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

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| In the matter of the adoption of NEW RULES I through V and the amendment of ARM 37.106.138 pertaining to financial assistance and community benefit provided by certain types of hospitals and related certificate of need requirements | ) ) ) ) ) ) ) | NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT |

TO: All Concerned Persons

1. On June 18, 2024, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed adoption and amendment of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: https://mt-gov.zoom.us/j/81061425192?pwd=K01sWUJraXB6REtiUWNTcXk2TGVQZz09, meeting ID: 810 6142 5192, and password: 143230; or

(b) Dial by telephone: +1 646 558 8656, meeting ID: 810 6142 5192, and password: 143230. Find your local number: https://mt-gov.zoom.us/u/kcCp3U3yXj.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on June 14, 2024, to advise us of the nature of the accommodation that you need. Please contact Bailey Yuhas, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail hhsadminrules@mt.gov.

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

NEW RULE I PURPOSE (1) Each hospital, critical access hospital, or rural emergency hospital that operates as a nonprofit health care facility under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) (referred to in these rules as a nonprofit hospital, critical access hospital, or rural emergency hospital) is expected to provide community benefits and financial assistance by virtue of its nonprofit and tax exempt status.

(2) It is the purpose of this subchapter to clarify and set forth the duties and responsibilities of nonprofit hospitals, critical access hospitals, and rural emergency hospitals with respect to the provision of community benefits and financial assistance in the areas they serve.

(3) Community benefits do not include the cost to the hospital of paying any taxes or governmental assessments.

(4) Financial assistance and other community benefits are reported at cost, not charges.

AUTH: 50-5-106, 50-5-121, MCA
IMP: 50-5-106, 50-5-121, MCA

NEW RULE II DEFINITIONS For the purposes of this subchapter, the following definitions apply:

(1) "Community benefit" means initiatives and activities undertaken by a nonprofit hospital, critical access hospital, or rural emergency hospital to improve health in the communities it serves. These initiatives and activities should not be of the kind considered to be normal for the day-to-day operation of the hospital or as having benefits to the hospital not in line with recommended patient or population health improvement. Community benefits may include providing free or discounted care to uninsured and low-income patients (i.e., financial assistance), activities to promote and improve population health, prevention activities, programs to support children and families, programs to increase access to care, medical research likely to directly benefit the community in which the nonprofit hospital, critical access hospital, or rural emergency hospital is located, education and training for health care professionals, workforce development, and other activities and contributions associated with the initiatives being undertaken to benefit the community in which the nonprofit hospital, critical access hospital, or rural emergency hospital is located and reported on the annual IRS Form 990 Schedule H.

(2) "Financial assistance" means direct financial assistance to patients. It is commonly understood as the unrecovered costs written off by a provider that results from providing care to individuals who are uninsured or who are otherwise unable to pay for the health care services they receive. Financial assistance was formerly known as charity care.

(3) "Net patient revenue (NPR)" means the aggregate money generated from patient services collected from payors, including private insurance, Medicaid, and Medicare. The calculation for NPR is the total patient revenues minus patient discounts.

AUTH: 50-5-106, 50-5-121, MCA
IMP: 50-5-106, 50-5-121, MCA

NEW RULE III COMMUNITY BENEFIT AND FINANCIAL ASSISTANCE REQUIREMENTS (1) The duty of nonprofit hospitals, critical access hospitals, and rural emergency hospitals to provide community benefits and financial assistance is established in 50-5-121, MCA. To satisfy the requirements, a nonprofit hospital, critical access hospital, or rural emergency hospital shall comply with the standards and requirements set forth in this subchapter.

(2) Each nonprofit hospital, critical access hospital, or rural emergency hospital shall:

(a) have in writing a community benefits plan, a community benefits policy; and a financial assistance policy;

(b) adhere to its written community benefit policy and financial assistance policy; and

(c) make its written community benefit and financial assistance policies available to the public, including posting the policies in a prominent location on its website.

(3) With respect to nonprofit hospitals:

(a) the community benefits policy must be consistent with federal standards and the standards established in this subchapter; and

(b) the financial assistance policy must be consistent with federal standards and the standards established in this subchapter, applicable to the area the nonprofit hospital serves.

(4) To establish community benefit and financial assistance standards, the department will do the following:

(a) The department will collect baseline data for a two-year period and utilize existing 2023 data to formulate standards after baseline data is validated/aggregated and a three-year average determined.

