 Asbestos Model Accreditation Plan). They must also be trained on the physical characteristics of asbestos, state-of-the-art work practices, and air monitoring. The department believes that the proposed rule establishes appropriate safeguards and criteria to ensure an asbestos worker is qualified to conduct final visual inspections. Accordingly, the department declines to modify the rule in response to this comment.

COMMENT NO. 47: A comment was made to add the word "prior" between the words "surface" and "to" in ARM 17.74.357(3)(b)(ii).

RESPONSE: The current version of ARM 17.74.357(3)(b)(ii), in the proposed rule reads: "... once the work area has passed the final visual inspection, sweep an air stream from a high-speed blower or equivalent air-blowing device across all surfaces in the work area for a time adequate to disturb air in all areas of the work area prior to beginning final air clearance sampling; ...". The department believes the provision as written is sufficiently clear and declines to make the proposed change.

COMMENT NO. 48: One commentor suggested that the air clearance sampling results should be maintained and distributed.

RESPONSE: The recordkeeping provisions contained in ARM 17.74.360(1) stating that "records of asbestos projects that are being, or have been, conducted must be retained for at least 30 years and made available to the department upon request." have not been amended in this proposal. While the rule does not specifically provide for "distribution" of the air clearance sampling results, any person interested in the records may request a copy from the department.

COMMENT NO. 49: Comments were made stating that OSHA covers glove bags, so the department should not also cover them.

RESPONSE: The department agrees the United States Supreme Court stated in *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992), that the OSH Act preempts any state requirements that address the same standards addressed in the OSH Act, unless the state has adopted a comprehensive worker protection program that has been approved by OSHA, and Montana has not adopted such a program. However, the department's rules relating to the use of glove bags are derived from the asbestos NESHAP regulations found in 40 CFR Part 61, subpart M, which the EPA has delegated to the department to enforce. The OSH Act and its implementing regulations do not preempt other federal statutes and rules, such as the Clean Air Act or the NESHAP. Because the department has been delegated authority by the EPA to enforce the NESHAP regulations, the department has determined there is no issue of preemption by the OSH Act. Accordingly, the department declines to make any changes to ARM 17.24.357 in response to this comment.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/ James M. Madden

JAMES M. MADDEN

Rule Reviewer

By: /s/ Richard H. Opper

RICHARD H. OPPER, DIRECTOR

Certified to the Secretary of State, October 17, 2011.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM	)	NOTICE OF AMENDMENT
17.36.103, 17.36.106, 17.36.108,)	
17.36.110, 17.36.116, and 17.36.322	)	(SUBDIVISIONS/ON-SITE
pertaining to application contents, review	)	SUBSURFACE WASTEWATER
procedures, compliance with local	)	TREATMENT)
requirements, certificate of approval,)	
certification of local department or board of)	
health, and sewage systems)	

TO: All Concerned Persons

1. On August 25, 2011, the Department of Environmental Quality published MAR Notice No. 17-327 regarding a notice of public hearing on proposed amendment of the above-stated rules at page 1577, 2011 Montana Administrative Register, issue number 16.

2. The department has amended the rules exactly as proposed.

3. No public comments or testimony were received.

Reviewed by:	DEPARTMENT OF ENVIRONMENTAL QUALITY
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/s/ James M. Madden
 JAMES M. MADDEN
 Rule Reviewer

By: /s/ Richard H. Opper
 RICHARD H. OPPER, DIRECTOR

Certified to the Secretary of State, October 17, 2011.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM) NOTICE OF AMENDMENT
17.56.101, 17.56.605, and 17.56.607)
pertaining to definitions, cleanup plan, and) (UNDERGROUND STORAGE
release categorization) TANKS)

TO: All Concerned Persons

1. On September 8, 2011, the Department of Environmental Quality published MAR Notice No. 17-328 regarding a notice of public hearing on proposed amendment of the above-stated rules at page 1775, 2011 Montana Administrative Register, issue number 17.

2. The department has amended the rules exactly as proposed.

3. No public comments or testimony were received.

Reviewed by: DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/ James M. Madden
JAMES M. MADDEN
Rule Reviewer

By: /s/ Richard H. Opper
RICHARD H. OPPER, DIRECTOR

Certified to the Secretary of State, October 17, 2011.

BEFORE THE BOARD OF REALTY REGULATION
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 24.210.667 continuing real)
estate education and 24.210.835)
continuing property management)
education)

TO: All Concerned Persons

1. On May 26, 2011, the Board of Realty Regulation (board) published MAR notice no. 24-210-36 regarding the public hearing on the proposed amendment of the above-stated rules, at page 815 of the 2011 Montana Administrative Register, issue no. 10.

2. On June 16, 2011, a public hearing was held on the proposed amendment of the above-stated rules in Helena. Several comments were received by the June 24, 2011, deadline.

3. GENERAL RESPONSE TO ALL COMMENTS: A "Realtor©" is a member of the National Association of Realtors© (NAR). The term is not a generic term to be applied to all licensees. Indeed, the term is copyrighted and may not legally be used by or applied to persons who are not actually "Realtors©". In fact, it is specifically a matter of unprofessional conduct for a Montana real estate licensee to apply the term to themselves if they are not actually a "Realtor©".

The board has noted that the majority of the commenters spoke of what core course education may or may not do for "Realtors©". In some instances, the commenters appeared to be referencing actual "Realtors©," but elsewhere, commenters appears to be referencing all real estate licensees. Further, the board concluded that many commenters clearly confused the board with the Montana Association of Realtors© (MAR).

The commenters almost universally urged the board to do things which are not within the purview or authority of the board. The board does not promote the industry or seek to maximize profits for licensees, which are within the missions of professional associations. The board is only charged with protecting the health, safety, and welfare of the Montana public through the licensure and regulation of real estate licensees. The commenters' confusion about the term "Realtor©", by itself, indicates a strong need for the kind of education that the board is proposing.

4. The board has thoroughly considered the comments received. A summary of the comments received and the board's responses are as follows:

COMMENT 1: One commenter opposed the annual requirement of a core education course citing the depressed economy and stating that current courses could be improved upon. The commenter suggested the board instead reform the 60-hour

prelicensing education stating that it teaches very little practical real estate and just enables people to pass the test.

RESPONSE 1: The board notes that the 60-hour prelicensing course is a separate issue from the core course concept. Prelicensing is for new licensees, is typically taken only once in a lifetime, and does not address new issues that arise each year. The board's education committee reviewed both reforming the prelicensing class and the core course, and concluded that the core course concept was the better method. Following discussions with the board, local associations and licensees endorsed the core course requirement as it addresses more current topics and ensures that all licensees will get new, selected information and education each year, rather than relying on each licensee to choose among different topics of continuing education (CE).

COMMENT 2: One commenter opposed the core education course since there already exists a variety of available education, much of it at no cost. The commenter opined that there is no excuse for anyone to not get the needed education to be a "Realtor©," and that broker/owners should be more diligent in hiring. The commenter suggested the board should enact stricter licensure requirements instead of requiring more education once someone has a license. The commenter opined that people think it is "cheap and easy" to be a "Realtor©," and initial education should include information about how to run a business, the cost involved, and the responsibilities of independent contractors. Lastly, the commenter promoted a flat prohibition against convicted felons having a license.

RESPONSE 2: The board notes that the point of the core education is not to provide more education at low cost, but to present specific education each year to address certain current concerns. Because it is intended to address specific current issues, the education will cover different topics each year.

The board's statutory duty is to protect the health, safety, and welfare of the Montana public. It is not to teach licensees how to run their businesses. There are professional associations who teach business ideas, but the board does not purport to instruct the associations in those endeavors.

The board has no legal authority to ban convicted felons from licensure. In fact, constitutional and other legal authority holds for the opposite premise. Under Title 37, chapter 1, part 2, MCA, criminal convictions cannot operate as an automatic bar to licensure in Montana. The board can only deny licensure to a convicted felon if the board finds that the offense relates to the practice of real estate and the person has not been sufficiently rehabilitated so as to warrant the public trust.

