

State of Utah
Administrative Rule Analysis

NOTICE OF PROPOSED RULE

- * The agency identified below in box 1 provides notice of proposed rule change pursuant to Utah Code Section 63G-3-301.
- * Please address questions regarding information on this notice to the agency.
- * The full text of all rule filings is published in the Utah State Bulletin unless excluded because of space constraints.
- * The full text of all rule filings may also be inspected at the Division of Administrative Rules.

DAR file no:

44117

Date filed:

10-7-2019

State Admin Rule Filing Id:

Time filed:

	Agency No.	Rule No.	Section No.
Utah Admin. Code Ref (R no.):	R 156	- 44a	-
Changed to Admin. Code Ref. (R no.):	R	-	-

1. **Agency:** Commerce/Division of Occupational and Professional Licensing

Room no.:

Building: Heber M. Wells Building

Street address 1: 160 East 300 South

Street address 2:

City, state, zip: Salt Lake City UT 84111-2316

Mailing address 1: PO Box 146741

Mailing address 2:

City, state, zip: Salt Lake City UT 84114-6741

Contact person(s):

Name:	Phone:	Fax:	E-mail:
Jeff Busjahn	801-530-6789	801-530-6511	jbusjahn@utah.gov

(Interested persons may inspect this filing at the above address or at the Division of Administrative Rules during business hours)

2. **Title of rule or section (catchline):**

Nurse Midwife Practice Act Rule

3. **Type of notice:**

New ___; Amendment XXXXXX Repeal ___; Repeal and Reenact ___

4. **Purpose of the rule or reason for the change:**

The Certified Nurse Midwife Board recommends these proposed amendments to clarify and update the rule, and to add a fine for a Certified Nurse Midwife (CNM) who fails to provide an opiate prescription consultation in accordance with new Section 58-37-19 enacted by 2019 HB 191.

5. **This change is a response to comments from the Administrative Rules Review Committee.**

No XXXX Yes ___

6. **Summary of the rule or change:**

R156-44a-402: These proposed amendments replace the fine schedule language with a table, and add the following sanctions for failure to provide an opiate prescription consultation as required by Section 58-37-19: initial offense \$250; second offense \$500; third and subsequent offenses \$1,000. R156-44a-502(1): This proposed amendment updates the referenced "Code of Ethics" published by the American College of Nurse-Midwives to the new June 2015 edition. R156-44a-502(2): This new subsection adds to the list of unprofessional conduct for a CNM, failing to provide an opiate prescription consultation as required by Section 58-37-19.

7. Aggregate anticipated cost or savings to:

A) State budget:

Affected: No ; Yes

The fiscal note for 2019 HB 191 estimated that two prescribers annually would pay a fine of \$500 to \$1,000 for non-compliance, for aggregate revenue of approximately \$1,500 annually. The fiscal note for 2019 HB 191 estimated the impact and is available at: <https://le.utah.gov/~2019/bills/static/HB0191.html>. Any fines levied would be paid into the Certified Nurse Midwife Education and Enforcement Account. The Division estimates that the proposed amendments may result in two additional investigations of violations or complaints at a cost of \$300 each for a total of \$600. The amendments are not expected to impact any existing state practices or procedures, and as described below in the analysis for small business and non-small business, the Division does not expect any state agencies that may be acting as employers of licensees to experience any measurable fiscal impacts. No other impact to the State is expected beyond a minimal cost to the Division of approximately \$75 to disseminate the rules once the proposed amendments are made effective.

B) Local government:

Affected: No Yes

The Division estimates that the proposed amendments will have no measurable impact on local government. None of these amendments are expected to impact existing local government practices or procedures. Additionally, as described below in the analysis for small business and non-small business, the Division does not expect any local governments that may be acting as employers of licensees to experience any measurable fiscal impacts.