(b) The department shall consider the following factors when developing the standards:

(i) hospital size;

(ii) community size and location;

(iii) net patient revenue;

(iv) patient care expenses;

(v) payor mix.

(c) The department may consider other factors when developing the standards, including:

(i) bad debt;

(ii) community health needs assessments; and

(iii) other factors to allow for a level which is reasonable in relation to community needs and the available resources of the hospital.

(d) The department shall consider whether to adopt numerical standards, narrative standards, or a combination of numerical and narrative standards, for community benefit and financial assistance.

(e) Under the standards, the community benefit requirement, including financial assistance, will be set at the beginning of the calendar year.

(5) A nonprofit hospital with operating losses in its fiscal year shall not be required to meet community benefit (including financial assistance) requirements established under the standards for that year.

AUTH: 50-5-106, 50-5-121, MCA
IMP: 50-5-106, 50-5-121, MCA

NEW RULE IV REPORTING REQUIREMENTS (1) Each nonprofit hospital, rural emergency hospital, or critical access hospital shall submit to the department, with the annual hospital financial report required in ARM 37.106.138, the following

documents within 30 days of its filing of the applicable forms with the Internal Revenue Service:

(a) a copy of Form 990 with Schedule H and associated worksheets. When no Schedule H is available, the methods used to determine community benefit and financial assistance spending and those amounts;

(b) a financial assistance policy and community benefit plan for the current calendar year.

(2) The report must include the following information:

(a) contact information for the hospital administrator and person filing the report should the department have any questions; and

(b) the beginning and end date of the reporting period for the nonprofit hospital, critical access hospital, or rural emergency hospital.

(3) The information and documentation required under (1) shall reflect inpatient and outpatient services, as well as any service provided by an urgent care or other facility operated by the nonprofit hospital, critical access hospital, or rural emergency hospital.

AUTH: 50-5-106, 50-5-121, MCA
IMP: 50-5-106, 50-5-121, MCA

NEW RULE V ENFORCEMENT AND PENALTIES FOR NONCOMPLIANCE WITH COMMUNITY BENEFIT AND FINANCIAL ASSISTANCE REQUIREMENTS OR REPORTING REQUIREMENTS (1) When the department establishes community benefit and financial assistance standards, it will also establish the applicable penalties for noncompliance with such standards in the adoption of community benefit and financial assistance policies or for failure to adhere to such policies by nonprofit hospitals.

(2) If a nonprofit critical access hospital or rural emergency hospital fails to adhere to its community benefit policy or financial assistance policy, the department shall provide technical assistance and may require corrective action.

(3) On proof of noncompliance with its reporting requirements, the department shall impose a fine of $1,000 and allow ten working days for the noncompliant nonprofit hospital, critical access hospital, or rural emergency hospital to take corrective action. If still not in compliance, a $5,000 fine will be assessed in the month following discovery of noncompliance and the first of each month still not in compliance.

AUTH: 50-5-106, 50-5-121, MCA
IMP: 50-5-106, 50-5-121, MCA

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

37.106.138 ANNUAL FINANCIAL REPORTS BY HOSPITALS, RURAL EMERGENCY HOSPITALS, AND CRITICAL ACCESS HOSPITALS (1) Every hospital, rural emergency hospital, and critical access hospital shall submit on an annual basis a financial report for its previous fiscal year to the department on a form

provided by the department by the deadline specified on the form. The annual financial report must ~~be signed by~~ include contact information for the hospital administrator and must include the beginning and end date of the facility's reporting period and whichever of the following information is requested on the form:

(a) hospital revenues for both acute and long-term care units, including:

(i) gross revenue from inpatient and outpatient service;

(ii) deductions for contractual adjustments, bad debts, charity, etc.;

(iii) other operating revenue;

(iv) nonoperating revenue (such as government appropriations, mill levies, contributions, grants, etc.);

(b) hospital expenses for both acute and long-term care units, including:

(i) payroll expenses for all categories of personnel;

(ii) nonpayroll expenses, including employee benefits, professional fees, depreciation expense, interest expense, others;

(c) detail of deductions for both acute and long-term care units, including:

(i) bad debts;

(ii) contractual adjustments (specifying Medicare, Medicaid, Blue Cross, or other);