The board notes that the commenter addressed matters that the board hopes to cover through the core education, like requiring brokers to exercise better supervision over salespersons. To that extent, the board agrees with the commenter and hopes to address these issues through core course education.

COMMENT 3: Two commenters state that as "Realtors©" they oppose the core education course in this economy because it would force "Realtors©" to spend more on education during tough economic times and may push some to quit the business.

RESPONSE 3: The board determined that it is important for all licensees to obtain consistent information. Many local associations do provide CE for its members as part of members' dues and such education is consistent for those members. The board notes that not every licensee is a member of an association and therefore, nonmembers would not get the same information. The board believes that these economic times require more, not less education and more professionalism.

COMMENT 4: One commenter opposed the core course education, stating that it takes more than education for a "Realtor©" to be good. The commenter stated that it also takes "choosing right, choosing honest" to make a good "Realtor©."

RESPONSE 4: The board concluded that this comment is not responsive to the issue of providing a core course, but the board hopes to address the commenter's issues through core course education.

COMMENT 5: One commenter opposed the core education course and asked if the requirement is proposed in response to problems caused by "Realtors©." The commenter was not opposed to learning more or new business aspects, but only if the education has value. The commenter noted that licensees are already required to take an ethics course every four years and complained that the course covers the same information each time.

RESPONSE 5: The board acknowledges that the concept of core education is proposed as a direct result of disciplinary problems and trends seen at screening panels and in audits. The board concluded that an inordinate amount of time is spent on matters that might be avoided with better education through the core courses. The board intends for the courses to be preventative in nature, and will be different each year to address current topics where the board sees problems.

Although a course may be offered more than once, the board does not intend to offer the same courses year after year. The board notes that the commenter appears to confuse the board with a real estate association that requires an ethics course every four years. The board does not require that licensees complete an ethics course every four years.

COMMENT 6: One commenter opposed the core education course and did not understand how the requirement board will help "Realtors©." The commenter suggested that if the core course is necessary, it should be included as part of the mandatory 12 hours of CE currently required, and not an additional requirement. The commenter opined that "Realtors©" should be in the field or office, not sitting in a mandated class being presented with repetitive information.

RESPONSE 6: The board did consider including the core course education as part of the 12 required hours, but determined the core course needs to be in addition to the 12 required hours at this time. That conclusion is supported by survey results from the local and statewide associations, which showed a majority of members supported the core course requirement over and above the required 12 hours.

COMMENT 7: One commenter opposed the core education course, stating that it should be more difficult to obtain a real estate license. The commenter asserted that the prelicensing education merely educates "Realtors©" on how to pass the test and does not teach them how to be professional "Realtors©." The commenter stated that the board should require more education upfront and opined that new licensees are not prepared to write contracts after only a weeklong class and an examination.

The commenter further stated that both CE and training new agents should be the responsibility of the brokerage, and that brokers should supervise new agents better. The commenter also suggested that the state organization should continually seek quality speakers and timely topics, make attendance more convenient, and offer mini education clinics a few times a year, rather than just the Graduate Realtor© Institute (GRI) or the education marathon.

RESPONSE 7: The board notes that the 60-hour prelicensing course is a separate issue from the core course concept. Prelicensing is for new licensees, is typically taken only once in a lifetime, and does not address new issues that arise each year. The board's education committee reviewed both reforming the prelicensing class and the core course, and concluded that the core course concept was the better method. Following discussions with the board, local associations and licensees endorsed the core course requirement as it addresses more current topics and ensures that all licensees will get new, selected information and education each year, rather than relying on each licensee to choose among different topics of continuing education (CE).

The board does not teach the business of real estate, it regulates the professional conduct of licensees. The board agrees that brokers should be responsible for the education and training of salespersons and notes that brokers are already required to supervise new agents. The board continues to see problems with lack of supervision and hopes to address that and other issues through uniform core courses.

The board believes the commenter references those speakers arranged by the state professional association and the board has no input as to those speakers. The board is attempting to present timely topics through the presentation of convenient core course education that will evolve in order to stay abreast of current issues. The board is not charged with teaching new aspects of the real estate business to licensees, but is statutorily mandated to protect the health, safety, and welfare of the Montana public.

COMMENT 8: One commenter advocated a grandfather clause that would exempt anyone licensed a minimum of ten years from any board-mandated core education course. The commenter asserted that licensees with that amount of experience have a wealth of on-the-job training, and the currently required 12 hours is more than adequate to keep licensees updated on current happenings within the real estate field. The commenter stated that the additional burden of the core course is a waste of licensees' time and money.

RESPONSE 8: The board previously considered a grandfathering concept, but strongly disagrees with the concept for long-time licensees. The board screening panel considers disciplinary complaints against long-time licensees at nearly every meeting. The board notes that some long-time licensees may need even more education to refresh them about things they have forgotten, or provide education on things that have only recently come into being. The board is not charged with teaching current happenings in the real estate business, but is statutorily mandated to protect the health, safety, and welfare of the Montana public.

COMMENT 9: Two commenters suggested that the board include the core course as part of the 12 hours of annual CE already required, and that the board make the core courses available online.

RESPONSE 9: The board did consider including the core course education as part of the 12 required hours, but determined the core course needs to be in addition to the 12 required hours at this time. That conclusion is supported by survey results from the local and statewide associations, which showed a majority of members supported the core course requirement over and above the required 12 hours. The board does intend to make the core course available online.

COMMENT 10: One commenter supported the idea of a core education course, but not as an annual requirement. The commenter noted that ethics is required every four years and opined that the core course should only be required every four years, or at most, every two years.

RESPONSE 10: The board believes the commenter has confused the board with a professional association, as the board does not require an ethics course every four years. Further, the board intends that the core course content will not be the same every year.

COMMENT 11: One commenter supported the core course requirement. The commenter opined that merely having a license does not equate to experience or understanding, but such knowledge can come from outstanding education. The commenter suggested the board add an additional eight hours of required core education on the necessary knowledge of real estate agents, including what is a material fact and the various kinds of fraud.

RESPONSE 11: The board appreciates all comments made during the rulemaking process. At this time, the board is not going to increase the core course hours.

COMMENT 12: Numerous commenters supported the proposed requirement of a core course because the additional education will increase the knowledge and professionalism of all practitioners in the state. The commenters further stated that all the state's licensees will receive uniform information that is pertinent to the profession and suggested that it will be important for the board to ensure that the topics selected are timely and relevant for licensees.

RESPONSE 12: The board appreciates all comments made during the rulemaking process.

COMMENT 13: Several commenters supported the core course requirement and requested the board include specific topics of education to emphasize risk management, board regulation, and the state's statutes and rules. The commenters suggested easing the initial broker qualifications, but advocated more stringent examination procedures for new licensees, including additional topics of education, and requiring licensees who have been inactive for more than two years to retake the rookie course to reactivate. The commenters suggested the board form a working group to explore the development of an apprenticeship program.

RESPONSE 13: The board appreciates all comments made during the rulemaking process, but does not believe it is necessary for a licensee who has been inactive for two years to retake the rookie course. The board is currently exploring the possibility of implementing an apprenticeship program and has recently reconfigured the initial broker qualifications. The board is looking to form a working group.

COMMENT 14: Staff discovered a numbering error in ARM 24.210.667(1) that references exceptions provided in sections (18) and (19). That numbering was done in anticipation of another rule package that is currently in the drafting process and that would also affect this section of rules. The references in the rule should actually be (19) and (20), to conform to the existing rules, rather than the anticipated rules.

RESPONSE 14 The board acknowledges the inadvertent numbering error and is amending the rule accordingly.

