

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 9

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

In the matter of the adoption of New)
Rules I through V relating to the State) NOTICE OF PUBLIC HEARING ON
Sampling Program) PROPOSED ADOPTION

TO: All Concerned Persons

1. On May 31, 2012, at 3:30 p.m. the Montana Department of Agriculture will hold a public hearing in Room 225 of the Scott Hart Building, 302 N. Roberts at Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Agriculture no later than 5:00 p.m. on May 24, 2012, to advise us of the nature of the accommodation that you need. Please contact Cort Jensen at the Montana Department of Agriculture, 302 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; phone: (406) 444-5402; fax: (406) 444-5409; or e-mail: agr@mt.gov.

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

NEW RULE I DEFINITIONS (1) "Department" means the Montana Department of Agriculture.

(2) "Established Protocol" means a sampling practice and procedure already recognized by the department.

(3) "Requester" means the party that first asked the department to take a sample.

AUTH: 80-5-606, MCA

IMP: 80-5-601, 80-5-602, 80-5-603, 80-5-604, 80-5-605, 80-5-606, MCA

REASON AND FINANCIAL IMPACT: The definitions provide clarity as to terms used and clear up ambiguity where it otherwise would exist. There is no financial impact to this rule.

NEW RULE II SAMPLING REQUESTS (1) A sampling request must be made in writing either mailed, e-mailed, or faxed to the department.

(2) The request must identify all parties involved and provide contact information for them.

(3) The request must identify the variety of all crops involved as well as the location of the requested sampling, ideally a legal description of the location.

(4) The request that the department take sample(s) must either refer to an established protocol or include a new protocol request as explained in [NEW RULE III].

(5) If the request is for the department to be present as an independent third party and not sample, the preferred, or range of dates, times, and location must be requested.

(6) The request must state exact material to be sampled (for example seeds, field crops, storage container, food).

(7) A request that is lacking required information will not be processed.

AUTH: 80-5-606, MCA

IMP: 80-5-601, 80-5-602, 80-5-603, 80-5-604, 80-5-605, 80-5-606, MCA

REASON AND FINANCIAL IMPACT: This rule establishes the proper way to start a sampling request and the minimum information needed to do so. The impact of this Rule is reflected in the impact of New Rule IV which sets the fees for sampling.

NEW RULE III ESTABLISHING A NEW PROTOCOL (1) A requester must petition the department to create an established protocol. The requester must provide a written description detailing the exact methodology the requester wants used in the sampling and the testing of any crop.

(2) The department will make a written determination if the description is adequate enough to be an established protocol or whether the department will require additional information and propose the base fee if any for the sampling protocol as described.

(3) After a protocol is established it can be modified by written agreement of both the requester and the department.

(4) If the department requests a modification and the requester does not agree to it, the protocol is no longer established.

(5) An established protocol does not guarantee that the department can perform the sampling.

AUTH: 80-5-606, MCA

IMP: 80-5-601, 80-5-602, 80-5-603, 80-5-604, 80-5-605, 80-5-606, MCA

REASON AND FINANCIAL IMPACT: Provides a system to make sure all sampling is performed to a level and in a manner that the requester needs performed.

NEW RULE IV COST RECOVERY FEES (1) The department will charge fees to recover the costs involved as outlined below:

(a) hourly rate of personnel for travel time;

(b) hourly rate of personnel for sampling time;

(i) the rate will be set by the department on an annual basis to ensure all anticipated costs are covered.

(c) per diem and mileage per Title 2, chapter 4; and

(d) any costs associated with testing analysis and shipping of samples.

(2) Other than personnel and travel time, the department will not charge a fee for being a third party witness for samplings.

AUTH: 80-5-606, MCA
IMP: 80-5-603, 80-5-606, MCA

REASON AND FINANCIAL IMPACT: As sampling protocols and requirements could vary greatly, it is unclear what amount of revenue this would bring into the department. The purpose of this rule is to ensure that the revenue is adequate enough to pay for this program. This is not anticipated to be a commonly used program and the total amount of revenue is not anticipated to be more than two thousand dollars in any year. If protocols standardize or the amount of activity in this program is greater than anticipated this rule will be reexamined.

NEW RULE V MEDIATION (1) All mediation correspondence and notices to the department will be in writing.

(2) All mediations will follow the notice requirements of informal administrative contested case hearings.

(3) Anyone wishing to be on the list of mediators will provide a resume including a cover letter detailing how they have the education, training, and experience listed as preferred in the law.

AUTH: 80-5-606, MCA
IMP: 80-5-601, 80-5-604, 80-5-606, MCA

REASON AND FINANCIAL IMPACT: The law required the department to establish a methodology for notice during mediation and to keep a list of mediators. There is no financial impact of this rule.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Cort Jensen at the Montana Department of Agriculture, 302 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; telephone (406) 444-5402; fax: (406) 444-5409; or e-mail: agr@mt.gov and must be received no later than June 7, 2012.

5. The Department of Agriculture 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, e-mail, and mailing address of the person 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 Montana Department of Agriculture, 302 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; fax: (406) 444-5409; or e-mail: agr@mt.gov or may be made by completing a request form at any rules hearing held by the Department of Agriculture.

6. An electronic copy of this Notice of Proposed Adoption is available through the department's web site at www.agr.mt.gov, under the Administrative Rules

section. 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 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.

7. The bill sponsor contact requirements of 2-4-302, MCA, have been met. The primary bill sponsors, Donald Steinbeisser, Ron Arthun, Terry Murphy, Cliff Larsen, Jim Peterson, Rick Ripley, Bradley Hamlett, Taylor Brown, Llew Jones, Sharon Stewart-Peregoy, Bruce Tutvedt, Verdell Jackson, Alan Olson, Walter McNutt, Jon Sonju, Eric Moore, were contacted by e-mail on April 17, 2012.

DEPARTMENT OF AGRICULTURE

/s/ Ron de Yong
Ron de Yong, Director

/s/ Cort Jensen
Cort Jensen, Rule Reviewer

Certified to the Secretary of State, April 30, 2012.

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

In the matter of the amendment of)
ARM 24.177.401 fees, 24.177.501)
examinations, 24.177.504 temporary)
licenses, 24.177.507 licensure of out-)
of-state applicants, 24.177.510)
foreign-trained physical therapy)
applicants, 24.177.2105 continuing)
education, 24.177.2301)
unprofessional conduct, and the)
repeal of ARM 24.177.2405)
screening panel)

NOTICE OF PUBLIC HEARING ON
PROPOSED AMENDMENT AND
REPEAL

TO: All Concerned Persons

1. On May 31, 2012, at 10:30 a.m., a public hearing will be held in room 439, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment and repeal 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 Physical Therapy Examiners (board) no later than 5:00 p.m., on May 25, 2012, to advise us of the nature of the accommodation that you need. Please contact Linda Grief, Board of Physical Therapy Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2395; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdp@mt.gov.

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

24.177.401 FEES (1) and (a) remain the same.

~~(b)~~ (c) Application for out-of-state licensure

Out-of-state license application fee \$125

~~(e)~~ (e) Renewal fee 60

(d) Temporary license fee 100

~~(e)~~ (b) Original license application fee 100

(f) through (3) remain the same.

AUTH: 37-1-134, 37-11-201, MCA

IMP: 37-1-134, 37-1-141, 37-1-304, 37-1-305, ~~37-11-201~~, 37-11-304, 37-11-307, MCA

REASON: The board is amending this rule to achieve consistency in terminology within board and department rules and for better organization and ease of use. It is reasonably necessary to delete an erroneous implementation cite to accurately reflect the statutes implemented through this rule.

24.177.501 EXAMINATIONS (1) The examination will be the national physical therapy exam (NPTE) or another equivalent examination as the board may, in its discretion, approve and adopt for physical therapist applicants. The examination for physical therapist assistants will be the national physical therapist assistant examination (NPTAE), or another equivalent examination as the board may, in its discretion, approve and adopt.

(2) Exact examination dates will be established by the current testing service as the national uniform testing ~~date~~ dates. ~~Applicants must have their complete applications in the board office at least 45 days prior to the examination date.~~

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

(4) remains the same.

(a) application ~~for examination fee;~~

(b) remains the same.

~~(c) three statements of good moral character, one of which is a professional reference from a licensed physical therapist, and two others from persons with knowledge of the applicant within the past five years. All reference letters must be sent directly to the board office from the reference source;~~

(d) and (e) remain the same, but are renumbered (c) and (d).

(5) remains the same.

(a) All applicants who have previously taken the NPTE, in any jurisdiction, shall submit a request for test history verification and the fee to the testing service, ~~on a form prescribed by the board.~~

(6) remains the same.

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

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

REASON: The board is amending this rule to accurately reflect the current examination process and requirements. In addition, the board is deleting the requirement for three statements of good moral character at (4)(c). The board concluded that a letter from a friend or someone who has known the applicant for a period of time is not an accurate indication of "good moral character." The board acknowledges that an applicant's good moral character can be evidenced by a showing in the application of no criminal record or discipline.

24.177.504 TEMPORARY LICENSES (1) Physical therapist or physical therapist assistant applicants for licensure by examination may be issued a temporary license. The temporary license shall identify the licensed physical therapist who shall be responsible for providing direct supervision. After issuance of the temporary license, the applicant must take and pass his/her examination within

~~60~~ 120 days of the issuance date. Only one temporary license will be issued per applicant.

(2) remains the same.

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

IMP: 37-1-131, 37-1-305, MCA

REASON: The board determined it is reasonably necessary to amend this rule and extend the duration for temporary licenses. Because the national examination no longer has open dates, and will only be given five times in 2012 and four times in 2013, this amendment will ensure that applicants have ample time to take and pass the exam.

24.177.507 LICENSURE OF OUT-OF-STATE APPLICANTS (1) through (2)(b) remain the same.

(c) verification of graduation from a ~~board-approved~~ board-approved physical therapy school or physical therapist assistant curriculum;

(d) remains the same.

~~(e) three statements of good moral character, one of which is a professional reference from a licensed physical therapist, and two others from persons with knowledge of the applicant within the past five years. All reference letters must be sent directly to the board office from the reference source;~~

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

(3) remains the same.

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

IMP: 37-1-131, 37-1-304, 37-11-307, MCA

REASON: The board is deleting the requirement for three statements of good moral character from this rule and ARM 24.177.510. The board concluded that a letter from a friend or someone who has known the applicant for a period of time is not an accurate indication of "good moral character." The board acknowledges that an applicant's good moral character can be evidenced by a showing in the application of no criminal record or discipline.

24.177.510 FOREIGN-TRAINED PHYSICAL THERAPIST APPLICANTS

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

~~(d) submit three statements of good moral character;~~

(e) through (g) remain the same, but are renumbered (d) through (f).

~~(h) (g) All applicants who have previously taken the NPTE, in any jurisdiction, shall submit a request for test history verification and the fee to the testing service, on a form prescribed by the board.~~

(2) remains the same.

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

IMP: 37-11-310, MCA

24.177.2105 CONTINUING EDUCATION (1) remains the same.

(2) Continuing education hours/credits shall be reported as follows:

(a) Each 60 minutes of instruction equals one continuing education hour/credit;

~~(a)~~ (b) Licensees with even-numbered licenses shall submit at least 20 continuing education hours/credits earned within the 24 months prior to the renewal date set by the department in each even-numbered year. Licensees in this category will not report continuing education on the odd-numbered years, but must renew their license each year;

~~(b)~~ (c) Licensees with odd-numbered licenses shall submit at least 20 continuing education hours/credits earned within the 24 months prior to the renewal date set by the department in each odd-numbered year. Licensees in this category will not report continuing education on the even-numbered years, but must renew their license each year;

(c) remains the same, but is renumbered (d).

~~(d)~~ (e) It is the responsibility of the licensee to establish and maintain detailed records of continuing education compliance in the form of programs and certificates of attendance and make them available upon board request; ~~and~~

(f) Course work may be live, by correspondence, video conferencing, internet, or be satellite-based; and

~~(e)~~ (g) The board will randomly audit continuing education hours/credits.

(3) remains the same.

~~(a) the~~ The activity must have significant intellectual or practical content. The activity must deal primarily with substantive physical therapy issues as physical therapy is defined in Montana. ~~The board may accept continuing education activities from other professional groups or academic disciplines if the licensee demonstrates that the activity is substantially related to the licensee's practice as a physical therapist or physical therapist assistant;~~

~~(b) a continuing education program may be a class, lecture, conference, workshop, cassette or videotape, correspondence or online course, or peer-reviewed publication of a journal article(s), or textbook(s);~~

~~(c) the activity must be conducted by an individual or group qualified by practical or academic experience;~~

(b) The board/staff does not preapprove any activities or sponsors for continuing education credits. All accepted continuing education hours/credits in category A, B, or C must meet the Standards of Continuing Competence (SCC) set forth by the Federation of State Boards of Physical Therapy (FSBPT). A licensee can determine the acceptability of a course or activity by referencing the current SCC activities set forth by the FSBPT. It is the responsibility of the licensee to select programs that contribute to their knowledge and competence in the physical therapy field, and which meet the qualifications specified in these rules;

~~(d)~~ (c) ~~all~~ All acceptable continuing education courses must issue a program and a certificate of completion. The program must contain the following information: full name and qualifications of the presenter; title of the presentations; number of hours; date and location of each presentation; name of sponsor; and description of the presentation format. The certificate must bear an official signature or verification

of the program sponsor and list the course name, number of hours of continuing education obtained by the licensee, and date and location of the presentation;

(d) Programs that promote a company, individual, or product, and programs whose subject is to practice economics cannot be credited for continuing education, except those programs specifically dealing with workers' compensation, public health, Medicare, or insurance coverage issues.

~~(e) programs that promote a company, individual, or product, and programs whose subject is practice economics cannot be credited for continuing education, except those programs specifically dealing with workers' compensation, public health, medicare, or insurance coverage issues; and~~

~~(f) a maximum of four hours of continuing education credit are allowed for presenting a continuing education course in each two-year cycle. The course must be presented to a group that includes physical therapists and physical therapist assistants for continuing education credit.~~

~~(4) Implementation for continuing education shall be as follows:~~

~~(a) one continuing education credit shall be granted for each hour of participation in a lab or lecture of the continuing education program, excluding breaks and meals;~~

~~(b) a maximum of two credits for cassette or videotape lectures;~~

~~(c) a maximum of four credits from online or correspondence courses;~~

~~(d) a maximum of ten credits is allowed per reporting period for peer-reviewed publication(s); and~~

~~(e) licensees whose regular occupation is teaching of physical therapy related courses will not be allowed continuing education credit for these regular teaching duties.~~

~~(5) The board/staff will not preapprove continuing education programs or sponsors. It is the responsibility of the licensee to select quality programs that contribute to their knowledge and competence in the physical therapy field and which meet qualifications specified in these rules.~~

(4) Qualifying continuing education hours/credits:

(a) Category A activities: A total of 20 continuing education hours/credits may be obtained in this category in each two-year cycle. Category A includes: continuing education courses, physical therapy clinical specialty certification coursework, physical therapy clinical residency coursework, and postgraduate physical therapy education, including, but not limited to, postdoctor of physical therapy course work. The course must be passed with a grade of "C" or higher or "pass" if a "pass/fail" course. Category A activities are distinguished from category B and C activities in that they are approved for continuing education hours/credits by one of the following, regardless of whether the course is classroom-based, online, or home study:

(i) an accredited medical, physical therapy, or healthcare education program;

(ii) a national or state medical, physical therapy, or healthcare association, or a component of that association; or

(iii) a national, medical, physical therapy, or healthcare specialty society.

(b) Category B Activities: A total of ten out of 20 continuing education credits may be obtained in this category in each two-year cycle. Category B activities must meet the Standards of Continuing Competence (SCC) activities set forth by the

FSBPT. Some Category B activities may not have not been approved for continuing education hours by any of the Category A approval organizations. Category B includes:

(i) any course that pertains to physical therapy, but which is not offered through an accredited medical, physical therapy, and/or healthcare education program as identified in (4)(a).