C) Small businesses ("small business" means a business employing fewer than 50 persons):

Affected: No ; Yes

The proposed amendments will regulate CNMs practicing in Utah, which may indirectly affect the estimated 22 small businesses in Utah comprising establishments of licensed CNMs or who employ CNMs, such as private or group practices, clinics, hospitals, private mental health practices or medical centers (NAICS 621399, 621498, 621111). However, the amendments are not expected to result in any measurable fiscal impact to small business. First, the amendments only impose a penalty for noncompliance with Utah Code requirements, and the practices of most small businesses are, or should be, already consistent with existing requirements. Second, the amendments will only affect licensees who violate the statute and are sanctioned, and as described below for other persons, for the typical licensee the amendments will have no fiscal impact. Accordingly, any impact from non-compliance will never be uniformly felt across the industry, and most small businesses will never be impacted. Finally, although a small business employing a licensee who is sanctioned may face indirect financial costs, it is impossible to estimate what those costs might be because any such violations are unforeseeable, and because any indirect costs that a small business may potentially experience from any potential sanctions will vary widely depending on the unique characteristics of the employer and the individual characteristics and actions of each licensee. This relevant data is unavailable and the cost of acquiring any such data is prohibitively expensive.

D) Persons other than small businesses, businesses, or local government entities ("person" means any individual, partnership, corporation, association, governmental entity, or public or private organization of any character other than an agency):

Affected: No Yes

There are approximately 180 licensed CNMs who may be affected by these proposed amendments. No measurable fiscal impact to these persons are expected. First, the amendments will only affect licensees who violate the statute(s) and are sanctioned, so that most licensees will never be impacted. The amendments only impose a penalty for noncompliance with existing Utah Code requirements, and the practices of most licensees are or should be already consistent with existing professional practice requirements. Further, the goal of the rules is to provide a deterrent, such that there is a \$0 net impact on all parties involved and minimal occasions to sanction a licensee for noncompliance. Therefore for the typical licensee the amendments are expected to have no direct or indirect fiscal impact. Second, although a licensee who is sanctioned may experience a fiscal impact, it is impossible to estimate what such costs might be with any accuracy at present, both because they would apply only in cases of unforeseeable violations, and because any potential costs would depend on the unique characteristics and actions of each individual licensee. This relevant data is unavailable and the cost of acquiring any such data is prohibitively expensive.

8. Compliance costs for affected persons:

As described above for other person, the Division does not anticipate any compliance costs for any affected person from these proposed amendments.

9. A) Comments by the department head on the fiscal impact the rule may have on businesses:

These proposed amendments replace the fine schedule language with a table. The amendments clarify and update the rule, and add a fine for a Certified Nurse Midwife (CNM) who fails to provide an opiate prescription consultation in accordance with new Section 58-37-19 U.C.A. enacted by 2019 HB 191. This proposed amendment updates the referenced "Code of Ethics" published by the American College of Nurse-Midwives to the more recent June 2015 edition. Finally, the amendments add to the list of unprofessional conduct for a CNM, the failure to provide an opiate prescription consultation as required by Section 58-37-19 U.C.A. Small Businesses (less than 50 employees):

The proposed amendments will regulate CNMs practicing in Utah, which may indirectly affect the estimated 22 small businesses in Utah comprising establishments of licensed CNMs or who employ CNMs, such as private or group practices, clinics, hospitals, private mental health practices or medical centers (NAICS 621399, 621498, 621111). However, the amendments are not expected to result in any measurable fiscal impact to small business. First, the amendments only impose a penalty for noncompliance with Utah Code requirements, and the practices of most small businesses are, or should be, already consistent with existing requirements. Second, the amendments will only affect licensees who violate the statute and are sanctioned. For the typical licensee, the amendments will have no fiscal impact. Accordingly, any impact from non-compliance will never be uniformly felt across the industry, and most small businesses will never be impacted. Finally, although a small business employing a licensee who is sanctioned may face indirect financial costs, it is impossible to estimate what those costs might be because any such violations are unforeseeable, and because any indirect costs that a small business may potentially experience from any potential sanctions will vary widely depending on the unique characteristics of the employer and the individual characteristics and actions of each licensee. This relevant data is unavailable and the cost of acquiring any such data is prohibitively expensive. Regulatory Impact to Non-Small businesses (50 or more employees): The proposed amendments will regulate CNMs practicing in Utah, which may indirectly affect the estimated 10 non-small businesses in Utah comprising establishments of CNMs or who employ CNMs, such as private or group practices, hospitals, or medical centers (NAICS 621498 and 621111). However, the proposed amendments are not expected to result in any measurable fiscal impact for non-small business for the same reasons as described above for small business. They are either inestimable, for the reasons stated, or there is no fiscal impact.