5. The board has amended ARM 24.210.835 exactly as proposed.

6. The board has amended ARM 24.210.667 with the following changes, stricken matter interlined, new matter underlined:

24.210.667 CONTINUING REAL ESTATE EDUCATION (1) Each active licensee is required to annually complete a board-mandated core education course of a length established by the board every year. The board-mandated core education does not apply to meeting the continuing education requirement provided for in (2), except as provided in ~~(18)~~ and (19) and (20).

(2) through (20) remain as proposed.

BOARD OF REALTY REGULATION
C.E. "ABE" ABRAMSON, CHAIRPERSON

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

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State October 17, 2011

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

In the matter of the amendment of	)	NOTICE OF AMENDMENT
ARM 37.12.301, 37.12.304,)	
37.12.305, 37.12.306, 37.12.310,)	
37.12.312, 37.12.313, 37.12.314,)	
37.12.315, 37.12.316, 37.12.320,)	
37.12.324, 37.12.325, 37.12.326,)	
37.12.333, 37.12.336, 37.12.337,)	
37.12.338, 37.12.341, 37.12.342,)	
37.12.345, and 37.12.346, pertaining)	
to licensure of laboratories)	
conducting analyses of public water)	
supplies)	

TO: All Concerned Persons

1. On June 23, 2011, the Department of Public Health and Human Services published MAR Notice No. 37-550 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1059 of the 2011 Montana Administrative Register, Issue Number 12.

2. The department has amended ARM 37.12.301, 37.12.304, 37.12.305, 37.12.306, 37.12.310, 37.12.312, 37.12.313, 37.12.315, 37.12.316, 37.12.324, 37.12.325, 37.12.326, 37.12.333, 37.12.336, 37.12.337, 37.12.338, 37.12.345, and 37.12.346 as proposed.

3. The department has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined.

37.12.314 RESTRICTION OF LICENSE (1) The department may downgrade a laboratory to provisional status and place conditions upon the license of a laboratory. The provisionally licensed laboratory must notify clients of its downgraded status in writing, on any applicable report. The department will notify the Department of Environmental Quality of any laboratories that have been downgraded to provisional status. Downgrading to provisional status may occur under the following circumstances:

(a) the laboratory reports results of an analysis of PE samples that are outside acceptable limits, and does not successfully perform analysis on a second set of PE samples within 90 days of receipt of the original report, or it fails to report results of a PE sample analysis for any analyte that the laboratory is approved to analyze. In this case:

(i) through (b)(ii) remain as proposed.

AUTH: 50-1-202, MCA
IMP: 50-1-202, 75-6-106, MCA

37.12.320 PROFICIENCY TESTING (1) and (2) remain as proposed.

(3) In addition to the requirements of (2), in order to remain approved for testing an analyte or interdependent analyte group, a laboratory must:

(a) remains as proposed.

(b) maintain a paper or electronic copy of all proficiency testing records, including analytical data and worksheets and a copy of the proficiency testing provider report forms authorized by the environmental laboratory and used by the laboratory to record proficiency testing results for a period of five years;

(c) through (9) remain as proposed.

AUTH: 50-1-202, MCA
IMP: 50-1-202, 75-6-106, MCA

37.12.341 REPORTING REQUIREMENTS (1) All results of samples collected from a public water supply system and accepted by the laboratory for analysis that exceed a maximum contaminant level (MCL) or that trigger additional actions under ARM Title 17, chapter 38, subchapter 2 must be promptly, on the day the result is determined or no later than noon the next working day, reported by the laboratory to the Montana Department of Environmental Quality (MDEQ) must be promptly notified, on that day or no later than noon the next working day, of all results from samples collected from a public water supply system and accepted by the laboratory for analysis, that exceeds a maximum contamination level (MCL) or triggers additional actions under ARM Title 17, chapter 38, subchapter 2. Notice Results must be reported to the Public Water Supply Section of the Montana MDEQ either electronically to dpws@mt.gov or by telephone to (406) 444-1947. The actual written sample result must be reported submitted to MDEQ on forms and in formats approved by the MDEQ within 48 hours of completion of the analysis. When a maximum contaminate contaminant level as set out in ARM Title 17, chapter 28 38, subchapter 2 is found to be exceeded in any sample, the reporting laboratory accepting the sample for analysis from the water supplier must notify the water supplier of that result within 24 hours after the analysis is completed.

(2) The analytical Rresult of all microbiological or chemical samples accepted by the laboratory for analysis, other than those which are defined in ARM 37.12.341(1), must be reported to the Department of Environmental Quality MDEQ within a week upon after completion of the analysis. The results must be reported submitted on forms and in formats approved by the MDEQ.

AUTH: 50-1-202, MCA
IMP: 50-1-202, 75-6-106, MCA

37.12.342 REPORTING RESULTS FROM OTHER LABORATORIES

(1) remains as proposed.

(2) A laboratory that reports analyses performed by other laboratories is required to report all analyte results that are used for regulatory compliance, to the Montana Department of Environmental Quality.

AUTH: 50-1-202, MCA

IMP: 50-1-202, 75-6-106, MCA

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: A commenter questioned the need for a required second inspection for newly licensed laboratories or for established laboratories changing physical location. The commenter asserted that, since the actual building housing the lab is irrelevant, the inspection would be a waste of time and money.

RESPONSE #1: The department disagrees with the premise that the facility housing a laboratory is almost irrelevant. An adequate facility is the foundation for laboratory activities. The Environmental Protection Agency (EPA) Manual for the Certification of Laboratories Analyzing Drinking Water devotes several paragraphs in sections IV and V to laboratory facilities. Secondly, a change in physical location means that all equipment and instrumentation must be disassembled, transported, and reassembled in the new facility. Depending upon the level of complexity of the equipment and instrumentation, this may require substantial validation and calibration which needs to be reviewed.

COMMENT #2: A commenter asked, "Why would you have to visit a lab a second time to inspect a new facility?" The EPA manual states the requirements needed. The proper methodologies and quality control should be checked on the first inspection. Inspecting the facility a second time is "silly and an even bigger waste of your time and money."

RESPONSE #2: A second inspection is required of a newly established facility to ensure continued adherence to approved procedures and policies.

COMMENT #3: A commenter questioned the definition of the performance evaluation (PE) audit and the requirement that PE providers be certified by the department.

RESPONSE #3: PE is clearly defined in ARM 37.12.301(20). Audit refers to the process of completing analyses and reporting of PE samples. The department will not certify PE providers. The requirement is for department approval, and does not specify EPA or National Environmental Laboratory Accreditation Conference (NELAC) to not be restrictive.

COMMENT #4: A commenter questioned the downgrading of laboratories for failed PE audits.

RESPONSE #4: The department agrees and is adding text to clarify ARM 37.12.314.

COMMENT #5: A commenter questioned the advisability of the department providing copies of administrative rule and EPA Guidance to customers, and to provide web links and addresses in the rule.

RESPONSE #5: The provision and interpretation of regulations is vital to the department's role as certifier of laboratories. It is important for customers to have references and contacts. Upon request, the department will direct customers to an electronic copy of the EPA Manual, will e-mail a copy, or will provide a printed copy if a customer is unable to retrieve the electronic copy.

COMMENT #6: A commenter questioned the maintenance of proficiency testing provider report forms, since most PE providers are transitioning to electronic reporting.

RESPONSE #6: The department agrees and is adding text to clarify the rule.

COMMENT #7: A commenter questioned the requirement to report new equipment and new staff to the department. The commenter also questioned the ability of the department to keep track of this information as well as information pertaining to analyst training.

RESPONSE #7: The department maintains a file of analysts performing microbiology testing that includes completion of mandatory training. Certification officers review the qualifications of all personnel during on-site audits.

EPA Guidance devotes Chapter IV, Section 1 and Chapter 5, Section 1 to describing personnel qualifications and requirements. The rule specifically states that the reporting of new equipment and new staff is required if it has a material effect on the analysis of analytes. Examples would be a new lead operator or a change in equipment that changes the testing procedures. The department considers the maintenance of qualified personnel and the appropriateness of equipment to be of utmost importance.