(c) Category C Activities: A total of ten out of 20 continuing education credits may be obtained in this category in each two-year cycle. Category C activities must meet the SCC activities set forth by the FSBPT. Some Category C activities may not have been approved for continuing education hours by any of the Category A approval organizations. Category C includes:

(i) teaching or lecturing principally for healthcare professionals, if teaching or lecturing is not the licensee's primary occupation. One continuing education credit may be granted per one hour of lecture or teaching. Max hour/credit five;

(ii) being a current member of the American Physical Therapy Association (APTA). Max hour/credit one;

(iii) performing as an APTA-certified clinical instructor in each two-year cycle. Max hour/credit five;

(iv) being a recognized committee member or serving on the Montana Board of Physical Therapy Examiners, the board of the Montana Chapter of American Physical Therapy Association (MAPTA), or nationally on the board of the APTA or the FSBPT in each two-year cycle. Max hour/credit five;

(v) being published in an area that pertains to physical therapy, if publishing is not a requirement for a licensee's primary occupation. Max hour/credit five;

(vi) taking and passing the jurisprudence exam in each two-year cycle. Max hour/credit one;

(vii) taking and completing the FSBPT's Practice Review Tool. Max hour/credit one.

(5) Activities excluded from continuing education credits: Staff meetings, teaching of physical therapy-related courses, or if the licensee's primary occupation is teaching, regularly scheduled institutional activities such as rounds or case conferences, and repeating or retaking an activity and/or coursework.

(6) remains the same.

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

IMP: 37-1-131, 37-1-306, MCA

REASON: The board is reorganizing and reformatting this rule as the board determined that the current rule is poorly organized and confusing to licensees.

The board is also amending this rule in general to change the current continuing education requirements to "competency" requirements. The amendments will specifically add and define three competency categories with varying degrees of difficulty. The board determined that following amendment, this rule will clearly set forth for licensees the variety of continuing education formats and the subject matter of continuing education.

The board notes that the purpose of requiring continuing education is to ensure that licensees remain up-to-date on current trends and changes in

healthcare, in addition to public protection. Nationally, continuing education is moving toward a competency-based system. In response to several requests from licensees, the doctor of physical therapy program has been incorporated into the proposed rule change. The board anticipates that the amendments will result in continuing education requirements that are more affordable, accessible, and less restrictive than the current requirements.

Implementation cites are being amended to accurately reflect all statutes implemented through the rule.

24.177.2301 UNPROFESSIONAL CONDUCT (1) For the purpose of implementing the provisions of 37-11-321~~(3)~~ and ~~(9)~~, MCA, the board defines immoral or unprofessional conduct, conduct unbecoming a person licensed as a physical therapist or physical therapist assistant, and conduct detrimental to the best interests of the public as follows:

(a) Engaging in or soliciting sexual relations with a patient, sexual misconduct, sexual exploitation, sexual contact, or sexual intercourse, as defined in 45-2-101, MCA, when such act or solicitation is related to the practice of physical therapy;

(b) Incompetence, negligence, or use of any modality procedure in the practice of the profession, which creates an unreasonable risk of physical or mental harm to the patient;

(c) remains the same.

(d) Any of the following, except when reasonably undertaken in an emergency situation to protect life, health, or property:

(i) accepting and performing physical therapy or physical therapist assistant responsibilities, which the licensee knows or has reason to know that he or she is not competent to perform; or

(ii) and (1)(e) remain the same.

(f) Promoting for personal gain of any unnecessary or inefficacious drug, device, treatment, procedure, or service;

(g) Over utilizing services by continuing treatment beyond the point of possible benefit to the patient, or treating more frequently than necessary to obtain maximum therapeutic effect;

(h) Offering, undertaking, or agreeing to cure or treat disease or affliction by a secret method, procedure, treatment, or medicine, or the treating, operating, or prescribing for any health condition by a method, means, or procedure which the licensee refuses to divulge upon demand of the board;

(i) and (j) remain the same.

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

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

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

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

REASON: The board is amending this rule to add licensees' failure to complete the required continuing education as unprofessional conduct, so that licensees are

aware of the negative implications of this failure. The board has become aware of licensees who have checked "yes" on their renewal forms to completing continuing education, but when audited, were found to not meet their continuing education requirements.

4. The rule proposed to be repealed is as follows:

24.177.2405 SCREENING PANEL found on ARM page 24-20225.

AUTH: 37-11-201, MCA

IMP: 37-1-307, MCA

REASON: The 2009 Montana Legislature amended 2-15-1748, MCA, the statute that reflects the board's membership, and deleted the physician member. The board determined that it is reasonably necessary to repeal this rule as there is no longer a medical doctor member and department statutes adequately outline the screening panel process.

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Physical Therapy Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdtpt@mt.gov, and must be received no later than 5:00 p.m., June 8, 2012.

6. An electronic copy of this Notice of Public Hearing is available through the department and board's web site on the World Wide Web at www.pt.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.

7. 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 Physical Therapy Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2305; e-mailed to

dlibsdp@mt.gov; or made by completing a request form at any rules hearing held by the agency.

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

9. Anne O'Leary, attorney, has been designated to preside over and conduct this hearing.

BOARD OF PHYSICAL THERAPY EXAMINERS
PATTIE JO LANE, PT, 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 April 30, 2012

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 37.86.3001, 37.86.3002,)	PROPOSED AMENDMENT AND
37.86.3003, 37.86.3005, 37.86.3006,)	REPEAL
37.86.3016, 37.86.3018, 37.86.3020,)	
37.86.3025, 37.86.3031, 37.86.3033,)	
37.86.3037, 37.86.3109 and repeal of)	
37.86.3014 pertaining to Medicaid)	
outpatient hospital services)	

TO: All Concerned Persons

1. On May 30, 2012, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing in Room 207 of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment and repeal 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 May 23, 2012, 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:

37.86.3001 OUTPATIENT HOSPITAL SERVICES, DEFINITIONS

(1) through (6) remain the same.

(7) "Disproportionate share hospital-specific uncompensated care" means the costs of inpatient and outpatient hospital services provided to clients who have no health insurance or source of third-party coverage.

(7) through (14) remain the same, but are renumbered (8) through (15).

~~(15)~~ (16) "Partial hospitalization services" means an active treatment program that offers therapeutically intensive, coordinated, structured clinical services provided only to individuals who are determined to have a serious emotional disturbance or severe disabling mental illness. Partial hospitalization services are time-limited and provided within either an acute level program or a sub-acute level program. Partial hospitalization services include day, evening, night, and weekend treatment programs that employ an integrated, comprehensive, and complementary schedule of recognized treatment or therapeutic activities.

- (a) ~~Acute level partial hospitalization is provided by programs which:~~
 - ~~(i) are operated by a hospital as described in 50-5-101, MCA and are colocated with that hospital such that in an emergency a patient of the acute partial hospitalization program can be transported to the hospital's inpatient psychiatric unit within 15 minutes;~~
 - ~~(ii) serve primarily individuals being discharged from inpatient psychiatric treatment or inpatient psychiatric residential treatment; and~~
 - ~~(iii) provide psychotherapy services consisting of at least individual, family, and group sessions at a frequency designed to stabilize patients sufficiently to allow discharge to a less intensive level of care at the earliest appropriate opportunity, on average, after 15 or fewer treatment days.~~
- ~~(b) Acute level partial hospitalization is reimbursed according to ARM 37.86.3022.~~
- (c) ~~Sub acute level partial (SAP) hospitalization is provided by programs which:~~
 - ~~(i) operate under the license of a general hospital with a distinct psychiatric unit or an inpatient psychiatric hospital for individuals under 21;~~
 - ~~(ii) operate in a self-contained facility and offer integrated mental health services appropriate to the individual's needs as identified in an individualized treatment plan;~~
 - ~~(iii) provide psychotherapy services consisting of at least three group sessions per week and five individual and/or family sessions per month;~~
 - ~~(iv) encourage and support parent and family involvement;~~
 - ~~(v) provide services in a supervised environment by a well-integrated, multi-disciplinary team of professionals which includes but is not limited to program therapists, behavioral specialists, teachers, and ancillary staff;~~
 - ~~(A) a program therapist must be a licensed mental health professional who is site based;~~
 - ~~(B) a program therapist must have an active caseload that does not exceed ten program clients;~~
 - ~~(C) a behavioral specialist must be site based and have a bachelor's degree in a behavioral science field or commensurate experience working with children with serious emotional disturbance. There must be one behavioral specialist for each five youth in the SAP program; and~~
 - ~~(D) all staff responsible for implementing the treatment plan must have a minimum of 24 hours orientation training and 12 additional hours of continuing education each year relating to serious emotional disturbance in children and its treatment. Training must include specific instruction on recognizing the effects of medication.~~
 - ~~(vi) provide education services through one of the following:~~
 - ~~(A) full collaboration with a school district;~~
 - ~~(B) certified education staff within the program; or~~
 - ~~(C) interagency agreements with education agencies.~~
 - ~~(vii) provide crisis intervention and management, including response outside of the program setting;~~
 - ~~(viii) provide psychiatric evaluation, consultation, and medication management on a regular basis. Psychiatric consultation to the program treatment~~

~~staff is provided at least twice each month and includes at least one face-to-face evaluation with each youth each month;~~

~~(ix) serve children or youth with a serious emotional disturbance being discharged from inpatient psychiatric treatment or residential treatment or who would be admitted to such treatment in the absence of partial hospitalization; and~~

~~(x) are designed to stabilize patients sufficiently to allow discharge to a less intensive level of care, on average, after 60 or fewer treatment days.~~

~~(d) Sub-acute level partial hospitalization is reimbursed at the rate specified in the department's Medicaid Mental Health Fee Schedule.~~

~~(16) remains the same, but is renumbered (17).~~

~~(17) "Qualified rate adjustment (QRA)" payment means an additional payment to a county owned, operated or partially county funded rural hospital in Montana as provided in ARM 37.86.3005, when the hospital's most recently reported costs are greater than the reimbursement received from Montana Medicaid for outpatient care.~~

~~(18) and (19) remain the same.~~

~~(20) "340B drug pricing program" means a drug pricing program established under section 340B of the Veterans Health Care Act which offers outpatient pharmaceuticals at substantially reduced prices to qualified entities.~~

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

37.86.3002 OUTPATIENT HOSPITAL SERVICES, SCOPE AND REQUIREMENTS (1) through (2)(d) remain the same.

(e) diabetic education services provided by a hospital whose diabetic education protocol has been approved by the Medicare Part A Program, P.O. Box 5017, Great Falls, MT 59403 ~~6732~~, Fargo, ND 58108-6732. Coverage of diabetic education services is limited to those services meeting the requirements of 42 CFR, part 410, subpart H as revised through October 1, ~~2005~~ 2010. A copy of this section is adopted and incorporated by reference and is available through the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

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

37.86.3003 OUTPATIENT HOSPITAL SERVICES, EXCLUSIONS

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

~~(d) experimental or investigational services, clinical trials, such as the use of off-label drugs where this usage is not a national standard of practice, or non-FDA-approved use of drugs, biologicals, and devices;~~

~~(e) and (f) remain the same.~~

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

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

37.86.3005 OUTPATIENT HOSPITAL SERVICES, REIMBURSEMENT AND QUALIFIED RATE ADJUSTMENT PAYMENT (1) remains the same.

(2) Outpatient hospital services that are not provided by ~~exempt hospitals or~~ critical access hospitals as defined in ARM 37.86.2901 will be reimbursed under ARM 37.86.3007, 37.86.3009, 37.86.3016, 37.86.3018, 37.86.3020, 37.86.3025, 37.86.3109, and 37.86.3037 for medically necessary services.

(3) remains the same.

(4) For critical access hospitals ~~and exempt hospitals~~, interim reimbursement for outpatient hospital services is based on hospital-specific Medicaid outpatient cost-to-charge ratio, not to exceed 100%. Critical access hospitals ~~and exempt hospitals~~ will be reimbursed their actual allowable costs determined according to ARM 37.86.2803.

~~(5) Subject to the availability of sufficient county and federal funding, the department will pay in addition to the established Medicaid rates provided in this rule a qualified rate adjustment payment to an eligible rural hospital in Montana as provided in ARM 37.86.2810.~~

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

37.86.3006 MENTAL HEALTH OUTPATIENT PARTIAL HOSPITAL SERVICES, PROSPECTIVE PAYMENT METHODOLOGY REQUIREMENTS (1) remains the same.

(2) Partial hospitalization services include day, evening, night, and weekend treatment programs that employ an integrated, comprehensive, and complementary schedule of recognized treatment or therapeutic activities.

(a) Acute level partial hospitalization is provided by programs which:

(i) are operated by a hospital as described in 50-5-101, MCA, and are collocated with that hospital such that in an emergency a patient of the acute partial hospitalization program can be transported to the hospital's inpatient psychiatric unit within 15 minutes;

(ii) serve primarily individuals being discharged from inpatient psychiatric treatment or inpatient psychiatric residential treatment; and

(iii) provide psychotherapy services consisting of at least individual, family, and group sessions at a frequency designed to stabilize patients sufficiently to allow discharge to a less intensive level of care at the earliest appropriate opportunity, on average, after 15 or fewer treatment days.

(b) Acute level partial hospitalization is reimbursed according to ARM 37.86.3022.

(c) Subacute level partial (SAP) hospitalization is provided by programs which:

(i) operate under the license of a general hospital with a distinct psychiatric unit or an inpatient psychiatric hospital for individuals under 21;

(ii) operate a self-contained facility and offer integrated mental health services appropriate to the individual's needs as identified in an individualized treatment plan;

- (iii) provide psychotherapy services consisting of at least three group sessions per week and five individual and/or family sessions per month;
 - (iv) encourage and support parent and family involvement;
 - (v) provide services in a supervised environment by a well-integrated, multidisciplinary team of professionals which includes program therapists, behavioral specialists, teachers, and ancillary staff;
 - (A) a program therapist must be a licensed mental health professional who is site-based;
 - (B) a program therapist must have an active caseload that does not exceed ten program clients;
 - (C) a behavioral specialist must be site-based and have a bachelor's degree in a behavioral science field or commensurate experience working with children with serious emotional disturbance. There must be one behavioral specialist for each five youth in the SAP program; and
 - (D) all staff responsible for implementing the treatment plan must have a minimum of 24 hours orientation training and 12 additional hours of continuing education each year relating to serious emotional disturbance in children and its treatment. Training must include specific instruction on recognizing the effects of medication.
 - (vi) provide education services through one of the following:
 - (A) full collaboration with a school district;
 - (B) certified education staff within the program; or
 - (C) interagency agreements with education agencies.
 - (vii) provide crisis intervention and management, including response outside of the program setting;
 - (viii) provide psychiatric evaluation, consultation, and medication management on a regular basis. Psychiatric consultation to the program treatment staff is provided at least twice each month and includes at least one face-to-face evaluation with each youth each month;
 - (ix) serve children or youth with a serious emotional disturbance being discharged from inpatient psychiatric treatment or residential treatment or who would be admitted to such treatment in the absence of partial hospitalization; and
 - (x) are designed to stabilize patients sufficiently to allow discharge to a less intensive level of care, on average, after 60 or fewer treatment days.
 - (d) Subacute level partial hospitalization is reimbursed at the rate specified in the department's Medicaid Mental Health Fee Schedule.
- (2) through (6) remain the same, but are renumbered (3) through (7).

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

37.86.3016 OUTPATIENT HOSPITAL SERVICES, PROSPECTIVE PAYMENT METHODOLOGY, IMAGING SERVICES (1) and (a) remain the same.

(b) For imaging services where no APC rate or Medicare fee has been assigned, a Medicaid fee will be set in accordance with the resource based relative value scale (RBRVS) methodology found at ARM ~~37.86.212~~ 37.85.212.