B) Name and title of department head commenting on the fiscal impacts:

Francine A. Giani, Executive Director

10 This rule change is authorized or mandated by state law, and implements or interprets the following state and federal laws.

State code or constitution citations (required) (e.g., Section 63G-3-402; Subsection 63G-3-601(3); Article IV) :

Subsection 58-1-106(1)(a)

Subsection 58-1-202(1)(a)

Section 58-44a-101

11 This rule adds, updates, or removes the following title of materials incorporated by references (a copy of materials incorporated by reference must be submitted to the Division of Administrative Rules; if none, leave blank):

First Incorporation

Second Incorporation

Official Title of Materials Code of Ethics
Incorporated (from title page)
Publisher American College of Nurse-Midwives
Date Issued
Issue, or version June 2015
ISBN Number (optional)
ISSN Number (optional)
Cost of Incorporated Reference
Action: Adds, updates, or removes Updates

(If this rule incorporates more than two items by reference, please attach additional pages)

12 The public may submit written or oral comments to the agency identified in box 1. (The public may also request a hearing by submitting a written request to the agency. The agency is required to hold a hearing if it receives requests from ten interested persons or from an association having not fewer than ten members. Additionally, the request must be received by the agency not more than 15 days after the publication of this rule in the Utah State Bulletin. See Section 63G-3-302 and Rule R15-1 for more information.)

A) Comments will be accepted until 5:00 p.m. on (mm/dd/yyyy): 12/02/2019

B) A public hearing (optional) will be held:

On (mm/dd/yyyy):	At (hh:mm AM/PM):	At (place):
11/06/2019	10:00 AM	160 East 300 South, Conference Room 475 (4th floor), Salt Lake City, Utah

13 This rule change may become effective on (mm/dd/yyyy): 12/09/2019

NOTE: The date above is the date on which this rule MAY become effective. It is NOT the effective date. After the date designated in Box 12(A) above, the agency must submit a Notice of Effective Date to the Division of Administrative Rules to make this rule effective. Failure to submit a Notice of Effective Date will result in this rule lapsing and will require the agency to start the rulemaking process over.

14 Indexing information -- keywords (maximum of four, in lower case, except for acronyms (e.g., "GRAMA") or proper nouns (e.g., "Medicaid")); may not include the name of the agency
 licensing midwifery
 certified nurse midwife

15 Attach an RTF document containing the text of this rule change R156-44a.pro
 (filename):

To the agency: Information requested on this form is required by Sections 63G-3-301, 302, 303, and 402. Incomplete forms will be returned to the agency for completion, possibly delaying publication in the *Utah State Bulletin*, and delaying the first possible effective date.

AGENCY AUTHORIZATION

Agency head or designee, and title:

Date
 (mm/dd/yyyy)
 : 10/7/2019

Appendix 1: Regulatory Impact Summary Table*

Fiscal Costs	FY 2020	FY 2021	FY 2022
State Government	\$675	\$600	\$600
Local Government	\$0	\$0	\$0
Small Businesses	\$0	\$0	\$0
Non-Small Businesses	\$0	\$0	\$0
Other Person	\$0	\$0	\$0
Total Fiscal Costs:	\$675	\$600	\$600
Fiscal Benefits			
State Government	\$1,500	\$1,500	\$1,500
Local Government	\$0	\$0	\$0
Small Businesses	\$0	\$0	\$0
Non-Small Businesses	\$0	\$0	\$0
Other Persons	\$0	\$0	\$0
Total Fiscal Benefits:	\$1,500	\$1,500	\$1,500
Net Fiscal Benefits:	\$825	\$900	\$900

*This table only includes fiscal impacts that could be measured. If there are inestimable fiscal impacts, they will not be included in this table. Inestimable impacts for State Government, Local Government, Small Businesses and Other Persons are described above. Inestimable impacts for Non-Small Businesses are described below.