(iii) charity/Hill-Burton (such as the amount and category of charity care/financial assistance provided, the number of individuals receiving financial assistance and average amount per person, which services are provided at no or reduced cost);

(iv) other;

(d) Medicaid and Medicare program revenue for both acute and long-term care units;

(e) unrestricted fund assets, including dollar amounts of:

(i) current cash and short-term investments;

(ii) current receivables and other current assets;

(iii) gross plant and equipment assets; deductions for accumulated depreciation;

(iv) long-term investments;

(v) other;

(f) unrestricted fund liabilities, including dollar amounts of:

(i) current liabilities;

(ii) long-term debts;

(iii) other liabilities;

(iv) unrestricted fund balance;

(g) restricted fund balances, with identification of specific purposes for which funds are reserved, including plant replacement and expansion, and endowment funds;

(h) capital expenditures made during the reporting period, including expenditures, disposals and retirements for land, building and improvements, fixed and moveable equipment, and construction in progress;

(i) whether a permanent change in bed complement or in the number of hospital services offered will result from any capital acquisition projects begun during the reporting period (specify);

(j) whether a certificate of need was received for any projects during the reporting period, and if so, the total capital authorization included in such approvals.

(2) For a hospital, rural emergency hospital, or critical access hospital operating as a nonprofit health care facility, the following are required, consistent with [NEW RULE IV]:

(a) a community benefit plan for the current calendar year;

(b) a financial assistance policy for the current calendar year; and

(c) a copy of Form 990 with Schedule H and associated worksheets.

~~(2)~~(3) Any facility failing to timely report such information to the department may be subject to corrective action.

(a) Any hospital, rural emergency hospital, or critical access hospital operating as a nonprofit health care facility shall be penalized according to [NEW RULE V] for noncompliance with (2) of this rule.

5. STATEMENT OF REASONABLE NECESSITY

Through this rulemaking, the Department of Public Health and Human Services (department) proposes to implement the amendments to 50-5-106 and 50-5-121, MCA, made by HB 45, enacted during the 2023 Legislative Session. (HB 45 also amended 50-5-245, MCA, which adds licensure requirements for specialty hospitals operating as nonprofit health care facilities or proposing a joint venture with such a nonprofit hospital; those amendments will be addressed in a separate rulemaking.)

There have been concerns that nonprofit hospitals, critical access hospitals, and rural emergency hospitals which are tax exempt may not be appropriately providing community benefit and financial assistance/charity care. In a 2020 audit report, the Legislative Audit Division faulted the department and indicated that the department needed to address the lack of reporting on and accountability concerning community benefit and charity care on the part of nonprofit hospitals and critical access hospitals. To address those concerns, HB 45 imposes certain requirements on nonprofit hospitals, critical access hospitals, and rural emergency hospitals on community benefits and financial assistance, and charges the department to issue regulations to implement these requirements. Specifically, HB 45:

- Requires nonprofit hospitals, critical access hospitals, and rural emergency hospitals to adopt written community benefit and financial assistance policies, to adhere to such policies, and to post them, as well as to provide the department with certain information concerning their community benefit and financial assistance plans/policies and activities.
- Requires nonprofit hospitals' community benefit and financial assistance policies to be consistent with federal and department standards.
- Authorizes and requires the department to adopt rules concerning community benefit and financial assistance requirements specific to the hospital and the area(s) it serves, including
    - Definitions of financial assistance and community benefit;
    - Standards for community benefit and financial assistance for nonprofit hospitals; and

- Penalties for noncompliance with the community benefit and financial assistance and reporting requirements.

In this rulemaking, the department proposes definitions of "financial assistance" and "community benefit," as well as certain financial assistance and community benefit requirements and reporting. Because it lacks the data necessary to establish financial assistance and community benefit standards and requirements specific to nonprofit hospitals and the area(s) they serve, the department proposes a process by which it will gather such data and adopt such standards and requirements. Finally, the department proposes penalties for noncompliance with the requirements established in this rulemaking, while proposing to adopt penalties for nonprofit hospital noncompliance with future standards at the time that it adopts those standards. The department anticipates that, as it analyzes the data and establishes standards, it will be able to provide more definitive guidance to nonprofit hospitals, critical access hospitals, and rural emergency hospitals.

The department also proposes certain revisions to its Certificate of Need (CON) rules to further implement HB 45.

