MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 21

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are found at the back of each register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Administrative Rules Bureau at (406) 444-2055.

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NOTICE SECTION

**BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA**

In the matter of the adoption of New Rule I concerning Montana's volume cap allocation	) NOTICE OF PROPOSED ADOPTION)) NO PUBLIC HEARING) CONTEMPLATED

TO: All Concerned Persons

1. On December 10, 2001, the Department of Administration proposes to adopt a rule concerning Montana's volume cap allocation.

2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Administration no later than 5:00 p.m. on November 23, 2001, to advise us of the nature of the accommodation that you need. Please contact Cathy Muri, Administrative Financial Services Division, P.O. Box 200102, Helena, MT 59620-0102, telephone (406) 444-4609; fax (406) 444-2812.

3. The proposed rule provides as follows:

RULE I VOLUME CAP ALLOCATION (1) The department of administration sets the state of Montana's volume cap as follows:

(a) $187.5 million for calendar year 2001; and

(b) $225 million for calendar year 2002.

(2) In calendar year 2003 and thereafter, the volume cap allocation shall be increased by the increase in the consumer price index (CPI) over the CPI for calendar year 2001.

AUTH: 17-5-1311, MCA
IMP: 17-5-1311, MCA

Reason: The Department has chosen to adopt this rule in order to provide state agencies and local governments with the ability to use the maximum private activity bond cap now available to them under federal law. Federal law recently changed the volume cap on private activity bonds from a set dollar amount to an accelerated amount to be phased in over an indefinite period of time. This change gives the State and local governments the opportunity to receive a lower interest rate on a larger number of tax-exempt bonds issued. The Department has chosen to adopt this rule because section 17-5-1311, MCA, was amended in 2001 to require the Department to adopt a rule which sets the State's volume cap. The alternative to not adopting a rule which sets out a method to determine the volume cap is to amend the statute every session. Therefore, the adoption of the rule seems the most

reasonable alternative.

4. If persons who are directly affected by the proposed adoption wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request, along with any written comments they have, to Cathy Muri, Administrative Financial Services Division, P.O. Box 200102, Helena, MT 59620-0102, telephone (406) 444-4609; fax (406) 444-2812, no later than 5:00 p.m. on December 7, 2001.

5. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those agencies directly affected has been determined to be approximately 6 based on the 5 state agencies and 56 local governments that are authorized to issue the tax-exempt private activity bonds affected by the volume cap allocation.

6. The Department of Administration 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 this list shall make a written request which includes the name and mailing address of the person to receive notices and specifies the specific areas over which the Department of Administration has rulemaking authority that the person wishes to receive notice regarding. Such written request may be mailed or delivered to Dal Smilie, Chief Counsel, Department of Administration, P.O. Box 200101, Helena, MT 59620-0101, telephone (406) 444-3310, fax (406) 444-2812, or may be made by completing a request form at any rules hearing held by the Department of Administration.

7. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

By: /s/ Steve Bender
STEVE BENDER, Acting Director
Department of Administration

/s/ Dal Smilie
DAL SMILIE, Rule Reviewer

Certified to the Secretary of State October 29, 2001.

**BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA**

In the matter of the repeal of ARM 2.4.101 through 2.4.105, 2.4.111 through 2.4.116, 2.4.126 through 2.4.131, 2.4.136 through 2.4.138, 2.4.141, and 2.4.146 through 2.4.154 concerning the regulation of travel expenses	) NOTICE OF PROPOSED REPEAL)) NO PUBLIC HEARING) CONTEMPLATED)))))

TO: All Concerned Persons

1. On December 10, 2001, the Department of Administration proposes repeal ARM 2.4.101 through 2.4.105, 2.4.111 through 2.4.116, 2.4.126 through 2.4.131, 2.4.136 through 2.4.138, 2.4.141, and 2.4.146 through 2.4.154 concerning the regulation of travel expenses.

2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Administration no later than 5:00 p.m. on November 23, 2001, to advise us of the nature of the accommodation that you need. Please contact Cathy Muri, Administrative Financial Services Division, P.O. Box 200102, Helena, MT 59620-0102, telephone (406) 444-4609; fax (406) 444-2812.

3. The rules proposed for repeal are as follows:

2.4.101 INTRODUCTION, located on page 2-87 of the Administrative Rules of Montana.
AUTH: 2-18-501, 2-18-502, and 2-18-503, MCA
IMP: 2-18-501, 2-18-502, and 2-18-503, MCA

2.4.102 TRAVEL GUIDELINES, located on page 2-87 of the Administrative Rules of Montana.
AUTH: 2-18-501 and 2-18-503, MCA
IMP: 2-18-501, 2-18-502, and 2-18-503, MCA

2.4.103 REIMBURSABLE EXPENSES, located on page 2-88 of the Administrative Rules of Montana.
AUTH: 2-18-501, 2-18-502, and 2-18-503, MCA
IMP: 2-18-501, 2-18-502, and 2-18-503, MCA

2.4.104 APPLICABLE STATE STATUTES, located on page 2-88 of the Administrative Rules of Montana.
AUTH: 2-18-501, 2-18-502, and 2-18-503, MCA
IMP: 2-18-501, 2-18-502, and 2-18-503, MCA

2.4.105 DEPARTURE AND RETURN TIME, located on page 2-88 of the Administrative Rules of Montana.
AUTH: 2-18-501, 2-18-502, and 2-18-503, MCA
IMP: 2-18-501, 2-18-502, and 2-18-503, MCA

2.4.111 USE OF STATE-OWNED VEHICLES, located on page 2-93 of the Administrative Rules of Montana.
AUTH: 2-18-503, MCA
IMP: 2-18-503, MCA