Appendix 2: Regulatory Impact to Non-Small Businesses

The proposed amendments will regulate CNMs practicing in Utah, which may indirectly affect the estimated 10 non-small businesses in Utah comprising establishments of CNMs or who employ CNMs, such as private or group practices, hospitals, or medical centers (NAICS 621498 and 621111). However, the proposed amendments are not expected to result in any measurable fiscal impact for non-small business. First, the amendments only impose a penalty for noncompliance with the Utah Code requirements, and the practices of most non-small businesses are, or should be, already consistent with existing requirements. Second, the amendments will only affect licensees who violate the statute and are sanctioned, and as described above for other persons, for the typical licensee the amendments will have no fiscal impact. Accordingly, any impact from non-compliance will never be uniformly felt across the industry, and most non-small businesses will never be impacted. Finally, although a non-small business employing a licensee who is

sanctioned may face indirect financial costs, it is impossible to estimate what those costs might be because any such violations are unforeseeable, and because any indirect costs that a non-small business may potentially experience from any potential sanctions will vary widely depending on the unique characteristics of the employer and the individual characteristics and actions of each licensee. This relevant data is unavailable and the cost of acquiring any such data is prohibitively expensive.

Include agency head sign-off here. The head of the Department of Commerce, Francine Giani, has reviewed and approved this fiscal analysis.

R156. Commerce, Occupational and Professional Licensing.

R156-44a. Nurse Midwife Practice Act Rule.

R156-44a-402. Administrative Penalties.

In accordance with Subsections 58-44a-102(1), ~~[and]~~ 58-44a-402(1), and 58-44a-503(3), unless otherwise ordered by the presiding officer, the following fine schedule shall apply[-]:

TABLE

FINE SCHEDULE

<u>VIOLATION</u>	<u>FIRST OFFENSE</u>	<u>SUBSEQUENT OFFENSE</u>
58-44a-501(1)	\$ 2,000 - \$ 5,000	\$ 5,000 - \$10,000
58-44a-501(2)	\$ 100 - \$ 500	\$ 200 - \$ 1,000
58-44a-501(3)	\$ 100 - \$ 500	\$ 200 - \$ 1,000
58-44a-501(4)	\$ 2,000 - \$ 5,000	\$ 5,000 - \$10,000
58-44a-502(1)	\$ 100 - \$ 500	\$ 200 - \$ 1,000
58-44a-502(2)	\$ 500 - \$ 2,000	\$ 2,000 - \$10,000
58-44a-502(3)	\$ 500 - \$ 2,000	\$ 2,000 - \$10,000
58-44a-502(4)	\$ 100 - \$ 500	\$ 200 - \$ 1,000
58-44a-502(5)	\$ 200 - \$ 1,000	\$ 500 - \$ 2,000
58-44a-502(6)	Double the original penalty amount, up to \$10,000	
58-44a-502(7)	\$ 500 - \$ 1,000	\$ 500 - \$ 1,000
58-44a-502(8) (a)	\$ 500 - \$ 1,000	\$ 500 - \$ 2,000
58-44a-502(8) (b)	\$ 500 - \$ 1,000	\$ 500 - \$ 2,000
58-1-501(1) (b)	\$ 500 - \$ 2,000	\$ 2,000 - \$10,000
58-1-501(1) (c)	\$ 500 - \$ 1,000	\$ 1,000 - \$ 5,000
58-1-501(1) (d)	\$ 500 - \$ 1,000	\$ 1,000 - \$ 5,000
58-1-501(1) (e)	\$ 500 - \$ 2,000	\$ 2,000 - \$10,000
58-1-502(2) (a)	\$ 500 - \$ 2,000	\$ 2,000 - \$10,000
58-1-502(2) (b)	\$ 500 - \$ 2,000	\$ 2,000 - \$10,000
58-1-502(2) (c)	\$ 500 - \$ 2,000	\$ 2,000 - \$10,000
58-1-502(2) (d)	\$ 100 - \$ 500	\$ 200 - \$ 1,000
58-1-502(2) (e)	\$ 100 - \$ 500	\$ 200 - \$ 1,000
58-1-502(2) (f)	\$ 100 - \$ 500	\$ 200 - \$ 1,000
58-1-502(2) (g)	\$ 500 - \$ 2,000	\$ 2,000 - \$10,000
58-1-502(2) (h)	\$ 100 - \$ 500	\$ 200 - \$ 1,000
58-1-502(2) (i)	\$ 100 - \$ 500	\$ 200 - \$ 1,000
58-1-502(2) (j)	\$ 100 - \$ 500	\$ 200 - \$ 1,000
58-1-502(2) (k)	\$ 100 - \$ 500	\$ 200 - \$ 1,000
R156-44a-502(1)	\$ 100 - \$ 500	\$ 200 - \$ 1,000
R156-44a-502(2)	\$ 250	\$ 500 - \$ 1,000
Ongoing offense(s)	\$ 1,000 per day but not less than the second offense.	
Any other conduct which constitutes unprofessional or unlawful conduct:	\$ 100 - \$ 500	\$ 200 - \$ 1,000