COMMENT #8: A commenter asked, "If I am running arsenic by graphite furnace atomic absorption (GFAA), and I want to add lead by GFAA, you have to do an on-site assessment?"

RESPONSE #8: The department would not perform an on-site assessment in this case because the question involves a group of similar analytes using the same method. The requirement for on-site assessment is limited to cases in which an analyte for which approval is required is unrelated to previously approved analytes, or requires specialized equipment and/or personnel training.

COMMENT #9: A commenter said that the language in ARM 37.12.341, which describes reporting requirements timelines is too complicated. It should be within 24 hours. The commenter also stated that the use of the word "contaminate" should be changed to "contaminant".

RESPONSE #9: The department does not agree that the reporting requirement timelines are too complicated. The current wording takes into account weekends and holidays. The department does agree that the use of the word "contaminate" should be changed to "contaminant" and will make that amendment.

COMMENT #10: A commenter questioned the requirement that samples submitted for compliance to the Total Coliform Rule (TCR), 40 CFR 141.21(f)(3) be limited to a maximum time of 30 hours between sample collection and initiation of analysis.

RESPONSE #10: EPA rule specifically requires that time from sample collection to initiation of analysis not exceed 30 hours. While the department understands the inherent difficulties involved with compliance, the department has no authority to deviate from EPA requirements.

COMMENT #11: A commenter questioned the licensure fee for out-of-state laboratories performing organic chemistry analyses.

RESPONSE #11: The fee section contains an error. The intended fee for an out-of-state chemistry license is \$900. The fee schedule was not included in this rulemaking, so cannot be amended at this time.

COMMENT #12: A commenter questioned the need and advisability of defining fees in administrative rule.

RESPONSE #12: The department includes licensure fees in rule, through the rulemaking process, to ensure that the public has input into, and understands the rationale.

COMMENT #13: A commenter requested that the use of the title, Montana Department of Environmental Quality, be added to ARM 37.12.342.

RESPONSE #13: The department agrees and has amended ARM 37.12.342.

COMMENT #14: A commenter proposed an amendment to the language in ARM 37.12.341, to clarify sample results language and reporting time.

RESPONSE #14: The department agrees to the proposed language and has amended ARM 37.12.342(2) as submitted by the commenter.

5. The department intends to apply the effective date of November 1, 2011 to these amendments.

/s/ Shannon McDonald
Rule Reviewer

/s/ Mary E. Dalton acting for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State October 17, 2011

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

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 37.86.2907 pertaining to)
Medicaid inpatient hospital services)

TO: All Concerned Persons

1. On August 25, 2011, the Department of Public Health and Human Services published MAR Notice No. 37-555 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1625 of the 2011 Montana Administrative Register, Issue Number 16.

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

3. No comments or testimony were received.

4. The department intends to apply the amendment retroactively to August 1, 2011.

/s/ John Koch
Rule Reviewer

/s/ Mary E. Dalton acting for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State October 17, 2011.

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

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 37.86.702, 37.86.801, and)
37.86.802 pertaining to audiology and)
hearing aids)

TO: All Concerned Persons

1. On August 25, 2011, the Department of Public Health and Human Services published MAR Notice No. 37-556 pertaining to the proposed amendment of the above-stated rules at page 1628 of the 2011 Montana Administrative Register, Issue Number 16. On September 22, 2011 the department published an amended notice of proposed amendment and extended the comment period for MAR Notice No. 37-556 at page 1976 of the 2011 Montana Administrative Register, Issue Number 18.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

4. The department intends to apply the effective date retroactively to October 1, 2011 for these amendments.

/s/ John Koch
Rule Reviewer

/s/ Mary E. Dalton acting for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State October 17, 2011.

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

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 37.86.4201, 37.86.4202, and)
37.86.4205 pertaining to dialysis)
clinics)

TO: All Concerned Persons

1. On September 8, 2011, the Department of Public Health and Human Services published MAR Notice No. 37-558 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1811 of the 2011 Montana Administrative Register, Issue Number 17.

2. The department has amended the above-stated rules as proposed.

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

COMMENT #1: A comment was received from a provider who believes the current payment methodology is too complex and appreciates the continued payment of the Medicare co-insurance and deductible for dialysis clients. The comment indicates support of the proposed rules.

RESPONSE #1: The department agrees that the current payment system is complex and has strived to streamline the new payment process. The department will continue to pay for the Medicare co-insurance and deductible. The department thanks the commenter.

/s/ John Koch
Rule Reviewer

/s/ Mary E. Dalton acting for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State October 17, 2011.

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

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 37.80.101 and 37.80.201)
pertaining to permissive licensing)
facilities exclusion from subsidy child)
care program)

TO: All Concerned Persons

1. On September 8, 2011, the Department of Public Health and Human Services published MAR Notice No. 37-559 pertaining to the proposed amendment of the above-stated rules at page 1815 of the 2011 Montana Administrative Register, Issue Number 17.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

4. The department intends to apply the effective date retroactively to September 1, 2011 for these amendments. A retroactive application of the amended rules does not result in a negative impact to any affected party.

/s/ Francis X. Clinch
Rule Reviewer

/s/ Mary E. Dalton acting for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State October 17, 2011.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I (ARM 42.11.106) and amendment of ARM 42.11.105 relating to the mark-up on liquor sold by the state) NOTICE OF ADOPTION AND AMENDMENT)))))

TO: All Concerned Persons

1. On August 25, 2011, the department published MAR Notice No. 42-2-865 regarding the proposed adoption and amendment of the above-stated rules at page 1642 of the 2011 Montana Administrative Register, issue no. 16.

2. A public hearing was held on September 27, 2011, to consider the proposed adoption and amendment. Oral testimony was received at the hearing and is summarized as follows along with the response of the department:

COMMENT NO. 1: John McKee, representing Headframe Spirits questioned whether there was an agriculture component addressed in the rule. He stated that he doesn't believe that it is possible to have a 100 percent Montana-produced ingredients. He stated that there are a number of arguments that doesn't make that possible. He suggested that 51 percent, such that there is a presumption of the majority used, but there is actually a reality that can occur. The 100 percent just doesn't make physical sense. A product simply cannot be made that way. Robin Blazer, Courtney McKee, and Brian Schultz expressed similar comments.

Mr. McKee further stated the most important thing would be to remove any ambiguity.

RESPONSE NO. 1: The department appreciates the comments made by Mr. McKee, Ms. Blazer, Ms. McKee, and Mr. Schultz during the rule hearing and has modified the language in New Rule I (ARM 42.11.106). It is the intent of the department to offer a 100 percent reduction in mark-up, after department costs, to all distilleries that produce 25,000 proof gallons or less of liquor nationwide regardless of the percentage of Montana-produced ingredients used in the production of the liquor. The department believes the modified language removes the ambiguity referenced in the oral testimony.

COMMENT NO. 2: Bryan Schultz, representing Roughstock Distillery asked a question regarding the background of the interstate commerce clause. He questioned the main points of why the agriculture information was taken away from the bill and then not put into the rules.

RESPONSE NO. 2: As to the commerce clause analysis, see the response to Comment No. 3 below. The department determined that it had no ability to discern the location of the production of the ingredients and hence the assumption

was warranted. See the response to Comment No. 5 below.

COMMENT NO. 3: Mr. McKee suggested the department review a Supreme Court case called *New Energy v. Ohio*. He stated that the case deals specifically with this type of interstate commerce clause. The interstate commerce clause action underneath *Bacchus Imports v. Hawaii (sic) Dias* dealt strictly with the excise tax. This isn't tax, this is a department warehouse overhead mark-up rate, not tax. And so in *New Energy vs. Ohio*, they speak very specifically in the Supreme Court then to an excise tax versus a state's cash, or contribution if you will, to the state's ongoing business interests. And the Supreme Court weighed in on the side of that ruling underneath the dormant commerce clause.