2.4.112 USE OF PERSONAL VEHICLES--REIMBURSEMENT RATES--GENERAL REQUIREMENTS, located on page 2-93 of the Administrative Rules of Montana.
AUTH: 2-18-503, MCA
IMP: 2-18-503, MCA

2.4.113 USE OF PERSONAL VEHICLES--REIMBURSEMENT AT STANDARD RATE, located on page 2-93 of the Administrative Rules of Montana.
AUTH: 2-18-503, MCA
IMP: 2-18-503, MCA

2.4.114 USE OF PERSONAL VEHICLES--REIMBURSEMENT AT HIGH RATE, located on page 2-93 of the Administrative Rules of Montana.
AUTH: 2-18-503, MCA
IMP: 2-18-503, MCA

2.4.115 USE OF PERSONAL VEHICLES--EXEMPTIONS, located on page 2-94 of the Administrative Rules of Montana.
AUTH: 2-18-503, MCA
IMP: 2-18-503, MCA

2.4.116 PERSONAL VEHICLE USE AUTHORIZATION FORM--WHERE OBTAINED, located on page 2-95 of the Administrative Rules of Montana.
AUTH: 2-18-503, MCA
IMP: 2-18-503, MCA

2.4.126 MEAL REIMBURSEMENT GENERALLY, located on page 2-107 of the Administrative Rules of Montana.
AUTH: 2-18-501 and 2-18-502, MCA
IMP: 2-18-501 and 2-18-502, MCA

2.4.127 MEAL REIMBURSEMENT--DEFINITION OF "TRAVEL SHIFT", located on page 2-107 of the Administrative Rules of Montana.
AUTH: 2-18-501 and 2-18-502, MCA
IMP: 2-18-501 and 2-18-502, MCA

2.4.128 MEAL REIMBURSEMENT--TIME RANGES, located on page 2-107 of the Administrative Rules of Montana.
AUTH: 2-18-501 and 2-18-502, MCA
IMP: 2-18-501 and 2-18-502, MCA

2.4.129 MEAL REIMBURSEMENT FOR TRAVEL WITHIN TRAVEL SHIFT, located on page 2-107 of the Administrative Rules of Montana.
AUTH: 2-18-501 and 2-18-502, MCA
IMP: 2-18-501 and 2-18-502, MCA

2.4.130 MEAL REIMBURSEMENT FOR TRAVEL ONE-HALF OUTSIDE TRAVEL SHIFT, located on page 2-108 of the Administrative Rules of Montana.
AUTH: 2-18-501 and 2-18-502, MCA
IMP: 2-18-501 and 2-18-502, MCA

2.4.131 MEAL REIMBURSEMENT FOR TRAVEL OUTSIDE TRAVEL SHIFT, located on page 2-108 of the Administrative Rules of Montana.
AUTH: 2-18-501 and 2-18-502, MCA
IMP: 2-18-501 and 2-18-502, MCA

2.4.136 REIMBURSEMENT FOR RECEIPTABLE LODGING, located on page 2-113 of the Administrative Rules of Montana.
AUTH: 2-18-501, MCA
IMP: 2-18-501, MCA

2.4.137 REIMBURSEMENT FOR NON-RECEIPTABLE LODGING, located on page 2-113 of the Administrative Rules of Montana.
AUTH: 2-18-501, MCA
IMP: 2-18-501, MCA

2.4.138 NO REIMBURSEMENT FOR PROVIDED LODGING, located on page 2-113 of the Administrative Rules of Montana.
AUTH: 2-18-501, MCA
IMP: 2-18-501, MCA

2.4.141 REIMBURSEMENT FOR MISCELLANEOUS TRAVEL EXPENSES, located on page 2-117 of the Administrative Rules of Montana.
AUTH: 2-18-501, MCA
IMP: 2-18-501, MCA

2.4.146 OUT-OF-COUNTRY TRAVEL, located on page 2-123 of the Administrative Rules of Montana.
AUTH: 2-18-501, 2-18-502, and 2-18-503, MCA
IMP: 2-18-501, 2-18-502, and 2-18-503, MCA

2.4.147 CHANGE IN TRAVEL STATUS, located on page 2-123 of the Administrative Rules of Montana.
AUTH: 2-18-501 and 2-18-502, MCA
IMP: 2-18-501 and 2-18-502, MCA

2.4.148 SPECIAL IN-LIEU ALLOWANCES, located on page 2-123 of the Administrative Rules of Montana.
AUTH: 2-18-501, 2-18-502, and 2-18-503, MCA
IMP: 2-18-501, 2-18-502, and 2-18-503, MCA

2.4.149 TRAVEL TIME ALLOWED, located on page 2-124 of the Administrative Rules of Montana.
AUTH: 2-18-501, 2-18-502, and 2-18-503, MCA
IMP: 2-18-501, 2-18-502, and 2-18-503, MCA

2.4.150 USE OF TRANSPORTATION PURCHASE ORDER FOR COMMERCIAL TRANSPORTATION, located on page 2-124 of the Administrative Rules of Montana.
AUTH: 2-18-501, 2-18-502, and 2-18-503, MCA
IMP: 2-18-501, 2-18-502, and 2-18-503, MCA

2.4.151 TRAVEL ADVANCES, located on page 2-125 of the Administrative Rules of Montana.
AUTH: 2-18-501, 2-18-502, and 2-18-503, MCA
IMP: 2-18-501, 2-18-502, and 2-18-503, MCA

2.4.152 TRAVEL EXPENSE VOUCHER, FORM DA-101, located on page 2-125 of the Administrative Rules of Montana.
AUTH: 2-18-501, 2-18-502, and 2-18-503, MCA
IMP: 2-18-501, 2-18-502, and 2-18-503, MCA

