

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF ADOPTION,
Rules I through V, the amendment of)	AMENDMENT, TRANSFER AND
ARM 42.12.105, 42.12.106,)	AMENDMENT, AND REPEAL
42.12.133, 42.12.209, 42.12.302,)	
42.12.401, 42.13.111, 42.13.405,)	
42.13.601, and 42.13.802, the)	
transfer and amendment of ARM)	
42.12.134, 42.12.135, 42.12.136,)	
42.12.137, and 42.12.138, and the)	
repeal of ARM 42.12.122, 42.12.126,)	
42.12.139, 42.12.213, 42.12.312,)	
42.12.314, 42.13.301, 42.13.304,)	
42.13.305, 42.13.602, and 42.13.805)	
pertaining to the premises suitability)	
requirements and conditions for)	
operating all types of alcoholic)	
beverage licenses)	

TO: All Concerned Persons

1. On November 25, 2016, the Department of Revenue published MAR Notice No. 42-2-967 pertaining to the public hearing on the proposed adoption, amendment, transfer and amendment, and repeal of the above-stated rules at page 2117 of the 2016 Montana Administrative Register, Issue Number 22.

2. On December 15, 2016, a public hearing was held to consider the proposed adoption, amendment, transfer and amendment, and repeal. Paul Cartwright, interested citizen; Dax Cetraro, Montana Tavern Association; Jack Fisher, Silver Bow Tavern Association; Jim Harris, Montana Distillers Guild; Sam Hoffman, Red Lodge Ales; John Iverson, Montana Tavern Association; Matt Leow, Montana Brewers Association; Neil Peterson, Gaming Industry Association; Max Pigman, Lewis and Clark Brewing Co.; Steffen Rasile, Gulch Distillers; Jill Roberts, Hawthorn Wine Shop; Melissa Shannon, Montana Beer and Wine Distributors Association; Joel Silverman, Liquor Store Owners' Association of Montana; Brian Smith, Blackfoot River Brewing Co.; and Josh Townsley, Tamarack Brewing Company, appeared and testified at the hearing. Several of those who testified at the hearing also submitted written comments. Kristi Blazer, Montana Beer and Wine Distributors Association; Gena Burghoff, Ox Pasture; Tyrrell Hibbard, Gulch Distillers; Michael Lawlor, Goodrich and Reely, PLLC; Nicholas Lee, Glacier Distilling; and Brad Simshaw, Blackfoot River Brewing Co., provided written comments.

3. The department amends ARM 42.12.105, 42.12.209, 42.12.302, and 42.12.401, amends and transfers ARM 42.12.135 (42.13.1103), and repeals ARM

42.12.122, 42.12.126, 42.12.139, 42.12.213, 42.12.312, 42.12.314, 42.13.301, 42.13.304, 42.13.305, 42.13.602, and 42.13.805 as proposed.

4. After consideration of the comments received, the department adopts, amends, and transfers and amends the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (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) the applicant or licensee has possessory interest in the premises ~~and the land upon which the premises are located;~~

(b) 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 be a continuous area that is not broken by any area in which the applicant or licensee does not have adequate control, such as another business or a common area shared with other building tenants. Subject to the exception in 16-3-311(2), 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. 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. ~~An additional lockable door~~ Additional lockable doors in the permanent floor-to-ceiling wall may be allowed only upon department approval;

(f) through (k) remain as proposed.

(l) there are no signs, posters, or advertisements displayed on the exterior portion of the premises that identify ~~an alcoholic beverage manufacturer~~ any brewer, beer importer, or wholesaler, or distributor in any manner. This prohibition extends to buildings adjacent to the premises only if the retailer has possessory interest in the building. This prohibition does not apply to temporary advertisements allowed under 16-3-244, MCA;

(m) the floor plan accurately states the dimensions of the premises, includes the entity name, alcoholic beverage license number, physical address, and date and identifies any service area, seating required under (o), stationary drink preparation area, storage area, patio/deck, perimeter barrier, and permanent floor-to-ceiling wall required between the premises and another business, ~~off-premises sales area, and separation barrier required between the on-premises and off-premises sales areas;~~

(n) through (r) remain as proposed.

(s) ~~except as provided for in (t), the physical layout and equipment utilized prevent the self-service of alcoholic beverages. This includes a prohibition against the service of alcoholic beverages through self-service devices and vending machines. Reach-in coolers and open shelving are prohibited unless they are located in a drink preparation area and the department determines that~~ provide

sufficient physical safeguards are in place to prevent the self-service of alcoholic beverages at any drink preparation area; and

~~(t) any off-premises sales area is contiguous with the on-premises sales area and there is a separation barrier between the off-premises sales area and the on-premises sales area. The off-premises sales area may contain reach-in coolers and open shelving. It must include a cash register or other equipment for conducting sales transactions~~ self-service devices and vending machines are not used to serve alcoholic beverages.

(3) through (5) remain as proposed.

NEW RULE II (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) the applicant or licensee has possessory interest in the premises ~~and the land upon which the premises are located~~;

(b) 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 be a continuous area that is not broken by any area in which the applicant or licensee does not have adequate control, such as another business or a common area shared with other building tenants. Subject to the exception in 16-3-311(2), 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. 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. ~~An additional lockable door~~ Additional lockable doors in the permanent floor-to-ceiling wall may be allowed only upon department approval;

(f) through (j) remain as proposed.

(k) there are no signs, posters, or advertisements displayed on the exterior portion of the premises that identify ~~an alcoholic beverage manufacturer~~ any brewer, beer importer, or wholesaler, or distributor in any manner. This prohibition extends to buildings adjacent to the premises only if the retailer has possessory interest in the building. This prohibition does not apply to temporary advertisements allowed under 16-3-244, MCA;

(l) through (p) remain as proposed.

(q) the physical layout and equipment utilized ~~prevent the self-service of alcoholic beverages. This includes a prohibition against the service of alcoholic beverages through self-service devices and vending machines. Reach-in coolers and open shelving are prohibited unless they are located in the service bar area and the department determines that~~ provide sufficient physical safeguards are in place to prevent the self-service of alcoholic beverages at any service bar;

(r) self-service devices and vending machines are not used to serve alcoholic beverages; and

(r) remains as proposed, but is renumbered (s).

(3) through (5) remain as proposed.

NEW RULE III (42.12.147) OFF-PREMISES BEER AND TABLE WINE LICENSE - PREMISES SUITABILITY REQUIREMENTS (1) remains as proposed.

(2) The premises of an off-premises beer and table wine retailer may be considered suitable only if:

(a) the applicant or licensee has possessory interest in the premises ~~and the land upon which the premises are located;~~

(b) through (d) remain as proposed.

(e) the premises are located in one building or a specific portion of one building. The interior portion of the premises must be a continuous area that is not broken by any area in which the applicant or licensee does not have adequate control, such as another business or a common area shared with other building tenants. 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 licensed alcoholic beverage business, ~~including any other business operated by the licensee.~~ The only access from the premises to another licensed alcoholic beverage business may be through a single lockable door, no more than six feet wide, in the permanent floor-to-ceiling wall. ~~An additional, lockable door~~ Additional lockable doors or a doorway larger than six feet wide in the permanent floor-to-ceiling wall may be allowed only upon department approval;

(f) through (k) remain as proposed.

(l) there are no signs, posters, or advertisements displayed on the exterior portion of the premises that identify ~~an alcoholic beverage manufacturer~~ any brewer, beer importer, or wholesaler, or distributor in any manner. This prohibition extends to buildings adjacent to the premises only if the retailer has possessory interest in the building. This prohibition does not apply to temporary advertisements allowed under 16-3-244, MCA;

(m) the floor plan accurately states the dimensions of the premises, includes the entity name, alcoholic beverage license number, physical address, and date and identifies any storage area and permanent floor-to-ceiling wall required between the premises and another licensed alcoholic beverage business;

(n) through (4) remain as proposed.

NEW RULE IV (42.12.148) BEER WHOLESALER AND TABLE WINE DISTRIBUTOR - PREMISES SUITABILITY REQUIREMENTS (1) remains as proposed.