(c) For imaging services where no APC rate, Medicare fee, or Medicaid fee has been assigned, outpatient hospital-specific percent of charges will be paid. Birthing centers and out-of-state hospitals will be reimbursed the statewide outpatient cost-to-charge ratio.

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

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

37.86.3018 OUTPATIENT HOSPITAL SERVICES, PROSPECTIVE PAYMENT METHODOLOGY, OTHER DIAGNOSTIC SERVICES (1) Other diagnostic services will be reimbursed as follows with the exception of hospitals reimbursed under ARM 37.86.3005(3) (4):

(a) and (b) remain the same.

(c) for other diagnostic services where no APC rate, Medicare fee, or Medicaid fee has been assigned, outpatient hospital-specific percent of charges will be paid. Birthing centers and out-of-state hospitals will be reimbursed the statewide outpatient cost-to-charge ratio.

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

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

37.86.3020 OUTPATIENT HOSPITAL SERVICES, OUTPATIENT PROSPECTIVE PAYMENT SYSTEM (OPPS) METHODOLOGY, AMBULATORY PAYMENT CLASSIFICATION (1) Outpatient hospital or birthing center services that are not provided by ~~exempt hospitals or critical access hospitals as defined in ARM 37.86.2901(4) and (8)~~ will be reimbursed on a rate-per-service basis using the Outpatient Prospective Payment System (OPPS) schedules. Under this system, Medicaid payment for outpatient services included in the OPPS is made at a predetermined, specific rate. These outpatient services are classified according to a list of APCs published annually in the Code of Federal Regulations (CFR). The rates for OPPS are determined as follows:

(a) The department uses a conversion factor for each APC group as defined ~~at in~~ ARM 37.86.3001(5). ~~The conversion factor for August 1, 2003 through September 30, 2007 is \$47.75. The conversion factor for October 1, 2007 through June 30, 2008 is \$49.71.~~ The conversion factor for services on or after July 1, 2008 is \$50.61. The APC-based fee equals the Medicare specific relative weight for the APC times the conversion factor that is the same for all APCs with the exceptions of services in ARM 37.86.3025. APCs are based on classification assignment of CPT/HCPCS codes.

(b) At the claim level, payment will be the lower of the provider's charge ~~and~~ or the payment as calculated using OPPS. There will be no charge cap at the line level.

(c) and (d) remain the same.

(e) If the OPPS does not assign a Medicare fee or APC for a particular procedure code, a Medicaid fee will be assigned in accordance with the resource based relative value scale (RBRVS) methodology found at ARM 37.85.212. If there is not a Medicaid fee, the service will be reimbursed at hospital-specific outpatient

cost-to-charge ratio as in ARM 37.86.2803. Birthing centers and out-of-state hospitals will be reimbursed the statewide outpatient cost-to-charge ratio.:

(i) Medicaid statewide average outpatient cost-to-charge ratio is 44.5%.

(f) The department will make separate payment for observation care procedure codes if the following criteria are met: only if the patient has a primary diagnosis code of asthma, chest pain, congestive heart failure, or obstetric complications. ~~If an observation service does not meet Medicare's criteria for these services, payment for observation care will be considered bundled into the APC for other services.~~

(i) ~~The diagnosis used to define a potential obstetric qualification will be taken from diagnosis related groups 382 (false labor) and 383 (other antepartum diagnosis with medical complications).~~ hours or units of service must be equal to or greater than eight;

(ii) must be a direct admit or have a high level clinic visit, high level critical care, or high level emergency room visit; and

(iii) must have a qualifying diagnosis as per the CMS Claims Processing Manual.

(g) and (h) remain the same.

(2) The department adopts and incorporates by reference the OPPTS Schedules published by the Centers for Medicare and Medicaid Services (CMS) in 71 Federal Register 226, ~~November 24, 2006~~, effective January 1, 2007 and reviewed annually by CMS as required in 42 CFR 419.5. A copy 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.

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

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

37.86.3025 OUTPATIENT HOSPITAL SERVICES, REIMBURSEMENT FOR SERVICES NOT PAID UNDER THE AMBULATORY PAYMENT CLASSIFICATION SYSTEM

(1) Therapy services will be paid ~~90% of the reimbursement provided the facility fee~~ in accordance with the RBRVS methodologies in ARM 37.85.212 using the allied services conversion factor. Therapy services include physical therapy, occupational therapy, and speech-language pathology and are subject to requirements and restrictions as in ARM 37.86.606.

~~(2) Screening mammography will be paid the same reimbursement provided in accordance with the RBRVS methodologies in ARM 37.85.212 for HCPCS 76092-TC.~~

(3) through (6) remain the same, but are renumbered (2) through (5).

~~(7)~~ (6) The department adopts and incorporates by reference the Outpatient Hospital Fee Schedule dated January 1, 2007 which is updated each quarter and is posted on the Medicaid web site. A written copy 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.

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

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

37.86.3031 PROVIDER-BASED ENTITY SERVICES, GENERAL (1) For services provided on or after August 1, 2003, hospitals receiving provider-based status from the Centers for Medicare and Medicaid Services (CMS) must send a copy of the CMS letter granting provider-based status to the department's hospital program officer at Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951 and must receive department approval prior to billing as a provider based clinic.

(2) Before a provider may bill as a provider-based entity, a copy of the CMS letter verifying provider-based status must be received by the department. In addition, the provider must be in receipt of written approval from the department allowing provider-based billing status.

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

(6) Medicaid does not recognize provider-based status for out-of-state providers.

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

IMP: 53-6-101, MCA

37.86.3033 PROVIDER-BASED ENTITY SERVICES, RECIPIENT ACCESS AND NOTIFICATION (1) through (4) remain the same.

(5) Recipients must be notified that they will be assessed two cost shares for Medicaid and/or two copayment and deductible charges for cross-over claims per each visit.

(a) remains the same.

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

IMP: 53-6-101, MCA

37.86.3037 PROVIDER-BASED ENTITY SERVICES, REIMBURSEMENT

(1) and (a) remain the same.

(b) The facility component of provider-based entities provided by ~~exempt hospitals~~ or critical access hospitals as defined in ARM 37.86.2901(4) and (8) will be interim-reimbursed a hospital-specific outpatient cost-to-charge ratio.

(2) through (6) remain the same.

AUTH: 53-6-101, 53-6-113, MCA

IMP: 53-6-101, MCA

37.86.3109 OUTPATIENT CARDIAC AND PULMONARY REHABILITATION REIMBURSEMENT (1) ~~Exempt hospital and e~~Critical access hospital (CAH) interim reimbursement is based on a hospital-specific Medicaid outpatient cost-to-charge ratio, not to exceed 100%. ~~Exempt hospitals and~~ CAHs will be reimbursed their actual allowable costs determined according to ARM 37.86.2803.

(2) and (3) remain the same.

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

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

4. The department proposes to repeal the following rule:

37.86.3014 OUTPATIENT HOSPITAL SERVICES, PROSPECTIVE PAYMENT METHODOLOGY, DIALYSIS SERVICES, is found on page 37-20507 of the Administrative Rules of Montana.

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

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

5. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (the department) is proposing amendments to ARM 37.86.3001, 37.86.3002, 37.86.3003, 37.86.3005, 37.86.3006, 37.86.3016, 37.86.3018, 37.86.3020, 37.86.3025, 37.86.3031, 37.86.3033, 37.86.3037, and 37.86.3109 and the repeal of 37.86.3014 regarding Medicaid Outpatient Hospital Services.

These changes are necessary to conform to changes in federal Medicaid regulations and to update reimbursement rules to reflect recent data. The department is taking this opportunity to remove obsolete rules and terminology, reorganize rules to conform to current practices, and to edit rules to include more specific language. This should make the rules easier for providers to use and interpret.

ARM 37.86.3001

The department is proposing changes to the list of definitions for outpatient hospital services. These new entries are "disproportionate share hospital-specific uncompensated care" and "340B drug pricing program." In addition, the definition of "partial hospitalization services" is being condensed with part of the wording being moved to ARM 37.86.3006. One entry has been removed from the list of outpatient definitions, that being the definition of "qualified rate adjustment." It is necessary for the department to keep the list of definitions current in an effort to have the department and providers working with the most current and accurate information.

ARM 37.86.3002

The department is proposing changes to update the address for Medicare Part A, and the reference to the Code of Federal Regulations (CFR). This proposed change is necessary to provide the most current and accurate information for both the department and providers.

ARM 37.86.3003

The department is proposing to add language to exclude experimental or investigational services as covered outpatient services. It is necessary for the

department to add this language in an effort to follow Medicare rules governing experimental or investigational services.

ARM 37.86.3005

The department is proposing to remove any reference to "exempt hospitals" and "qualified rate adjustment" from the rule. It is necessary to remove this language from the rule as the department no longer recognizes "exempt hospitals" and no longer pays a "qualified rate adjustment" payment. By removing this language from the rule, providers will receive clear and accurate information regarding the status of "exempt hospitals" and "qualified rate adjustment" payments.

ARM 37.86.3006

The department is proposing to add "requirements" to the title of ARM 37.86.3006 and to language regarding "partial hospitalization services" that was moved from ARM 37.86.3001. This proposed change is necessary as it more completely describes the rule for both the department and for providers.

ARM 37.86.3014

The department is proposing to repeal ARM 37.86.3014 in its entirety. The department feels this rule is redundant and should be removed as the information contained in this rule is already written in ARM 37.86.4205.

ARM 37.86.3016

The department is proposing to correct the referenced ARM, for imaging services where no APC rate, Medicare fee, or Medicaid fee has been assigned, to 37.85.212. Language was added to specify that out-of-state hospitals will be reimbursed the Montana statewide outpatient cost-to-charge ratio. The department feels the proposed change is necessary to specify to providers the payment methodology for imaging services where no payment rate exists, as well as accurately referencing the correct rule regarding RBRVS payment methodology also for imaging services.

ARM 37.86.3018

The department is proposing to correct the referenced ARM, for other diagnostic services where no APC rate, Medicare fee, or Medicaid fee has been assigned, to 37.86.3005(4). Language was added to specify that out-of-state hospitals will be reimbursed the Montana statewide outpatient cost-to-charge ratio. The department feels the proposed change is necessary to inform providers of the payment methodology for diagnostic services where no payment rate exists, as well as accurately referencing the correct rule regarding payment methodology for diagnostic services performed in a nonhospital setting.

ARM 37.86.3020

The department is proposing to specify that out-of-state hospitals will be reimbursed the Montana statewide cost-to-charge ratio in instances where there is no Medicaid fee for the service; establish the Medicaid statewide cost-to-charge ratio at 44.5%; define the criteria for payment regarding observation care procedure codes; and update the CMS reference to the outpatient fee schedule. The department feels the proposed change is necessary to inform providers of the payment methodology for any services where no payment rate exists; to specify the payment criteria for observation care; to accurately reference the correct Montana statewide cost-to-charge ratio, and to update the CMS reference to the outpatient fee schedule.

ARM 37.86.3025

The department is proposing to specify that therapy services will be paid the facility fee of the reimbursement provided in accordance with RBRVS payment methodologies described in ARM 37.85.212; establish that the department adopts and incorporates by reference the Outpatient Hospital Fee Schedule which is updated each quarter and is posted on the Medicaid web site; and remove the reference to screening mammography paid in accordance with RBRVS payment methodologies. The department feels the proposed changes are necessary to inform providers of the payment methodology for therapy services, accurately describing when and where the outpatient fee schedule is updated, and condensing the rule by removing the reference to screening mammography as this information is already contained in ARM 37.85.212.

ARM 37.86.3031

The department is proposing to add language to exclude out-of-state providers from provider-based reimbursement status. Language is also being added to specify that before an in-state provider can be paid, they must be approved by the department and that before a provider may bill as a provider-based entity, a copy of the CMS letter verifying provider-based status must be received by the department. Also, additional language is proposed to specify that the provider must be in receipt of written approval from the department allowing provider-based billing status before the provider may bill Medicaid. It is necessary for the department to add this language to the rule to notify providers of requirements of Montana Medicaid, and to inform providers of the criteria that must be met before an approved provider-based facility may bill claims to Montana Medicaid.

ARM 37.86.3033

The department is proposing to add language requiring applicable providers to notify recipients that they will be assessed two cost shares for Medicaid and/or two copayment and deductible charges for cross-over claims for each visit. It is necessary for providers to inform Medicaid clients of the additional cost share requirements that clients will pay when deciding to seek services from a provider-based facility.

ARM 37.86.3037 and 37.86.3109

The department is proposing to remove the reference to "exempt hospitals." The department no longer recognizes "exempt hospitals" in its reimbursement methodology.

Fiscal Impact

The proposed rule changes regarding Medicaid Outpatient Hospital services will have a budget neutral effect on the Medicaid budget for State Fiscal Year (SFY) 2013. Because of this, there will not be any fiscal impact to the Medicaid budget. The proposed changes will affect approximately 372 outpatient hospital providers both in and out of state. Services provided to Medicaid clients will not be affected.

6. The department intends to apply these rules retroactively to July 1, 2012. A retroactive application of the proposed rules does not result in a negative impact to any affected party.

7. 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., June 7, 2012.

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

9. 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 7 above or may be made by completing a request form at any rules hearing held by the department.

10. 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.

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

/s/ John Koch
Rule Reviewer

/s/ Anna Whiting Sorrell
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State April 30, 2012.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF PUBLIC HEARING ON
Rules I through VIII, the amendment of)	PROPOSED ADOPTION AND
ARM 42.12.101, 42.12.103, 42.12.106,)	AMENDMENT
42.12.110, 42.12.111, 42.12.115,)	
42.12.122, 42.12.126, 42.12.128,)	
42.12.129, 42.12.130, 42.12.132,)	
42.12.133, 42.12.141, 42.12.143,)	
42.12.144, 42.12.302, 42.12.401, and)	
42.13.101 relating to liquor license)	
application general regulation and)	
premises suitability requirements)	

TO: All Concerned Persons

1. On June 4, 2012, at 1:00 p.m., a public hearing will be held in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, Helena, Montana, to consider the adoption and amendment of the above-stated rules.

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

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Revenue no later than 5:00 p.m., May 25, 2012, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov.

3. The department is proposing to amend current rules and adopt new rules to increase the public's and licensees' understanding of liquor licensing laws. The goal is to eliminate any potential confusion by applicants, licensees, and the public of the premises suitability requirements for each license type where alcoholic beverages may be served or sold for either on-premises consumption or off-premises consumption, and to reflect legislative changes. The department's intention is to achieve this goal by making the rules clearly understandable and thoroughly complete.

The Legislature has established the Montana Alcoholic Beverage Code (MABC) as an exercise of the police power of the state for the protection of the welfare, health, and safety of the people of the state, and the provisions of the MABC must be broadly construed to accomplish the purposes of (a) promoting temperance, (b) creating orderly markets, and (c) aiding in the collection of taxes.

The legislatively determined policy of the state regarding alcoholic beverages is that transactions involving alcoholic beverages are illegal unless specifically

permitted by the MABC. There is no presumption that a transaction involving alcohol is legal unless it is specifically authorized. Therefore, any practice to the contrary does not imply a practice is permissible. The absence of explicit permission in the MABC to engage in a particular transaction means that such a transaction is prohibited. The sale of alcoholic beverages and the privileges for each license type are to only occur as provided by the MABC. These rules seek to reflect current state law to describe related privileges and conditions for each license type. The department does not have discretionary authority to authorize additional privileges; the authority is only granted through legislative approval.

Public convenience and necessity are governing principles of the MABC, with regard to on-premises licenses. Public convenience and necessity are determined to exist when evidence indicates that issuance of the license will materially promote the public's ability to engage in the licensed activity, i.e., the on-premises consumption of alcoholic beverages. Gambling is regulated under separate code provisions by a different agency. Issuance of the license accordingly must be consistent with the public's demand for alcoholic beverages.