Mr. McKee further stated that the *Bacchus v. Dias* ruling was strictly about the excise tax, and this is not a tax. He stated that the warehouse overhead is not a tax and therefore *Bacchus v. Dias* doesn't apply, however, *New Energy v. Ohio* does.

RESPONSE NO. 3: The department understands the comments and suggestions made by Mr. McKee. Mr. McKee stated that the *Bacchus Imports, Ltd. v. Dias*, 468 U. S. 263 (1984) case was not on point because it concerned an excise tax rather than a price mark-up. Instead, *New Energy Co. v. Limbach*, 486 U. S. 269 (1988) was said to permit discrimination in favor of in-state agricultural products.

The department disagrees with this analysis. The commerce clause analysis does not turn on the form of the state imposition as between a mark-up and an excise tax. See *Oregon Waste Systems, Inc. v. Oregon*, 511 US 33 (1994). In the *Oregon* case, the Supreme Court struck Oregon's surcharge on waste from out-of-state. In *New Energy* the Supreme Court struck Ohio's tax credit for ethanol producers using Ohio ingredients. Accordingly, *Bacchus* is directly on point and prohibits favoring Montana ingredients. *New Energy* reinforces the same legal conclusion.

Other comments were received to the effect that other states have statutes that purport to only license distillers that obtain a majority of their ingredients from within the licensing state. It was not proven that these states actually enforce this restriction and even so, because the restriction operates solely to disqualify potential in-state licensees, the commerce clause analysis of such a statute would be completely different.

COMMENT NO. 4: Robin Blazer, representing Willies Distillery stated that she believes there should be an enforcement of Montana raw materials. She said that she wasn't saying that she would run to North Dakota and grab her supplies, but she suggested that as an extra incentive for the agriculture producers in Montana, or rather the distilleries to take that extra step, she doesn't think a presumption is good enough.

On this same subject, Mr. Shultz commented that the portion of the rule that states 25,000 proof gallons with reductions that are not going to be based on a Montana agricultural portion doesn't reflect the law. He further stated that he understands there may be some challenges that the department's legal office may have but that there are two other states that require small distilleries in those states to be 51 percent compliant with in-state grown agricultural products to even be

lawfully considered a distillery. Additionally, Mr. Schultz stated that if he wanted to import 25,000 gallons of scotch whiskey into Montana and re-brand it as his own, it could be done. He stated that he believes the 25,000 proof gallon limit just as a producer nationwide is a very wide and open avenue for anybody to get a reduction in mark-up without using any kind of agricultural products. He stated that this has no face value to what the original bill was passed on.

RESPONSE NO. 4: The department appreciates the comments made by Ms. Blazer and Mr. Schultz. The department believes the act of giving incentives to distilleries that use Montana-produced ingredients violates the interstate commerce clause. Such an incentive would likely make the state liable for refunds of approximately \$9.0 million of annual general fund revenue. See Comment No. 3 above. The department will allow all companies that produce less than 25,000 proof gallons annually to receive the reduced mark-up rate regardless of the percentage of Montana-produced ingredients. See Comment No. 2 above.

COMMENT NO. 5: Senator Steve Gallus, representing Senate District 37, sponsor of Senate Bill 215 provided written comments regarding the proposed rule action stating: "As primary sponsor of Senate Bill 215 during the 2011 session, I wanted to respond to the proposed department rule regarding the legislation. Just to be clear, I am very much opposed to the proposed rule and plan to exhaust every legal recourse possible to block its adoption. The proposed rule flies in the face of legislative intent, and the authority of the legislative branch and separation of powers.

The proposed new rule does not follow the language set out in Senate Bill No. 215 since all distillers who produce 25,000 proof gallons or less are assumed to qualify for the reduced mark-up, regardless of whether Montana-produced ingredients were used. Additionally, the proposed new rule implies that a distiller cannot receive the reduced mark-up until November 1, 2011, despite the immediate effective date of Senate Bill No. 215.

The department does not have the legal authority to use ARM to take the preventative measure of protecting the state from a potential violation of the interstate commerce clause in the U.S. Constitution, especially when rule combines to violate and ignore MCA.

The department relied heavily on the Governor's signing statement which does not carry any weight of law where MCA does."

RESPONSE NO. 5: The department does not have a mechanism to determine where the ingredients used by any particular distillery are produced. In particular, as noted by a member of the Revenue and Transportation Committee, a number of Montana farmers also produce grain in Canada and North Dakota, and those farmers would be hard pressed to identify the origin of their grain. Lacking the mechanism to determine the actual source of production (as opposed to determining from whom the ingredients were purchased) justifies the rule and steers clear of the separation of powers argument posited by the sponsor.

The department's implementation of the law is prompt and timely given that it was necessary for the department to: (i) respect the contractual rights of agency

liquor store owners and permit existing inventories in the retail system to be exhausted and (ii) determine which portion of the mark-up was attributable to costs and promulgate a rule explaining the department's conclusion. No earlier implementation was feasible, despite the immediate effective date. The Revenue and Transportation Interim Committee has reviewed the department's rule and determined to take no action on the rule.

3. As a result of the comments received the department adopts New Rule I (42.11.106) with the following changes:

NEW RULE I (42.11.106) REDUCTION IN STATE MARK-UP FOR DISTILLERIES AT OR BELOW 25,000 PROOF GALLONS (1) For purposes of applying 16-2-211, MCA, ~~the department will assume that for distilleries a reduced mark-up rate of 20 percent will be applied to all liquor products acquired from a distillery that manufactures, distills, rectify rectifies, bottles, or processes 25,000 proof gallons or less of liquor nationwide annually, all ingredients contained in the liquor from such distilleries is comprised of 100 percent Montana-produced ingredients. A reduced mark-up rate of 20 percent will be applied to liquor products from such distilleries.~~

(2) through (7) remain as proposed.

AUTH: 16-1-103, 16-1-303, 16-2-211, MCA

IMP: 16-2-211, MCA

4. Therefore, the department adopts New Rule I (42.11.106) with the amendments listed above and amends ARM 42.11.105 as proposed.

5. An electronic copy of this notice is available on the department's web site at www.revenue.mt.gov. Locate "Legal Resources" in the left hand column, select the "Rules" link and view the options under the "Notice of Proposed Rulemaking" heading. The department strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State October 17, 2011

BEFORE THE DEPARTMENT OF PUBLIC SERVICE REGULATION
PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

In the matter of the Commission-) REGULATORY DIVISION
Initiated Declaratory Ruling)
Proceeding Addressing the Scope of) DOCKET NO. T-11-21.DR
Commission Regulation over Non-)
Profit or Free or Tips-Only) DECLARATORY RULING
Transportation of Passenger Service)

DECLARATORY RULING

Findings of Fact

Declaratory Ruling Proceeding

1. On August 8, 2011, the Montana Public Service Commission ("Commission"), voted to initiate a Declaratory Ruling proceeding under the provisions of ARM §§38.2.101 and 1.3.226 through 1.3.229. The matter was processed under the aforementioned ARM provisions as well as §2-4-501, MCA. The Commission notes that this matter may be the subject of rulemaking following completion of this proceeding.

Questions Presented

2. Would the following types of passenger motor carrier operations be regulated by the Commission under the provisions of §§ 69-12-201, 69-12-101(8), and 69-12-101(9), MCA considering the exemptions set forth in § 69-12-102(1)(k):

A. Transportation of passengers by a non-profit corporation organized under §501(c) of the Internal Revenue Code organization if:

(i) Passengers are not assessed any charges for the transportation services rendered?

(ii) Passengers are not assessed any charges for the transportation services rendered, but drivers accept tips? or,

(iii) Passengers are assessed a fare meant only to assist in offsetting the § 501(c) entity's operating expenses?