2.4.153 TRAVEL EXPENSE VOUCHER--FREQUENCY OF FILING, located on page 2-125 of the Administrative Rules of Montana.
AUTH: 2-18-501, 2-18-502, and 2-18-503, MCA
IMP: 2-18-501, 2-18-502, and 2-18-503, MCA

2.4.154 TRAVEL EXPENSE VOUCHER--SUPERVISOR'S APPROVAL REQUIRED, located on page 2-126 of the Administrative Rules of Montana.
AUTH: 2-18-501, 2-18-502, and 2-18-503, MCA
IMP: 2-18-501, 2-18-502, and 2-18-503, MCA

Reason: It is reasonably necessary to repeal the above-referenced rules because House Bill 74, passed by the 1997 Legislature, amended section 2-18-503, MCA, to mandate that state travel reimbursement provisions affecting lodging, meals, and mileage requirements for state employees be administered through state policy and exempted the policies from the Montana Administrative Procedure Act, Title 2, chapter 4, MCA. In addition, section 2-4-314, MCA, requires a biennial review of an agency's rules to determine whether any existing rule should be modified or repealed. The alternative to repealing the rules would be to leave them in place. However, since the above-referenced rules are outdated and extraneous and have been replaced by state policy, it seems that the most reasonable alternative is to repeal the outdated rules.

4. Concerned persons may submit their data, views and arguments in writing to Cathy Muri, Administrative Financial Services Division, P.O. Box 200102, Helena, MT 59620-0102, telephone (406) 444-4609; fax (406) 444-2812. Any comments must be received no later than 5:00 p.m. on December 7, 2001.

5. If persons who are directly affected by the proposed repeal wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request, along with any written comments they have, to Cathy Muri, Administrative Financial Services Division, P.O. Box 200102, Helena, MT 59620-0102, telephone (406) 444-4609; fax (406) 444-2812. A written request for hearing must be received no later than 5:00 p.m. on December 7, 2001.

6. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed actions; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 1,222 based on approximately 12,220 state employees.

7. The Department of Administration 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 this list shall make a written request which includes the name and mailing address of the person to receive notices and specifies the specific areas over which the Department of Administration has rulemaking authority that the person wishes to receive notice regarding. Such written request may be mailed or delivered to Dal Smilie, Chief Counsel, Department of Administration, P.O. Box 200101, Helena, MT 59620-0101, telephone (406) 444-3310, fax (406) 444-2812, or may be made by completing a request form at any rules hearing held by the Department of Administration.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

By: /s/ Steve Bender
STEVE BENDER, Acting Director
Department of Administration

/s/ Dal Smilie
DAL SMILIE, Rule Reviewer

Certified to the Secretary of State October 29, 2001.

BEFORE THE BOARD OF RESEARCH AND COMMERCIALIZATION TECHNOLOGY DEPARTMENT OF COMMERCE STATE OF MONTANA

In the matter of the proposed amendment of ARM 8.100.104 and 8.100.105 pertaining to definitions and application procedures	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On December 8, 2001, the Board of Research and Commercialization Technology proposes to amend the above-stated rules pertaining to definitions and application procedures.

2. The Board will make reasonable accommodations for person with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Research and Commercialization Technology no later than 5:00 p.m. on November 19, 2001 to advise us of the nature of the accommodation that you need. Please contact Jane Todd, 1424 Ninth Avenue, P.O. Box 200533, Helena, Montana 59620-0533; telephone (406) 444-3477; facsimile (406) 444-3511, TDD (406) 444-2978; Montana Relay 1-800-253-4091; e-mail to jtodd@state.mt.us.

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

8.100.104 DEFINITIONS The following definitions shall apply for the purposes of these rules~~.~~:

(1) and (2) remain the same.

(3) "Research and commercialization project" means a project eligible for funding under the criteria set forth in 90-3-1003~~(4)~~ (6), MCA, to be conducted at a "research and commercialization center" as set forth under 90-3-1001(2), MCA.

AUTH: 90-3-1003, MCA
IMP: 90-3-1003, MCA

8.100.105 APPLICATION PROCEDURES FOR A RESEARCH AND COMMERCIALIZATION GRANT OR LOAN - SUBMISSION AND EVALUATION OF EXECUTIVE SUMMARY AND PROJECT PROPOSAL (1) and (1)(a) remain the same.

(b) an explanation of how the project meets each of the statutory project criteria set forth in 90-3-1003~~(4)~~(6)(a) through (i), MCA;

(c) through (3)(d) remain the same.

AUTH: 90-3-1003, MCA
IMP: 90-3-1003, MCA

REASON: These rules are proposed for amendment because HB 368 of the 2001 Legislative session, which clarified that the research and commercialization expendable trust may be used for grants for production agriculture research and commercialization projects, amended the numbering of 90-3-1003, MCA.

4. Interested persons may submit their data, views or arguments concerning the proposed action in writing to the Board of Research and Commercialization Technology, Department of Commerce, 1424 Ninth Avenue, P.O. Box 200533, Helena, Montana 59620-0533, no later than 5:00 p.m., December 6, 2001.

5. If persons who are directly affected by the proposed action wish to present their data, views or arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit the request along with any comments they have to the Board of Research and Commercialization Technology, Department of Commerce, 1424 Ninth Avenue, P.O. Box 200533, Helena, Montana 59620-0533, or by facsimile (406) 444-3511, to be received no later than 5:00 p.m., December 6, 2001.

6. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the Board. Persons who wish to have their name added to the list shall make a written request which includes the name and address of the person to receive notices and specifies that the person wishes to receive notices regarding the Board's administrative rulemaking proceedings. Such written request may be mailed or delivered to the Board of Research and Commercialization Technology, 1424 Ninth Avenue, P.O. Box 200533, Helena, Montana 59620-0533, by phone at (406) 444-3477, e-mailed to jtodd@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

7. If the Board receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed action, from the appropriate administrative rule review committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 50 based on the number of persons applying for loans through the Board of Research and Commercialization Technology.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

BOARD OF RESEARCH AND COMMERCIALIZATION TECHNOLOGY

BY: *Mark A. Simonich*
MARK A. SIMONICH, DIRECTOR
DEPARTMENT OF COMMERCE

BY: *G. Martin Tuttle*
G. MARTIN TUTTLE, RULE REVIEWER

Certified to the Secretary of State, October 29, 2001.

**BEFORE THE OFFICE OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA**

In the matter of the proposed amendment of ARM 10.41.101 through 10.41.104, 10.41.106, 10.41.109, 10.41.111, 10.41.115, 10.41.118, 10.41.120, 10.41.124 through 10.14.126, 10.41.130 and the amendment and transfer of ARM 10.44.103, 10.44.104, 10.44.106 and 10.44.211 and the repeal of 10.41.105, 10.41.107, 10.41.108, 10.41.116, 10.41.117, 10.41.119, 10.41.127, 10.41.129, 10.44.102 and 10.44.105 pertaining to vocational education	)	NOTICE OF EXTENSION OF COMMENT PERIOD TO NOVEMBER 28, 2001

TO: All Concerned Persons

1. On September 20, 2001, the Office of Public Instruction published notice of the proposed amendment, amendment and transfer, and repeal of rules pertaining to vocational education at page 1784 of the Montana Administrative Register, Issue No. 18.

2. On October 17, 2001, at 4:00 p.m. a public hearing was held in the University room at the Holiday Inn, 5 Baxter Lane, Bozeman, Montana, to consider the amendment, amendment and transfer and repeal of the above stated rules relating to vocational education.

3. Prior to the end of the public comment period, the Office of Public Instruction received a request to extend the comment period to allow additional time for the submission of comments. The Office of Public Instruction concludes that in the interest of allowing the public a meaningful opportunity to comment on the proposed rule changes, the comment period can be extended without significant adverse impact to the vocational education program.

4. Written data, views or arguments may be submitted to the Office of Public Instruction, 1227 Eleventh Avenue, P.O. Box 202501, Helena, MT 59620-2501, FAX: (406) 444-1373, e-mail opirules@state.mt.us and must be received by no later than 5:00 p.m., November 28, 2001.

/s/ Linda McCulloch
Linda McCulloch
Superintendent
Office of Public Instruction

/s/ Jeffrey A. Weldon
Jeffrey A. Weldon
Rule Reviewer
Office of Public Instruction

Certified to the Secretary of State October 29, 2001.

**BEFORE THE TRANSPORTATION COMMISSION
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 18.6.211 pertaining to the collection of permit fees for outdoor advertising signs) NOTICE OF PROPOSED AMENDMENT) NO PUBLIC HEARING) CONTEMPLATED

TO: All Concerned Persons

1. On December 21, 2001, the Transportation Commission proposes to amend the above stated rule concerning collection of permit fees for outdoor advertising signs.

2. The Transportation Commission will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative, accessible format of this notice. If you require an accommodation, contact the Transportation Commission no later than 5:00 p.m., on November 30, 2001, to advise us of the nature of the accommodation that you need. Please contact Richard T. Munger, Outdoor Advertising Coordinator, Right-of-Way Bureau, P. O. Box 201001, Helena, MT 59620-1001, (406) 444-6055. TTY users can call (406) 444-7696, fax (406) 444-6032, or e-mail rmunger@state.mt.us.

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

18.6.211 PERMITS (1) through (2) remain the same.

(3) Signs shall be assigned a permit number and given a permanent identification plate that must be attached to the structure and may be renewed every three years thereafter upon payment of a renewal fee as follows:

(a) $~~15~~10 for signs with a face(s) of 50 square feet or less;

(b) ~~30~~20 cents per square foot for signs that have face(s) exceeding 51 square feet. If the sign structure has multiple sign faces, the renewal fee is based on the total square footage of the sign area.

(4) through (5) remain the same.

**AUTH: 75-15-121 and 75-15-122, MCA
IMP: 75-15-122, MCA**

REASON: Section 75-15-122, MCA, states, in part, that the fees for this program shall be determined by the square footage of the sign face and established by rule by the Transportation Commission to cover the cost of administering and enforcing the program. The commission has determined that the cost for the administration and enforcement is accomplished by the new fee structure.

4. If a person who is directly affected by the proposed action wishes to express data, views and arguments orally or in writing at a public hearing, that person must make a written request for a public hearing and submit each request, along with any written comments regarding the proposed amendment to Richard T. Munger, Outdoor Advertising Coordinator, Right-of-Way Bureau, P. O. Box 201001, Helena, MT 59620-1001, (406) 444-6055 no later than 5:00 p.m. on December 6, 2001. TTY users can call (406) 444-7696, fax (406) 444-6032, or e-mail rmunger@state.mt.us.

5. If the Transportation Commission receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of those who are directly affected by the proposed action, from the Administrative Rule Review Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who are directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 180, based on 1800 businesses or individuals who may be affected by the rule covering the collection of outdoor advertising sign permit fees.

6. There are approximately 3,100 outdoor advertising signs permitted by the department. The fees are paid on a three-year cycle. Approximately 1,035 signs (or one-third) are due for renewal each year. The average renewal fee per permit is $105.00 for a total of $108,700.00 annually. There are approximately 600 individuals or businesses that own the 1,035 signs due for renewal each year. With a one-third reduction in fees, the cumulative effect should be a reduction of approximately $32,600.00 per year.

