TO: All Concerned Persons

1. On July 22, 2022, the Department of Revenue published MAR Notice No. 42-1052 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1246 of the 2022 Montana Administrative Register, Issue Number 14.

2. On August 12, 2022, a public hearing was held to consider the proposed adoption and amendment. The following persons were present but provided no oral testimony: Shauna Helfert, Gaming Industry Association of Montana (GIA); John Iverson, Montana Tavern Association (MTA); Jessie Luther, Taylor Luther Group, PLLC, representing the Hospitality and Development Association of Montana.

3. On August 15, 2022, the MTA provided the department its written comments and concerns with the proposed amendments to ARM 42.12.149(3). The comments were also brought before the Economic Affairs Interim Committee (EAIC) at its August 16, 2022 meeting.

4. On August 16, 2022, prior to the interim committee meeting, the department filed an amended notice of public hearing on the proposed adoption and amendment of the above-stated rules (amended proposal notice). The amended proposal notice, which contained the department's changes to the original proposal notice described in paragraph 1, attempted to resolve the MTA's concerns in paragraph 3 and Comment 1 (below) and to maintain the department's schedule of adoption and amendment of the rulemaking to comply with 2-4-305(11), MCA.

5. Notwithstanding the MTA's appearance at the August 16 interim committee meeting and the withdrawal of its concerns based on the amended proposal notice, EAIC voted to object to the entire rulemaking pursuant to 2-4-
EAIC provided formal notice of the objection to the department by its written correspondence of August 17, 2022.

6. The amended proposal notice was published on August 26, 2022, at page 1686 of the 2022 Montana Administrative Register, Issue Number 16. No additional public hearing was held to consider the amended proposal notice. The department extended the comment period for the proposed rulemaking in accordance with 2-4-305(8), MCA, until September 2, 2022.

7. The following persons provided written comments to the rulemaking: Ms. Helfert, GIA; Mr. Iverson, MTA; Michael Lawlor, attorney, Lawlor & Co., PLLC; Allen Hodges, Undammed Distilling Co., LLC; Susan Young, Chief Operating Officer, Westslope Distillery; Willie Blazer, President, Willie’s Distillery, Inc.; Ryan Montgomery for Montgomery Distilling and the Montana Distiller’s Guild (Guild); Jim Harris, Bozeman Spirits Distillery; Steffen Rasile and Tyrell Hibbard, Gulch Distillers; and Jeffrey Miser, Mountain Wave Distilling.

8. EAIC met on the morning of September 13, 2022, and withdrew its objection to this rulemaking.

9. The department has adopted New Rule I (42.12.152) and amended ARM 42.12.106, 42.12.111, 42.12.118, 42.12.143, 42.12.147, 42.12.209, 42.12.301, 42.13.106, 42.13.111, 42.13.405, 42.13.601, 42.13.802, 42.13.1102 through 42.13.1105, and 42.13.1202 as proposed in the original proposal notice published on July 22, 2022.

10. The department has amended ARM 42.12.149 as presented in the amended proposal notice published on August 26, 2022.

11. The department has amended ARM 42.12.133, 42.12.145, and 42.12.146 as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

42.12.133 CONCESSION AGREEMENTS (1) through (6) remain as proposed.

(7) All concession agreements must be renewed on or before June 30 of each year by completing and submitting a department-prescribed renewal form and paying the renewal fee provided in 16-4-418, MCA. Failure to submit a completed renewal form and pay the renewal fee may result in the denial of renewal of the concession agreement.

(8) remains as proposed.

