BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.12.101, 42.12.106, 42.12.130, 42.12.133, 42.12.209, 42.13.101, and 42.13.107, and the repeal of ARM 42.12.207 pertaining to approval of a licensee without premises and concession agreements	))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On April 6, 2020, at 1:30 p.m., the Department of Revenue will hold a public hearing in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, located at 125 North Roberts, Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules. The conference room is most readily accessed by entering through the east doors of the building.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, please advise the department of the nature of the accommodation needed, no later than 5 p.m. on March 20, 2020. Please contact Todd Olson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or todd.olson@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY. The 2019 Montana Legislature passed House Bill 727 (HB 727) which adopts and implements 16-4-417 and 16-4-418, MCA, and amends other statutes located in Title 16, chapter 4, MCA. Section 16-4-417, MCA, allows for department approval of certain alcoholic beverage licenses without a premises which replaces conditional license approval provided in 16-4-402, MCA. Section 16-4-418, MCA, provides statutory authority for the use of alcoholic beverages concession agreements between licensees and non-licensees.

Based on the statutory changes contained in HB 727, the department finds it necessary to propose amendments to ARM 42.12.101, 42.12.106, 42.12.130, 42.12.133, 42.12.209, and 42.13.107, and to repeal ARM 42.12.207, to implement the bill. The department proposes amendments to the rules to reflect changes in legislative policy and also department license application processes which were developed through department policy and administrative rule.

The department proposes other amendments to the above-described rules which are based on the department's periodic rule review for outdated business processes, terminology, and language use. The department believes these amendments reflect better rule language usage and are necessary for clarity, brevity, and internal consistency.

Implementing citation amendments are also proposed throughout the rulemaking which are necessary for the administrative rules to align with HB 727, and comply with 2-4-305, MCA.

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

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

42.12.101 APPLICATION FOR LICENSE (1) All applications for licenses to sell, manufacture, or distribute alcoholic beverages shall be made to the department upon forms supplied by the department or through the department's licensing portal. An abbreviated application may be ~~permissible~~ used for license modifications as specified in ARM 42.12.118. In all other cases, the application process specified below shall be followed.

(2) and (3) remain the same.

(4) At any time during the application process, an applicant must notify the department of any changes in the information and documents submitted under (3) and immediately provide the department with any corrected or updated information or documents.

(5) An applicant who does not have a premises ready to operate may apply for an available license pursuant to 16-4-417, MCA. The applicant must electronically apply for the license through the department's licensing portal and submit any applicable information under (3) for the department to review the application. A license issued without an approved premises will be automatically placed on nonuse status by the department.

(6) Failure of a licensee to fulfill the requirements of 16-4-417, MCA, shall subject the license to revocation.

~~(4)~~ (7) The department~~, in its sole discretion,~~ may waive an application requirement set forth in this rule in its sole discretion.

~~(5)~~ (8) ~~The department shall make a thorough investigation as to the qualifications of the applicant and the suitability of the premises proposed for licensing.~~ The disqualification of any applicant to hold the license disqualifies all.

~~(6)~~ (9) The department~~, in its sole discretion,~~ may issue a license in its sole discretion. ~~If approved, the~~ A licensee remains bound by all requirements in statute and rule that apply at the time an application for license or an application for renewal is approved. ~~A licensee's failure to remain in compliance with a statute or rule shall constitute a violation of that statute or rule and may subject the licensee to administrative action.~~

AUTH: 16-1-303, MCA

IMP: 16-4-105, 16-4-201, 16-4-204, 16-4-207, 16-4-210, 16-4-401, 16-4-402, 16-4-414, 16-4-417, 16-4-420, 16-4-501, 16-4-502, MCA

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity provided at the beginning of this notice, the department proposes to amend ARM 42.12.101 as follows:

Amend (1) to recognize the department's use of its online licensing portal in addition to paper applications. The amendment is necessary for procedural guidance to applicants of current department practices.