7. The Department of Transportation maintains a list of interested persons who wish to receive notices of the rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies the subject area or areas of interest of the person requesting notice, including, but not limited to, rules proposed by the Administration Division, Aeronautics Division, Highways and Engineering Division, Maintenance Division, Motor Carrier Services Division, and Rail, Transit and Planning Division. Such written request may be mailed or delivered to the Montana Department of Transportation, Legal Services, P.O. Box 201001, Helena, MT 59620-1001, faxed to the office at (406) 444-7206, e-mailed to lmanley@state.mt.us, or may be made by completing a request form at any rules hearing held by the department.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

MONTANA TRANSPORTATION COMMISSION

By: */s/ Shiell Anderson*
Chair, Transportation Commission

By: */s/ Lyle R. Manley*
Rule Reviewer

Certified to the Secretary of State October 29, 2001.

BEFORE THE OFFICE OF THE WORKERS' COMPENSATION JUDGE OF THE STATE OF MONTANA

In the matter of the amendment of ARM 24.5.303, 24.5.307, 24.5.307A, and 24.5.331 regarding procedural rules of the Court	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On January 1, 2002, the Office of the Workers' Compensation Judge proposes to amend the above procedural rules of the Court.

2. The Workers' Compensation Court will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative, accessible format of this notice. If you require an accommodation, contact the Court no later than 5:00 p.m., on December 20, 2001, to advise us of the nature of the accommodation that you need. Please contact Patricia J. Kessner, Workers' Compensation Court, P.O. Box 537, Helena, MT 59624-0537; telephone (406) 444-7794; FAX (406) 444-7798.

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

24.5.303 SERVICE AND COMPUTATION OF TIME (1) Except as provided below, t~~T~~he court will serve the furnished copies of the petition or third-party petition upon adverse parties and others, as designated in the petitioner's or third-party petitioner's instructions, by mailing them at Helena, Montana, with first class postage prepaid.

(a) If the respondent or third-party respondent is an unrepresented claimant, other individual, corporation, partnership, limited liability company, or other entity other than a Montana state agency, insurer doing business in Montana, self-insurer, insurance guarantee fund, or insurer qualified to do business in Montana at the time of an alleged injury or occupational disease and its successors and predecessors, then the party filing the petition or third-party petition shall cause personal service of a summons and the petition or third-party petition upon the respondent or third-party respondent in accordance with the provisions of the Mont. R. Civ. P. regarding service of summons and complaint.

(b) If the matter involves a third-party respondent, service shall include all pleadings and orders filed in the case to date.

(c) Time lines for service, return of service and response shall be in accordance with the rules of the workers' compensation court or as ordered by the workers' compensation court. ~~party or anyone other than an insurer, then the petition or third-party petition shall ordinarily be mailed by certified~~

~~mail with return receipt requested. Where service is made by certified mail and a signed return receipt is not received by the court within 14 days, or at the court's discretion, the court may order the petitioner or third-party petitioner to serve the petition or third-party petition in accordance with Rule 4(d) of the Mont. R. Civ. P.~~

(d) The petitioner or third-party petitioner is responsible for providing correct names and addresses of all parties to be served by the court.

(2) through (5) remain the same.

(6) The court will accept fax filings, but an original of any document filed by fax should be filed in the court within three days. The signature of an attorney or party on any fax filing shall have the same effect, and carry the same representations and consequences, as a signature on an original filing.

(7) remains the same.

AUTH: Sec. 2-4-201, MCA
IMP: Sec. 2-4-201, 39-71-2901, MCA

RATIONALE: The proposed amendment to subsection (1) conforms the rule to current Court practice of not attempting to serve petitions or third-party petitions by mail upon unrepresented parties or other individuals or business entities not typically appearing in the Workers' Compensation Court. Although service on such parties by certified mail was undertaken in the past, there were numerous recent failed attempts at such service, which resulted in delays in litigation of claims. This proposed amendment makes clear that such parties will be served by summons and also specifies with more particularity the parties who must be so served. The proposed amendment to subsection (2) admonishes parties who file by fax to forward originals to the Court. The purpose is to avoid long-term retention in court files of fax printings, which are in some cases difficult to read.

24.5.307 THIRD-PARTY PRACTICE (1) Prior to or simultaneous with the filing of the response to a petition, the responding party, an insurer or the uninsured employers' fund, may file a third-party petition with the court, naming any other insurer not already a party to the action which may be liable to the responding insurer, the uninsured employers' fund or claimant for all or part of the claims asserted in the petition.

(a) The third-party petition shall contain a short, plain statement of the party's contentions with regard to the third party's liability and may incorporate allegations of the petition and/or the response to the petition.

(b) The party filing the third-party petition shall serve the third-party petition upon the original petitioner in the case and shall file with the court an original and ~~3~~ three copies of the third-party petition, along with a letter indicating the names and addresses of third parties to be served.

(c) The court shall serve the furnished copies of the third-party petition along with all other pleadings and orders filed in the case to date upon the third party, who shall be referenced as the third-party respondent in accordance with ARM 24.5.303.

(2) through (3) remain the same.

AUTH: Sec. 2-4-201, MCA
IMP: Sec. 2-4-201, 39-71-2901, MCA

RATIONALE: The proposed amendment conforms the rule with current Court practice of serving all pleadings and orders filed to date upon a party served as a third-party respondent. This practice is necessary to allow the party entering the case to understand the positions of the other parties and the status of the case.

24.5.307A JOINDER AND SERVICE OF ALLEGED UNINSURED EMPLOYERS (1) In any case involving entitlement to benefits from the uninsured employers' fund, whether filed by a claimant, the uninsured employers' fund, or any other party, the alleged uninsured employer shall be deemed a party to the action.

(2) In all such cases, the uninsured employers' fund shall use due diligence to accomplish personal service of the petition upon the alleged uninsured employer within 20 days of the filing of the petition.