- ~~[(1) Engaging in practice as a CNM or RN when not licensed or exempt from licensure: initial offense: \$2,000 - \$5,000
subsequent offense(s): \$5,000 - \$10,000~~
- ~~(2) Representing oneself as a CNM or RN when not licensed:
initial offense: \$100 - \$500
subsequent offense(s): \$200 - \$1,000~~
- ~~(3) Using any title that would indicate that one is licensed under this chapter:
initial offense: \$100 - \$500
subsequent offense(s): \$200 - \$1,000~~
- ~~(4) Practicing or attempting to practice nursing without a license or with a restricted license:
initial offense: \$2,000 - \$5,000
subsequent offense(s): \$5,000 - \$10,000~~
- ~~(5) Impersonating a licensee or practicing under a false name:
initial offense: \$500 - \$2,000
subsequent offense(s): \$2,000 - \$10,000~~
- ~~(6) Knowingly employing an unlicensed person:
initial offense: \$500 - \$1,000
subsequent offense(s): \$1,000 - \$5,000~~
- ~~(7) Knowingly permitting the use of a license by another person:
initial offense: \$500 - \$1,000
subsequent offense(s): \$1,000 - \$5,000~~
- ~~(8) Obtaining a passing score, applying for or obtaining a license, or otherwise dealing with the Division or board through the use of fraud, forgery, intentional deception, misrepresentation, misstatement, or omission:
initial offense: \$500 - \$2,000
subsequent offense(s): \$2,000 - \$10,000~~
- ~~(9) Violating or aiding or abetting any other person to violate any statute, rule, or order regulating nurse midwifery:
initial offense: \$500 - \$2,000
subsequent offense(s): \$2,000 - \$10,000~~
- ~~(10) Violating, or aiding or abetting any other person to violate any generally accepted professional or ethical standard:
initial offense: \$500 - \$2,000
subsequent offense(s): \$2,000 - \$10,000~~
- ~~(11) Engaging in conduct that results in convictions or, or a plea of nolo contendere to a crime of moral turpitude or other crime:
initial offense: \$500 - \$2,000
subsequent offense(s): \$2,000 - \$10,000~~