(2) The premises of a beer wholesaler and table wine distributor may be considered suitable only if:

(a) the applicant or licensee has possessory interest in the premises ~~and the land upon which the premises are located;~~

(b) through (e) remain as proposed.

(f) the premises are located in one building or a specific portion of one building. The interior portion of the premises must be a continuous area that is not broken by any area in which the applicant or licensee does not have adequate control, such as another business or a common area shared with other building tenants. 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 licensed alcoholic

~~beverage business, including any other business operated by the licensee.~~ The only access from the premises to another licensed alcoholic beverage business may be through a single lockable door, no more than six feet wide, in the permanent floor-to-ceiling wall. ~~An additional lockable door~~ Additional lockable doors in the permanent floor-to-ceiling wall may be allowed only upon department approval;

(g) the floor plan accurately states the dimensions of the premises, includes the entity name, alcoholic beverage license number, physical address, and date and identifies any permanent floor-to-ceiling wall required between the premises and another licensed alcoholic beverage business;

(h) through (5) remain as proposed.

NEW RULE V (42.12.149) WINERY, BREWERY, AND DISTILLERY - PREMISES SUITABILITY REQUIREMENTS (1) remains as proposed.

(2) The premises of a manufacturer may be considered suitable only if:

(a) the applicant or licensee has possessory interest in the premises ~~and the land upon which the premises are located;~~

(b) through (e) remain as proposed.

(f) 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 be a continuous area that is not broken by any area in which the applicant or licensee does not have adequate control, such as another business or a common area shared with other building tenants. 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 licensed alcoholic beverage business, ~~including any other business operated by the licensee.~~ The only access from the premises to another licensed alcoholic beverage business may be through a single lockable door, no more than six feet wide, in the permanent floor-to-ceiling wall. ~~An additional lockable door~~ Additional lockable doors in the permanent floor-to-ceiling wall may be allowed only upon department approval;

(g) the floor plan accurately states the dimensions of the premises, includes the entity name, alcoholic beverage license number, physical address, and date and identifies any manufacturing area, storage area, sample room, drink preparation area, patio/deck, perimeter barrier, and permanent floor-to-ceiling wall required between the premises and another licensed alcoholic beverage business, ~~off-premises sales area, and separation barriers required between the on-premises and off-premises sales areas;~~

(h) through (5) remain as proposed.

(6) In addition to all other requirements, a manufacturer's premises with a sample room shall be considered suitable only if:

(a) through (c) remain as proposed.

(d) the sample room contains a drink preparation area. The premises may have more than one drink preparation area, including drink preparation areas on the patio/deck, subject to department approval; and

(e) the physical layout and equipment utilized ~~prevent the self-service of alcoholic beverages.~~ This includes a prohibition against the service of alcoholic beverages through self-service devices and vending machines. ~~Reach-in coolers and open shelving are prohibited unless they are located in a drink preparation area~~

and the department determines that provide sufficient physical safeguards are in place to prevent the self-service of alcoholic beverages at any drink preparation area; and

(f) self-service devices and vending machines are not used to serve alcoholic beverages.

~~(7) In addition to all other requirements, a manufacturer's premises with an off-premises sales area shall be considered suitable only if there is a separation barrier between the off-premises sales area and a sample room where the areas are contiguous. The off-premises sales area may contain reach-in coolers and open shelving. It must include a cash register or other equipment for conducting sales transactions.~~

(8) through (10) remain as proposed, but are renumbered (7) through (9).

42.12.106 DEFINITIONS The following definitions apply to this chapter:

(1) through (6) remain as proposed.

(7) "Business directly related to the on-premises consumption of alcoholic beverages" means a business that is readily associated with on-site alcoholic beverage consumption, such as a hotel, bowling alley, casino, or restaurant. It does not include alcoholic beverage manufacturers, grocery stores, or off-premises alcoholic beverage businesses.

(8) through (23) remain as proposed.

(24) "Manufacturing area" means the portion of a manufacturing premises that is not designated as a sample room ~~or off-premises sales area~~.

(25) remains as proposed.

~~(26) "Off-premises sales area" means an area on the premises of an on-premises consumption licensee or a manufacturer where alcoholic beverages are available for purchase in original packaging for off-premises consumption.~~

(27) and (28) remain as proposed, but are renumbered (26) and (27).

~~(29)~~(28) "Patio/Deck" means an outdoor portion of the premises where the preparation, service, and consumption of alcoholic beverages is ~~permitted~~ allowed.

(30) through (35) remain as proposed, but are renumbered (29) through (34).

~~(36)~~(35) "Self-service of alcoholic beverages" means allowing persons other than the licensee or its employees to have access to alcoholic beverages prior to the licensee or its employees providing the alcoholic beverage to the person for on-premises consumption.

~~(37) "Separation barrier" means a barricade that limits entry from the on-premises sales area to the off-premises sales area through an entrance no wider than six feet. An additional entrance in the separation barrier may be allowed only upon department approval. The separation barrier shall span from floor to ceiling and remain in a fixed position unless alternative construction that accomplishes the same purpose is approved by the department. The barrier may be constructed of materials such as lattice or wrought iron that do not form a solid physical barrier.~~

(38) through (45) remain as proposed, but are renumbered (36) through (43).

42.12.133 CONCESSION AGREEMENTS (1) through (3) remain as proposed.

(4) The licensee must maintain a physical possessory interest as required in

ARM ~~42.12.133~~ 42.12.145.

(5) and (6) remain as proposed.

42.13.111 DEFINITIONS The following definitions apply to this subchapter chapter:

(1) through (18) remain as proposed.

~~(19) "Off-premises sales area" means an area on the premises of an on-premises consumption licensee or manufacturer where alcoholic beverages are available for purchase in original packaging for off-premises consumption.~~

(20) remains as proposed, but is renumbered (19).

~~(21)~~(20) "Patio/deck" means an outdoor portion of the premises where the preparation, service, and consumption of alcoholic beverages is ~~permitted~~ allowed.

(22) through (31) remain as proposed, but are renumbered (21) through (30).

~~(32)~~(31) "Self-service of alcoholic beverages" means allowing persons other than the licensee or its employees to have access to alcoholic beverages prior to the licensee or its employees providing the alcoholic beverage to the person for on-premises consumption.

(33) through (35) remain as proposed, but are renumbered (32) through (34).

42.13.405 WINERY - CONDITIONS FOR OPERATING (1) In addition to all other alcoholic beverage licensing requirements, a winery shall:

(a) through (e) remain as proposed.

(f) prevent the self-service of alcoholic beverages on the premises, ~~except in an off-premises sales area;~~

(g) through (j) remain as proposed.

(k) ~~for any alcoholic beverage purchased on the premises, prevent the consumption of alcoholic beverages on any property in which the licensee has possessory interest and that is contiguous or used in connection with the licensee's business, including any patio, deck, sitting area, smoking area, playground, or parking lot that is not part of the premises~~ prevent the consumption of alcoholic beverages in the manufacturing area or storage area except as authorized by federal laws;

(l) through (2) remain as proposed.

(3) A winery may sell alcoholic beverages on its premises to a consumer for off-premises consumption only as follows:

(a) and (b) remain as proposed.

(c) alcoholic beverages may only be sold ~~from a drink preparation area in an approved sample room or an approved off-premises sales area.~~

42.13.601 BREWERY - CONDITIONS FOR OPERATING (1) In addition to all other alcoholic beverage licensing requirements, a brewery shall:

(a) through (d) remain as proposed.

(e) prevent the self-service of alcoholic beverages on the premises, ~~except in an off-premises sales area;~~

(f) and (g) remain as proposed.

(h) ~~for any alcoholic beverage purchased on the premises, prevent the consumption of alcoholic beverages on any property in which the licensee has~~

~~possessory interest and that is contiguous or used in connection with the licensee's business, including any patio, deck, sitting area, smoking area, playground, or parking lot that is not part of the premises~~ prevent the consumption of alcoholic beverages in the manufacturing area or storage area except as authorized by federal laws;

(i) through (2) remain as proposed.

(3) A brewery may sell alcoholic beverages on its premises to a consumer for off-premises consumption only as follows:

(a) and (b) remain as proposed.