(3) Service shall be made in accordance with the Mont. R. Civ. P., except that time lines for service, return of service, or response shall be in accordance with the rules of the workers' compensation court or as ordered by the workers' compensation court ~~Rules 4B(2), (3), (5), and/or (6) of the Mont. R. Civ. P~~.

(4) Failure or inability to timely serve the alleged uninsured employer shall not be cause to delay the proceeding absent agreement of the parties or order of the court for good cause.

(5) At the request of any party, for good cause shown, an issue as to whether the employer was in fact uninsured or owed claimant a duty of providing workers' compensation coverage, may be bifurcated from the trial of issues relating to a claimant's entitlement to benefits.

AUTH: Sec. 2-4-201, MCA
IMP: Sec. 2-4-201, 39-71-2901, MCA

RATIONALE: The proposed amendment avoids erroneous reference to particular subsections of the Montana Rules of Civil Procedure, which are subject to change and reorganization, and clarifies that time lines established in the Montana Rules of Civil Procedure are not applicable in the Workers' Compensation Court. This will clarify requirements of practice in the Workers' Compensation Court.

24.5.331 SUBPOENA (1) through (2) remain the same.

(3) A subpoena may be served by any person who is not a

party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by state law ~~is made by exhibiting the original and delivering a true copy to the witness personally, giving or offering to her/him at the same time, if demanded, the fees to which s/he is entitled for travel to and from the place designated, and one day's attendance there~~. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

(4) and (5) remain the same.

AUTH: Sec. 2-4-201, MCA
IMP: Sec. 2-4-201, 39-71-2901, MCA

RATIONALE: The proposed amendment aligns the Workers' Compensation Court rule on subpoena service with the comparable rule of the Montana Rules of Civil Procedure. This will avoid confusion among attorneys, process servers, and citizens who work with both sets of rules. The change also benefits subpoenaed individuals in that they will no longer be required to demand witness fees in order to receive fees and mileage before their appearance.

4. It is reasonably necessary to amend the rules in order for the Workers' Compensation Court to properly and timely hear and decide cases. In addition, the rules committee of the Court has reviewed and agreed to the rule changes.

5. Concerned parties may submit their data, views, or arguments concerning these changes in writing to the Workers' Compensation Court, 1625 Eleventh Avenue, P.O. Box 537, Helena, MT 59624-0537, to be received no later than December 19, 2001.

6. If persons who are directly affected by the proposed action wish to express their data, views, and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to the Workers' Compensation Court, 1625 Eleventh Avenue, P.O. Box 537, Helena, MT 59624-0537, no later than December 19, 2001.

7. If the Workers' Compensation Court receives requests for a public hearing on the proposed action from either 10% or 25 persons, whichever is less, of those who are directly affected by the proposed action, from the appropriate administrative rule review committee of the legislature, from a governmental agency or subdivision, or from another association having no less than 25 members that are directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined

to be more than 25 based on the number of petitions filed in a year.

8. The Court maintains lists of interested persons who wish to receive notice of rulemaking actions proposed by the Court. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding Workers' Compensation Court rules. Such written request may be mailed or delivered to the Workers' Compensation Court, 1625 Eleventh Avenue, P.O. Box 537, Helena, MT 59624-0537, faxed to the Court at 406-444-7798, or may be made by completing a request form at any rules hearing held by the Court.

9. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

/s/ Mike McCarter
MIKE McCARTER
JUDGE

/s/ Jay Dufrechou
JAY DUFRECHOU
Hearing Examiner - Rule Reviewer

CERTIFIED TO THE SECRETARY OF STATE: October 29, 2001

**BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA**

In the matter of the proposed amendment of ARM 42.29.101, 42.29.103, 42.29.104 and 42.29.111 relating to universal system benefits credits	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On November 29, 2001, at 1:00 p.m., a public hearing will be held in the Fourth Floor Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the amendment of ARM 42.29.101, 42.29.103, 42.29.104, and 42.29.111 relating to universal system benefits credits.

Individuals planning to attend the hearing shall enter the building through the east doors of the Sam W. Mitchell Building, 125 North Roberts, Room 455, Helena, Montana.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Revenue not later than 5:00 p.m., November 15, 2001, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 5805, Helena, Montana 59604-5805; telephone (406) 444-2855; fax (406) 444-3696; or e-mail canderson@state.mt.us.

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

42.29.101 DEFINITIONS The following ~~terms will be used in~~ definitions apply to this chapter:

(1) through (12) remain the same.

(13) "Universal system benefits programs," means public purpose programs for:

(a) through (d) remain the same.

(e) market transformation designed to encourage competitive markets for public purpose programs; ~~and~~

(f) low-income energy assistance~~.~~; and

(g) energy conservation measures for irrigated agriculture.

AUTH: Sec. 69-8-413, MCA
IMP: Sec. 69-8-402, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.29.101 to comply with the change to 69-8-402, MCA by the 2001 Legislature.

42.29.103 CLAIM PROCEDURE (1) through (3) remain the same.

(4) Publication will occur ~~within 10 days of the department receiving the annual report~~ 15 days after the March 1 annual report deadline. The department shall publish the public notice in the six major newspapers of general circulation for the state

of Montana. Those newspapers are: Independent Record; Montana Standard; Billings Gazette; Missoulian; Bozeman Chronicle; and Great Falls Tribune.

(5) remains the same.

AUTH: Sec. 69-8-413, MCA
IMP: Sec. 69-8-402, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.29.103 to provide interested parties with a fixed period in which to locate published universal system benefits annual reports. The amendment will reduce the department's administrative costs.