NEW RULE I

The department proposes NEW RULE I to establish the purpose of these proposed rules, which the department anticipates being codified as a new subchapter in ARM Title 37, chapter 106. The department proposes to note the obligation of nonprofit hospitals, critical access hospitals, and rural emergency hospitals to provide community benefits and financial assistance, as well as to provide that community benefits do not include the cost of paying any taxes or governmental assessments and are reported at cost, not charges. These provisions are consistent with the Internal Revenue Service's (IRS) requirements and guidance on the provision of community benefits and financial assistance by nonprofit hospitals that are exempt from federal taxes under section 501(c)(3) of the Internal Revenue Code.

NEW RULE II

In NEW RULE II, the department proposes certain definitions, including:

Community Benefit: The department proposes to define "community benefit" as initiatives and activities undertaken by a nonprofit hospital, critical access hospital, or rural emergency hospital, to improve health in the communities it serves. This definition is based on the IRS's definition of "community benefit," as well as the definitions used by other states with community benefits laws, and guidance from sources including Congressional Research Service reports. Consistent with these sources, the department proposes to exclude from "community benefit" activities that are normal for the day-to-day operation of the hospital or as having benefits to the hospital not in line with recommended patient or population health improvement. The department proposes to include in the definition examples of the types of activities and initiatives that constitute community benefits. The department is considering whether to include the IRS's reportable categories in the definition, and asks for comment on this issue.

Financial Assistance: The department proposes to define "financial assistance" as direct financial assistance to patients. Consistent with the IRS's definition and guidance, the department would consider it to be the unrecovered costs written off by a hospital that results from providing care to individuals who are uninsured or who are otherwise unable to pay for the health care services they receive. As in the proposed definition of "community benefit," "financial assistance" would include both free and discounted/subsidized care.

Net Patient Revenue: Based on the IRS's definition, the department proposes to define "net patient revenue" as the aggregate money generated from patient services collected from payors, including private insurance, Medicaid, and Medicare. The calculation would be total patient revenues less patient discounts.

NEW RULE III

In NEW RULE III, the department proposes certain community benefit and financial assistance requirements, as well as a process for development of the community benefit and financial assistance standards for which it currently lacks the information needed to establish such standards.

The department proposes that each nonprofit hospital, critical access hospital, and rural emergency hospital have in writing:

- A community benefit plan. Section 50-5-106, MCA, requires the submission of a community benefit plan to the department. Consistent with this requirement, the department proposes to require such a written plan. The department understands that the IRS uses the term "community health improvement plan" or "community health implementation strategy," not "community benefit plan." While the department's current understanding is that the community health improvement plan or implementation strategy would meet the requirement for a community benefit plan, the department proposes to use "community benefit plan" because that is the term used in HB 45.
- A community benefit policy and a financial assistance policy. This proposal is based on 50-5-121(3)(a), MCA (community benefit and financial assistance policy requirements for nonprofit hospitals) and 50-5-121(3)(b), MCA (nonprofit hospitals, critical access hospitals and rural emergency hospitals required to adhere to written financial assistance and community benefit policies).[1]

Based on 50-5-121(3)(b), MCA, the department proposes that such entities be required (1) to adhere to their community benefit and financial assistance policies,

[1] Some stakeholders suggested that the department propose to require a written Community Health Needs Assessment (CHNA) every three years. The department understands that the CHNAs form a basis for their community benefit plans, but does not propose such a requirement because HB 45 is silent on CHNAs.

and (2) to make them available to the public, including by website posting.[2] Based on 50-5-121(3)(a), MCA, the department proposes that the community benefit and financial assistance policies of nonprofit hospitals be consistent with both federal standards and the department-adopted standards.

Based on stakeholder input, the department proposes a two-year process, culminating in rulemaking, to develop the standards for community benefits and financial assistance, using validated/aggregated baseline data and three-year averages. The department proposes certain factors that it must consider, and other factors that it may consider, in developing these standards. Further, the department would consider whether to adopt numerical or narrative standards or a combination of numerical and narrative standards. Finally, the department proposes to not require compliance with such standards in any year in which a nonprofit hospital operates at a loss. These factors and considerations were identified based on stakeholder consultation.