A licensee may not minimize the sale of alcoholic beverages to promote other business interests or activities, including those licensed under separate code provisions. Demand for the "licensed activity" involves the purchase of alcoholic beverages for on-premises consumption in a business licensed to sell alcoholic beverages at retail. Public convenience and necessity pertains to the ability of the public to engage in the on-premises consumption of alcoholic beverages, by the drink, in a licensed public setting, whether or not people choose to engage in gambling. In addition to the general applicability of this law, this is specifically applicable in implementing New Rules II and IV, and amending ARM 42.12.122, Determination of Suitability of Premises.

The proposed new rules and amendments seek to improve the transparency of the department's process to the public and licensees by rearranging and adding more complete and understandable rules pertaining to the premises requirements for each license type and the respective privileges.

The rules also address changes made by the 2011 Legislature with the enactment of Senate Bill 203, Chapter 77, (16-3-303, MCA), which allows for beer containers known as "growlers" to be sold for off-premises consumption by additional license types beyond the manufacturer. The rules further address changes made by the 2009 Legislature with the enactment of Senate Bill 511, Chapter 414, (16-4-313, MCA), which established a sacramental wine license for the retail sale of sacramental wine for religious purposes. Finally, the rules address statutory amendments made by the 2007 Legislature with the enactment of House Bill 113, Chapter 197, (16-4-401, MCA), which requires anyone with ownership interest of 10 percent or more in an alcoholic beverages license to first apply and qualify for the license.

4. The proposed new rules do not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rules provide as follows:

NEW RULE I EDUCATIONAL MATERIALS (1) The department maintains

educational materials for each type of alcoholic beverage license along with the trade practices that are permitted by Montana law and rules. Montana law provides that transactions involving alcoholic beverages are illegal unless specifically permitted by law.

(2) Licensees should seek guidance from the department concerning whether actions not listed in the department materials are allowed before engaging in such transactions. Unless the department provides written guidance citing explicit authority, the licensee should treat all transactions not in the educational materials as prohibited.

AUTH: 16-1-303, 16-3-101, MCA

IMP: 16-1-301, 16-1-302, 16-1-304, 16-3-101, 16-6-301, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule I to make it clear to licensees and the public what the allowed practices are for an alcoholic beverage licensee as specifically authorized by the MABC. Public welfare, health, and safety cannot be protected from the ill effects of the misuse of alcohol if licensees are permitted to expand the allowed activities under the MABC beyond those explicitly permitted by the MABC. Also, the education materials provide clear instruction as to the permitted practices under the MABC.

NEW RULE II CONDITIONS AND QUALIFICATIONS SPECIFIC FOR AN ALL-BEVERAGES LICENSE (1) In addition to the provisions stated in ARM 42.12.122, which pertain to every type of alcoholic beverage license, with regard to an all-beverages license, a party applying for either a new license, transfer of ownership of an existing license, transfer of location of an existing license, or approval of an alteration to the premises:

(a) must operate at a premises recognizable as a bar or tavern with designated space and accommodation for the individual sale and consumption of beer, wine, and distilled spirits; or a restaurant (not including a coffee or beverage shop, bakery, or kiosk) with designated space and accommodations where, in consideration of payment, food is routinely furnished to the public;

(b) must offer individual sales of beer, wine, and distilled spirits by the drink and;

(c) may sell alcoholic beverages for off-premises consumption only in their original packages, an individual serving, or beer in refillable growlers.

AUTH: 16-1-303, MCA

IMP: 16-3-303, 16-3-311, 16-4-402, 16-4-404, 16-4-405, MCA

REASONABLE NECESSITY: On-premises liquor licenses are in place for the benefit of the public. These licenses allow, within guidelines, for alcohol to be made available by the drink to the public. Therefore, the department is proposing to adopt New Rule II to provide greater public and licensee understanding on suitability requirements specific to an all-beverage license type beyond the general on-premises licenses suitability requirements in ARM 42.12.122. In addition, the rule seeks to eliminate any potential confusion regarding which alcoholic beverages can

be sold by an all-beverage license type for off-premises consumption.

Alcoholic beverages must be sold in their original packages, in a limited individual single service size, or beer in refillable growlers. To reflect statutory changes made by the 2011 Legislature, by the enactment of Chapter 77, L. 2011 (16-3-303 MCA), beer containers known as "growlers" are allowed to be sold for off-premises consumption by these license types. Mixed beverages may not be sold for off-premises consumption in containers larger than a single-serving size. This proposed rule is consistent with current application of the law and with responses the department has provided to questions of this nature. The department has approved individual serving sizes of not more than 16 ounces of beer, not more than 2 ounces of liquor, or not more than 7 ounces of wine. No combination of beer, liquor, or wine may exceed the equivalent limits

A licensee may petition the department to establish a larger quantity if it can demonstrate that it can reliably meet the obligations of the licensee's responsibility to not over-serve an individual, as stated in 16-6-304, MCA.

NEW RULE III CONDITIONS AND QUALIFICATIONS SPECIFIC FOR A RESTAURANT BEER AND WINE LICENSE (1) In addition to the provisions stated in ARM 42.12.122, which pertain to every type of alcoholic beverage license, with regard to a restaurant beer and wine license, a party applying for either a new license, transfer of ownership of an existing license, transfer of location of an existing license, or approval of an alteration to a premises:

(a) must operate at a premises clearly recognizable as a restaurant, as defined in ARM 42.12.401; and

(b) must not provide alcoholic beverages to any person for off-premises consumption.

(2) The term restaurant, as defined in ARM 42.12.401, does not include a coffee or beverage shop, bakery, kiosk, or a fast-food restaurant that, excluding any carry-out business, serves a majority of its food and drink in disposable containers not reused in the same restaurant.

AUTH: 16-1-303, MCA

IMP: 16-3-311, 16-4-402, 16-4-404, 16-4-405, 16-4-420, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule III to provide greater understanding to the public and licensees of the suitability requirements specific to a restaurant beer and wine license, beyond the general on-premises license suitability requirement.

Many of these requirements for a restaurant beer and wine license are outlined elsewhere in laws and rules; however, the department feels it is beneficial to combine all of the requirements into one rule for transparency and completeness.

NEW RULE IV CONDITIONS AND QUALIFICATIONS SPECIFIC FOR A BEER LICENSE AND A BEER LICENSE WITH WINE AMENDMENT FOR ON-PREMISES CONSUMPTION (1) In addition to the provisions stated in ARM 42.12.122, which pertain to every type of alcoholic beverage license, with regard to beer licenses for on-premises consumption, a party applying for either a new

license, transfer of ownership of an existing license, transfer of location of an existing license, or approval of an alteration to the premises:

(a) must operate at a premises recognizable as a bar or tavern with designated space and accommodation for the individual sale and consumption of beer and/or wine;

(b) for a beer license with a wine amendment, must meet the standards for premises operated as either a restaurant or a prepared food business (not including a coffee or beverage shop, bakery, or kiosk); or operate at a premises with designated space and accommodations where, in consideration of payment, food is routinely furnished to the public;

(c) must offer individual sales of beer and/or wine by the drink; and

(d) may sell alcoholic beverages for off-premises consumption only in their original packages, as an individual serving, or beer in refillable growlers.

AUTH: 16-1-303, MCA

IMP: 16-3-303, 16-3-311, 16-4-105, 16-4-402, 16-4-404, 16-4-405, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule IV to provide a better description for the public and licensees as to the specific requirements for a beer license, and a beer license with a wine amendment. These specific requirements are in addition to the general suitability rules for on-premises license types in ARM 42.12.122.

In addition, the rule seeks to improve the understanding in an effort to eliminate any potential confusion regarding what alcoholic beverages can be sold by a beer license, and a beer license with a wine amendment for off-premises consumption.

Alcoholic beverages must be sold in their original packages or in a limited individual single service size. To reflect statutory changes made by the 2011 Legislature by the enactment of Chapter 77, L. 2011 (16-3-303, MCA), beer containers known as "growlers" are allowed to be sold for off-premises consumption by these license types. Other large containers more than individual servings containing beer and wine are not allowed to be sold for off-premises consumption. This proposed rule is consistent with current application of the law and with responses the department has provided to questions of this nature.

NEW RULE V CONDITIONS AND QUALIFICATIONS SPECIFIC FOR AN OFF-PREMISES BEER LICENSE AND/OR WINE LICENSE (1) In addition to the

provisions stated in ARM 42.12.122, which pertain to every type of alcoholic beverage license, with regard to a license for off-premises consumption, a party applying for either a new license, transfer of ownership of an existing license, transfer of location of an existing license, or approval of an alteration to a premises must:

(a) operate at a premises recognized as a grocery store, or a pharmacy, as described in ARM 42.12.126;

(b) sell beer and/or wine for off-premises consumption only in their original packages; and

(c) be physically separated from any business not directly related to the sale

of beer and/or wine for off-premises consumption by four permanent walls. This includes a separate on-premises alcohol beverage business. The walls must be floor-to-ceiling and shall not be moved without department approval of alterations to the premises pursuant to ARM 42.13.106. The premises can have inside access to each business conducted in the building through a doorway no larger than six feet wide with a door that can be closed and locked when not in use.

(2) All beer and wine inventory must be stored on-site in an area identified on the floor plan.

(3) Beer and/or wine purchased from the off-premises licensee may not be consumed anywhere on property owned or leased by the licensee that is part of, adjacent to, or used in connection with the licensed off-premises business. By example this includes a patio, deck, sitting area, designated smoking areas, sports or play area, parking lots, and any other area that is adjacent to the licensed premises and is under the control of the licensee.

AUTH: 16-1-303, MCA

IMP: 16-4-115, 16-4-402, 16-4-405, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule V to educate the public and licensees as to the off-premises suitability requirements, in addition to the suitability rules for off-premises license types as described in ARM 42.12.122. The rule seeks to eliminate any potential confusion regarding what alcoholic beverages can be sold, what constitutes acceptable alcohol beverage storage areas, and where alcoholic beverages cannot be consumed to ensure proper control by the licensee for public welfare, health, and safety, and to maintain the distinction between on-premises and off-premises licenses.

NEW RULE VI CONDITIONS AND QUALIFICATIONS SPECIFIC FOR A BEER WHOLESALER AND/OR TABLE WINE DISTRIBUTOR LICENSE AND SUBWAREHOUSES

(1) In addition to the provisions stated in ARM 42.12.122, which pertain to every type of alcoholic beverage license, with regard to a beer wholesaler, table wine distributor, and/or a subwarehouse license, a party applying for either a new license, transfer of ownership of an existing alcoholic beverages license, transfer of location of an existing license, or approval of an alteration to a premises must:

(a) maintain a fixed place of business, and the facilities, storehouse, receiving house, or warehouse for the receiving of, storage, handling, and moving of beer and wine in large quantities for distribution and sale in original packages to other licensed wholesalers and distributors or licensed retailers;

(b) have sufficient space for the storage and distribution of beer and/or table wine in large quantities; and

(c) the premises must be physically separated by permanent walls from any other business located in the same building.

AUTH: 16-1-303, MCA

IMP: 16-4-106, 16-4-108, 16-4-402, 16-4-415, MCA

REASONABLE NECESSITY: The department is seeking to adopt New Rule VI to educate the public and licensees as to the requirements for beer wholesalers, wine distributors, and subwarehouse premises, in addition to the suitability rules for these license types as described in ARM 42.12.122. In addition, the department seeks to provide the same standards for beer wholesalers' and wine distributors' subwarehouse premises to ensure the interest of the public's welfare, health, and safety is met. These proposed standards match the department's current application.

NEW RULE VII CONDITIONS AND QUALIFICATIONS SPECIFIC FOR A MANUFACTURER OF BEER, WINE, OR DISTILLED SPIRITS LICENSE (1) In

addition to the provisions stated in ARM 42.12.122, which pertain to every type of alcoholic beverage license, with regard to a license for the manufacture of beer, wine, or distilled spirits, a party applying for either a new license, transfer of ownership or location of an existing license, or approval of an alteration to a premises, upon approval of its license by the department:

- (a) must operate at a premises recognizable as a manufacturing facility of beer, wine, or distilled spirits;
- (b) must be physically separated from any other business, not directly related to a manufacturing facility located in the same building;
- (c) must not allow alcoholic beverages to be provided to the customer through automatic dispensing or vending machines or self-service devices, and the licensee or employees must have direct involvement in the service of alcohol for on- or off-premises consumption; and
- (d) when provided for in law, may serve sample products manufactured on the licensed premises in one sample room. The sample room must:
 - (i) be located on the licensed premises;
 - (ii) must restrict access by unauthorized persons to the manufacturing areas; and
 - (iii) have licensee's or employee's direct involvement in the service of alcohol for on- and off-premises consumption. No alcoholic beverages can be provided to the customer through self-service vending machines, self-service reach-in coolers, self-service open shelving, or self-service devices.

AUTH: 16-1-303, MCA

IMP: 16-3-213, 16-3-214, 16-3-411, 16-4-102, 16-4-107, 16-4-311, 16-4-312, 16-4-402, MCA

REASONABLE NECESSITY: The department is seeking to adopt New Rule VII to educate the public and licensees as to the premises requirements for a manufacturer of beer, wine, or distilled spirits license in addition to the suitability rules for these license types as described in ARM 42.12.122. These proposed standards match the department's current application approval process and, for transparency, are listed out in this proposed rule to eliminate any confusion by applicants.

NEW RULE VIII SACRAMENTAL WINE LICENSE (1) An establishment in

Montana desiring to sell sacramental wine pursuant to 16-4-313, MCA, may apply to the department by submitting an off-premises wine license application accompanied by a \$200 fee, of which \$100 is a processing fee and \$100 is an annual license fee.

(2) An applicant must qualify for licensure under 16-4-401, MCA.

(3) The premises must meet suitability requirements for the retail sale of wine for off-premises consumption, excluding the requirements to operate as a bona fide grocery store or pharmacy.

(4) This type of license is nontransferable and not subject to the quota system as described in 16-4-105, MCA.

(5) Sacramental wine containing not more than 16 percent alcohol by volume must be purchased by a sacramental wine licensee from an agency liquor store or licensed Montana wine distributor or winery in Montana. Sacramental wine that is more than 16 percent alcohol by volume must be purchased by a sacramental wine licensee from an agency liquor store.

(6) Licensees must adhere to all laws and rules relating to the retail sale of wine for off-premises consumption.

AUTH: 16-1-303, MCA

IMP: 16-4-105, 16-4-313, 16-4-316, 16-4-401, 16-5-501, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule VIII to reflect the statutory changes made by the 2009 Legislature with Senate Bill 511, L. 2009. Senate Bill 511 (16-4-313, MCA) established a sacramental wine license for the retail sale of sacramental wine for religious purposes. Establishments located in Montana wishing to sell sacramental wine only, now have the ability to apply for an off-premises consumption sacramental wine license.

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

42.12.101 APPLICATION FOR LICENSE (1) All applications for licenses to sell, ~~manufacture or distribute~~ alcoholic beverages ~~at retail or wholesale~~ must be made to the department upon forms supplied by the department.

(2) Applications for licenses shall be in the names of all persons with an ownership interest or to have an ownership interest in the business to be operated under the license. An owner of 10 percent or more, or who will have an ownership interest of 10 percent or more in the license, in the business, or in the entity owning the license, must meet the requirements as described in 16-4-401, MCA. If no single owner's interest is 10 percent or more, then persons whose combined ownership totals, or will total, 51 percent must meet the requirements as described in 16-4-401, MCA. The names of all such persons shall appear on the licenses. The disqualification of any one or more applicants to hold the license disqualifies all.