42.29.104 CHALLENGE AND REVIEW PROCEDURE (1) Any interested person may file comments challenging a claim. A challenge must include supporting documentation. A challenge of any claimed credit must be received within 60 days of the ~~department's receipt of the credit claimant's annual reports~~ initial publication date. The 60 days does not begin to run until the department ~~receives the claimant's annual reports~~ publishes the claimant's annual report or a motion for protective order is determined, whichever occurs later.

(2) through (5) remain the same.

AUTH: Sec. 69-8-413, MCA
IMP: Sec. 69-8-402 and 69-8-414, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.29.104 to conform with the proposed amendment to ARM 42.29.103.

42.29.111 QUALIFYING EXPENDITURES AND TIMING (1) through (4) remain the same.

~~(5) A qualifying expenditure is an expenditure or financial commitment made during the current year and does not include costs for debts incurred in a prior year.~~

AUTH: Sec. 69-8-413, MCA
IMP: Sec. 69-8-402 and 69-8-414, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.29.111 to conform to the statutory changes of 69-8-402, MCA.

4. 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:

Cleo Anderson
Department of Revenue
Director's Office
P.O. Box 5805
Helena, Montana 59604-5805

and must be received no later than December 7, 2001.

5. Cleo Anderson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

6. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

7. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding particular subject matter or matters. Such written request may be mailed or delivered to the person in 4 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

8. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme
KURT G. ALME
Director of Revenue

Certified to Secretary of State October 29, 2001

**BEFORE THE PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA**

In the matter of amendment of ARM 2.43.406, pertaining to the retirement systems administered by the Montana Public Employees' Retirement Board	) NOTICE OF AMENDMENT))))

TO: All Concerned Persons

1. On July 19, 2001, the Public Employees' Retirement Board published notice of the proposed amendment of the above stated rule at page 1222 of the 2001 Montana Administrative Register, Issue Number 14.

2. Other rules were proposed to be amended in this proposal and were amended at page 1834 of the 2001 Montana Administrative Register, Issue Number 18.

3. The Board has amended ARM 2.43.406 with the following changes, stricken matter interlined, new matter underlined:

2.43.406 BASIC PERIOD OF SERVICE (1) The month is the basic period for the awarding of service credit and membership service for all retirement systems.

(a) Except as otherwise specified by rule or statute, ~~12 months~~ 160 hours of service credit will equal one ~~year~~ month of service credit, regardless of the calendar period during which the service credit was earned.

(b) Except as otherwise specified by rule or statute, ~~160 hours~~ 12 months of service credit will equal one ~~month~~ year of service credit, regardless of the calendar period during which the service credit was earned.

(c) Service credit granted for any fiscal year may not be greater than one year.

(2) Service credit of less than 160 hours in a calendar month constitutes part-time service.

~~(2)~~ (3) If only compensation for full-time covered employment is used to calculate "final average compensation" or "highest average compensation" and if the member has both full- and part-time service, then the member must be granted proportional service credit for service in each calendar month of employment. The proportion will be equal to the number of documented hours for which compensation during a calendar month was reported for the employee, divided by 160 hours, but may not be greater than one.

~~(3)~~ (4) If only compensation for part-time covered employment is used to calculate "final average compensation" or "highest average compensation" and if the member has both full- and part-time service, then the member must be granted ~~one month of~~ proportional service credit for service in each calendar month ~~regardless the number of hours worked that month~~ of employment. The proportion will be equal to the

number of documented hours for which compensation during a calendar month was reported for the employee, divided by the average number of hours worked each month during the "final average compensation" or "highest average compensation" time period, but may not be greater than one.

(5) If compensation for both part-time and full-time covered employment is used to calculate the "final average compensation" or "highest average compensation", then the member must be granted proportional service credit for service in each calendar month of employment. The proportion will be equal to the number of documented hours for which compensation during a calendar month was reported for the employee, divided by the average number of hours worked each month during the "final average compensation" or "highest average compensation" period, but may not be greater than one.

AUTH: 19-2-403, MCA
IMP: 19-2-701, 19-3-904, 19-5-502, 19-6-502, 19-7-503, 19-8-603, 19-9-804, 19-13-704, MCA

COMMENT: A Board member commented in writing and orally regarding the complexity of ARM 2.43.406's proposed language.

RESPONSE: The Board agrees that the proposed language was complex. The subject matter which is addressed by ARM 2.43.406 is extremely complicated. ARM 2.43.406 as amended uses consistent terms and sentence structure to clearly identify, step-by-step, the calculation of service credit under every possible combination of full and part-time service.

/s/ Terry Teichrow
Terry Teichrow, President
Public Employees' Retirement Board

/s/ Kelly Jenkins
Kelly Jenkins, General Counsel and
Rule Reviewer

/s/ Dal Smilie
Dal Smilie, Chief Legal Counsel and
Rule Reviewer

Certified to the Secretary of State on October 29, 2001.

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE OF THE STATE OF MONTANA

In the matter of the amendment of ARM 6.6.302 through 6.6.309, the repeal of ARM 6.6.310, and the adoption of New Rules I, II and III pertaining to life insurance and annuities replacement	)))))))	NOTICE OF AMENDMENT, REPEAL AND ADOPTION

TO: All Concerned Persons

1. On July 19, 2001, the State Auditor and Commissioner of Insurance published a notice of proposed amendment, repeal and adoption of the above stated rules pertaining to life insurance and annuities replacement at page 1259 of the 2001 Montana Administrative Register, Issue No. 14.

2. The State Auditor has amended ARM 6.6.302, repealed ARM 6.6.310, and adopted new RULE II (6.6.312) and new RULE III (6.6.313) as proposed.

3. The State Auditor has amended ARM 6.6.303 through 6.6.309 with the following changes, stricken matter interlined, new matter underlined:

6.6.303 DEFINITIONS (1) "Direct-response solicitation" means a solicitation through mailings, telephone, the internet or other mass communication media.