(c) alcoholic beverages may only be sold ~~from a drink preparation area in an approved sample room or an approved off-premises sales area;~~ and

(d) through (5) remain as proposed.

42.13.802 DISTILLERY - CONDITIONS FOR OPERATING (1) and (2) remain as proposed.

(3) In addition to all other requirements, a microdistillery shall:

(a) remains as proposed.

(b) only transfer alcoholic beverages from a manufacturing area or storage area to a sample room ~~or off-premises sales area~~ in original packaging;

(c) ~~for any alcoholic beverage purchased on the premises, prevent the consumption of alcoholic beverages on any property in which the licensee has possessory interest and that is contiguous or used in connection with the licensee's business, including any patio, deck, sitting area, smoking area, playground, or parking lot that is not part of the premises~~ prevent the consumption of alcoholic beverages in the manufacturing area or storage area except as authorized by federal laws;

(d) prevent the self-service of alcoholic beverages on the premises, ~~except in an off-premises sales area;~~

(e) through (4) remain as proposed.

(5) In addition to all other requirements, a microdistillery that conducts off-premises sales shall:

(a) and (b) remain as proposed.

(c) sell alcoholic beverages only ~~from a drink preparation area~~ in an approved sample room ~~or an approved off-premises sales area;~~

(d) through (f) remain as proposed.

42.12.134 (42.13.1102) ALL-BEVERAGES LICENSE - CONDITIONS FOR OPERATING (1) In addition to all other alcoholic beverage licensing requirements, an all-beverages licensee shall:

(a) through (c) remain as proposed.

(d) prevent the self-service of alcoholic beverages on the premises, ~~except in an off-premises sales area;~~

(e) and (f) remain as proposed.

(g) prevent the consumption or possession of alcoholic beverages on the premises by persons who are under 21 years of age or actually, apparently, or obviously intoxicated; and

(h) prevent the on-premises consumption of alcoholic beverages not sold or

provided at the premises and those sold in original packaging or growlers for off-premises consumption; and

~~(i) prevent the consumption of alcoholic beverages on any property in which the licensee has possessory interest and that is contiguous or used in connection with the licensee's business, including any patio, deck, sitting area, smoking area, playground, or parking lot that is not part of the premises.~~

(2) An all-beverages licensee may sell alcoholic beverages for off-premises consumption only as follows:

(a) alcoholic beverages must be sold in original packaging or individual servings, except that the retailer may fill and sell growlers with beer and table wine; and

(b) the sale of alcoholic beverages must occur on the premises; the delivery of alcoholic beverages to the consumer off-site is prohibited;

~~(c) alcoholic beverages may only be sold from a drink preparation area or an off-premises sales area; and~~

~~(d) the sale of alcoholic beverages within the off-premises sales area must equal at least 95 percent of the gross revenue of all sales in that area.~~

42.12.136 (42.13.1104) ON-PREMISES CONSUMPTION BEER LICENSE - CONDITIONS FOR OPERATING

(1) In addition to all other alcoholic beverage licensing requirements, an on-premises consumption beer licensee shall:

(a) through (c) remain as proposed.

~~(d) prevent the self-service of alcoholic beverages on the premises, except in an off-premises sales area;~~

(e) and (f) remain as proposed.

(g) prevent the consumption or possession of alcoholic beverages on the premises by persons who are under 21 years of age or actually, apparently, or obviously intoxicated; and

(h) prevent the on-premises consumption of alcoholic beverages not sold or provided at the premises and those sold in original packaging or growlers for off-premises consumption; and

~~(i) prevent the consumption of alcoholic beverages on any property in which the licensee has possessory interest and that is contiguous or used in connection with the licensee's business, including any patio, deck, sitting area, smoking area, playground, or parking lot that is not part of the premises.~~

(2) remains as proposed.

(3) An on-premises consumption beer licensee and an on-premises consumption beer licensee with a wine amendment may sell alcoholic beverages for off-premises consumption only as follows:

(a) alcoholic beverages must be sold in original packaging or individual servings, except that the retailer may fill and sell growlers with beer and table wine; and

(b) the sale of alcoholic beverages must occur on the premises; the delivery of alcoholic beverages to the consumer off-site is prohibited;

~~(c) alcoholic beverages may only be sold from a drink preparation area or an off-premises sales area; and~~

~~(d) the sale of alcoholic beverages within the off-premises sales area must equal at least 95 percent of the gross revenue of all sales in that area.~~

42.12.137 (42.13.1105) OFF-PREMISES CONSUMPTION BEER AND TABLE WINE LICENSE - CONDITIONS FOR OPERATING

(1) In addition to all other alcoholic beverage licensing requirements, an off-premises consumption beer and table wine licensee shall:

- (a) through (c) remain as proposed.
 - (d) operate as a stand-alone beer and/or table wine business, grocery store, or drugstore licensed as a pharmacy; and
 - (e) prevent the sale of alcoholic beverages between 2 a.m. and 8 a.m.; and
 - ~~(f) prevent the consumption of alcoholic beverages on the premises and any property in which the licensee has possessory interest and that is contiguous or used in connection with the licensee's business, including any patio, deck, sitting area, smoking area, playground, or parking lot that is not part of the premises.~~
- (2) remains as proposed.

42.12.138 (42.13.1202) BEER WHOLESALER AND TABLE WINE DISTRIBUTOR - CONDITIONS FOR OPERATING

(1) In addition to all other alcoholic beverage licensing requirements, a beer wholesaler and table wine distributor shall:

- (a) through (b)(i) remain as proposed.
 - (ii) all product labels have been approved by the department; and
 - (iii) an agreement of distributorship agreement is in place between the manufacturer or importer and the wholesaler or distributor; and
 - ~~(iv) an accommodation agreement is in place between the importer and manufacturer when the product is received from an importer;~~
- (c) through (3) remain as proposed.

5. 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: Mr. Pigman asked if it was consumer complaints, licensee abuses, or fines that prompted the department to propose the rule amendments.

RESPONSE 1: Section 2-4-314, MCA, of the Montana Administrative Procedure Act, states that each agency shall review its rules at least biennially. The intent of the review is to determine if any rules can be eliminated, are in need of updates, or should be amended for better guidance and clarity. The review process can also bring to light the need to reorganize certain rules or sections of rules, which happened during the department's recent comprehensive review of these liquor rules. In addition to the updates and reorganization changes proposed in this notice based on the findings of its recent review, the department also proposed changes to address some observations by and questions received from the industry since the previous biennial review took place.

COMMENT 2: Mr. Lawlor asked the department to consider outside perspective in advance of all rulemaking as a matter of efficiency, to stay in sight of

statutory boundaries of authority, to be mindful of burdens placed on businesses, and to be aware of inconsistencies with other rules and laws.

RESPONSE 2: The department complies with statutory rulemaking requirements, which provides all interested parties with the same opportunity and time to review the department's proposed actions. This is the fairest approach and ensures the concerns of all interested parties are considered equally.

COMMENT 3: Mr. Lawlor stated that the department's small business impact statement does not account for the burden and costs that New Rules I through V will create, such as expensive remodels that put strain on a business's finances and employees.

RESPONSE 3: The department has reviewed its small business impact statement and believes it accurately reflects the impact the proposed rules would have on licensees.

Based on comments received about some of the proposed language in the new rules, the department has made amendments to remove requirements for off-premises sales areas, separation barriers, and permanent floor-to-ceiling walls in certain circumstances. These amendments to the new rules should also lessen any perceived burden or financial strain.

COMMENT 4: Mr. Silverman asked if the proposed new rules will impact agency liquor stores.

RESPONSE 4: Agency liquor stores are not subject to this set of administrative rules. ARM Title 42, chapter 12 contains rules related to liquor licenses and permits, and chapter 13 contains rules related to regulation of licenses. Agency liquor store rules are located in ARM Title 42, chapter 11.

COMMENT 5: Mr. Harris commented that any reference to on-premises, off-premises, and separation barriers throughout the proposed rule changes is a copy and paste from areas in the rules regulating agency liquor or package liquor stores. Manufacturers such as wineries, breweries, and distilleries are not bound by these same distinctions and the rule language should specify these differences.