(3) In addition to other information required on the application form, the department may require an applicant to submit all information necessary to determine qualifications, including, but not limited to:

(a) personal history statements and authorization to access state and federal income tax information for all persons who appear to have an ownership interest or

control over the business operated or to be operated under the license; and

(b) in the case of a license to be operated seasonally, the applicant may be required to submit sufficient information for the department to determine whether the criteria for seasonal operation, as described in 16-3-310, MCA, and ARM 42.13.108, are met.

(4) Upon receipt of an application for a license to sell, manufacture, or distribute alcoholic beverages, the department shall make a thorough investigation as to the qualifications of the applicant and the suitability of the premises proposed for licensing. If, upon such investigation, it appears that the applicant is qualified under the law, and the premises is suitable for licensing under the laws of the state and the rules of the department, the department shall issue the license if all other requirements of the law and these rules are fulfilled. Temporary authority may be granted to applicants for a retail alcoholic beverages license if the requirements of ARM 42.12.208 are met.

(5) Except as provided in ~~(9)~~, (10), ~~and (11)~~, and (12), an ownership interest may not be transferred to a new owner until an application has been submitted to the department and the department approves the transfer.

~~(6) The license application~~ To be considered "complete" for processing, applications for licenses to sell alcoholic beverages for on-premises consumption, to manufacture, or distribute alcoholic beverages in Montana must include:

(a) the processing fee required for the applicable license as stated in ARM 42.12.111;

(b) a copy of the proposed agreement to transfer the interest in the license, if applicable;

(c) proof of possessory interest in the premises by the applicant;

~~(d) any required loan documents~~ source of funding documents including, but not limited to, loan documents, gifting statements, and finance institution statements;

(e) the premises floor plan;

(f) taxpayer identification number;

(g) bank account authorization and signature documents;

(h) proof of assumed business name, if applicable;

(i) additional documentation required for entity applicants as stated in ARM 42.12.103;

(j) proof that all filings and payments related to Montana income, corporation, withholding, business, and other taxes, are current for the applicant in all cases, and if the application is for a sale of the license, for the seller (current licensee);

~~(e)~~(k) a two complete sets of fingerprints, provided on the department's form FD-258 (obtained and certified by a local law enforcement agency, the department, or a private security company which has been approved by the department), for each person required to complete a personal history statement as specified by this rule; and

~~(f)~~(l) any other documentation required to determine licensing or premises qualifications.

(7) To be considered "complete" for processing, applications for licenses to sell alcoholic beverages for off-premises consumption only must include:

(a) the processing fee as required in ARM 42.12.111, and the license fee stated in 16-4-501, MCA;

- (b) proof of possessory interest in the premises by the applicant;
 - (c) the premises floor plan;
 - (d) taxpayer identification number;
 - (e) bank account authorization and signature documents;
 - (f) proof of assumed business name, if applicable;
 - (g) grocery inventory;
 - (h) any other documentation required to determine licensing or premises qualifications;
 - (i) proof that all filings and payments related to Montana income, corporation, withholding, business, and other taxes, are current for the applicant in all cases; and
 - (j) two complete sets of fingerprints, provided on the department's form FD-258 (obtained and certified by a local law enforcement agency, the department, or a private security company which has been approved by the department), for each person required to complete a personal history statement as specified by this rule.
- (7) and (8) remain the same, but are renumbered (8) and (9).
- ~~(9)~~(10) The provisions of this rule do not apply to:
- (a) the transfer of a security interest in a licensed liquor operation; or
 - (b) a transfer that would not result in a new owner or owner of less than 10% in the licensed corporation, license owning 10% or more of the same licensed corporation. These transfers may occur without prior consent of the department. Immediate notice must be given to the department in these cases in accordance with ARM 42.12.103 the death of a licensee. In that case, the procedure described in ARM 42.12.204 applies.
- (10) remains the same, but is renumbered (11).
- ~~(11)~~(12) An application is not required to be filed if For circumstances listed below, an existing licensee may complete a simplified form, provided by the department, along with the required documentation supporting the transactions:
- (a) when an existing licensee owner, or member, partner, or shareholder of a licensee entity that was previously qualified is being removed from the face of the license as an owner. In this case, documentation supporting the removal of the person and immediate notification to the department is required;
 - (b) when an individual or entity is proposed to be added to the license as a less than 10 percent owner;
 - (c) when an existing owner, member, partner, or shareholder of a licensee entity that was previously qualified gifts some or all of their ownership interest to another existing owner, member, partner, or shareholder of a licensee entity that was previously qualified; or
 - (d) for a transfer of location of a current licensee. There cannot be other changes to the licensee, such as changes in ownership structure or creditors other than the lessor.
- (12) remains the same, but is renumbered (13).

AUTH: 16-1-303, MCA

IMP: 16-3-310, 16-4-105, 16-4-201, 16-4-204, 16-4-207, 16-4-210, 16-4-220, 16-4-401, 16-4-402, 16-4-414, 16-4-502, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM

42.12.101 to reflect the statutory amendments made to 16-4-401, MCA, by the 2007 Legislature, through the enactment of House Bill 113, L. 2011. Section 16-4-401, MCA, requires anyone with an ownership interest (of 10 percent or more) in an alcohol beverages license to apply and qualify for a liquor license.

The department is also proposing amendments to (3) to eliminate confusion and to ensure consistent treatment of liquor licensees in the application of liquor laws with regard to "seasonal" status. Section 16-3-310, MCA, and ARM 42.13.108, establish criteria for the granting of seasonal status, and the additional information submitted with the application will enable the department to determine whether such criteria are met.

In addition, the department is proposing the amendments in (6) to better inform applicants of the application requirements, and to ease the process for the applicant that can be at times complex and challenging, by listing for them all the documents that are necessary when completing an application.

The department is proposing an amendment in new (10) to enhance liquor licensees' understanding when the provisions of this rule do not apply. In the case of a death of a licensee, for example, the rules in ARM 42.12.204 apply instead.

The department is also proposing to amend new (12) to simplify the license process by eliminating the need for full applications in those situations when a simplified form would suffice and not compromise the integrity of the process. A simplified application will be used when an owner is being removed from the license, when a proposed owner of less than 10 percent is being added to the license, when gifting or sales of shares to a previously qualified owner, or for certain transfer of locations. Only a simplified form is necessary in these circumstances.

The department also proposes to update the implementing statutes to correspond with the proposed amendments to the rule.

42.12.103 SUPPORTING DOCUMENTATION -- CORPORATE ENTITY APPLICANTS (1) ~~A corporate~~ An entity applicant other than one with fewer than ten owners ~~other than one~~ or whose stock is ~~or membership units are~~ listed on a national exchange ~~or a corporation with fewer than 10 stockholders~~ shall list:

(a) the names, dates of birth ~~and~~, social security ~~or federal tax identification~~ numbers, and resident addresses of all owners, shareholders ~~of the issued stock~~, directors, officers, members, and partners; ~~and~~

(b) the number of shares of stock ~~and/or membership units~~ owned by each ~~stockholder~~ person, as well as the percentage of ownership held by each person;

(c) Certificate of Existence or Certificate of Fact, as applicable;

(d) Articles of Incorporation or Organization;

(e) stock certificates;

(f) stock ledger or membership units register;

(g) by-laws;

(h) organization minutes; and

(i) any other documentation required to determine licensing qualifications.

(2) ~~A corporate~~ An entity applicant whose stock is listed on a national exchange ~~or a corporation~~ an entity with more than 10 stockholders, members, or partners shall list:

(a) the names, dates of birth, social security numbers, and residence

addresses of all directors and officers, and all owners of 10% percent or more of the issued stock, all directors and officers membership units, or partnership interest; and

(b) the number of shares of stock, membership units, or percentage of partnership interest held by each stockholder owner of 10% percent or more of shares of stock-, membership units, or partnership interest; and

(c) in addition, the entity applicant must supply the documents required in (1)(c) through (1)(i).

AUTH: 16-1-303, MCA

IMP: 16-4-203, 16-4-205, 16-4-401, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.103 to reflect the statutory amendments made to 16-4-401, MCA, by House Bill 113, L. 2007. Section 16-4-401, MCA, allows out-of-state residents to apply for liquor licenses, and includes other business entity types such as limited liability companies and limited liability partnerships in addition to corporations. It also applies the same licensing requirements to the additional business types as is currently required of corporations. The proposed amendments replace the word "corporation" with "entity" to encompass all business entity types within the rule.

In addition, the department is proposing amendments to enhance taxpayer understanding of what is required for applicants and licensees that are entities. The proposed amendments to this subchapter will help to eliminate confusion among applicants and licensees who are entities but are not corporations.

42.12.106 DEFINITIONS The following definitions apply to this sub-chapter subchapter:

(1) remains the same.

(2) "Bar preparation area" means a bar area where alcoholic beverages can be purchased and consumed. The area must have sufficient seating and must include supplies to prepare, consume, and deliver alcoholic beverages.

(2) through (7) remain the same, but are renumbered (3) through (8).

~~(8)~~(9) "Conditional approval letter" means a letter that is issued upon completion of the license application investigation and public protest period, but prior to approval of the premises. A conditional approval letter precedes issuance of a license.

~~(a)~~ A conditional approval letter is not an approval to operate, and is not to be confused with a license with conditions written on the face of the license itself pursuant to 16-1-302, MCA. The conditions appearing on the face of the license are permanent and last through the existence of ownership by the current licensee.

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

(11) "Fair" means a county, state, or regional fair that occurs no more than once per year, is held on a publicly owned fairgrounds, and is officially sanctioned by a government entity.

(12) "Individual serving" means not more than 16 ounces of beer, not more than 2 ounces of liquor, not more than 7 ounces of wine, or a proportional combination thereof (for example, 1 ounce of liquor mixed with 8 ounces of beer).

~~(10)~~(13) "Licensee" means a person, partnership, association, or corporation

other entity holding a Montana retail liquor alcoholic beverage license, and a retail liquor alcoholic beverage operations located on a U.S. military installations, an alcoholic beverage manufacturer, a table wine distributor, or a beer wholesaler within Montana.

(11) and (12) remain the same but are renumbered (14) and (15).

~~(13)~~(16) "Noninstitutional lender" means a person other than a state or federally regulated banking or financial institution, a credit union, an investment company, a development company, or other regulated lender as defined in 31-1-111, MCA, who loans money to ~~an~~ the applicant for a license or to a the licensee.

(14) and (15) remain the same, but are renumbered (17) and (18).

(19) "Patio/Deck" means an outdoor area that is part of the licensed premises, specifically designated on a floor plan, with a perimeter barrier and immediately adjacent to, and accessible from, the indoor portion of the licensed premises.

(20) "Perimeter barrier" means a barrier enclosing the perimeter of the patio/deck portion of a licensed premises, which defines the boundary of the licensed premises in a way that:

(a) clearly marks for patrons, licensees, licensees' employees, investigators, local law enforcement, or other interested parties, where consumption of alcohol is allowed;

(b) impedes access to the service areas by underage persons or others who may attempt to enter the premises without the licensee's knowledge; and

(c) consists of a fence or wall at least three feet high, or an alternative barrier that accomplishes the same purposes and is approved by the department. A perimeter barrier may be with or without entrances from the parking lot, sidewalk, or other areas beyond the patio or deck regardless of whether those areas beyond the licensed premises are land or water. In the case of a patio/deck which abuts a river, lake, or other body of water, the edge of the water may serve as a portion of the perimeter barrier, subject to department approval.

(16) and (17) remain the same but are renumbered (21) and (22).

~~(18)~~(23) "Restaurant," as it applies to an all-beverages license or a retail on-premises beer or beer and wine license (but not a restaurant beer and wine license), means a public eating establishment allowing for seated service for a minimum of 12 persons at tables or booths where the sale of food is prepared, sold, and served is prepared on-site.

(24) "Retail alcoholic beverages license" means a license operated by an establishment for the retail sale of alcoholic beverage for either on- or off-premises consumption but does not include brewery, winery, or distillery licenses.

(25) "Sacramental wine" means wine that is manufactured and sold exclusively for use as sacramental wine or for other religious purposes.

~~(19)~~(26) "Sample room" means a specific area designated on a floor plan where samples of product produced on site may be provided to the public; and the floor plan that accompanied the application, for a brewery, distillery, or winery, was approved by, and is on file with, the department.

(27) "Special event," as it relates to all special permits and catering, means a short, infrequent, out-of-the-ordinary occurrence such as a picnic, fair, festival, reception, seasonal event, or sporting event for which there is an outcome,

conclusion, or result. By example, a community winter holiday stroll held on four consecutive weekends, or a community summer gathering held one night a week all summer long that ceases in fall, is a seasonal special event.

(20) through (22) remain the same, but are renumbered (28) through (30).

AUTH: 16-1-303, MCA

IMP: 16-1-106, 16-3-311, 16-4-105, 16-4-205, 16-4-207, 16-4-301, 16-4-401, 16-4-402, 16-4-404, 16-4-413, 16-4-420, 16-4-423, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.106 to include definitions of terms that are used in other rules contained in Chapter 12, and to enhance the definition of existing terms for better clarity and understanding. New (13) also includes a format correction to add a missing quotation mark into the existing language.

Additionally, the department proposes to update the implementing citations to include 16-4-401, MCA, regarding entities as licensees.

42.12.110 SERVICE OF NOTICES (1) A notice of proposed adverse action issued pursuant to 16-4-107, 16-4-406, 16-4-407, or 16-4-1008, MCA, shall be served upon the licensee or registrant of record or, in the case of an application for a new license, on the applicant, by sending a copy of the notice to the licensee, registrant, or applicant by certified mail to the mailing address on file with the department.

(2) remains the same.

(3) The licensee, registrant, or applicant must respond to the department in writing within 20 days of service of the notice of proposed adverse action. Failure to respond will result in the enforcement of the administrative action proposed in the notice.

AUTH: 16-1-303, MCA

IMP: 2-4-601, 16-4-107, 16-4-406, 16-4-407, 16-4-1008, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.110 to enhance alcoholic beverage licensees' understanding and eliminate any confusion of the department's business practice on the time allowed for a licensee to respond to a proposed adverse action notice. The proposed addition of (3) will make it clear to licensees that they have 20 days to respond to a proposed adverse action.

Section 2-4-601, MCA, requires that reasonable notice be provided to parties against whom administrative action is proposed. The department considers 20 days to be reasonable notice.

Additionally, the department proposes to update the implementing citations to include the statutes that correspond with the proposed amendments.