AUTH: 16-1-303, MCA
IMP: 16-3-305, 16-3-311, 16-4-401, 16-4-402, 16-4-418, MCA

42.12.145 ON-PREMISES CONSUMPTION BEER AND ALL-BEVERAGE LICENSE - PREMISES SUITABILITY REQUIREMENTS (1) remains as proposed.
(2) The premises of an on-premises consumption beer or all-beverage retailer may be considered suitable only if:
   (a) through (d) remain as proposed.
   (e) the premises are located in one building or a specific portion of one building, except that a patio/deck may extend the premises beyond the interior portion of the building. The interior portion of the premises must comply with the requirements of 16-3-311(3), MCA. Subject to the exceptions in 16-3-311(2), (8), and (9), MCA, if the premises are located in a portion of a building, the premises must be separated by permanent floor-to-ceiling walls from any other business, including any other business operated by the licensee. Except as otherwise provided in 16-3-311(8) and (9), MCA, the only access from the premises to another business may be through a single lockable door, no more than six feet wide, in the permanent floor-to-ceiling wall. Additional lockable doors in the permanent floor-to-ceiling wall may be allowed only upon department approval;
   (f) through (5) remain as proposed.

AUTH: 16-1-303, MCA
IMP: 16-3-244, 16-3-309, 16-3-311, 16-3-312, 16-4-213, 16-4-402, 16-4-405, 16-4-418, MCA

42.12.146  RESTAURANT BEER AND WINE LICENSE - PREMISES SUITABILITY REQUIREMENTS  (1) remains as proposed.
(2) The premises of a restaurant beer and wine retailer may be considered suitable only if:
   (a) through (d) remain as proposed.
   (e) the premises are located in one building or a specific portion of one building, except that a patio/deck may extend the premises beyond the interior portion of the building. The interior portion of the premises must comply with the requirements of 16-3-311(3), MCA. Subject to the exceptions in 16-3-311(2), (8), and (9), MCA, if the premises are located in a portion of a building, the premises must be separated by permanent floor-to-ceiling walls from any other business, including any other business operated by the licensee. Except as provided in 16-3-311(8) and (9), MCA, the only access from the premises to another business may be through a single lockable door, no more than six feet wide, in the permanent floor-to-ceiling wall. Additional lockable doors in the permanent floor-to-ceiling wall may be allowed only upon department approval;
   (f) through (5) remain as proposed.

AUTH: 16-1-303, MCA
IMP: 16-3-244, 16-3-309, 16-3-311, 16-3-312, 16-4-402, 16-4-405, 16-4-421, MCA

12. The department has thoroughly considered the comments and testimony received. A summary of the comments received, and the department's responses are as follows:
COMMENT 1: As described in paragraph 3, the MTA provided written comments to EAIC which were the basis for the committee's August 16 objection. The core of MTA's comments asserts that the department's proposed revisions to ARM 42.12.149(3) exceed the department's rulemaking authority. The MTA also contends the amendment of ARM 42.12.149(3) would create more discord and consumer confusion and the "...issue [of allowing distilleries to operate more than one manufacturing facility at noncontiguous locations] is best resolved through the legislative process."

RESPONSE 1: The department disagrees that the rulemaking authority granted to it by the legislature under 16-1-201, MCA, restricts the department's ability to amend ARM 42.12.149(3) for consistency with the federal regulation with respect to noncontiguous manufacturing facilities for alcoholic beverage manufacturing, including distilleries. Notwithstanding, the department acknowledges the immediacy of the issue to the upcoming 68th Montana Legislature and the possibilities for a legislative solution. The department also weighed the adoption of its entire legislative implementation rules package with and without the objectionable rule amendment. It was through this analysis that the department filed the amended proposal notice.

Regarding the MTA's comments that the amendment of ARM 42.12.149(3) would create more discord and consumer confusion, the department cannot provide a substantive response because the comment is an opinion for which the MTA provides no foundation.

COMMENT 2: Mr. Lawlor opined the department is within its legislatively designated authority to align manufacturer licensed premises criteria with its federal counterpart. Mr. Lawlor continues that the department's proposed amendments in this rulemaking correct department error made in past rules packages and provided support for his argument.

Similarly, the Guild, Messrs. Montgomery, Hodges, Blazer, Harris, Rasile, Hibbard, and Miser, and Ms. Young (collectively, the distillery commenters) all commented that the department's requirements in ARM 42.12.149(3) are inconsistent with federal requirements for noncontiguous manufacturing facilities and requested that the department reverse its action in the amended proposal notice and adopt the proposed amendment in the July 22, 2022 original proposal notice.