RESPONSE 5: The department has amended New Rule V to remove the requirement for manufacturers to have a separation barrier.

COMMENT 6: Mr. Lawlor requested that the language "and the land upon which the premises are located" be stricken from New Rules I through V, because the requirement that a licensee have possessory interest in the premises and the land upon which it is located is not supported by statute and is inconsistent with property law. A large number of existing premises would be rendered unsuitable by this language. Mr. Lawlor further stated that any grandfather provision for future application would not adequately remedy the problem.

RESPONSE 6: The department has amended New Rules I through V to remove the language "and the land upon which the premises are located." However, licensees are still required to have possessory interest in the premises, which includes any patio/deck or other outside area used by the licensee.

COMMENT 7: Mr. Silverman commented that New Rule I(2)(b), which requires an on-premises consumption beer or all-beverage retailer to have adequate control over the premises, would prohibit retailers from utilizing a common area as part of their premises.

Mr. Lawlor commented that the language requiring that "the interior portion of the premises be a continuous area unbroken by any area in which the licensee does not have adequate control, such as another business or a common area shared with other building tenants" in New Rules I through III(2)(e), and New Rules IV and V(2)(f), would render a large number of existing licensed premises unsuitable. There is no legitimate basis for the department to conclusively presume that a licensee would not have adequate control over a common area unless it has exclusive authority to govern the conduct of the area.

RESPONSE 7: To effectively manage the sale, service, and consumption of alcoholic beverages on the premises, the licensee must have adequate control of the premises. When areas are shared with other building tenants, a licensee does not have the exclusive authority to govern the conduct that occurs in that area. Therefore, these areas are prohibited from being part of the premises.

COMMENT 8: Mr. Hoffman, Mr. Iverson, Mr. Lawlor, Mr. Peterson, and Mr. Pigman all stated opposition to the requirement for a single, lockable door, as proposed in New Rules I through V. They maintain this regulation is unwarranted and unsupported by statute, which broadly allows inside access to the rest of the building during lawful hours without a restriction as to the number of doors. They recommend the department instead use language such as "doors must be for building, fire, health, or service purposes, and must be lockable."

RESPONSE 8: The department has amended the language in all five new rules to allow for multiple additional doors, subject to department approval.

COMMENT 9: Mr. Hoffman, Mr. Iverson, Mr. Lawlor, Mr. Peterson, Mr. Pigman, Mr. Leow, and Mr. Silverman all stated opposition to the restriction on doors more than six feet wide, as proposed in the New Rules I through V. They maintain this limitation is impractical and unfair, especially for warehouses. There are existing, licensed storage depots with overhead doors much wider than six feet. Renovations would be costly and not lead to increased public health and welfare. They recommended the department use language requiring door widths comply with building and fire codes instead.

RESPONSE 9: The language in 16-3-311, MCA, allows for inside access through a permanent wall when an on-premises consumption retail licensee's premises is within a building shared by other entities. The six-foot door requirement

for on-premises consumption retail licenses is an existing requirement that ensures the licensee can retain adequate control over the premises and prevent unauthorized access. The department declines to make further amendments to New Rule I or II, which are specific to on-premises consumption retail license types.

The department has amended the language in New Rules III through V, which are specific to off-premises licensees, wholesalers, distributors, and manufacturers, to only include a door size requirement when the premises are within a building shared with another alcoholic beverage licensee. This will ensure there is a clear designation of each licensee's premises. For off-premises licensees, wholesalers, distributors, and manufacturers, this means no door size requirement exists when the premises is located within a building shared by non-licensed entities.

COMMENT 10: Mr. Lawlor asked whether there is a contradiction between the "lockable door" requirement in New Rules I through III, and the explanatory language pertaining to these sections which indicate that "unrestricted access" by law enforcement means that there will be "no locked gates."

RESPONSE 10: The department is requiring, when a licensed establishment is located in a portion of a building, any doors between the licensed establishment and another business have the ability to be locked. This will prevent unauthorized access to the licensed establishment. The requirement that law enforcement must have unrestricted access pertains to the land upon which the premises are located. Gates or fences that prevent law enforcement access onto the land are prohibited.

COMMENT 11: Multiple parties commented regarding the language in New Rule I(2)(l), New Rule II(2)(k), and New Rule III(2)(k), prohibiting signage other than certain temporary advertisements on the exterior of a building.

Mr. Lawlor, Mr. Iverson, and Mr. Peterson requested clarification that this requirement does not restrict the placement of signage inside windows that are visible from the outside, such as neon beer signs.

Mr. Silverman also requested clarification whether there was a certain percentage of ownership interest a retailer must have in an adjacent building before the prohibition applied. He also asked if a sign must be removed when a retailer moves into a building with a sign painted on the exterior.

Mr. Pigman stated the proposed amendments regarding signage could cause substantial financial outlay for any premises alterations.

Mr. Leow and Mr. Pigman questioned whether the term "adjacent to," as used in New Rule I and defined in ARM 42.12.106(1)(c), could mean that a building across the street would be subject to the signage prohibition.

Mr. Smith and Mr. Simshaw stated that they thought the statutory language was clear without additional rule guidance and that it allowed manufacturer advertising on an adjacent building as long as the retailer did not cause it to be placed there. They also requested that existing retailers in violation of the statute not be grandfathered in until committing a triggering event for a suitability review.

Mr. Hoffman requested that the department not extend the statutory beer advertising limitations to wineries and distilleries. He also stated that there was an

apparent conflict between New Rule I(2)(l) and New Rule V(2)(k) because New Rule I prohibits certain signs and New Rule V requires manufacturers to have signs.

RESPONSE 11: The prohibition of signs, posters, or advertisements displayed on the exterior portion of the premises that identify an alcoholic beverage manufacturer, importer, wholesaler, or distributor in New Rule I(2)(l), New Rule II(2)(k), and New Rule III(2)(l), does not extend to the interior portion of the premises. A licensee is not prohibited from having these forms of marketing inside the premises facing outward through a window.

The beer advertising limitation applies to any retail owner, regardless of the ownership percentage. In Mr. Silverman's hypothetical situation, the retailer would be required to remove the painted sign before final approval is granted by the department.

The department has amended New Rules I, II, and III to remove the advertising prohibition to other alcoholic beverage types. As amended, the rules will only prohibit beer advertisements as per 16-3-244, MCA. The beer advertising limitations in 16-3-244, MCA, prohibit the retail alcoholic beverage licensee from displaying the marketing material on the exterior portion of the premises.

Because a retail alcoholic beverage licensee cannot control the activities that occur on property not owned by the licensee, the department is clarifying that adjacent property is only affected when it is owned by the licensee.

New Rule I(2)(l) and New Rule V(2)(k) are not in conflict because each rule is specific to a different alcoholic beverage license type. The prohibition of exterior signs only applies to retailers. Therefore, the prohibition exists only in New Rules I, II, and III. The prohibition does not exist in New Rule IV or V, as these rules are specific to distributors, wholesalers, and manufacturers.

COMMENT 12: Mr. Smith and Mr. Simshaw requested adding a condition for operating which would prohibit a licensee from utilizing marketing that advertises itself as a type of licensee that it is not.

RESPONSE 12: Although the department will consider the inclusion of such false advertising claims in future rulemaking, such an amendment cannot occur at this stage of the current rulemaking process as it would be implementing new content that the public did not have an opportunity to consider and comment on.

COMMENT 13: Mr. Cartwright, Mr. Hibbard, Mr. Iverson, Mr. Lawlor, Mr. Lee, Mr. Peterson, Mr. Pigman, Mr. Rasile, Ms. Roberts, and Mr. Silverman all spoke in opposition to the regulations pertaining to on-premises licenses with off-premises sales areas regarding self-service, reach-in coolers, open shelving, separation barriers, and additional cash registers, as proposed in New Rules I and V; the definition of "off-premises sales area" in ARM 42.12.106; and the 95 percent sales requirement in ARM 42.12.134 and 42.12.136. They maintain the regulations are unsupported by statute, engraft new requirements not envisioned by the legislature, cause financial and other hardships for businesses for renovations and additional staffing, and yield little public benefit.