42.12.111 PROCESSING FEES (1) The following are the fees to be charged for processing endorsement and license applications:

(a) ~~All beverages license (including veterans' or fraternal)~~\$200

(b) Catering endorsement (all-beverages, restaurant beer/wine, beer and wine	\$100
(c) All-beverages license with catering endorsement (when applied for concurrently	\$200
(d) Retail on-premises beer license (including veterans' or fraternal).....	\$200
(e) Wine amendment (for use with existing on-premises retail beer license).....	\$100
(f) Restaurant beer/wine license	\$200
(g) Retail on-premises beer license and wine amendment (when applied for concurrently)	\$200
(h) Retail off-premises beer license	\$100
(i) Retail off-premises table wine license.....	\$100
(j) Retail off-premises beer and table wine license (when applied for concurrently)	\$100
(k) Wholesale beer license.....	\$100
(l) Wholesale beer sub-warehouse license	\$100
(m) Wholesale table wine license	\$100
(n) Wholesale table wine sub-warehouse	\$100
(o) Wholesale beer and table wine license	\$100
(p) Brewer's license	\$100
(q) Beer importer's license.....	\$100
(r) Resort all-beverages license	\$200
(s) Winery/wine importer	\$100
<u>(a) All-beverages license (including veterans' or fraternal)</u>	<u>\$200</u>
<u>(b) All-beverages license with catering endorsement (when applied for concurrently)</u>	<u>\$200</u>
<u>(c) Beer importer's license</u>	<u>\$100</u>
<u>(d) Beer wholesaler and table wine distributor license</u>	<u>\$100</u>
<u>(e) Beer wholesaler beer subwarehouse license</u>	<u>\$100</u>
<u>(f) Beer wholesaler license.....</u>	<u>\$100</u>
<u>(g) Brewer's license</u>	<u>\$100</u>
<u>(h) Brewery storage depot license</u>	<u>\$100</u>
<u>(i) Catering endorsement (all-beverages, restaurant beer and wine, and beer)</u>	<u>\$100</u>
<u>(j) Domestic distillery license.....</u>	<u>\$100</u>
<u>(k) Resort all-beverages license</u>	<u>\$200</u>
<u>(l) Restaurant beer and wine license</u>	<u>\$200</u>
<u>(m) Retail off-premises beer and table wine license (when applied for concurrently)</u>	<u>\$100</u>
<u>(n) Retail off-premises beer license</u>	<u>\$100</u>
<u>(o) Retail off-premises table wine license</u>	<u>\$100</u>
<u>(p) Retail on-premises beer license and wine amendment (when applied for concurrently)</u>	<u>\$200</u>
<u>(q) Retail on-premises beer license (including veterans' or fraternal).....</u>	<u>\$200</u>

(r) Sacramental wine license.....	\$100
(s) Table wine distributor license	\$100
(t) Table wine distributor subwarehouse	\$100
(u) Tour boat endorsement	\$100
(v) Wine amendment (for use with existing on-premises retail beer license).....	\$100
(w) Winery license	\$100

(2) through (5) remain the same.

AUTH: 16-1-303, MCA

IMP: 16-1-302, 16-1-303, 16-4-313, 16-4-414, 16-4-420, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.111 to include all types of licenses in the processing fee schedule to match current department practice and to reflect the statutory changes made through the enactment of Senate Bill 511, L. 2009, (16-4-313, MCA), which allows for a sacramental wine license. In addition, the proposed rule amendments revise the license titles in the rule to match the statutory language for Restaurant Beer and Wine, and Beer Wholesaler licenses.

42.12.115 ASSESSMENT OF LICENSE RENEWAL LATE-PAYMENT PENALTY FEE - GROUNDS FOR WAIVER (1) The department will assess a license renewal late-payment ~~penalty~~ fee in all cases where a licensee fails to pay the license renewal fee on or before the due date. The renewal application and fee are timely filed and paid if mailed in an envelope postmarked by the United States ~~postal service~~ Postal Service ~~prior to~~ on or before the due date. If the due date falls on a Saturday, Sunday, or state legal holiday, a postmark for the following business day or a payment received at the department on the following business day is timely.

(2) The department may waive a license renewal late-payment ~~penalty~~ fee assessment upon receipt of a written request by the licensee. The request must state the reason for late payment and be supported by documentation. A waiver of the license renewal late-payment ~~penalty~~ fee assessment shall be granted under the following conditions:

- (a) a department error;
- (b) the department mailed a license renewal notice less than two weeks prior to the due date;
- (c) a delay in payment caused by the death or serious illness of the licensee;
- (d) a United States ~~postal service~~ Postal Service error;
- (e) a renewal application and fee was erroneously mailed to the ~~internal revenue service~~ Internal Revenue Service or ~~bureau of alcohol, tobacco, and firearms~~ Alcohol and Tobacco Tax and Trade Bureau;
- (f) a delay in payment due to bankruptcy or foreclosure action; or
- (g) the late payment is the only late payment within the most recent five consecutive years or since the license was acquired, whichever is less, and payment was received at the department within 30 days after the due date.

(3) remains the same.

AUTH: 16-1-303, MCA

IMP: 16-4-501, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.115 to support the statutory language found in 16-4-501, MCA, regarding late-payment fees, and to eliminate inconsistent language. The proposed amendment to the rule changes the wording from late-payment penalty fee to late-payment fee. In addition, the proposed rule amendment adds consistency with the timing of payment, as on or before the due date.

The department's intent with the proposed amendment to the language in (2), to read the "Alcohol and Tobacco Tax and Trade Bureau," is to eliminate confusion by mirroring the terminology used by the Internal Revenue Service.

42.12.122 CONDITIONS, QUALIFICATIONS, AND DETERMINATION OF

SUITABILITY OF LICENSED PREMISES (1) A party applying for either a new ~~retail~~ alcoholic beverages license, the transfer of ownership of an existing ~~retail~~ alcoholic beverages license, the transfer of location of an existing ~~retail~~ alcoholic beverages license, or approval of an alteration to a premises must provide the department with evidence of the suitability of the premises for the use intended.

(2) The premises ~~must~~ may be considered suitable for the retail sale of alcoholic beverages, distribution of alcoholic beverages, or manufacture of alcoholic beverages only if:

(a) it meets the standards of the ~~department of PHHS~~ Department of Public Health and Human Services; the ~~department of labor and industry~~ Department of Labor and Industry, ~~building codes bureau~~ Building Codes Bureau; and the ~~state fire marshal's office~~ Montana Fire Marshal's Office in the ~~fire prevention and investigation bureau~~ Investigations Bureau of the ~~department of justice~~ Department of Justice; or their delegated representatives;

(i) ~~a license issued for off-premises consumption of beer and/or table wine must meet the standards for an establishment operated as a grocery store, or a drug store licensed as a pharmacy;~~

(ii) ~~a license issued for on-premises consumption of beer must meet the standards for an establishment operated as a bar or tavern;~~

(iii) ~~a license issued for on-premises consumption of beer and wine must meet the standards for an establishment operated as either a restaurant or a prepared food business; and~~

(iv) ~~a license issued for on-premises consumption of all alcoholic beverages must meet the requirements for a bar or tavern;~~

(b) the investigator can easily ~~ascertain~~ determine the type of alcoholic beverages business that is being conducted on the premises due to indoor and outdoor advertising, signage, and/or the general layout and atmosphere of the premises to be licensed. ~~The two circumstances to be ascertained are:~~

(i) ~~a beer and/or table wine license issued for off-premises consumption operates at a premises recognizable as a grocery store or a pharmacy as defined in ARM 42.12.126;~~

(ii) ~~a license issued for on-premises consumption operates at a premises recognizable as a restaurant, bar, tavern, or other business directly related to the on-~~

~~premises consumption of alcoholic beverages, such as a bowling alley, hotel, or gambling casino. The licensed premises must have a bar preparation area and sufficient seating to encourage patrons to remain on the premises and consume the alcoholic beverages sold by the drink. Sufficient seating must consist of not less than 12 seats at either a bar, not including a service bar as defined in ARM 42.12.401, or tables, booths, gaming areas, or any combination of the above; and~~

~~(iii) a restaurant beer and wine licensed premises must have a service bar as defined in ARM 42.12.401, and sufficient seating as defined in 16-4-420, MCA;~~

~~(c) for retail establishments, alcoholic beverages are advertised and displayed as being available for purchase;~~

~~(d) the premises is are open for business on a regular basis so as not to be considered a license on nonuse status;~~

~~(e) the layout of the premises allows for licensee- and/or employee-only control over the preparation, sale, service, and/or distribution of alcoholic beverages;~~

~~(f) the investigator can verify to the department that the dimensions shown on the floor plan accurately represent the physical layout of the premises;~~

~~(g) the applicant has demonstrated that adequate safeguards are in place to prevent the sale, delivery, or giving away of alcoholic beverages to minors underage and intoxicated persons;~~

~~(h) the premises are not located where local government zoning restrictions or ordinances prohibit the sale and/or consumption of alcohol;~~

~~(i) the premises are not located off regular police beats and can be properly policed by local authorities;~~

~~(j) the sale of alcoholic beverages does not occur through the use of a drive-up window;~~

~~(h)(k) the premises to be used for the on-premises consumption of alcoholic beverages is physically separated from any business not directly related to the on-premises consumption of alcoholic beverages by four permanent walls. The walls must be floor to ceiling and shall not be moved without department approval of alterations to the premises pursuant to ARM 42.13.106. The premises can maintain inside access to each business conducted in the building through a doorway no larger than six feet wide with a door that can be closed and locked when not in use. Businesses directly related to the on-premises consumption of alcoholic beverages are a hotel, bowling alley, gambling casino, or restaurant the premises meet the additional rules specific to each license type; and~~

~~(i)(l) the provisions of (3) are not violated met for on-premises licenses.~~

~~(3) The premises cannot be considered suitable for the retail sale of alcoholic beverages if:~~

~~(a) local government zoning restrictions or ordinances prohibit the sale and/or consumption of alcohol at the location of the premises;~~

~~(b) the location is off regular police beats and cannot be properly policed by local authorities;~~

~~(c) the service of alcohol is handled by the customer without the direct involvement of the licensee or employees such as:~~

~~(i) alcoholic beverages provided the customer through automatic dispensing or vending machines; or~~

~~(ii) self-service beer tap;~~

~~(d) the on-premises operation is not physically separated from other businesses operated in the same building that are unrelated to the business of retail on-premises alcoholic beverages consumption, such as a grocery store, laundromat, clothing store, hardware store, flower shop, nursery, or preschool; and~~

~~(e) the operator of the alcoholic beverages business intends to conduct some or all of the sale of alcoholic beverages through the use of a drive-up window~~ A license issued for on-premises consumption of alcoholic beverages:

(a) must be operated at a premises clearly recognizable as a business established for the on-premises consumption of alcoholic beverages or other business directly related to the on-premises consumption of alcoholic beverages, such as a bowling alley, hotel, gambling casino, or restaurant;

(b) must be operated at premises that are physically separated by permanent walls from any business not directly related to the on-premises consumption of alcoholic beverages. This includes a separate off-premises alcoholic beverage business operated by the on-premises licensee. The walls must be floor-to-ceiling and shall not be moved without department approval of alterations to the premises pursuant to ARM 42.13.106. The premises can have inside access to each business conducted in the building through a doorway no larger than six feet wide with a door that can be closed and locked when not in use;

(c) except for restaurant beer and wine licenses, must be used at premises that have a bar preparation area where alcohol can be purchased and consumed and sufficient seating to encourage patrons to remain on the premises and consume the alcoholic beverages sold by the drink. Sufficient seating must consist of not less than twelve seats at a bar, tables, booths, gaming areas, or any combination of the above. The twelve seats required are independent of any seats at gaming machines;

(d) may be used at premises that include a patio/deck, if it has the required perimeter barrier and is in compliance with fire regulations, except that a license used at a golf course does not require a perimeter barrier around a patio/deck because alcohol may be consumed at any place within the boundaries of the golf course;

(e) must be operated at premises where no alcoholic beverages can be provided to the customer from self-service devices, self-service vending machines, self-service reach-in coolers, or self-service open shelving (except for off-premises consumption) as provided in (f), and where the licensee or employees have direct involvement in the service of alcohol for on- or off-premises consumption; and

(f) except for restaurant beer and wine licenses, allows the licensee to sell alcoholic beverages for off-premises consumption, and the premises may include self-service open shelving or reach-in coolers for off-premises sales only if the off-premises sales area is contiguous with the on-premises sales area, but is physically separated with walls.

(4) A shed, warehouse, or other temporary or permanent enclosure used to store alcoholic beverage inventory must be:

(a) connected to the licensed premises;

(b) accessible only from inside the licensed premises; and

(c) listed on the floor plan provided to the department and be on property owned or leased by the licensee.

~~(4)~~(5) Premises currently licensed that do not meet the suitability standards ~~would be~~ are required to meet the above standards upon seeking department approval of ~~completed~~ alterations of the existing licensed premises in accordance with 16-3-311, MCA, or upon a transfer of ownership.

AUTH: 16-1-303, MCA

IMP: 16-3-311, 16-4-402, 16-4-404, 16-4-405, 16-4-420, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.122, in addition to adding new rules for enhancement, to provide for better understanding, add clarity, and eliminate any potential confusion by applicants, licensees, and the public of the suitability requirements for a premises to be licensed; and where alcoholic beverages may be served and sold for on-premises consumption or off-premises consumption. On-premises alcoholic beverage licenses are in place for the benefit of the public, and are intended to provide the public with the ability to consume alcoholic beverages by the drink, at the licensed premises, whether or not the public also engages in gambling. These licenses allow, within guidelines, for alcohol to be made available by the drink to the public. In the interest of protecting public welfare, health, and safety in administering the liquor laws, the department is also proposing to add new (3) for on-premises licenses, including new language regarding a deck or patio, and new (4) regarding storage of alcoholic beverages.

The proposed amendments are the department's effort to be responsive after learning that it is not always clear to the public who is operating the liquor license in situations where alcohol is being served on certain premises; for example, decks and patios.

Additionally, current licensed premises that do not meet the suitability standards in ARM 42.12.122, will be required to come into compliance with the standards when the premises are altered, or when the license changes ownership. The proposed amendments add this clarity to the rule.

42.12.126 OFF-PREMISES SALE OF BEER OR TABLE WINE (1) A retail alcoholic beverages license to sell beer or table wine in the original packages for off-premises consumption only may be issued to any person, ~~firm, or corporation~~ or entity approved by the department as a fit and proper person ~~firm, or corporation~~ or entity to sell beer or table wine, and whose premises proposed for licensing is are operated as a bona fide grocery store or a drugstore licensed as a pharmacy.

(2) remains the same.

AUTH: 16-1-303, MCA

IMP: 16-4-105, 16-4-401, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.126(1) to include the new language for "retail alcoholic beverages license" also being proposed in ARM 42.12.106, the definitions rule. Section 16-4-401, MCA, allows out-of-state residents to apply for liquor licenses, and includes other business entity types such as limited liability companies and limited liability partnerships in

addition to corporations. It also applies the same licensing requirements to the additional business types as is currently required of corporations. The proposed amendments replace the word "corporation" with "entity" to encompass all business entity types within the rule.

The department also proposes to update the implementing citations to include 16-4-401, MCA, regarding entities as licensees.

42.12.128 CATERING ENDORSEMENT (1) Any licensee having obtained a catering endorsement under the provisions of 16-4-111 or 16-4-204, MCA, is authorized to sell alcoholic beverages authorized under the license to persons attending a special event ~~upon premises~~ at locations not otherwise licensed. Only the licensee or the licensee's employees are authorized to sell and serve alcoholic beverages at the special event.

(2) remains the same.

(3) A catered event may only last for a maximum of three days, except that each licensee may have one special event per year that lasts up to seven days for a fair. A fair is defined in ARM 42.12.106.

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

~~(4)~~(5) Every licensee holding a catering endorsement shall report, on or before the 15th day of each month, those events the licensee catered in the previous month. The report shall include the date, time, the sponsor of the event, and place of the catered event. This report can be provided to the department in letter format.

AUTH: 16-1-103, 16-1-303, MCA

IMP: 16-3-103, 16-4-111, 16-4-204, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.128 to ensure consistent and equitable treatment in the application of liquor control laws by further describing how a catering endorsement is to be used and the length of time an event can be catered. In addition, the department is requesting the sponsor of the event be included in the monthly report for transparency purposes.

The department further proposes the amendment in (1) to correct a grammatical error.

42.12.129 DETERMINATION OF PROXIMITY TO PLACE OF WORSHIP OR SCHOOL (1) and (2) remain the same.

(3) The distance between entrance doors is measured by a geometric straight line, regardless of intervening property and buildings. An entrance is considered to be a means of ingress to the premises generally used by the public. This does not include egress-only doors, delivery, or service entrances.

(4) and (5) remain the same.

AUTH: 16-1-303, MCA

IMP: 16-3-306, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.129 to enhance the public's understanding of what is considered a "public

entrance." This issue was raised to the department in a request for a legal opinion. The proposed amendments to the language incorporate the primary conclusion of that legal opinion, which will add clarity and make the distinction readily available to the public as part of the rule.