RESPONSE 2: The department appreciates Mr. Lawlor's and the distillery commenters' support for the department's continuing effort to improve consistency in its administrative rules, but refers them to Response 1 and the department's decision to defer to possible legislative resolution of the issue.

COMMENT 3: The distillery commenters reiterated in their respective comments that the issue is not about the expansion of retail opportunity or sample rooms; it is the ability to grow in manufacturing through the use of noncontiguous facilities - often within urban settings which have limited availability of adequate or affordable real estate.
The distillery commenters also challenged the MTA's position that the amendment of ARM 42.12.149(3) would create more discord and consumer confusion as baseless and contrary to prior understandings between the MTA and the Guild as members of the alcoholic beverage coalition.

**RESPONSE 3:** The department understands the distillery commenters' comments about the need to expand manufacturing through the use of noncontiguous facilities, especially in urban areas. However, there are genuine disputes between the MTA and the Guild, which are outside the scope of this rulemaking and, as a matter of public policy, the department's preference is for legislative guidance or resolution.

**COMMENT 4:** Mr. Lawlor commented on New Rule I that 16-4-213, MCA, could be interpreted to permit more than one noncontiguous storage area and he requests the department concur with that conclusion and amend the rule upon adoption to that effect.

**RESPONSE 4:** Mr. Lawlor appears to confuse the applicable statutes that were amended by House Bill 705 (HB 705)(2021). HB 705 amended 16-3-311(6), MCA, to provide for a noncontiguous storage area for retail licensees, while 16-4-213(8), MCA, provides for a resort alternate alcoholic beverage storage facility for a resort retail all-beverage licensee or a resort all-beverages licensee within the boundaries of the resort. The respective storage area alternatives, while procedurally similar in application and approval, are substantively different.

The department respectfully disagrees with Mr. Lawlor's interpretation that either law would allow multiple storage areas. The legislature unambiguously provides for only one such alternate storage area/facility: "A licensed retailer may apply to the department to have a noncontiguous storage area that is under the control of the licensed retailer. . . ."; and "If a resort area has two or more resort retail all-beverage licenses or retail all-beverages licenses within the boundaries of the resort, the licensees may also apply to use a resort alternate alcoholic beverage storage facility to be located within the resort area. 16-3-311(6), MCA, and 16-4-213(8), MCA, respectively (emphasis added).

Based on the plain language of the respective statutes, the department declines to revise New Rule I upon adoption based on these comments.

**COMMENT 5:** The GIA provided several suggested edits to New Rule I that it claims would simplify the rule, namely striking several internal references to noncontiguous alcoholic beverage storage area or resort alternate alcoholic beverage storage facility, and in some instances replacing them with the term "premises."

**RESPONSE 5:** New Rule I already represents the consolidation of application procedures and requirements for both statutory alcoholic beverage storage types instead of having two rules that could be largely repetitive. The department finds the suggested edits would be brevity in the extreme to the detriment of the rule. Further, the word "premises" is already defined in ARM
Based on this reasoning, the department declines to adopt the GIA's suggested revisions.

**COMMENT 6:** The GIA proposed edits to New Rule I(3) to add that a noncontiguous alcoholic beverage storage area or resort alternate alcoholic beverage storage facility must be onsite and cannot be used to serve alcoholic beverages.

The GIA also asks the department to include additional permissible uses in the description of a noncontiguous alcoholic beverage storage area or resort alternate alcoholic beverage storage facility such as storage of equipment of food items.

**RESPONSE 6:** The GIA's proposed edits to New Rule I(3) do not add clarity or fit because the rule section is not limited to a noncontiguous alcoholic beverage storage area. In drafting New Rule I(1), the department intentionally references 16-3-311, MCA, for what constitutes a suitable premises, including a noncontiguous alcoholic beverage storage area. In drafting New Rule I(2), the department intentionally references 16-4-213, MCA, for what constitutes a compliant resort alternate alcoholic beverage storage facility.

The department contends the prohibitions in New Rule I(8) and (9) provide satisfactory information and deterrence regarding the selling, giving away, or consumption of alcoholic beverages at a noncontiguous alcoholic beverage storage area or resort alternate alcoholic beverage storage facility.