RESPONSE 13: The department has amended New Rules I and V to remove the requirement that the licensee have a separation barrier between the on-premises consumption area and the off-premises sales area. This includes removing the definitions of separation barrier and on-premises sales area in ARM 42.12.106 and ARM 42.13.111. Additionally, the requirement to have a cash register or other equipment for conducting sales transactions and the 95 percent sales requirement is being removed from ARM 42.13.1102 and ARM 42.13.1104.

The department has further amended the definition of "business directly related to the on-premises consumption of alcoholic beverages," in ARM 42.12.106, to include grocery stores as a type of business that is not directly related to the on-premises consumption of alcoholic beverages.

The original intent of the 95 percent sales requirement was to ensure on-premises licensees were not extending the operations of the business into avenues in which off-premises licenses are more suitable. Prohibiting an on-premises consumption license from operating in conjunction with a grocery store serves the same purpose as the 95 percent sale requirement without putting any additional burden on licensees to implement an off-premises sales area.

COMMENT 14: Mr. Peterson asked if the department is removing the requirement that there be stools or seats at the bar, because New Rule I(2)(n) only references the requirement to include at least one stationary drink preparation area. If this is the case, Mr. Peterson supports the change because it will eliminate the need for licensees to incur the expense of putting unutilized seats at a bar.

RESPONSE 14: Mr. Peterson is correct that there is no longer language in the suitability requirements requiring seats to be located at the drink preparation area. However, as provided in New Rule I(2)(o), licensees are still required to have at least twelve seats independent of any seats at gambling machines.

COMMENT 15: Mr. Silverman asked how New Rule I(2)(p), which requires interior access to any interior portion of the premises, will affect historic buildings or licensees that have already received floor plan approvals.

RESPONSE 15: To meet suitability requirements, a premises must be located in one building or a specific portion of one building. By not having interior access to all interior portions of the premises, the licensee is operating out of multiple portions of a building, which is prohibited. Licensees must come into compliance with this provision when requesting an alteration or transfer in ownership requiring the vetting of a new party.

COMMENT 16: Mr. Iverson, Mr. Peterson, and Mr. Pigman asked the department to allow the storage of alcoholic beverages in areas other than the interior portion of the premises, as proposed in New Rule I(2)(q), New Rule III(2)(o), and the definition of "storage area" in ARM 42.12.106(42). The parties contend that interior storage is unnecessary so long as the department knows where the product is stored and can inspect and verify security of that area. They contend that the

department should only require that the storage area be included on the floor plan and be on property owned or leased by the licensee.

RESPONSE 16: The department declines to amend New Rule I, New Rule III, or the definition of "storage area," in ARM 42.12.106, to allow alcoholic beverages to be stored in other areas than the interior portion of the premises.

A retail licensee's premises is required to be located in one building or a specific portion of one building. Storing alcoholic beverages in an additional building would involve the licensee operating in more than one location.

COMMENT 17: Mr. Cartwright recommended the department adopt a rule requiring employees to open all bottles, containers, etc., to place the responsibility of monitoring over-consumption on the licensee and their employees.

Mr. Iverson voiced opposition to Mr. Cartwright's proposal, asserting that it will not work well in all situations, including sporting events, festivals, concerts, or on a golf course where the patron is participating or seated at a great distance from the service bar and use of a sealed container would make sense.

RESPONSE 17: Although the department will consider the inclusion of such language in future rulemaking, such an amendment cannot occur at this stage of this current rulemaking process as it would be implementing new content that the public did not have an opportunity to consider and comment on.

COMMENT 18: Regarding New Rule II(2)(i), governing suitability for restaurant beer and wine licenses, Mr. Hoffman asked who determines the "general layout and atmosphere" of a premises in terms of its suitability to possess a restaurant beer and wine license.

RESPONSE 18: As part of suitability determination, the department determines whether the general layout and atmosphere clearly demonstrates that an alcoholic beverage license is being operated within the premises.

COMMENT 19: Mr. Peterson commented that New Rule II(2)(n) eliminates the previous requirement that a restaurant beer and wine (RBW) licensee not allow patrons to consume beer or wine at a bar, which may open up the possibility for a licensee to allow patrons to consume beer or wine without the sale of food prepared on the premises to that patron. Mr. Iverson stated a similar concern and opposition to the proposed amendment of ARM 42.12.135, which allows patrons to sit at the service bar, because it could create an environment that is more reflective of an on-premises consumption beer or all-beverage license rather than an RBW license.

RESPONSE 19: Although the department is allowing patrons to sit at the service bar, patrons are still required to purchase food to be served alcoholic beverages pursuant to 16-4-420, MCA. This condition clearly differentiates the license from other on-premises consumption licenses and reduces the perception of the atmosphere being more reflective of other on-premises consumption licenses.

COMMENT 20: Mr. Iverson opposes the requirement in New Rule III(2)(e) for floor-to-ceiling walls to separate the off-premises business because the requirement will pose significant problems for current licensees, does nothing to protect the public's health, welfare, and safety, and fails to allow for any requirements that local building, health, and fire departments may place on the premises.

RESPONSE 20: The department has amended New Rule III(2)(e) to require a permanent floor-to-ceiling wall only when an off-premises establishment shares a building with another alcoholic beverage licensee. This amendment will allow the off-premises licensee more flexibility when sharing a building with a non-licensed entity. A permanent floor-to-ceiling wall is required when sharing a portion of a building with another alcoholic beverage licensee to ensure there is a clear and separate designation between licensed premises. This amendment was also made to New Rules IV and V, specific to wholesalers, distributors, and manufacturers.

New Rules I and II, which are specific to on-premises consumption retailers, were not further amended. Suitability requirements in 16-3-311, MCA, specifically state that a permanent wall must separate on-premises consumption retailers from all other businesses located within the same building.

COMMENT 21: Ms. Shannon commented that New Rule IV(2)(f), which specifies that "premises are located in one building or a specific portion of one building," is contradicted by (3), which states that the "premises may include more than one building for storage purposes only if the property on which buildings are located is contiguous."

RESPONSE 21: These two sections of New Rule IV are not contradictory. Section (2)(f) requires beer wholesaler and table wine distributors to be located in one building or a portion of a building. Section (3) provides for an exception to this general requirement, in that licensees can seek approval to use separate product storage areas if their property meets certain qualifications.

COMMENT 22: Regarding floor plans in New Rule IV(2)(g), Ms. Shannon commented that, while 16-3-234, MCA, does not allow beer and wine distributors to consume alcohol on their premises, some distributors do have department-approved floor plans that include adjacent, separate, secure, access-controlled areas that are not part of their premises, where alcohol may be consumed for manufacturer-distributor education, training, tastings, private functions, etc., and wants the department to confirm that this new rule language does not preclude distributors from continuing to do this.

Ms. Shannon requested similar assurance about the amended language in ARM 42.12.138(1)(g), to ensure that separate areas in beer and wine distribution warehouses for sampling and education of sales staff are still allowed.

RESPONSE 22: The suitability requirements in New Rule IV, and the conditions for operating a beer wholesaler and table wine distributor license in newly numbered ARM 42.13.1202, apply to the floor plan that is on file and approved by the department. Those areas that are not on the approved floor plan are not bound

by the suitability and operational condition requirements in New Rule IV and ARM 42.13.1202.

COMMENT 23: Mr. Silverman asked if the department would be able to more clearly define the meaning of "drink preparation area," which is used in New Rule V and defined in ARM 42.12.106. He added that he understands that more clearly defining the term to address off-premises versus on-premises consumption might be difficult to do. Mr. Smith and Mr. Simshaw asked for clarification of this definition as it applies to New Rule V(6)(d), because they want to continue filling growlers and bottles in the drink preparation area of their business for off-premises consumption.

RESPONSE 23: New Rule V requires a manufacturer to have a drink preparation area in the sample room, and the department believes the definition provided for a drink preparation area in ARM 42.12.106 is sufficient for the application of this new rule. As Mr. Silverman acknowledged, it would be difficult to define the term any further. As for growler fills, the definition of drink preparation area does not prohibit a brewer from filling growlers and bottles behind the bar for off-premises consumption.