Propose (4) to include the requirement that an applicant must provide updated supportive documentation if the information or documents has changed at any time during the application process. This has been a department practice for some time, but the department believes it is important to clarify, in rule, the necessity for an applicant's most current and accurate information so the department can make its license approval determinations in accordance with state law.

Propose (5) which is necessary for the department to effectuate the licensee's premises requirements provided under 16-4-417, MCA, and implement the department's proposed premises application using its online licensing portal and existing authority under statute and administrative rule. The requirement for the electronic submission of 16-4-417, MCA, license applications is necessary because of case processing functionality for paper applications within the computer system that the department and the Montana Department of Justice, Gambling Control Division, utilize for all license application matters. The department weighed its application implementation options and determined the best outcome, given the estimated number of applications submitted, is to advance electronic-only application submissions.

Propose (6) as a reiteration of the license conditions requirements found in 16-4-417, MCA, and discuss failure in fulfilling each of the license conditions. A license issued under the conditions of 16-4-417, MCA, is no different than any other license, and stating that a licensee's failure to meet the stated license conditions will subject the license to revocation is necessary and consistent with department actions involving lapse of a license under 16-3-310, MCA.

Propose (7), (8), and (9) which, collectively, contain amendments for improved clarity by moving sentence clauses to the end of section sentences, removing unnecessary introductory language, and proposing removal of unnecessary sentences. The proposed removal of the sentence in (7) is already stated in 16-4-402, MCA, and the sentence at the end of proposed (8) is provided in ARM 42.13.101 - Compliance with Laws and Rules.

42.12.106 DEFINITIONS The following definitions apply to this chapter:

(1) through (11) remain the same.

~~(12) "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, 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.~~

(13) through (46) remain the same but are renumbered (12) through (45).

AUTH: 16-1-303, MCA
IMP: 16-1-302, MCA

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, 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 attesting to the location~~ the legal description or street address 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 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 from the nearest corporate city boundary to the nearest entrance of the proposed premises.~~

(2) If the department determines the proposed premises are in close proximity to a quota area boundary line, the department may request the applicant complete and submit a survey affidavit form, provided by the department, from the local county or city surveyor or a private licensed land surveyor attesting to the location of the proposed premises. Any cost in obtaining the completed survey affidavit shall be paid by the applicant.

~~(3) The sworn statement or affidavit must be substantially in the following form or on a form provided by the department entitled Certified Survey Affidavit:~~

~~(a) Legal description and/or street address of proposed premises:~~

~~I, (individual's name), (title), have the knowledge and the authority to attest to the location of the premises known as (trade or business name).~~

~~The location of this premises is within the incorporated boundaries of (name of city) or is located (number) miles from the incorporated boundaries of (name of city).~~

~~(b) In the case of a location outside the corporate boundary include the following:~~

~~The distance was measured from the nearest corporate city boundary to the nearest entrance of the proposed premises. Plat(s)/map(s) verifying the location that indicate the points between which the measurement was made and the distance can be provided upon request.~~

~~(c) In the case of a location inside the corporate boundary include the following:~~

~~The location of the premises was determined by examination of corporate plats or other official records.~~

~~(d) A signature block, title of the parties, and the document must be dated and notarized.~~

AUTH: 16-1-303, 16-4-105, 16-4-420, MCA
IMP: 16-4-105, 16-4-201, 16-4-420, 16-4-501, MCA

REASONABLE NECESSITY: In addition to the general statement of

reasonable necessity provided at the beginning of this notice, the department proposes to amend ARM 42.12.130 to remove the universal requirement that an applicant submit a sworn statement from a land surveyor attesting the location of a proposed premises. However, in situations where the proposed premises is located near a quota area boundary, the department reserves the right to request an applicant to submit a certified survey affidavit from a land surveyor to confirm the location of the proposed premises in relation to the quota area boundary.

The department believes this is a positive simplification of the process to confirm the location of an applicant's premises because many proposed premises are locatable through computer-aided mapping resources available to the department. And in those instances that require additional verification, the existing form and department process can still be used.