As to the GIA's request for additional storage use approval notwithstanding the terms in New Rule I(3), the department agrees that a licensee's storage of food inventory, equipment, etc. is permissible, provided the use is limited to the licensee and all other storage facility safeguards in statute and rule are observed. It defeats the purpose of the laws that created these storage alternatives if a licensee's use of them is for general purposes and not for the storage of alcoholic beverages. And while the department approves of the above-described ancillary storage uses, the text of the rule will be adopted as proposed and the enforcement of the rule is subject to the department's discretion.

**COMMENT 7:** The GIA requests the department remove the proposed definition in ARM 42.12.106(32) solely because the definition is provided in statute.

**RESPONSE 7:** House Bill 226 (2021) implemented new terminology when it allowed for curbside service of alcoholic beverages in original packaging, prepared servings, or growlers depending on the type of license. Because of this change, the department believes it is necessary to clarify serving size.

The department declines to remove the definition for the reasons provided above and because the inclusion of statutory language in administrative rule is not prohibited. Section 2-4-305, MCA, provides rules may not unnecessarily repeat statutory language. The department's inclusion and maintenance of statutory language in the definition is necessary for transparency, context, and attribution to
the underlying law.

**COMMENT 8:** The GIA requests that the department make additional revisions to ARM 42.12.118 to include a prospective (2)(d) that would add the circumstance of ownership changes of two or more qualified owners (owners of 15% or more) to the list of transactions that require an abbreviated application within 90 days of the change. The GIA asserts that these transaction(s) should be allowable without prior notification to the department. The GIA supports its argument with changes made under Senate Bill 49 (2021)(SB 49) and the prospect of eliminating administrative red tape.

**RESPONSE 8:** What the GIA seeks by its comment exceeds the scope of this rulemaking nor is it supported by 16-4-415, MCA, or SB 49.

SB 49 was proposed by the Gaming Advisory Council for the gaming industry. The department stated at the initial senate hearing for SB 49 that, occasionally, the department's alcohol licensing laws differ from the gaming operator laws of the Department of Justice. Such is the case between 23-5-118, and 16-4-415, MCA, and the differences are not administrative red tape. Mr. Iverson appears to concur with this understanding as he also testified at the same hearing that any similar SB 49 change for alcoholic beverage licensees would require an act of the legislature to change Title 16, MCA.

The department notes that ARM 42.12.118(3)(a) already provides that qualified owners (i.e., owners of 15% or more) must submit an abbreviated application prior to consummation of an internal ownership change. While this does require prior department approval, the application and approval process is an abbreviated one.

**COMMENT 9:** Mr. Lawlor provided commentary that the department should reconsider the concession agreement renewal requirements in proposed ARM 42.12.133(7) and (8) because renewal forms are necessary for licenses, not concession agreements, and the return of payment with the payment coupon generated from the department's system should be sufficient for concession renewal.

**RESPONSE 9:** The department appreciates Mr. Lawlor's comments pertaining to ARM 42.12.133(7), and the department has amended the section upon adoption in response to the comments. However, the department does not agree with the need for any additional revision to ARM 42.12.133(8) because license renewal obligations have direct bearing on the renewal of a concession agreement. Stated differently, a concession agreement cannot be renewed if the license involved in the concession has not been renewed or cannot be renewed.

**COMMENT 10:** Mr. Lawlor commented that the suitability of premises requirements amendments in proposed ARM 42.12.145(1) should be changed because suitability determination is not necessary with the addition of a new concession agreement unless the addition of the concession agreement changes the physical premises. He continues that it is an unnecessary regulatory and
compliance burden on both the department and on businesses.

The GIA shares the same commentary and believes the situation described in ARM 42.12.145(1) applies under (4). The GIA contends that House Bill 525 (2021)(HB 525) did not include the additional requirement and that the amendment in (1) exceeds the department's rulemaking authority.