COMMENT 24: Regarding the language in New Rule V(6)(d), allowing multiple drink preparation areas for wineries, distilleries, and breweries, Mr. Iverson commented that multiple drink preparation areas add complication to compliance with the statutory service limits placed on manufacturers and, therefore, he requests that the department add language to ensure that each of the manufacturer's systems will adequately ensure compliance with those limits, such as "the manufacturer must have adequate controls in place to ensure that patrons are not served more than the statutorily allowed number of ounces per day."

RESPONSE 24: Although the department will consider the inclusion of such language in future rulemaking, such an amendment cannot occur at this stage of this current rulemaking process as it would be implementing new content that the public did not have an opportunity to consider and comment on.

COMMENT 25: Mr. Leow requested elimination of the proposed language in New Rule V(6)(e) and (7), and the definitions in ARM 42.12.106(26) and 42.13.111(19) and (20), regarding off-premises sales areas and original packaging. He commented that, while it is probably not intended to require a brewery to have a separate off-premises sales area for growler fills and other to-go beer, ambiguity exists in these proposed amendments that could cause problems in the future, and he requested that the current practice of sample room growler fills and sales of other to-go beer remain in place and continue to be permitted.

RESPONSE 25: The department is not implementing a separate off-premises sales area for growler fills. Growler fills are allowed to continue to occur from the drink preparation area. The department has further amended New Rule V to remove the requirement that a separate off-premises sales area be located on the

premises. This additional amendment should eliminate the ambiguity Mr. Leow mentions.

COMMENT 26: Mr. Harris commented that the regulations for a non-contiguous warehouse should accurately reflect federal regulations and requested that the language in New Rule V(5) allow a distillery or warehouse to perform the same tasks permitted by the TTB under 27 C.F.R., section 19.

RESPONSE 26: The ability for a distiller to operate a non-contiguous warehouse for storage purposes only is currently allowed in rule. Performing any further activities would require the distiller to obtain an additional license under Montana's laws and regulations.

COMMENT 27: Mr. Leow expressed concern that, based upon the language in New Rule V(9), the department could change its suitability determination and require a licensee to make costly changes. Mr. Silverman stated that licensees are concerned that the department will revoke their licenses because they are no longer in compliance with the proposed new regulations.

RESPONSE 27: New Rule V(9) requires the licensee to remain in compliance with the suitability requirements in place when the premises were last inspected. Licensees are subject to administrative action when their premises are not in compliance with those suitability requirements. The licensee is responsible for complying with any new suitability requirements when the licensee proposes to change locations, alter an existing premises, or change ownership, requiring the vetting of a new party. This is the same process that exists in current rules.

COMMENT 28: Mr. Silverman stated his interpretation is that a patio/deck will no longer be a part of the licensed premises but will require permits, and asked if there is an application for the permits.

RESPONSE 28: A patio/deck, when approved by the department, is part of the licensed premises. This is the case in current rule and in the proposed rule language. New Rule I(2)(e) allows the interior portion of the premises to be extended by a patio/deck. New Rule I(2)(m), requires the licensee to accurately identify all areas of the premises, including the patio/deck. Also, New Rule I(3) states that the premises may have a patio/deck if certain requirements are met.

The department's use of the word "permitted" in the definition of patio/deck referred to services that are allowed, not an actual permit. To eliminate any confusion, the department has further amended ARM 42.12.106(29) and ARM 42.13.111(21) to replace the word "permitted" with "allowed."

COMMENT 29: Mr. Leow said he takes issue with the wording of the proposed definition of "business directly related to the on-premises consumption of alcoholic beverages," in ARM 42.12.106(7), and asked what could be more directly associated with on-premises consumption than a manufacturing facility that is producing the beverages that are being consumed there.

RESPONSE 29: New Rule I requires an on-premises consumption beer licensee's or all-beverage licensee's premises to be solely dedicated to the on-premises consumption of alcoholic beverages or to be within a business directly related to the on-premises consumption of alcoholic beverages. As Mr. Leow mentions, the definition of "business directly related to the on-premises consumption of alcoholic beverages" does not include an alcoholic beverage manufacturer.

As provided in (2)(c), of the same rule, only a single alcoholic beverage license of any kind can be operated at the premises. In other words, the stacking of multiple alcoholic beverage licenses on the premises is prohibited.

Therefore, the premises of an on-premises consumption beer or an all-beverage licensee cannot be operated in conjunction with an alcoholic beverage manufacturer. Each license is bound by its own suitability requirements and must be operated independent of each other.

COMMENT 30: Regarding the proposed definition of "perimeter barrier" in ARM 42.12.106 and 42.13.111, Mr. Lawlor asked the department to provide its rationale for the default limitation to a single entrance.

RESPONSE 30: The proposed amendment to the definition of "perimeter barrier" requires a single entrance. The definition further states that additional entrances may be allowed upon department approval. Only one entrance on the patio/deck is necessary. Additional entrances may be added. Therefore, the department's proposed language best meets the needs of all licensees.

COMMENT 31: Regarding the proposed definition of "perimeter barrier" in ARM 42.12.106 and 42.13.111, Mr. Lawlor asked for a description of the process by which the department will determine the allowance of such things as additional entrances, use of lattice, barriers under three feet high, and water barriers.

RESPONSE 31: The determination of additional entrances, building material, barrier height, and whether water barriers may be considered will vary from one location to another depending on circumstances. The department will grant variances to these when an alternative barrier accomplishes the same purposes of clear markings for patrons, licensees, licensees' employees, investigators, local law enforcement, or other interested parties, where consumption of alcohol is allowed and impedes access to the service areas by underage persons or others who may attempt to enter the premises without the licensee's knowledge.

COMMENT 32: Regarding the proposed definition of "perimeter barrier" in ARM 42.12.106 and 42.13.111, Mr. Lawlor asked if the department would be willing to review and approve a prospective license applicant's floor plan drawing, including patio and perimeter barrier, early in the planning stages before the full license application is submitted. This information would help determine the viability of a business plan. Early review and assistance from the department is appreciated.

RESPONSE 32: The department is available for guidance; however, granting approval of an applicant's floor plan cannot occur until all required documents have been submitted and reviewed. This includes an investigation of the premises by the Montana Department of Justice.

COMMENT 33: Mr. Lawlor, Mr. Lee, and Mr. Peterson all commented on the proposed definition of "permanent floor-to-ceiling wall" in ARM 42.12.106(31), specifically the restriction against the use of lattice or wrought iron materials. They contend that this requirement engrafts additional requirements not envisioned by the legislature and that it is onerous and overly restrictive. The construction materials used are not relevant to temperance, orderly markets, and tax collection, as per 16-1-101(3), MCA. They request allowing a separation barrier to be constructed in a manner that does not form a solid physical barrier.

RESPONSE 33: When an on-premises consumption retail licensee operates out of a portion of a building, section 16-3-311, MCA, requires the premises to be separated by a permanent wall from any other portion of the building. The building material used in constructing the permanent wall must be sufficient to ensure the licensee can maintain adequate control of the premises and ensure any unauthorized entrance is prohibited. The building material specified by the department will ensure a solid structure is built to meet its intended purpose.

COMMENT 34: Mr. Silverman asked why an exception for the use of building materials, such as lattice and metal, would be allowed for a separation barrier as defined in ARM 42.21.106(37), but not for a wall as defined in (31).

RESPONSE 34: Different building materials are specified for floor-to-ceiling walls and separation barriers in these two different sections of the rule, because they serve different purposes. Floor-to-ceiling walls separate the licensed premises from another business, whereas, the separation barrier would be an internal structure within the licensed premises. Floor-to-ceiling walls ensure the licensee has adequate control of the premises to prevent unauthorized access by another business. Separation barriers were proposed to ensure there is a clear distinction between the on-premises sales area and the off-premises sales area of the licensee's business and to ensure the licensee has control over the consumption of alcoholic beverages on the premises to prevent self-service, overconsumption, or consumption by underage persons.

COMMENT 35: Mr. Townsley expressed concern about the definition of permanent floor-to-ceiling wall in ARM 42.12.106 because, if he made an alteration, it may affect him financially and impact customer expectation about the atmosphere.