42.12.130 DETERMINATION OF LICENSE QUOTA AREAS (1) Any applicant applying to the department for a new license or transfer of location of an existing license under the quota limitations provided for under 16-4-105, ~~and 16-4-201, and 16-4-420~~, MCA, must submit to the department a sworn statement or affidavit from the local county or city surveyor, ~~or~~ a private licensed land surveyor ~~or local government official~~ attesting to the location of the proposed premises.

(2) If the location of the proposed premises is not within the boundaries of an incorporated city ~~or incorporated town~~, the ~~official~~ surveyor must attest to the exact distance from the nearest corporate boundary to the proposed premises as measured from official city or county plats.

(a) The distance must be measured by radial survey method from the nearest corporate city boundary to the nearest entrance of the proposed premises.

(3) remains the same.

AUTH: 16-1-303, MCA

IMP: 16-4-105, 16-4-201, 16-4-409, 16-4-420, 16-4-501, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.130 to ensure consistent and equitable treatment of liquor licensees in the application of liquor control laws. The department requires a qualified surveyor to determine the exact location of a premises proposed for licensing and requires both a legal description and street address of the proposed premises. Therefore, the department is removing the option to use local government officials to attest to the location of the licensed premises. The words "or incorporated town" are being added to reflect the language of 16-4-105 and 16-4-201, MCA. Additionally, the department proposes to update the implementing citations to correspond with the proposed amendments.

42.12.132 MANAGEMENT AGREEMENTS (1) and (2) remain the same.

(3) The department will review the agreement for compliance with the following standards:

(a) the licensee must retain the possessory interest in the premises through ownership, lease, rent, or other agreement with the owner of the premises;

(b) while the agreement may delegate duties to the manager, the licensee must retain ultimate control, liability, responsibility, and accountability for the retail ~~liquor~~ alcoholic beverage operation. The agreement may not assign or limit any of the rights or responsibilities of ownership. In particular, the agreement may not grant or assign to the manager:

(i) control of business hours, types of alcoholic beverage products sold, selling price, level of inventory maintained, and overall business atmosphere;

(ii) exclusive authority over business accounts and operation funds;

(iii) authority to remodel or otherwise make changes in the business

operation requiring nonroutine actions;

(iv) ultimate decision-making authority regarding the hiring, firing, advancement or promotion, or any other change of status of other employees;

(v) liability for all business expenses and losses, either directly or through an indemnification agreement with the licensee. The licensee may require the manager to do the ministerial act of paying the expenses, but this must be accomplished by using the licensee's funds; and

(vi) ownership of the inventory or the right to use or dispose of it at will.

(c) the licensee must maintain an active participation in the business operation sufficient to ~~insure~~ ensure the proper and lawful conduct of the business, and execute all reports required by governmental agencies that attest to the licensee's ownership and certify compliance with applicable statutes and regulations. The licensee may work in the establishment at any time;

(d) the agreement may not be assignable by the manager to a successor manager without the written consent of the licensee;

(e) the agreement may not place any restrictions on the licensee's right to transfer, mortgage, hypothecate, or alienate the license, or change the location of the operation;

(f) the agreement must be terminable upon the licensee transferring the license, selling the business, or otherwise ceasing business operations at the licensee's option;

(g) the agreement must provide for compensation either as a fixed amount, a percentage of gross sales, or a combination of fixed amount and percentage of gross sales;

(h) the compensation of the manager must be commensurate with the duties performed, cannot consist of ~~all~~ net profits from the business, and cannot be less than the federal wage and hourly standards for an individual; and

(i) the management agreement must establish a principal agent, employer-employee, or other type of agency relationship, making the manager responsible to the licensee for the performance of assigned duties, while the licensee is responsible for the proper performance of the manager.

(4) remains the same.

AUTH: 16-1-303, MCA

IMP: 16-3-101, 16-4-404, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.132, by striking the word "all" in (3)(h), to improve licensee and managers' understanding that a manager may not receive any net profits of the business. Owner-managers receive net profits through other means as owners. Receipt of any net profits by a non-owner manager constitutes an undisclosed ownership.

The department further proposes to amend ARM 42.12.132, to correct a grammatical error by replacing the word insure with ensure.

42.12.133 CONCESSION AGREEMENTS (1) All new concession agreements must be submitted to the department for review and approval prior to their execution and/or effective date, and must set forth the following:

- (a) the nature of the agreement is one that arises from a mutually beneficial situation only;
- (b) the agreement gives the licensee ~~possessory interest~~ authority to operate in the concessioned premises;
- (c) a copy of the licensee's amended floor plan, including the new service area, will accompany the agreement;
- (d) the licensee is responsible for the sales and service of all alcoholic beverages;
- (e) the parties may share the employees. In the event of shared employees, the licensee must retain the right to discipline or otherwise sanction any employee in relation to the service of alcohol. Any violation of ~~liquor law~~ the Montana Alcoholic Beverage Code is the sole responsibility of the licensee;
- (f) the compensation to be paid for shared employees. The compensation may not be based on a percentage of alcohol sales;
- ~~(f)~~(g) the nonlicensed entity cannot order, or otherwise purchase, any alcoholic beverage product from a wholesaler or agency liquor store;
- ~~(g)~~(h) the agreement must include language that allows the licensee to terminate the agreement without cause; ~~and~~
- ~~(h)~~(i) that all the proceeds from the sale of alcoholic beverages are the property of the licensee; ~~and~~
- (i) any proceeds of alcoholic beverages sales that are collected by the concessionaire must be returned to the licensee not less than every two weeks.
- (2) In addition to the general suitability rule requirements in ARM 42.12.122, and other rules specific to the license type, the premises for any license operated under a concession agreement can only be considered suitable for the retail sale of alcoholic beverages if the existence of a concession agreement and the names of the parties to the concession agreement are plainly disclosed to the public both inside and outside of the licensed premises by signage as follows:
 - (a) at least one sign inside the licensed premises, measuring not less than 8 1/2 by 11 inches and with printing in a font size not smaller than 72, must be clearly visible to customers, and must plainly disclose:
 - (i) the existence of a concession agreement;
 - (ii) the names of the persons or entities which are party to the concession agreement and the assumed business names as filed with the Montana Secretary of State, including which party is the licensee; and
 - (iii) the fact that the licensee is responsible for the service of alcoholic beverages within the premises; and
 - (b) at least one sign outside the licensed premises so the public can easily determine that alcoholic beverages are available.
- (3) The requirements of (2) regarding signage must be met for all licenses operating under a concession agreement and must be complied with for any such license to be issued or renewed for the license year beginning July 1, 2012, or thereafter.
- (4) The licensee must maintain a physical possessory interest as required in ARM 42.12.133.
- ~~(2)~~(5) The department, upon receipt of the concession agreement and any supporting documentation, will advise the licensee within seven working days of

approval or denial of the agreement unless further documentation or an audit review is necessary. Upon approval of the agreement, the license will reflect language that the licensee is also serving alcoholic beverages in the establishment.

(3) remains the same, but is renumbered (6).

AUTH: 16-1-303, MCA

IMP: 16-3-305, 16-3-311, 16-4-401, 16-4-402, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.133 to require concession agreements to include the compensation to be paid for shared employees. The proposed amendments will make it clear to licensees and concessionaries that compensation may not be based on a percentage of alcohol sales. Concession agreements are agreements under which an all-beverages licensee or an on-premises consumption beer licensee uses their license in an otherwise nonlicensed establishment within the confines of their current building. For illustration purposes, Chili's and Macaroni Grill in Helena are two separate businesses that are physically conjoined. It is possible for Chili's and Macaroni Grill to have a concession agreement where Chili's owns the alcoholic beverages license, but Macaroni Grill is also allowed to serve alcoholic beverages under the same license.

The department is proposing the addition of new language in (1)(j) to increase public understanding that only the licensee of record may receive and expend funds from the alcohol enterprise. Current practices of concession agreements normally include one party collecting all revenues from food and alcohol sales. These are then turned over to the proper licensee in a given time period that can vary considerably. A lengthy period of time of withholding of alcohol revenues may cause undisclosed ownership issues. The department acknowledges the practice of "layered" management and concession agreements as common, but seeks to make it clear within the rule that the revenues from alcoholic beverage sales belong to the licensee alone and the sooner they are placed in the licensee's account, the better.

The department is proposing the addition of language to (2) to enhance licensees' understanding of the signage requirements in the suitability of a premises. The department seeks to notify the public that alcoholic beverages are available at the premises and identify the licensee and concessionaire who provide service of that alcohol on the premises. The department has received concerns that there is not proper notice of who is operating the license; thus, by amending this rule it can provide transparency to the public and proper notice for the public's right to know.

The proposed amendment to (4) addresses the additional advice response time the department could potentially need in situations where an agreement is submitted for approval with incomplete information or missing required documentation; or when the Department of Justice is conducting an audit review. Either situation has the potential to otherwise extend the notification beyond the routine seven working days.

42.12.141 CORPORATE LICENSES LICENSED ENTITIES (1) No alcoholic beverages license shall be issued to ~~a Montana corporation~~ an entity unless the following requirements are met:

~~(a) The corporation was organized and has existed as a Montana corporation or the entity has been authorized to do business in Montana prior to making application for an alcoholic beverages license; and~~

~~(b) The corporate the application must be accompanied by a copy of the corporation's entity's certificate of incorporation or certificate of good standing Certificate of Existence for corporations and limited liability companies, and limited liability partnerships or a copy of the entity's Certificate of Fact for all other types of entities issued within the last six months by the Montana ~~secretary of state~~ Secretary of State; and~~

~~(c) the applicant must be current on all filings and payments related to Montana income, corporation, withholding, business, and other taxes.~~

AUTH: 16-1-303, MCA

IMP: 16-4-401, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.141 to reflect the statutory amendments made to 16-4-401, MCA, through the enactment of House Bill 113, L. 2007. Section 16-4-401, MCA, allows out-of-state residents to apply for liquor licenses, and includes business entity types such as limited liability companies and limited liability partnerships in addition to corporations. It also applies the same license qualification requirements to the additional business types as is currently required of corporations. The proposed amendments replace the word "corporation" with "entity" to encompass all business entity types within the rule.

In addition, the department is proposing to amend the rule to include a requirement for applicants to be current on all income, corporation, withholding, and business taxes and filings, to reflect the department's current policy when processing licensing applications, and to improve the applicant's ease and convenience in meeting their responsibilities under the law.

42.12.143 RESTRICTION ON INTEREST IN OTHER LICENSES (1) For purposes of this rule, any ownership interest in a business which operates in conjunction with a license issued under the Montana Alcoholic Beverage Code is considered to be an ownership interest in the license itself. Except as provided in 16-4-205, MCA, any person owning stock in a corporation which owns holding an ownership interest in an all-beverages license issued pursuant to 16-4-401, MCA, is not qualified to own an interest, ~~either as owner, partner, or stockholder,~~ in:

(a) another all-beverages, ~~wholesale beer,~~ license in Montana;

(b) a Montana beer wholesaler license, ~~or;~~

(c) a Montana table wine distributor's license;

(d) an alcoholic beverage manufacturer;

(e) an importer of alcoholic beverages; or

(f) a state agency liquor store.

(2) Any person holding ownership interest in a Montana retail alcoholic beverages license is not qualified to own an interest in:

(a) a Montana beer wholesaler license;

(b) a Montana table wine distributor license;

- (c) an alcoholic beverage manufacturer;
- (d) an importer of alcoholic beverages; or
- (e) a state agency liquor store.

~~(2)~~(3) Any person ~~owning stock in a corporation which owns~~ holding an ownership interest in a wholesale beer wholesaler license issued pursuant to 16-4-401, MCA, is not qualified to own an interest, ~~either as owner, partner, or stockholder~~ in:

- (a) another wholesale beer or Montana beer wholesaler license;
- (b) an alcoholic beverage manufacturer;
- (c) an importer of alcoholic beverages;
- (d) a Montana retail alcoholic beverages license; or
- (e) a state agency liquor store.

~~(3)~~(4) Any person ~~owning stock in a corporation which owns~~ holding an ownership interest in a table wine distributor's license issued pursuant to 16-4-401, MCA, is not qualified to own an interest, ~~either as owner, partner, or stockholder~~ in:

- (a) another Montana table wine distributor's license or;
- (b) an alcoholic beverage manufacturer;
- (c) an importer of alcoholic beverages;
- (d) a Montana retail alcoholic beverages license; or
- (e) a state agency liquor store.

(5) Any person holding an ownership interest in a Montana alcoholic beverage manufacturer pursuant to 16-4-401, MCA, is not qualified to own an interest in:

- (a) a Montana retail alcoholic beverage license;
- (b) a Montana beer wholesaler license;
- (c) a Montana table wine distributor license; or
- (d) a state agency liquor store.

AUTH: 16-1-303, MCA

IMP: 16-4-205, 16-4-401, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.143 to adjust the language to reflect the statutory changes to 16-4-401, MCA, enacted by the 2007 Montana Legislature. Section 16-4-401, MCA, allows out-of-state residents to apply for liquor licenses. It also includes licensing requirements for other business entity types, such as limited liability companies and limited liability partnerships, in addition to corporations. The proposed amendments update the rule to reflect that business entities, other than corporations, can own liquor licenses. In addition, the proposed amendments are to improve the understanding of the separation requirements of the three-tier system. The three-tier system, (manufacturer, distributor, and retailer) is set into place to prevent coercion and inducement of alcohol sales. The rule supports the three-tier system in Montana and ensures the separation is understandable to the public.

42.12.144 TRANSFERS BETWEEN QUOTA AREAS - PROCEDURES AND DOCUMENTATION (1) and (2) remain the same.

(3) Documentation required under (1) and (2) includes:

- (a) ~~a completed application form~~ documents required for the application to be considered a complete application as defined in ARM 42.12.106;
- (b) ~~a transfer fee;~~
- (c) ~~a purchase agreement;~~
- (d) a request for termination of existing secured parties' interest and the applicable fee (\$10 each);
- (e) ~~a floor plan of the proposed premises; and~~
- (f)(c) other documents which may be needed or specified on the application form, depending upon the response to certain questions, for example: lease or sales agreements, or during the license investigation process; and
- (d) The the department or hearing examiner may require additional documentation as deemed necessary to reach a final decision.
- (4) ~~Documentation required under (1) is the same as that itemized in (3)(a) through (f). However, a signed~~ A fully executed purchase agreement and a request for termination of secured parties' interests are not required upon initial filing of the application.
- (5) remains the same.

AUTH: 16-1-303, MCA

IMP: 16-4-204, 16-4-413, MCA

REASONABLE NECESSITY: The department is proposing to reformat and amend ARM 42.12.144 to include all necessary items to obtain a license together for process simplification and improved applicant understanding. Additionally, the department is proposing to add language referencing the documents required to be considered for a complete application, to correspond with the proposed amendments to ARM 42.12.106.

42.12.302 DEFINITIONS The following terms will be used in this subchapter:

- (1) through (6) remain the same.
- (7) ~~The term "manufacture"~~ "Manufacture" includes distillation, rectification, bottling, and processing, as defined under the provisions of the laws of the United States.
- (8) through (12) remain the same.

AUTH: 16-1-303, MCA

IMP: 16-4-201, 16-4-202, 16-4-301, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.12.302 as a matter of housekeeping to properly format the rule.

42.12.401 DEFINITIONS The following terms will be used in this chapter.

- (1) remains the same.
- (2) The following terms specifically apply to restaurant beer and wine licenses:
 - (a) "Evening dinner meal" means individually priced meals served at least four days a week for at least two hours a day between the hours of 5 p.m. and 11

p.m.

(b) "Preference" means a priority provided to a restaurant beer and wine lottery applicant based upon eligibility.