NEW RULE IV

Consistent with 50-5-106, MCA, the department proposes reporting requirements in NEW RULE IV, to be provided within 30 days of filing of the applicable forms with the IRS: (1) a copy of the Form 990 with Schedule H and associated worksheets, (2) the financial assistance policy for the current year, and (3) the community benefit plan for the current year.

If no Schedule H is available, the department proposes to require submission of the methods used to determine community benefit and financial assistance spending and those amounts. This proposed requirement is designed to allow the department to obtain the same information as would be found on the Schedule H and the associated worksheets.

The report or submission to the department would also be required to include certain contact information and the reporting period.

Finally, to ensure that the department receives complete information, NEW RULE IV proposes that the information reflect inpatient and outpatient services as well as services provided by any urgent care or other facilities operated by the nonprofit hospital, critical access hospital, or rural emergency hospital.

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[2] Certain stakeholders suggested that nonprofit hospitals, critical access hospitals, and rural emergency hospitals also be required to make their CHNAs and community benefit plans/community health improvement plan/community health implementation strategy publicly available and to post such documents on their websites. While the department supports and encourages such transparency, the department – consistent with the language of HB 45 – does not make such a proposal.

NEW RULE V

In NEW RULE V, the department proposes enforcement and penalties for noncompliance. Specifically, the department proposes:

- To develop penalties for noncompliance (by nonprofit hospitals) with the community benefit and financial assistance standards when it develops such standards.
- If a nonprofit critical access hospital or rural emergency hospital fails to comply with its community benefit and/or financial assistance policies, the department proposes to provide technical assistance and/or require corrective action. The department does not propose to impose financial penalties, recognizing their size, rural/frontier location, and financial and other vulnerabilities. The department asks for comment on whether there should be any financial penalty for a nonprofit critical access hospital's or nonprofit rural emergency hospital's persistent failure to adhere to its own community benefit or financial assistance policies – and whether, during the period prior to adoption of community benefit and financial assistance standards, nonprofit hospitals should be subject to penalties for noncompliance with their current community benefit and financial assistance policies and, if so, what such penalties should be.
- On proof of noncompliance with the reporting requirements, a fine of $1,000, allowing ten working days for the nonprofit hospital, critical access hospital, or rural emergency hospital to take corrective action. If there is continued noncompliance, the department proposes assessment of monthly $5,000 penalties. The department proposes these penalties because of (1) the importance to the program and the establishment and maintenance of the standards and requirements of the data that would be provided pursuant to the reporting requirements, and (2) the fact that the reporting requirements do not require the creation of any information or documents that the nonprofit hospital, critical access hospital, or rural emergency hospital is not otherwise required to create.

The department is considering whether, in addition to the proposed enforcement and penalties, it should post on its website information about the nonprofit hospitals, critical access hospitals, and rural emergency hospitals that fail to comply with the requirements of these statutes and the implementing regulations that the department adopts.

ARM 37.106.138 Annual Financial Reports by Hospitals and Critical Access Hospitals

Due to the enactment of HB 312, the department proposes to add rural emergency hospitals to the list of facilities required to report under this rule. In addition, the department proposes to clarify the reporting period, as well as to specify the charity care information to be reported under the existing requirement to provide information on deductions for charity/Hill-Burton. Finally, with the enactment of HB 45, the department proposes to add new reporting requirements, and related

noncompliance penalties, for nonprofit hospitals, critical access hospitals, and rural emergency hospitals, consistent with NEW RULES IV and V.

Fiscal Impact

The proposed rule amendments should have little effect on the department's administrative costs.

The proposed new rules implementing HB 45's requirements on community benefit and financial assistance would affect Montana's 15 hospitals and 48 critical access hospitals, although the current proposals should have a de minimis impact on them. The department anticipates that the community benefit and financial assistance standards may have a fiscal impact on Montana's nonprofit hospitals, but that impact would not be realized until such standards are developed and adopted through a subsequent rulemaking.

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: Bailey Yuhas, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail hhsadminrules@mt.gov, and must be received no later than 5:00 p.m., June 21, 2024.

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

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

9. An electronic copy of this notice is available on the department's web site at https://dphhs.mt.gov/LegalResources/administrativerules, or through the Secretary of State's web site at http://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 notified by email on January 17, 2024.

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

/s/ Paula M. Stannard
Paula M. Stannard
Rule Reviewer

/s/ Charles T. Brereton
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State May 14, 2024.