RESPONSE 35: The requirement of a permanent wall between an on-premises consumption retailer and another business is a statutory requirement pursuant to 16-3-311, MCA. Both the department and licensees must follow the laws of the state and cannot waive this requirement.

COMMENT 36: Mr. Leow asked that the perimeter barrier definition in ARM 42.12.106 be amended to allow for fire and building code compliance.

RESPONSE 36: The health and safety of the public is of the utmost importance to the department. All portions of the premises must be compliant with building, health, and fire codes. The department will approve or disapprove a license in conjunction with compliance with these codes. Therefore, no additional language is necessary.

COMMENT 37: Mr. Smith and Mr. Simshaw commented that the proposed definition of "sample room" in ARM 42.12.106(35) appears to specify that the sample room is the only place on the premises where consumption of alcohol is allowed. They asked the department to add language clarifying that on-premises consumption of alcohol can continue in the manufacturing area under the guidance of a licensee's employee on tours of the manufacturing process.

Mr. Harris, Mr. Hibbard, and Mr. Rasile all requested language in ARM 42.13.802(4)(b), to allow microdistilleries to sample, test, and consume within their storage and manufacturing areas.

RESPONSE 37: The department has further amended ARM 42.13.405, 42.13.601, and 42.13.802 to provide for the consumption of alcoholic beverages in the manufacturing area or storage area as allowed by federal law.

COMMENT 38: Mr. Iverson asked that the definition of "self-service of alcoholic beverages," in ARM 42.12.106(36), be amended to clarify that self-service for on-premises consumption is not allowed. Mr. Peterson also recommended amending the definition to include consumption as part of self-service.

RESPONSE 38: The department has further amended the definition of "self-service of alcoholic beverages" to reference on-premises consumption.

COMMENT 39: Mr. Harris requested the addition of the phrase "wines and spirits" to the end of the sentence in ARM 42.13.111(11), to reflect legal allowances for non-beverage flavoring and alcoholic beverages other than strictly beer, as provided by federal law.

RESPONSE 39: The term "flavors and nonbeverage ingredients containing alcohol," as defined in ARM 42.13.111, is used in ARM 42.13.603, which pertains only to the manufacturing of beer. Because ARM 42.13.603 does not speak to the manufacturing of wine or spirits, the department declines to amend this definition.

COMMENT 40: Mr. Iverson and Mr. Peterson expressed concern with the proposed elimination of language in ARM 42.12.122(5), addressing situations that do not require suitability inspections such as the death or divorce of a co-owner.

RESPONSE 40: This language in ARM 42.12.122(5), to which Mr. Iverson and Mr. Peterson refer, currently does not require the licensee to come into

compliance with suitability requirements when ownership changes occur due to the death of a co-owner or a divorce among co-owners.

The department is not eliminating this exception in the rules. If the co-owner assuming more ownership interest due to the death or divorce of another co-owner is an approved owner that was vetted pursuant to 16-4-401, MCA, then the department does not require a suitability inspection. However, if the co-owner assuming the additional ownership interest was not vetted pursuant to 16-4-401, MCA, then the department would require a suitability inspection. This is consistent with current practice.

COMMENT 41: Mr. Lawlor noted that the existing language in ARM 42.12.133(4) contains an apparent typographical error from a prior rule revision. Therefore, the reference cited in this section, which should have been to ARM 42.12.122, needs to be changed to reference New Rule I.

RESPONSE 41: The department agrees and has further amended the rule to reference ARM 42.12.145, the number being assigned to New Rule I.

COMMENT 42: Mr. Cartwright said the department failed to cite the relevant statute to prohibit the on-premises consumption of alcoholic beverages not sold or provided at the premises, as proposed in ARM 42.12.134(1)(h), 42.12.135(1)(k), and 42.12.136(1)(h). He recommends the department strike these references and instead require all businesses covered by these rules to charge a corkage fee for alcohol brought in by the customer.

RESPONSE 42: Licensees are prohibited from allowing alcoholic beverages to be consumed on the premises that were not purchased at the premises. Section 16-6-303, MCA, is clear that liquor may not be present on a licensee's premises for any purpose whatsoever unless the licensee purchased it from an agency liquor store. Additionally, 16-3-301, MCA, which was added as a citation in the implementing section for these three rules in the proposal notice, makes it unlawful for a licensed retailer to have beer or wine on its premises except beer and wine purchased or acquired by the licensee from a licensed brewery, winery, or wholesaler. The citation is correct. The department declines to amend this rule to allow patrons the ability to bring alcohol onto a licensed premises.

COMMENT 43: Ms. Fisher, Mr. Iverson, Mr. Leow, and Mr. Silverman all requested the removal of the proposed language pertaining to a licensee preventing alcohol consumption on land or property in which a licensee has possessory interest that is not part of the premises, as stated in ARM 42.13.405, 42.13.601, 42.13.802, 42.13.1102, 42.13.1104, and 42.13.1105.

RESPONSE 43: The department has further amended these six rules to remove the requirement that the licensee prevent the consumption of alcoholic beverages on such unlicensed areas.

COMMENT 44: Regarding the conditions for operating a restaurant beer and wine (RBW) license, in ARM 42.12.135, Mr. Iverson asked the department to require licensees to provide a "meaningful food purchase" with the sale of beer or wine, something other than snack items such as chips, cookies, and pretzels. He contends that while the legislative intent of the RBW license was to allow restaurateurs to provide alcohol with sit-down lunch or dinners, there are some RBW licenses being used outside of this intent and operating more like taverns. Mr. Peterson asked the department to require these licensees to sell only food prepared on the premises to ensure a RBW licensee does not sell prepackaged food.

RESPONSE 44: Although the department will consider the inclusion of such language in future rulemaking, such an amendment cannot occur at this stage of this current rulemaking process as it would be implementing new content that the public did not have an opportunity to consider and comment on.

COMMENT 45: Mr. Lawlor opposes the exclusion of non-alcoholic beverages from the 65 percent food requirement in the proposed amendment of ARM 42.12.135(1)(f), because it would require changes in business operations and bookkeeping for some businesses that would need to track three separate categories. He further stated that the department's rationale that food is not commonly understood to include liquids is debatable given the statutory definition of food in 50-50-102(9), MCA, which provides that "food means an edible substance, beverage, or ingredient used, intended for use, or for sale for human consumption."

RESPONSE 45: The department declines to allow the sale of non-alcoholic beverages to count towards the 65 percent food requirement. A patron is required to order food to be served alcoholic beverages pursuant to 16-4-420, MCA. If non-alcoholic beverages were considered food, then a patron at a licensed restaurant beer and wine establishment could order a soda (to meet the food requirement) and a glass of beer or wine. This is not the intent of the statute.

COMMENT 46: Ms. Shannon requested clarification on the requirement for an accommodation agreement in ARM 42.12.138(1)(b)(iv).

RESPONSE 46: After further consideration, the department has determined the accommodation agreement requirement is unnecessary and inapplicable and has further amended ARM 42.12.138 to remove this provision.

COMMENT 47: Mr. Silverman asked why the department is placing a limitation on the earnest money allowed for in ARM 42.12.209, why five percent was chosen, and whether this applies to agency liquor stores.

RESPONSE 47: The existing rule language prevented any funds or other consideration for the liquor license to be exchanged between the seller and the buyer. Understanding that business transactions typically allow earnest money to be exchanged, the department proposed allowing five percent as a reasonable amount

to help ensure buyers follow through with their agreement to a purchase transaction. Additionally, rules in ARM Title 42, chapter 12, do not apply to agency liquor stores.

COMMENT 48: Mr. Cartwright recommends in ARM 42.12.401(4) that wines between 16 and 24 percent alcohol by volume be labelled as "strong wine" or "elevated ABV wines" rather than "fortified wine," because the term "fortified wine" has a specific meaning in the trade, referring to wines which have had distilled spirits added to them.

RESPONSE 48: The department is using the term fortified wine as a general term to describe all wine with more than 16 percent but less than 24 percent alcohol by volume. Because the department is not specifying how the wine is to be produced, the department declines to amend the definition.

COMMENT 49: Ms. Shannon requested additional clarification of the meaning of "self-service of alcoholic beverages" in ARM 42.13.111(32).