42.12.133 CONCESSION AGREEMENTS (1) Concession agreements, authorized under 16-4-418, MCA, are written agreements that provide the terms where a licensee extends its licensed premises into the concessionaire's business for the purpose of selling and serving the licensee's alcoholic beverages to the concessionaire's customers. A concession agreement may only be entered if the premises suitability requirements in ARM 42.12.145 are met.

(2) 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~~ include the following:

~~(a) the nature of the agreement is one that arises from a mutually beneficial situation only;~~

(a) a completed concession agreement request form provided by the department and the one-time processing fee;

(b) a copy of the proposed floor plan; and

(c) any additional documentation the department deems necessary to approve the concession arrangement.

(3) The concession agreement must provide that licensee and concessionaire agree:

~~(b)~~ (a) ~~the agreement gives~~ the licensee ~~authority to~~ may operate in the ~~concessioned premises~~ concessionaire's area;

~~(c) a copy of the licensee's amended floor plan, including the new service area;~~

~~(d) the licensee is responsible for the sales and service of all alcoholic beverages;~~

~~(e)~~ (b) 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 alcoholic beverages~~. Any violation of the Montana Alcoholic Beverage Code is the sole responsibility of the licensee~~;

~~(f)~~ (c) on the compensation to be paid for shared employees. The compensation may not be based on a percentage of alcoholic beverage sales;

~~(g)~~ (d) ~~the nonlicensed entity cannot order, or otherwise purchase, any alcoholic beverage product from a wholesaler or agency liquor store~~ alcoholic beverages may not be ordered, purchased, or received by the concessionaire;

~~(h)~~ (e) ~~the agreement must include language that allows~~ the licensee ~~to~~ may

terminate the agreement without cause;

~~(i)~~ (f) ~~that all~~ the proceeds from the sale of alcoholic beverages are the property of the licensee; and

~~(j)~~ (g) 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 42.12.145, 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, 2013, or thereafter.~~

~~(4) The licensee must maintain a physical possessory interest as required in ARM 42.12.145.~~

~~(5)~~ (4) 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.

(5) Upon approval of the agreement, the license will reflect language that the licensee is also serving alcoholic beverages in the establishment. The concessionaire shall display in a prominent place, a copy of the license and a placard, issued by the department, stating the consequences for violations of the alcoholic beverage code by persons under 21 years of age.

(6) remains the same.

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

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity provided at the beginning of this notice, the department proposes to amend ARM 42.12.133 as follows:

Insert new text as (1) to provide an introduction as to what concession agreements are and which license types are able to operate under a concession

agreement. The department believes the introduction is necessary for context since the statute only acknowledges and authorizes the use of these agreements between licensees and non-licensees. The last sentence of (1) is proposed for consistency with existing operating conditions requirements for the licensees referenced in ARM 42.12.145 and is text relocated and revised from current (2).

Current rule text in current (1) regarding licensee submissions, department processes, and required concession agreement terms are proposed for relocation - and where necessary, restatement - to proposed (2) and (3), which the department believes is necessary to improve clarity and comprehension of the rule.

Proposed (2) provides the list of items the licensee is required to submit to the department for the concession agreement to be considered. The list is amended to include a department concession agreement request form and processing fee, which are new to the rule but have been in use or adopted by the department since early 2015.

In addition to the reorganization of proposed (3), the wording of the section has been revised for brevity and consistency with statute and rule. Proposed (3) removes rule language regarding a licensee's sole responsibility in the concessionaire's sale and service of alcoholic beverages, which was modified by HB 727's amendments to 16-4-406, MCA. Now, a concessionaire is subject to department action for violations of the alcoholic beverage code or department rules in the sale and service of the licensee's alcoholic beverages.

Current (2) is proposed for removal in its entirety as the requirement to have a specific concessionaire sign is unnecessary. Instead, the department proposes (5) to require the concessionaire to post a copy of the licensee's license and age placard. This requirement is less burdensome on licensees and will be easier for law enforcement and other representatives to determine the identity of the licensee engaged in the concession.