RESPONSE 10: The department respectfully disagrees with Mr. Lawlor's and the GIA's interpretation that the department's authority to determine suitability of the premises is limited under 16-4-418, MCA, or is solely determined when an alteration of the premises changes incidental to a new concession agreement.

When a licensee and a concessionaire apply to operate under a concession agreement, as stated in the amendment to ARM 42.12.145(1), the expansion of the service area for alcoholic beverages into a previously nonlicensed area requires a determination of contiguous premises, as described in 16-4-418, MCA. This is but one element of premises suitability, as determined under 16-3-311, MCA, and ARM 42.12.145. For example, the department has encountered proposed concession arrangements where the interrelationship of the two premises was not contiguous, as required, or where one premises was suitable for building, health, and fire code compliance, but the other was not despite the premises being contiguous.

As to the GIA's comment that HB 525 did not include the additional premises requirement and the department exceeds it rulemaking authority, the department reiterates the preceding paragraphs and that neither HB 525 nor 16-4-418, MCA, are the primary authority for premises suitability. Since compliant alcoholic beverage concessions are conditioned, in part, upon premises suitability, the department is not exceeding its rulemaking authority under 16-1-303, MCA, or in the implementation of 16-4-418, MCA, in ARM 42.12.145.

The department declines to revise the requirement because the conditions in (1) are clearly stated.

COMMENT 11: The GIA commented that the department's amendments to ARM 42.12.145(2)(e) and 42.12.146(2)(e) failed to strike the reference to 16-3-311(2), MCA, which is no longer necessary.

RESPONSE 11: The department agrees and the two rule sections have been revised upon adoption based on the comments.

COMMENT 12: The GIA commented its concerns that ARM 42.12.149(2)(f) - a rule applicable to manufacturers - contains retailer premises suitability requirements cross-referenced from 16-3-311, MCA.

RESPONSE 12: While the department understands the GIA's concerns, 16-1-303, MCA, broadly authorizes the department to include rules regarding the subject matter. See 16-1-303(2)(k), (l), and (m), MCA. Section 16-3-311, MCA, also provides the department and licensees with specific suitability requirements and ARM 42.12.149, adopted to apply similar suitability requirements to manufacturers, has been the same since its adoption under MAR Notice No. 42-2-967 in 2017.
Since that time, and as Ms. Helfert is aware, the department has desired that manufacturer premises suitability requirements have the greatest degree of parity with on-premises consumption license requirements, as is possible, since manufacturers operate sample rooms and conduct other retail sales authorized under 16-4-312, MCA. See ARM 42.12.149(2)(a) through (g) for reference.

Section 16-3-311(3), MCA, as amended, requires the interior portion of the premises to be a continuous area under the control of the licensee and addresses multiple floors and common area shared by multiple building tenants in the same building, including entryways, hallways, stairwells, and elevators.

ARM 42.12.149(2)(f) and (g) now meet those requirements to maintain parity with on-premises consumption licensees and contain amendments which refer to the suitability of premises exception that was created by House Bill 157(2021) amendments to 16-3-311, MCA, regarding a retail on-premises licensee being adjacent to a brewery and winery.

COMMENT 13: The GIA commented that the department's amendments to ARM 42.13.1102 through 42.13.1104 should reference the word "onsite" to comply with the law and provide additional context (i.e., a definition) to what "onsite" means for clarity.

RESPONSE 13: Inclusion of the term "onsite" is not a requirement for any of the rules to comply with the law. Section 16-3-311(6), MCA, sufficiently describes a noncontiguous alcoholic beverage storage area, and New Rule I provides additional context making inclusion of the requested word unnecessary.

Neither does the GIA provide any substantiation or information regarding its request that the department define what "onsite" means. At this time, the department is unpersuaded that defining a common term would lend any greater understanding of what is permitted under 16-3-311(6), MCA, or the department's application and approval process under New Rule I. Accordingly, the department declines to incorporate the suggestion into the rules.

13. The effective date of these rules is September 26, 2022.

/s/ Todd Olson                    /s/ Brendan Beatty
Todd Olson                      Brendan Beatty
Rule Reviewer                   Director of Revenue

Certified to the Secretary of State September 13, 2022.