(c) "Restaurant" as it refers to a restaurant beer and wine license, means a public eating place:

(i) where individually priced meals are prepared and served for on-premises consumption;

(ii) where at least 65 percent of the restaurant's annual gross income from the operation is from the sale of food (including nonalcoholic beverages) and not from the sale of alcoholic beverages;

(iii) that has a dining room, a kitchen, and the number and kinds of employees necessary for the preparation, cooking, and serving of meals in order to satisfy the department that the space is intended for use as a full-service restaurant;

(iv) that serves an evening dinner meal at least four days a week for at least two hours a day between the hours of 5 p.m. and 11 p.m. This provision does not apply to a restaurant for which a restaurant beer and wine license is in effect as of April 9, 2009, or to subsequent renewals of that license;

(v) that offers individual sales of beer and wine by the drink;

(vi) that serves beer and wine only to a patron who orders food;

(vii) where beer and wine purchases will be stated on the food bill;

(viii) that has a service bar as defined in ARM 42.12.401, at which the consumption of alcoholic beverages by patrons or any other person is not permitted;

(ix) that provides table service of alcoholic beverages from the service bar;

and

(x) that has sufficient seating to accommodate the number of patrons indicated by the restaurant beer and wine licensing fees indicated in 16-4-420, MCA.

~~(c)~~(d) "Restaurant beer and wine license" means a license which must be used in conjunction with a restaurant where beer and wine can only be served to patrons who order food or who are waiting to be seated.

~~(d) "Seasonal restaurant" means one that is only open during one, two, or three seasons of any year. Seasonal restaurants can be open any part of a season or the full season, as long as the restaurant is not open year-round.~~

(e) "Service bar" means an area where alcoholic beverages are stored and prepared for table service delivery to patrons for on-premises consumption. Consumption of alcoholic beverages by patrons or any other person is not permitted at the service bar. The table service area, including the eating counter, must be noticeably separated from, and not attached or connected to, the service bar.

(f) "Table service" means service of alcoholic beverages to a table, booth, or eating counter by a licensee or licensee's employees.

AUTH: 16-1-303, MCA

IMP: 16-4-105, 16-4-201, 16-4-204, 16-4-420, 16-4-502, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.401 to include a definition for "restaurant" as it refers to a restaurant beer and wine license, and a definition for "table service," to make it clearer to the public and licensees that customers may not consume beer and wine at the service bar. The

proposed amendments are in response to questions the department frequently receives regarding the criteria necessary to be considered an acceptable counter area for customers to sit at and consume beer and wine. This proposed amendment to the rule is consistent with current application of the law and with responses the department has provided to questions of this nature.

The department further proposes to remove the term "seasonal restaurant" from this set of definitions because it is inconsistent with statute and with other liquor rule definitions.

42.13.101 COMPLIANCE WITH LAWS AND RULES (1) through (11) remain the same.

(12) If the violation discovered is an undisclosed ownership interest, the department will consider aggravating circumstances described in ~~(40)~~(11) and mitigating circumstances such as voluntary disclosure of relevant facts in determining the appropriate penalty.

(13) remains the same.

AUTH: 16-1-303, 16-4-1009, MCA

IMP: 16-3-301, 16-4-406, 16-4-1001, 16-4-1002, 16-4-1003, 16-4-1004, 16-4-1005, 16-4-1006, 16-4-1007, 16-4-1008, 16-6-305, 16-6-314, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.13.101, to correct a reference that was inadvertently not revised when sections within the rule were amended in MAR Notice Number 42-2-870, at page 122, of the 2012 Montana Administrative Register, Issue Number 1.

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: Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov and must be received no later than June 15, 2012. Cleo Anderson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

7. 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 "Current Rulemaking Actions – Published Notices" 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.

8. The Department of Revenue maintains a list of interested persons who

wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding particular subject matter or matters. 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 person in 6 above or faxed to the office at (406) 444-4375, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary sponsor of House Bill 113, L. 2007, Representative Bill McChesney, and the primary sponsor of Senate Bill 511, L. 2009, Senator Mitch Tropila, were contacted on March 6, 2010, by electronic mail. The primary sponsor of Senate Bill 203, L. 2011, Senator Ryan Zinke, was contacted on August 23, 2011, by electronic mail. All three sponsors were subsequently notified on April 3, 2012, by both electronic and regular mail.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State April 30, 2012

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 8.94.3727 pertaining to the)
administration of the 2011-2012)
Federal Community Development)
Block Grant (CDBG) Program)

TO: All Concerned Persons

1. On March 22, 2012, the Department of Commerce published MAR Notice No. 8-94-102 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 530 of the 2012 Montana Administrative Register, Issue Number 6.

2. The department has amended the above-stated rule as proposed, with the following change to the rule's catchphrase:

8.94.3727 INCORPORATION BY REFERENCE OF RULES FOR THE
ADMINISTRATION OF THE 2010- 2011-2012 CDBG PROGRAM
(1) through (3) remain as proposed.

3. No comments or testimony were received.

/s/ G. MARTIN TUTTLE
G. MARTIN TUTTLE
Rule Reviewer

/s/ DORE SCHWINDEN
DORE SCHWINDEN
Director
Department of Commerce

Certified to the Secretary of State April 30, 2012.

BEFORE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 8.99.303 pertaining to the)
Certified Regional Development)
Corporations Program)

TO: All Concerned Persons

1. On March 22, 2012, the Department of Commerce published MAR Notice No. 8-99-101 pertaining to the proposed amendment of the above-stated rule at page 533 of the 2012 Montana Administrative Register, Issue Number 6.
2. The department has amended the above-stated rule as proposed.
3. No comments or testimony were received.

/s/ G. MARTIN TUTTLE
G. MARTIN TUTTLE
Rule Reviewer

/s/ DORE SCHWINDEN
DORE SCHWINDEN
Director
Department of Commerce

Certified to the Secretary of State April 30, 2012.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF AMENDMENT AND
ARM 24.33.121 construction)	ADOPTION
contractor registration fees,)	
24.33.131 evidence of compliance)	
with laws, and the adoption of NEW)	
RULES I through IV construction)	
contractor registration requirements)	

TO: All Concerned Persons

1. On February 23, 2012, the Department of Labor and Industry (department) published MAR notice no. 24-101-262 regarding the public hearing on the proposed amendment and adoption of the above-stated rules, at page 339 of the 2012 Montana Administrative Register, issue no. 4.

2. On March 16, 2012, a public hearing was held on the proposed amendment and adoption of the above-stated rules in Helena. One comment was received by the March 23, 2012, deadline.

3. The department has thoroughly considered the comment received. A summary of the comment received and the department's response is as follows:

COMMENT 1: One comment was received on proposed New Rule IV(1)(d), regarding the certificate status of "NO EMPLOYEES, MAY HIRE EXEMPT WORKERS ONLY." The commenter stated that this provision would re-categorize hired independent-exempt contractors as employees needing workers' compensation coverage and violate terms governing independent-exempt contractors.

RESPONSE 1: The department notes that this comment appears to reflect the ongoing confusion over the provisions and requirements for independent contractor exemption certificates. Because the comment does not relate to the proposed construction contractor registration rules, it is beyond the scope of this rule's notice.

4. The department has amended ARM 24.33.121 and 24.33.131 exactly as proposed.

5. The department has adopted NEW RULES I (24.33.101), II (24.33.111), III (24.33.141), and IV (24.33.151) exactly as proposed.

/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 April 30, 2012

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

In the matter of the amendment of) NOTICE OF AMENDMENT AND
ARM 24.159.2001, 24.159.2002,) REPEAL
24.159.2003, 24.159.2004,)
24.159.2010, 24.159.2011,)
24.159.2012, 24.159.2013,)
24.159.2020, 24.159.2021, and the)
repeal of ARM 24.159.2022 and)
24.159.2023, all related to the nurses')
assistance program)

TO: All Concerned Persons

1. On November 10, 2011, the Board of Nursing (board) published MAR notice no. 24-159-76 regarding the public hearing on the proposed amendment and repeal of the above-stated rules, at page 2338 of the 2011 Montana Administrative Register, issue no. 21.

2. On December 5, 2011, a public hearing was held on the proposed amendment and repeal of the above-stated rules in Helena. Several comments were received by the December 13, 2011, deadline.

3. 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 suggested that references to "nurses" in ARM 24.159.2001 should be changed to "licensees," so that it is clear to the reader that medication aides are served by and subject to the Nurses' Assistance Program (NAP).

RESPONSE 1: Noting that it is the board's intention for all licensees subject to the board's jurisdiction to be served by and subject to the NAP, the board acknowledges that current statutory language in 37-8-202, MCA, limits the program's applicability to licensed nurses only. The board is unable to broaden the applicability through rulemaking, but must consider amending the statute which would be consistent with similar laws regarding assistance programs under the jurisdiction of other boards.

COMMENT 2: A commenter suggested the board amend ARM 24.159.2001 to standardize language among statutes and rules, be more inclusive as to the bases of impairment, and clarify that only impaired licensees are subject to the NAP.

RESPONSE 2: The board is incorporating most of the suggested language as it is consistent with the proposed rule or improves the consistency of language used within the board's rules. However, the board is neither altering the order of the

sentences, nor including the commenter's phrase "whose judgment or ability to practice is impaired." The board is amending the rule to include "who are found to be physically or mentally impaired" to be consistent with the implemented statute.

COMMENT 3: A commenter suggested adding "and who has experience treating healthcare professionals," to ARM 24.159.2003(3)(e) to make the language consistent with that in (3)(b) through (d) of the rule.

RESPONSE 3: The board agrees with the commenter and is amending the rule accordingly.

COMMENT 4: A commenter suggested the board amend ARM 24.159.2020(1) to include "mental illness," and language to require proof of one's inability to practice with reasonable skill and safety as a prerequisite to admission into the alternative monitoring track of NAP.

RESPONSE 4: The board agrees with the commenter's suggestion to add "mental illness" and is amending the rule accordingly. However, the board concluded that adding the language regarding inability to practice may improperly interfere with the board's capacity to provide help to licensees before the inability to safely practice and the resulting harm occur. The board is also concerned that such language may be interpreted as a limitation that would unintentionally narrow the board's ability to address complaints that deal with issues other than "practice issues," and is not making the suggested amendment at this time.

COMMENT 5: One commenter suggested the board amend ARM 24.159.2020(2) to clarify that alternative monitoring track participants are known only to the board's screening panel instead of the full board.

RESPONSE 5: As provided in 37-1-307(1)(d), MCA, the board has established a screening panel to determine whether there is reasonable cause to believe that a licensee has violated a particular statute, rule, or standard justifying disciplinary proceedings. Because all complaints against licensees are reviewed by the screening panel, and not the full board, the board determined the suggested language is not necessary to protect participants' anonymity.

The board notes that the screening panel is not a substitute for the board in relation to the board's responsibility to establish and administer the NAP. The board is not adding the suggested language, but retaining the current reporting process, as it provides the necessary transparency and accountability sought by the legislature through the recent passage of the assistance program legislation.

COMMENT 6: One commenter suggested the board strike "such as diverting drugs by replacing the drug with another drug," from ARM 24.159.2021(2)(d), because the rule's current language regarding behavior with high potential to cause patient harm is sufficient.

RESPONSE 6: The board's only concern with the suggested deletion is that the board does not intend to be prohibited from determining what amounts to behavior with high potential to cause patient harm. Being advised by legal counsel that the rule language as proposed does not create an exclusive list, but only provides an example and benchmark for behavior the board may consider having "high potential to cause patient harm," the board is not deleting the language as suggested.

COMMENT 7: A commenter offered general support for various parts of the notice, with respect to the rules being amended or repealed.

RESPONSE 7: The board appreciates all public input received through the rulemaking process.

4. The board has amended ARM 24.159.2002, 24.159.2004, 24.159.2010, 24.159.2011, 24.159.2012, 24.159.2013, and 24.159.2021 exactly as proposed.

5. The board has repealed ARM 24.159.2022 and 24.159.2023 exactly as proposed.

6. The board has amended ARM 24.159.2001, 24.159.2003, and 24.159.2020 with the following changes, stricken matter interlined, new matter underlined:

24.159.2001 INTRODUCTION OF THE NURSES' ASSISTANCE PROGRAM

(1) The Board of Nursing's medical assistance program shall be called the Nurses' Assistance Program (NAP), also referred to as the program. The program shall be based upon the concept that early identification, intervention, and referral to treatment are paramount to promoting public health, safety, and welfare in that it decreases the time between the nurse's acknowledgement of a substance use disorder or mental health problem or chronic physical illness and the time treatment is received. The NAP is a specially designed program that shall be available to assist all licensed nurses under the jurisdiction of the board ~~whose judgment or ability to practice may be~~ who are found to be physically or mentally impaired due to ~~by~~ habitual intemperance; ~~;~~ excessive use of addictive drugs, alcohol, or any other drug or substance; ~~;~~ by mental illness; ~~;~~ or chronic physical illness. The purpose of the program is to protect the public by putting appropriate monitoring processes in place for nurses ~~with problems with substance use or mental illness to maintain an ongoing recovery and to provide monitoring of nurses in the program~~ with impairments that result in the inability to practice with reasonable skill and safety.

(2) and (3) remain as proposed.

24.159.2003 PROGRAM DIRECTOR REQUIREMENTS (1) through (3)(d) remain as proposed.

(e) a medical doctor with a current and active license with no pending or current discipline and who has experience treating healthcare professionals; and

(f) remains as proposed.

24.159.2020 ALTERNATIVE MONITORING TRACK (1) remains as proposed.

(a) any licensee who identifies a substance use disorder or mental health ~~problem~~ illness or chronic physical illness and requests admission to the NAP and meets the admission criteria of ARM 24.159.2021; or

(b) through (3) remain as proposed.

BOARD OF NURSING
KATHY HAYDEN, LPN, 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 April 30, 2012

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 42.38.101, 42.38.102,)
42.38.104, 42.38.201, 42.38.203,)
42.38.204, and 42.38.206 relating to)
the general provisions and disposition)
of abandoned property)

TO: All Concerned Persons

1. On March 8, 2012, the department published MAR Notice Number 42-2-877 regarding the proposed amendment of the above-stated rules at page 488 of the 2012 Montana Administrative Register, Issue Number 5.

2. A public hearing was held on April 17, 2012, to consider the proposed amendments. No one appeared at the hearing to testify and no written comments were received. Therefore the department amends the rules as proposed.

3. An electronic copy of this notice is available on the department's web site at www.revenue.mt.gov. Select the "Legal Resources" link in the left hand column, and click on the "Rules" link within to view the options under the "Current Rulemaking Actions – Published Notices" 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. While the department also strives to keep its web site accessible at all times, in some instances it may be temporarily unavailable 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 April 30, 2012

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New) NOTICE OF ADOPTION
Rule I (42.20.519) relating to property)
tax abatement for gray water systems)

TO: All Concerned Persons

1. On March 22, 2012, the department published MAR Notice Number 42-2-878 regarding the proposed adoption of the above-stated rule at page 612 of the 2012 Montana Administrative Register, Issue Number 6.

2. A public hearing was held on April 16, 2012, to consider the proposed adoption. No one appeared at the hearing to testify and no written comments were received. However, the department further amends the rule as follows, to extend the filing deadline for 2012 only.

NEW RULE I (42.20.519) APPLICATIONS FOR PROPERTY TAX ABATEMENT FOR GRAY WATER SYSTEMS (1) through (9) remain as proposed. (10) For tax year 2012 only, the filing deadline is June 1. All applications postmarked after that date will be considered for the following year.

AUTH: 15-1-201, MCA

IMP: 15-24-3201, 15-24-3202, 15-24-3203, 15-24-3204, 75-5-305, 75-5-325, 75-5-326, 75-5-327, MCA

3. Therefore, the department adopts New Rule I (42.20.519) with the amendments listed above.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State April 30, 2012

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 December 31, 2011. This table includes those rules adopted during the period January 1, 2012, through March 31, 2012, 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 December 31, 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 2011/2012 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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