- ~~(12) Engaging in conduct that results in disciplinary action by any other jurisdiction or regulatory authority:
initial offense: \$100 - \$500
subsequent offense(s): \$200 - \$1,000~~
- ~~(13) Engaging in conduct, including the use of intoxicants, drugs to the extent that the conduct does or may impair the ability to safely engage in practice as a CNM:
initial offense: \$100 - \$500
subsequent offense(s): \$200 - \$1,000~~
- ~~(14) Practicing or attempting to practice as a CNM when physically or mentally unfit to do so:
initial offense: \$100 - \$500
subsequent offense(s): \$200 - \$1,000~~
- ~~(15) Practicing or attempting to practice as a CNM through gross incompetence, gross negligence, or a pattern of incompetency or negligence:
initial offense: \$500 - \$2,000
subsequent offense(s): \$2,000 - \$10,000~~
- ~~(16) Practicing or attempting to practice as a CNM by any form of action or communication which is false, misleading, deceptive, or fraudulent:
initial offense: \$100 - \$500
subsequent offense(s): \$200 - \$1,000~~
- ~~(17) Practicing or attempting to practice as a CNM beyond the individual's scope of competency, abilities, or education:
initial offense: \$100 - \$500
subsequent offense(s): \$200 - \$1,000~~
- ~~(18) Practicing or attempting to practice as a CNM beyond the scope of licensure:
initial offense: \$100 - \$500
subsequent offense(s): \$200 - \$1,000~~
- ~~(19) Verbally, physically, mentally, or sexually abusing or exploiting any person through conduct connected with the licensee's practice:
initial offense: \$100 - \$500
subsequent offense(s): \$200 - \$1,000~~
- ~~(20) Disregarding for a patient's dignity or right to privacy as to his person, condition, possessions, or medical record:
initial offense: \$100 - \$500
subsequent offense(s): \$200 - \$1,000~~
- ~~(21) Engaging in an act, practice, or omission which does or could jeopardize the health, safety, or welfare of a patient or the public:
initial offense: \$500 - \$2,000
subsequent offense(s): \$2,000 - \$10,000~~

~~(22) Failing to confine one's practice to those acts permitted by law:~~

~~initial offense: \$500 - \$2,000~~

~~subsequent offense(s): \$2,000 - \$10,000~~

~~(23) Failure to file or impeding the filing of required reports:~~

~~initial offense: \$100 - \$500~~

~~subsequent offense(s): \$200 - \$1,000~~

~~(24) Breach of confidentiality:~~

~~initial offense: \$200 - \$1,000~~

~~subsequent offense(s): \$500 - \$2,000~~

~~(25) Failure to pay a penalty:~~

~~Double the original penalty amount up to \$10,000~~

~~(26) Prescribing a Schedule II-III controlled substance without a consulting physician or outside of a consultation and referral plan:~~

~~initial offense: \$500 - \$1,000~~

~~subsequent offense(s): \$500 - \$2,000~~

~~(27) Failure to have and maintain a safe mechanism for obtaining medical consultation, collaboration, and referral with a consulting physician, including failure to identify one or more consulting physicians in the written documents required by Subsection 58-44a-102(9)(b)(iii):~~

~~initial offense: \$500 - \$1,000~~

~~subsequent offense(s): \$500 - \$2,000~~

~~(28) Representing that the certified nurse midwife is in compliance with Subsection 58-44a-502(8)(a) when the certified nurse midwife is not in compliance with Subsection 58-44a-502(8)(a):~~

~~initial offense: \$500 - \$1,000~~

~~subsequent offense(s): \$500 - \$2,000~~

~~(29) Any other conduct which constitutes unprofessional or unlawful conduct:~~

~~initial offense: \$100 - \$500~~

~~subsequent offense(s): \$200 - \$1,000]~~

R156-44a-502. Unprofessional Conduct.

"Unprofessional conduct" includes:

(1) failure to abide by the "Code of Ethics" published by the American College of Nurse-Midwives, [October 2008] June 2015, which is hereby adopted and incorporated by reference;

(2) failing to discuss the risks of using an opiate with a patient or the patient's guardian before issuing an initial opiate prescription, in accordance with Section 58-37-19.

KEY: licensing, midwifery, certified nurse midwife

Date of Enactment or Last Substantive Amendment: [~~May 11,~~
2015]2019

Notice of Continuation: August 28, 2018

Authorizing, and Implemented or Interpreted Law: 58-1-106(1)(a);
58-1-202(1)(a); 58-44a-101