RESPONSE 49: The term "self-service of alcoholic beverages" means allowing persons other than the licensee or its employees to have access to alcoholic beverages prior to the licensee or its employees providing the alcoholic beverages to the person. Self-service of alcoholic beverages occurs when consumers or patrons of an establishment obtain or can access alcoholic beverages without the licensee or the licensee's employees providing it to them.

COMMENT 50: Mr. Leow and Mr. Silverman suggested that wherever "alternating proprietor" is mentioned, such as in New Rule V(2)(c), ARM 42.13.405(1)(d), 42.13.601(1)(c), and 42.13.802(1)(d), that the department also add "alternating premises." Mr. Silverman further commented that the department's proposed rule language should reflect the TTB's allowance for alternating manufacturing to occur within a single facility. Ms. Shannon requested clarification of the meaning of "alternating proprietor arrangement."

RESPONSE 50: Alternating proprietor arrangements are allowed pursuant to ARM 42.13.1002. Once approved by the department, these arrangements allow a manufacturer to utilize the licensed premises and equipment of another manufacturer. The department declines to further amend these rules, because ARM 42.13.1002 currently allows the premises to be alternated for these types of arrangements.

In order to obtain licensure, each manufacturer is required to have its own premises. Multiple manufacturers operating out of a single facility under an alternating proprietor arrangement is not allowable, because multiple licenses would have the same location as the primary premises.

COMMENT 51: As to product returns, Ms. Blazer and Ms. Shannon expressed concern that a retailer could claim that a product is discontinued, necessitating that the distributor retrieve the product. If ARM 42.13.305 is repealed, then ARM 42.12.138 (newly numbered 42.13.1202) should be amended with better

definitions and to specify what is allowed on the exchange or return of products. Specifically, they request clarification of what "discontinued" and "acquisition of other products" mean. Ms. Blazer also asked if the detailed outline of consignment sales language in the rule being repealed is really being replaced by the simple statement in ARM 42.12.138, that "a beer wholesaler and/or table wine distributor shall only sell product under a bona fide sale. It shall not sell product on consignment, under conditional sale, with the privilege of return, or in a sale involving acquisition of other products," with no further guidance, and stated that it is a major change not addressed in the statement of reasonable necessity provided for this rulemaking. Ms. Shannon requested clarification of what "the sale involving the acquisition of other products" in this same section means and who determines what product is discontinued in (3). Is it the retailer, the manufacturer, or the distributor?

RESPONSE 51: Beer wholesalers and table wine distributors are bound by the laws and regulations set forth in 27 C.F.R., section 11, subpart C, as they apply to sales arrangements between an industry member and retailer. The department reiterates the allowance or prohibition of these sales arrangements in newly numbered ARM 42.13.1202(2) and (3).

Title 27 C.F.R., section 11.23, refers to the "acquisition of other products" as exchanging one product for another product. This title also refers to the status of a product being "discontinued," as determined by the producer or importer in 27 C.F.R., section 11.38.

Ms. Blazer is correct that the department is repealing ARM 42.13.305 and replacing the contents in ARM 42.13.1202. ARM 42.13.305 provided a list of examples of when a product may or may not be returned to a beer wholesaler or table wine distributor. The inclusion of these examples in ARM 42.13.1202(2) and (3) provides retailers and distributors with the same guidance as the repealed rule.

COMMENT 52: Mr. Smith and Mr. Simshaw requested that ARM 42.13.601(1)(c) be amended to apply only to alcohol stored in the sample room because under the proposed rule the storage of alcohol products, such as commercially available beers being professionally sampled or distilled spirits used in yeast culturing and infusion, in the brewery manufacturing area would be prohibited.

RESPONSE 52: A licensee is allowed to have on its premises only the alcoholic beverages for which the premises are licensed or those alcoholic beverages authorized under an approved alternating proprietor arrangement. Other beers could be on the premises for research purposes because the premises is licensed as a brewery; however, a brewery would be prohibited from selling or providing those beers on its premises. Additionally, distilled spirits would not be prohibited if the spirits are used in the beer making process. However, storing distilled spirits on the premises for any other purpose would be prohibited.

COMMENT 53: Mr. Lawlor commented that the reason provided by the department for ARM 42.13.601(1)(d), to "prohibit such things as a manufacturer delivering product to a retailer by such unapproved means as pipes or hoses," requires further explanation. He stated that 16-3-214, MCA, permits a brewery to

deliver beer to a retailer using the brewery's own equipment, and does not exclude pipes or hoses.

RESPONSE 53: For federal tax purposes, beer may be removed from the brewery for consumption or sale only in barrels, kegs, bottles, or similar containers pursuant to 27 C.F.R., section 25.155.

The department allows a brewery to use pipes and hoses to transfer beer to its sample room because the sample room is part of the brewery. However, beer sales to wholesalers, retailers, and consumers outside the sample room requires the use of original packaging.

COMMENT 54: Mr. Harris noted the omission of the statute that allows for direct delivery of product to state agency liquor stores in ARM 42.13.802. He proposes the language in (1)(e), which reads "sell and deliver its product in Montana only in original packaging and to the department" be amended to add "and to the department or agency liquor stores as allowed by code." He stated that the language should not inhibit the ability to sell out of state or export out of the country.

RESPONSE 54: The ability to deliver product directly to an agency liquor store is solely granted to distilleries that produce less than 25,000 gallons of product annually. ARM 42.13.802(1) lists operational conditions that apply to all distilleries regardless of annual production. Section (5) lists additional operational conditions that apply to distilleries that produce less than 25,000 gallons of product annually (microdistilleries). Subsection (5)(f) specifically allows the microdistillery to deliver alcoholic beverages to an agency liquor store.

The proposed language does not inhibit a distiller from selling its products out of state or out of the country. The operational condition in (1)(e) only applies to sales within Montana. The department declines to further amend this section.

COMMENT 55: Mr. Iverson requested that ARM 42.13.802(3)(g)(i) be amended to read "for purposes of this rule, alcohol previously distilled at another distillery does not count towards the 90 percent requirement," to ensure that consumers are receiving a product closely aligned with their expectations when entering a microdistillery sample room and that microdistilleries operate within the expectations set with the passage of the microdistillery sample room law.

RESPONSE 55: Although the department will consider the inclusion of such language in future rulemaking, such an amendment cannot occur at this stage of this current rulemaking process as it would be implementing new content that the public did not have an opportunity to consider and comment on.

COMMENT 56: Mr. Iverson requested that ARM 42.13.802(3)(g)(ii) be amended to read "all alcohol provided at the microdistillery for on-premises and off-premises consumption contain at least 50 percent alcohol that was distilled at the microdistillery," because the proposed rule, as written, is meaningless.

RESPONSE 56: Although the department will consider the inclusion of such language in future rulemaking, such an amendment cannot occur at this stage of this current rulemaking process as it would be implementing new content that the public did not have an opportunity to consider and comment on.

COMMENT 57: Mr. Lee stated that ARM 42.13.802(4)(c), which adds a requirement preventing alcohol consumption between 8 p.m. and 10 a.m., is unnecessarily restrictive because 16-4-312(3), MCA, does not require a specific time by which the beverage must be consumed. Mr. Lee further stated that regulating how quickly a lawfully obtained beverage must be consumed does not encourage responsible consumer behavior.

RESPONSE 57: The statute which Mr. Lee mentions specifically states that the consumption of liquor on the premises is only allowed between the hours of 10 a.m. and 8 p.m. The department declines to amend this rule because the statute is clear and unambiguous.

COMMENT 58: Mr. Iverson requested that the department add language following ARM 42.13.802(4)(d) to make it clear in the rule that free-pouring from a liquor bottle is not allowed in a business with a volume distribution limit.

RESPONSE 58: Although the department will consider the inclusion of such language in future rulemaking, such an amendment cannot occur at this stage of this current rulemaking process as it would be implementing new content that the public did not have an opportunity to consider and comment on.

/s/ Laurie Logan
Laurie Logan
Rule Reviewer

/s/ Mike Kadas
Mike Kadas
Director of Revenue

Certified to the Secretary of State April 17, 2017.