B. Transportation of passengers by a sole proprietorship or any other type of legal entity other than a § 501(c) Internal Revenue Code entity in which:

(i) Passengers are not assessed any charges for the transportation services rendered? or;

(ii) Passengers are not assessed any charges for the transportation services rendered, but drivers accept tips?

Background

Commission's General Regulatory Powers

3. The statutory provisions described below provide background and standards that assist the Commission in issuing its declaratory ruling. The Commission has general supervisory and regulatory powers over motor carriers in Montana. Section 69-12-201, MCA provides in relevant part as follows:

- "(1) The Commission has the power and authority and it is its duty to:
- (a) Supervise and regulate every motor carrier in this state;
 - (b) Fix, alter, regulate, and determine specific, just, reasonable, equal, nondiscriminatory and sufficient rates, fares, charges, and classifications for Class A and Class B motor carriers;
 - (c) Regulate the properties, facilities, operations, accounts, service, practices, and affairs of all motor carriers;
 - (d) Require the filing of annual and other reports, tariffs, schedules, or other data by motor carriers;
 - (e) Supervise and regulate motor carriers in all matters affecting the relationship between motor carriers and the traveling and shipping public. ..."

"Motor Carrier"

"(8) 'Motor carrier' means a person or corporation, or its lessees, trustees, or receivers appointed by a court, operating motor vehicles upon a public highway in this state for the transportation of passengers, household goods, or garbage **for hire on a commercial basis**, either as a common carrier or under private contract, agreement, charter, or undertaking." (emphasis added). § 69-12-101(9), MCA.

"Charter Service"

Section 69-12-101(3), MCA reads as follows:

"(3) 'Charter service' means a service used for the transportation of passengers by a motor carrier with rates not subject to approval by the commission if:

- (a) The transportation of passengers is based on a single contract;
- (b) The contract is entered into in advance of the transportation and does not result from a spontaneous, curbside agreement;
- (c) The contract includes a single fixed charge and fares are not assessed per passenger;
- (d) The passenger or group of passengers acquires exclusive use of the motor vehicle through the contract; and
- (e) When applied to a group of passengers being transported, the group of passengers travels together to a specified destination."

"For Hire"

To be regulated, the passenger service must be a "for hire on a commercial basis" operation. Section § 69-12-101(5), MCA provides:

"'For hire' means for remuneration of any kind, paid or promised, either directly or indirectly, or received or obtained through leasing, brokering, or buy-and-sell arrangements from which a remuneration is obtained or derived for transportation service."

501(c) organization

4. The Montana Legislature has specifically exempted a number of types of operations from Commission jurisdiction in § 69-12-102, MCA. As pertinent to this declaratory ruling proceeding, the following exemption is provided in this statute:

"(1) This chapter does not affect:

...

(k) the transportation of persons provided by private, nonprofit organizations, including those recognized by the Montana department of transportation as federal transit administration providers pursuant to 49 U.S.C. 5310. As used in this subsection (1)(k), 'private, nonprofit organizations' means organizations recognized as nonprofit under section 501(c) of the Internal Revenue Code."

Scope of Declaratory Ruling Proceeding is Limited

5. The scope of this declaratory ruling proceeding does not include "charter bus operations" as the federal government exempted "charter bus operations" in the Transportation Equity Act for the 21st Century, Pub. Law. 105-178, amending 49 U.S.C. § 14501(c)(1). The Commission does not, therefore, have any entry-into-the field jurisdiction¹ or any rate regulation over charter bus operations. The 2011 Montana Legislature defined charter bus operations as charter service when the motor vehicle used for the transportation of passengers is designed to carry more than 26 passengers and the motor carrier has obtained a USDOT number from the U. S. Department of Transportation as provided in 49 CFR 390.19. Moreover, the federal government has also preempted state jurisdiction over rate regulation of passenger motor carrier service except taxicab service. See 49 U.S.C. § 14501(c)(1). As a result of the federal and state statutes cited immediately above, the Commission has entry-into-the field jurisdiction over taxicab operations and charter operations if: 1) The service is conducted with vehicles designed to carry 26 or fewer passengers, 2) The carriers has failed to secure a USDOT number from the U.S. Department of Transportation under 49 CFR 390.19, and 3) The carrier conducts passenger motor carrier operations with vehicles, as defined.

Comments

6. The Commission received three comments in response to its August 11, 2011 Notice of Declaratory Ruling proceeding:

A. Capitol Taxi & Courier, 1025 Phoenix, Helena, Montana stated that it was important for the Commission to note the effect non-profits have on the "paying users and tax-paying business" that provides the same or like service. Tax

¹ "Entry-into-the field" herein means jurisdiction over initiation and conduct of regulated motor carrier operations. See §§ 69-12-321 through 69-12-323, MCA which require those seeking to conduct regulated motor carrier operations to first seek and secure a certificate of public convenience and necessity from the Commission.

supported businesses operate at the most efficient times of the day and take "the cream" of the business time leaving the regulated business to cover the rest of the day and the most expensive times to operate. If it is the goal of government to keep small business in business so they can pay property tax and maintain a base for the economy, there must be some consideration given to the competition provided by government.

B. Billings Yellow Cab ("Yellow Cab"), 720 1st Ave., North, Billings, Montana provided comments on the questions identified in the Notice. Yellow Cab contends that it is unacceptable for non-profit drivers to accept tips or for non-profit entity's assessing a fare to offset operating expenses. Yellow Cab also objects to a non-501(c) operator providing free transportation services or accepting tips from passengers.

C. The Boone Karlberg law firm, 201 West Main St., Suite 300, Missoula, Montana, representing Mr. Kevin Sandberg of Ucallus, Inc.², filed strongly supporting the Commission's initial conclusion that the agency has no jurisdiction of any 501(c) motor carrier operator. The firm also contends that this "exempt-from-regulation" position will help foster and support organizations such as Ucallus, Inc., which seeks to improve safety for all of Montana's citizens.

Analysis

7. When interpreting a statute, in this case § 69-12-102, MCA, this agency's purpose, like Montana courts, is to implement the objectives the legislature sought to achieve. *Western Energy Co. v. State, Dept. of Revenue*, 1999 MT 289, P11, 297 Mont. 55, P11, 990 P.2d 767, P11. If the intent of the legislature can be determined from the plain language of the statute, the plain language controls and we may go no further nor apply other means of interpretation. *Western Energy Co.*, P11. Moreover, the Commission is required to simply ascertain and declare what is in terms of in substance contained in the statute, neither inserting what has been omitted nor omitting what has been inserted. *Wild v. Fregein Constr.*, 2003 MT 115, P20, 315 Mont. 425, P20, 68 P.3d 855, P20. The Commission finds that § 69-12-102, MCA (1)(k) is straightforward and unambiguous. The statute makes clear that the Commission's jurisdiction over motor carriers (ch. 12 of Title 69) does not affect; i.e., is not applicable, to the transportation of persons provided by organizations recognized as nonprofit under section 501(c) of the Internal Revenue Code. This would be the case regardless of whether the operator charges for the passenger transportation services rendered or whether no charges were assessed to passengers, but tips would be accepted.

8. The Commission further finds that any person or legal entity other than a recognized 501(c) corporation that provides passenger motor carrier service and assesses no fee and accepts no tips does not meet the definition of "for hire" under § 69-12-101(5), MCA which requires receipt of remuneration of any kind before meeting the definition of a "for hire." In order to be a regulated "motor carrier," the person or legal entity must be operating motor vehicles on the highways of Montana

² Ucallus, Inc. proposes to operate as a non-profit carrier transporting those who are too intoxicated to drive safely.

"for hire on a commercial basis," according to the provisions of § 69-12-101(9), MCA. As an operator that does not assess fees to passengers or accepts tips is not operating on a "for hire" basis, these types of operators are not regulated Montana motor carriers. Conversely, any non-501(c) corporation motor carrier operator that does accept tips does meet the definition of a for hire motor carrier under §§ 69-12-101(9) and 69-12-101(5),MCA and is therefore subject to Commission regulation.