Section (3) is proposed for removal because it contains a date-specific provision that becomes obsolete with the department's required signage alternative.

Section (4) is proposed for removal as the possessory interest requirement of (4) is contained within ARM 42.12.145, which is cross-referenced into the amendments to proposed (1).

Renumber (5) as (4) and propose amendments to remove the requirement that the department will approve or deny the concession agreement within seven working days of receipt. The department contends this amendment is necessary because the volume and complexity of concession agreements have changed dramatically since the processing deadline was adopted into rule and approval deadlines for concession agreements within seven working days is unfeasible. Furthermore, many of the concession agreement review requests are incidental to pending license applications, and this deadline may be confusing to applicants during the overall license application approval process. For any stand-alone concession agreement review requests that the department receives, the department will process the requests in as expedient a manner as time and resources permit. The last sentence of current (5) is proposed to be split into its own section which the department believes is better organization of content because proposed (5) applies to after-approval compliance requirements.

42.12.209 TRANSFER OF A LICENSE TO ANOTHER PERSON

(1) remains the same.

(2) An ownership interest may not be transferred ~~to a new owner~~ until an application reflecting the proposed transfer is submitted to the department and the department approves the application.

(3) through (6) remain the same.

(7) Prior to the department granting written approval:

(a) remains the same.

(b) earnest money may be paid to the license seller, not to exceed five percent of the license purchase price, but any additional funds or other consideration for the ~~liquor~~ license or alcoholic beverage inventory may not be exchanged unless:

(i) temporary operating authority ~~or conditional approval~~ is granted, but any consideration other than earnest money must be returned to the buyer in the event the application is not approved; or

(ii) remains the same.

(8) The provisions of this rule do not apply to the:

(a) transfer of a security interest in a ~~licensed liquor operation~~ license;

(b) through (10) remain the same.

(11) The buyer of the license can acquire the seller's alcoholic beverage inventory when either temporary operating authority has been granted to the buyer pursuant to ARM 42.12.208 or the transfer of the license to the buyer has been approved by the department.

AUTH: 16-1-303, MCA
IMP: 16-4-401, 16-4-402, MCA

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity provided at the beginning of this notice, the department proposes to amend ARM 42.12.209 as follows:

Strike the reference from (2) " . . . to a new owner." The required application to transfer ownership is applicable not only to new ownership but also when existing owners are changing ownership percentages.

Propose (11) to provide necessary cross-referencing in this rule of the circumstances under which a buyer of an alcoholic beverage license has the ability to acquire a seller's inventory when temporary operating authority is granted or when the transfer of the license has been approved. The department believes the proposed section is necessary as neither 16-4-404, MCA, or ARM 42.12.208 contain both permissible times of inventory purchase involving the transfer of an alcoholic beverage license.

42.13.101 COMPLIANCE WITH LAWS AND RULES (1) All licensees, their agents, ~~and~~ employees, and concessionaires must ~~conduct the premises~~ operate in compliance with the rules of other state and local agencies and abide by all:

(a) through (d) remain the same.

(2) Proof of violation by a licensee, a concessionaire, or the licensee's or concessionaire's agent or employee of any of the provisions of the above laws, ordinances, or rules is sufficient grounds for revocation or suspension of the license

or department termination of a concession agreement, and a licensee~~s~~, a concessionaire, or both, may be reprimanded or assessed a civil penalty in accordance with 16-4-406, MCA.

(3) through (8) remain the same.

(9) In the event a reprimand is issued:

(a) the incident shall not be considered to be a first offense for purposes of the progressive penalty schedule unless the licensee or concessionaire commits the same offense within one year; and

(b) and (10) remain the same.

(11) Aggravating circumstances include, but are not limited to:

(a) no effort on the part of a licensee, a concessionaire, or both, to prevent a violation from occurring;

(b) remains the same.