DECLARATORY RULING

Fully apprised of all premises, the Montana Public Service Commission hereby DECLARES that:

1. Any operator of a passenger motor carrier service that is providing such service as a recognized 501(c) organization under the Internal Revenue Code, and such service is related to, or within, the organization's exempt purpose, is not a regulated motor carrier in Montana under the jurisdiction of the Montana Public Service Commission;
2. Any operator of a passenger motor carrier service that does not assess fees to passengers and whose drivers do not accept tips, is not a for-hire motor carrier in Montana under the jurisdiction of the Montana Public Service Commission; and,
3. Any non-501(c) operator that assesses fees on passengers or whose drivers accepts tips, is a regulated motor carrier in Montana and is subject to the jurisdiction and regulation of the Montana Public Service Commission.

Done and dated this 17th day of October, 2011.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

/s/TRAVIS KAVULLA
TRAVIS KAVULLA
Chairman

/s/GAIL GUTSCHE
GAIL GUTSCHE
Vice Chair

/s/ W.A. GALLAGHER
W. A. GALLAGHER
Commissioner

/s/ BRAD MOLNAR
BRAD MOLNAR
Commissioner

/s/ JOHN VINCENT
JOHN VINCENT
Commissioner

NOTICE: Petitioner has the right to appeal the decision of this agency by filling a petition for judicial review in district court within 30 days after service of this decision. Judicial review is conducted pursuant to §16-4-411, MCA.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 17th day of October 2011, a true and correct copy of the foregoing has been serviced by placing the same in the United States Mail, postage prepaid, to the service list in the PSC's master file which can be viewed at 1701 Prospect Avenue, Helena, MT 59601.

/s/Aleisha Solem
PSC Commission Secretary

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.

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 a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the Attorney General (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

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

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through June 30, 2011. This table includes those rules adopted during the period July 1, 2011, through September 30, 2011, and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through June 30, 2011, this table, and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule, and the page number at which the action is published in the 2011 Montana Administrative Register.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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- 17.36.922 and other rule - Local Variances - Variance Appeals to the Department, p. 528, 1548
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BOARD APPOINTEES AND VACANCIES

Section 2-15-108, MCA, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees, and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of 2-15-108, MCA, is that the Secretary of State publish monthly in the ***Montana Administrative Register*** a list of appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments effective in September 2011 appear. Vacancies scheduled to appear from November 1, 2011, through January 31, 2012, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of October 1, 2011.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES FROM SEPTEMBER, 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Aging Advisory Council (Public Health and Human Services)			
Rep. Beverly Barnhart Bozeman Qualifications (if required): public representative	Governor	reappointed	9/2/2011 7/18/2014
Mr. Marvin Carter Laurel Qualifications (if required): public representative	Governor	reappointed	9/2/2011 7/18/2014
Mrs. Jessie James-Hawley Harlem Qualifications (if required): public representative	Governor	reappointed	9/2/2011 7/18/2014
Ms. Lauren Lynch Butte Qualifications (if required): public representative	Governor	reappointed	9/2/2011 7/18/2014
Alternative Health Care Board (Labor and Industry)			
Dr. Anne Camber Libby Qualifications (if required): medical doctor	Governor	Stevens	9/28/2011 9/1/2015
Ms. Phyllis Lefon Clancy Qualifications (if required): public representative	Governor	Mensing	9/28/2011 9/1/2014

BOARD AND COUNCIL APPOINTEES FROM SEPTEMBER, 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Alternative Health Care Board (Labor and Industry) cont.			
Dr. Nancy Patterson Great Falls Qualifications (if required): naturopathic physician	Governor	Aagenes	9/28/2011 9/1/2015
Board of Investments (Commerce)			
Mr. David E. Ageson Gilford Qualifications (if required): representative of the agriculture community	Governor	Cobell	9/19/2011 1/1/2013
Rep. Mark E. Noennig Billings Qualifications (if required): business person	Governor	Cohea	9/19/2011 1/1/2013
Board of Medical Examiners (Labor and Industry)			
Ms. Tanja Brekke Bozeman Qualifications (if required): acupuncturist	Governor	not listed	9/2/2011 9/1/2015
Rep. Mary Anne Guggenheim Helena Qualifications (if required): doctor of medicine	Governor	reappointed	9/2/2011 9/1/2015
Dr. James D. Upchurch Crow Agency Qualifications (if required): doctor of medicine	Governor	reappointed	9/2/2011 9/1/2015

BOARD AND COUNCIL APPOINTEES FROM SEPTEMBER, 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Board of Psychologists (Labor and Industry)			
Dr. Marla Lemons Butte	Governor	reappointed	9/2/2011 9/1/2016
Qualifications (if required): public health psychologist			
Board of Regents (High Education)			
Mr. Joseph Thiel Bozeman	Governor	Snyder	9/8/2011 6/30/2012
Qualifications (if required): full-time student in the Montana State			
Community Service Commission (Labor and Industry)			
Mr. Jack Chambers Missoula	Governor	reappointed	9/2/2011 7/1/2014
Qualifications (if required): representative of a non-profit organization			
Mr. James B. Corson Billings	Governor	reappointed	9/2/2011 7/1/2014
Qualifications (if required): representative with experience in promoting volunteerism			
Ms. Nancy Matheson Helena	Governor	VanGenderen	9/2/2011 7/1/2012
Qualifications (if required): agency representative			
Mr. Robert Nystuen Lakeside	Governor	Kolstad	9/2/2011 7/1/2012
Qualifications (if required): representative of business			

BOARD AND COUNCIL APPOINTEES FROM SEPTEMBER, 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Community Service Commission (Labor and Industry) cont.			
Mr. James Steele Arlee	Governor	reappointed	9/2/2011 7/1/2014
Qualifications (if required): representative of Tribal government			
Mr. David Van Son Great Falls	Governor	Harris	9/2/2011 7/1/2014
Qualifications (if required): expert in public safety services			
Electronic Government Advisory Council (Administration)			
Ms. Karen Harrison Lolo	Governor	reappointed	9/2/2011 6/18/2013
Qualifications (if required): public representative			
Commissioner Andy Hunthausen Helena	Governor	reappointed	9/2/2011 6/18/2013
Qualifications (if required): local government official			
Mr. Christian Mackay Helena	Governor	reappointed	9/2/2011 6/18/2013
Qualifications (if required): agency representative			
Director Mary Sexton Helena	Governor	reappointed	9/2/2011 6/18/2013
Qualifications (if required): agency representative			

BOARD AND COUNCIL APPOINTEES FROM SEPTEMBER, 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Electronic Government Advisory Council (Administration) cont.			
Mr. Land Tawney Missoula	Governor	reappointed	9/2/2011 6/18/2013
Qualifications (if required): public representative			
Public Defender Commission (Administration)			
Mr. Alfred F. Avignone Bozeman	Governor	Kuntz	9/19/2011 7/1/2013
Qualifications (if required): attorney nominated by the Montana Supreme Court			
Mr. Christopher Daem Billings	Governor	Hensley	9/19/2011 7/1/2014
Qualifications (if required): a member of an organization advocating on behalf of people with mental illness			
Mr. Kenneth R. Olson Great Falls	Governor	reappointed	9/19/2011 7/1/2014
Qualifications (if required): attorney nominated by the Montana Supreme Court			
Ms. Ann Sherwood Pablo	Governor	Taylor	9/19/2011 7/1/2014
Qualifications (if required): attorney nominated by the State Bar, experienced in defense of juvenile delinquency			
Statewide Interoperability Governing Board (Administration)			
Atty. General Steve Bullock Helena	Governor	not listed	9/30/2011 9/30/2013
Qualifications (if required): Attorney General			