(c) involvement of a licensee~~'s~~, a concessionaire, or both, ~~involvement~~ in the violation;

(d) and (e) remain the same.

(f) lack of cooperation by ~~the~~ a licensee, a concessionaire, or both, in an investigation; and

(g) a violation's significant negative effect on the health and welfare of the community in which the licensee, the concessionaire, or both, operate~~s~~.

(12) Nothing in this rule prevents the department from revoking, suspending, or refusing the renewal of a license, or a concession agreement, or both, if revocation, suspension, or refusing renewal is expressly allowed in law or rule with reference to a prohibited act.

AUTH: 16-1-303, 16-4-1009, MCA
IMP: 16-1-302, 16-3-301, 16-4-406, 16-4-1004, 16-4-1008, 16-6-314, MCA

REASON: The department proposes to add the term "concessionaire" in many areas of the rule due to the passage of House Bill 727 during the 2019 Legislative Session. House Bill 727 gives the department the authority to also take administrative action against a concessionaire for violations of the Montana Alcoholic Beverage Code or related administrative rules.

42.13.107 NONUSE STATUS (1) The department shall grant nonuse status to a licensee ~~that is not operating a going establishment if~~ who:

(a) is issued a license without an approved premises as provided in 16-4-417, MCA; or

(b) is not operating a going establishment if the licensee submits a written verification documenting to the department's satisfaction how the nonuse is beyond the licensee's control~~;~~ and

~~(b)~~ the request is received prior to exceeding 90 days of not operating a going establishment.

(2) Acceptable reasons for not operating a going establishment may include but are not limited to:

(a) the death of the licensee or the licensee's family member;

(b) a natural disaster;

(c) a department approved alteration is underway or is pending department approval; or

(d) the licensee lost possessory interest in the premises.

(2) through (6) remain the same but are renumbered (3) through (7).

(8) A licensee may not purchase, sell, or otherwise provide alcoholic beverages while on nonuse status. This includes catering events and operating through a concession agreement.

AUTH: 16-1-303, 16-4-417, MCA
IMP: 16-3-310, MCA

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity provided at the beginning of this notice, the department proposes to amend ARM 42.13.107 as follows:

Section (1) is proposed for amendment to remove the phrase ". . . that is not operating a going establishment if. . . " because 16-4-417, MCA, provides another condition for department approved non-use not related to a going establishment and the two conditions are reorganized as (1)(a) and (1)(b).

Section (1)(a) text is proposed for the rule to implement 16-4-417, MCA, and is consistent with the department's proposed amendments to ARM 42.12.101. Proposed (1)(b) begins as a restatement of (1) and is necessary to clarify the method by which a licensee requests nonuse status when they cannot operate a going establishment, which is defined in ARM 42.13.111.

Section (2) provides a non-exhaustive list of acceptable reasons that the department may approve nonuse status. This list provides examples that are typically beyond the licensee's control.

Section (8) proposes to place into this rule, the reiteration of the prohibition of a licensee to engage in any sort of alcoholic beverage business activity while on nonuse status. The department believes this addition to the rule is necessary for clarity and guidance to licensees facing non-use - whether the nonuse arises from the conditions in (1)(a) or (1)(b) - because there is no concise prohibition such as this elsewhere in the department's administrative rules.

5. The department proposes to repeal the following rule:

42.12.207 APPLICATION APPROVED SUBJECT TO FINAL INSPECTION OF PREMISES

AUTH: 16-1-303, MCA
IMP: 16-4-104, 16-4-106, 16-4-201, 16-4-402, 16-4-404, MCA

6. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Todd Olson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or e-mail todd.olson@mt.gov and must be received no later than 5:00 p.m. on April 13, 2020.

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

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

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

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by email on October 7, 2019 and on February 27, 2020.

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

/s/ Todd Olson	/s/ Gene Walborn
Todd Olson	Gene Walborn
Rule Reviewer	Director of Revenue

Certified to the Secretary of State March 3, 2020.