BOARD AND COUNCIL APPOINTEES FROM SEPTEMBER, 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Statewide Interoperability Governing Board (Administration) cont.			
Mr. Dick Clark Helena	Governor	not listed	9/30/2011 9/30/2013
Qualifications (if required): Chief Information Officer			
Sheriff Leo C. Dutton Helena	Governor	not listed	9/30/2011 9/30/2013
Qualifications (if required): representative of the Montana's Sheriffs and Peace Officers Association			
Mr. Tim Reardon Helena	Governor	not listed	9/30/2011 9/30/2013
Qualifications (if required): Director of the Montana Department of Transportation			
Ms. Sheena Wilson Helena	Governor	not listed	9/30/2011 9/30/2013
Qualifications (if required): Governor's office representative			
Workers' Compensation Judge (not listed)			
Judge James Shea Helena	Governor	reappointed	9/7/2011 9/7/2017
Qualifications (if required): none specified			

VACANCIES ON BOARDS AND COUNCILS -- NOVEMBER 1, 2011 THROUGH JANUARY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Alternative Livestock Advisory Council (Fish, Wildlife and Parks) Dr. Don Woerner, Laurel Qualifications (if required): Veterinarian	Governor	1/1/2012
Mr. Stan Frasier, Helena Qualifications (if required): sportsperson	Governor	1/1/2012
Mr. James Bouma, Choteau Qualifications (if required): alternative livestock industry representative	Governor	1/1/2012
Board of Chiropractors (Labor and Industry) Dr. John Sando, Butte Qualifications (if required): practicing chiropractor with at least one year experience	Governor	1/1/2012
Ms. Alice Whiteman, Missoula Qualifications (if required): public representative	Governor	1/1/2012
Board of Horseracing (Livestock) Mr. Mike Tatsey, Valier Qualifications (if required): resident of district 3	Governor	1/20/2012
Mr. Cody Drew, Circle Qualifications (if required): resident of district 1	Governor	1/20/2012
Board of Occupational Therapy Practice (Labor and Industry) Ms. Amy J. Gilbertson, Great Falls Qualifications (if required): occupational therapist	Governor	12/31/2011

VACANCIES ON BOARDS AND COUNCILS -- NOVEMBER 1, 2011 THROUGH JANUARY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p>Board of Personnel Appeals (Labor and Industry) Mr. Jack A. Holstrom, Helena Qualifications (if required): attorney with labor-management experience</p>	Governor	1/1/2012
<p>Board of Speech-Language Pathologists and Audiologists (Governor) Ms. Lynn Harris, Missoula Qualifications (if required): audiologist</p>	Governor	12/31/2011
<p>Ms. Tina Hoagland, Billings Qualifications (if required): audiologist</p>	Governor	12/31/2011
<p>Children's Trust Fund (Public Health and Human Services) Ms. Lori Brengle, Glendive Qualifications (if required): public representative</p>	Governor	1/1/2012
<p>Mr. Everall Fox, Billings Qualifications (if required): public representative</p>	Governor	1/1/2012
<p>Ms. Roberta Kipp, Browning Qualifications (if required): public representative</p>	Governor	1/1/2012
<p>Judicial Nomination Commission (Justice) Ms. Mona Charles, Kalispell Qualifications (if required): public representative</p>	Governor	1/1/2012
<p>Mr. Andrew P. Suenram, Dillon Qualifications (if required): attorney actively engaged in the practice of law</p>	Supreme Court	12/31/2011

VACANCIES ON BOARDS AND COUNCILS -- NOVEMBER 1, 2011 THROUGH JANUARY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p>Montana Alfalfa Seed Committee (Agriculture) Mr. Ernest Johnson, Chinook Qualifications (if required): alfalfa seed grower</p>	Governor	12/21/2011
<p>Mr. John Mehling, Hardin Qualifications (if required): alfalfa seed grower</p>	Governor	12/21/2011
<p>Mr. Marvin Frank, Joliet Qualifications (if required): alfalfa seed grower</p>	Governor	12/21/2011
<p>Montana Council on Developmental Disabilities (Commerce) Dr. R. Timm Vogelsberg, Missoula Qualifications (if required): advocacy program representative</p>	Governor	1/1/2012
<p>Sen. Carol Williams, Missoula Qualifications (if required): legislator</p>	Governor	1/1/2012
<p>Ms. Diana Tavary, Helena Qualifications (if required): secondary consumer representative</p>	Governor	1/1/2012
<p>Mr. Roger Holt, Billings Qualifications (if required): advocacy program representative</p>	Governor	1/1/2012
<p>Rep. Tim Furey, Milltown Qualifications (if required): legislator</p>	Governor	1/1/2012

VACANCIES ON BOARDS AND COUNCILS -- NOVEMBER 1, 2011 THROUGH JANUARY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Montana Grass Conservation Commission (Natural Resources and Conservation) Mr. Leo Solf, Winnett Qualifications (if required): grazing district director	Governor	1/1/2012
Mr. Alvin Windy Boy Sr., Box Elder Qualifications (if required): public representative	Governor	1/1/2012
Montana Local Government Records Committee (Historical Society) Ms. Marcia Porter, Missoula Qualifications (if required): none specified	Director	12/31/2011
Ms. Martha Rehbein, Missoula Qualifications (if required): none specified	Director	12/31/2011
Small Business Health Insurance Pool Board (State Auditor) Ms. Connie Welsh, Helena Qualifications (if required): management level individual with knowledge of state employee health benefit plans	Governor	1/1/2012
Mr. John Thomas, Helena Qualifications (if required): management-level individual with knowledge of state employee health benefit plans	Governor	1/1/2012
Statewide Independent Living Council (Public Health and Human Services) Ms. Evelyn Pool, Lincoln Qualifications (if required): public representative	Governor	12/1/2011
Trauma Care Committee (Public Health and Human Services) Mr. Joseph D. Hansen, Big Timber Qualifications (if required): representative of the Eastern Region Trauma Advisory Council	Governor	11/2/2011

VACANCIES ON BOARDS AND COUNCILS -- NOVEMBER 1, 2011 THROUGH JANUARY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Trauma Care Committee (Public Health and Human Services) cont. Mr. Tim Sinton, Choteau Qualifications (if required): representative of the Central Region Trauma Advisory Council	Governor	11/2/2011
Ms. Pauline Linnell, Bigfork Qualifications (if required): representative of the Montana Emergency Medical Services Association	Governor	11/2/2011
Dr. Dennis Maier, Billings Qualifications (if required): representative of the Montana Committee on Trauma/ACS	Governor	11/2/2011
Ms. Elaine Schuchard, Glasgow Qualifications (if required): representative of the Emergency Nurses Association	Governor	11/2/2011
Ms. Kristen Lowery, Deer Lodge Qualifications (if required): representative of the Montana Trauma Coordinators	Governor	11/2/2011
Ms. Jennifer Thuesen, Polson Qualifications (if required): representative of the Western Region Trauma Advisory Council	Governor	11/2/2011
Mr. Justin Grohs, Great Falls Qualifications (if required): representative of private ambulances	Governor	11/2/2011
Dr. Andrew Michel, East Helena Qualifications (if required): representative of the American College of Emergency Physicians	Governor	11/2/2011
Ms. Leah Emerson, Ronan Qualifications (if required): representative of the Western Region Trauma Advisory Council	Governor	11/2/2011

VACANCIES ON BOARDS AND COUNCILS -- NOVEMBER 1, 2011 THROUGH JANUARY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Trauma Care Committe (Public Health and Human Services) cont. Mr. Sam Miller, Bozeman Qualifications (if required): representative of the Eastern Region Trauma Advisory Council	Governor	11/2/2011
Traumatic Brain Injury Advisory Council (Public Health and Human Services) Ms. Julia Hammerquist, Kalispell Qualifications (if required): brain injury survivor	Governor	1/1/2012
Ms. Cindi Laukes, Missoula Qualifications (if required): representative of an injury control or prevention program	Governor	1/1/2012