(2) "Existing insurer" means the insurance company whose policy or contract is or will be changed or affected in a manner described within the definition of "replacement".

(3) "Existing policy or contract" means an individual life insurance policy or annuity contract in force, including a policy under a binding or conditional receipt or a policy or a contract that is within an unconditional refund period.

(4) "Financed purchase" means the purchase of a new policy involving the actual or intended use of funds obtained by the withdrawal or surrender of, or by borrowing from values of an existing policy to pay all or part of any premium due on the new policy. For purposes of a regulatory review of an individual transaction only, ~~I~~if a withdrawal, surrender, or borrowing by an individual involves the policy values of an existing policy and is used to pay premiums on a new policy owned by the same policyholder and issued by the same company within four months before or 13 months after the effective date of the new policy, it will be deemed prima facie evidence of the policyholder's intent to finance the purchase of the new policy with existing policy values. This prima facie standard is not intended to increase or decrease the monitoring obligations contained in this subchapter.

(5) "Illustration" means a presentation or depiction

that includes non-guaranteed ~~or variable~~ elements of a policy of life insurance over a period of years as described in 33-20-604, MCA.

(6) "Policy summary," for the purposes of this subchapter:

(a) for policies or contracts other than universal life policies, means a written statement regarding a policy or contract which shall contain to the extent applicable, but need not be limited to, the following information:

(i) current death benefit;

(ii) annual contract premium;

(iii) current cash surrender value;

(iv) current dividend;

(v) application of current dividend; and

(vi) amount of outstanding loan.

(b) for universal life policies, means a written statement that shall contain at least the following information:

(i) the beginning and end date of the current report period;

(ii) the policy value at the end of the previous report period and at the end of the current report period;

(iii) the total amounts that have been credited or debited to the policy value during the current report period, identifying each by type (e.g., interest, mortality, expense and riders);

(iv) the current death benefit at the end of the current report period on each life covered by the policy;

(v) the net cash surrender value of the policy as of the end of the current report period; and

(vi) the amount of outstanding loans, if any, as of the end of the current report period.

(7) "Producer" shall be defined to include agents and producers.

(8) "Registered contract" means a variable annuity contract or variable life insurance policy subject to the prospectus delivery requirements of the Securities Act of 1933.

(9) "Replacement" means a transaction in which a new policy or contract ~~or registered contract~~ is to be purchased, and it is known or should be known to the proposing producer, or to the proposing insurer if there is no producer, that by reason of such transaction, an existing policy or contract has been or is to be:

(a) lapsed, forfeited, surrendered, or partially surrendered, assigned to the replacing insurer or otherwise terminated;

(b) converted to reduced paid-up insurance, continued as extended term insurance, or otherwise reduced in value by the use of nonforfeiture benefits or other policy values;

(c) amended so as to effect either a reduction in benefits or in the term for which coverage would otherwise remain in force or for which benefits would be paid;

(d) reissued with any reduction in cash values; or

(e) used in a financed purchase.

(10) "Replacing insurer" means the insurance company that issues or proposes to issue a new policy or contract that replaces an existing policy or contract or is a financed purchase.

(11) "Sales material" means a sales illustration and any other written, printed or electronically presented information created, or completed or provided by the company or producer and used in the presentation to the policy or contract owner related to the policy or contract purchased.

AUTH: Sec. 33-1-313, MCA
IMP: Sec. 33-18-204, MCA

6.6.304 EXEMPTIONS (1) Unless otherwise specifically included, this subchapter shall not apply to transactions involving:

(a) credit life insurance;

(b) group life insurance or group annuities where there is no direct solicitation of individuals by an insurance producer. Direct solicitation shall not include any group meeting held by an insurance producer solely for the purpose of educating or enrolling individuals or, when initiated by an individual member of the group, assisting with the selection of investment options offered by a single insurer in connection with enrolling that individual. Group life insurance or group annuity certificates marketed through direct response solicitation shall be subject to the provisions of ARM 6.6.307;

(c) an application to the existing insurer that issued the existing policy or contract when a contractual change or a conversion privilege is being exercised, or when the existing policy or contract is being replaced by the same insurer pursuant to a program filed with and approved by the commissioner;

(d) proposed life insurance that is to replace life insurance under a binding or conditional receipt issued by the same company;

(e) policies or contracts used to fund:

(i) an employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA);

(ii) a plan described by section 401(a), 401(k) or 403(b) of the Internal Revenue Code, where the plan, for purposes of ERISA, is established or maintained by an employer;

(iii) a governmental or church plan defined in section 414, a governmental or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization under section 457 of the Internal Revenue Code; or

(iv) a nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor.

(f) notwithstanding (1)(e), this subchapter shall apply

to policies or contracts used to fund any plan or arrangement that is funded solely by contributions an employee elects to make, whether on a pre-tax or after-tax basis, and where the insurance company has been notified that plan participants may choose from among two or more insurers and there is a direct solicitation of an individual employee by an insurance producer for the purchase of a contract or policy. As used in this rule, direct solicitation shall not include any group meeting held by an insurance producer solely for the purpose of educating individuals about the plan or arrangement or enrolling individuals in the plan or arrangement or, when initiated by an individual employee, assisting with the selection of investment options offered by a single insurer in connection with enrolling that individual employee;

(g) existing life insurance that is a non-convertible term life insurance policy that will expire in five years or less and cannot be renewed;

(h) where new coverage is provided under a life insurance policy or contract and the cost is borne wholly by the insured's employer or by an association for which the insured is a member; or

(i) immediate annuities that are purchased with proceeds from an existing contract. Immediate annuities purchased with proceeds from an existing policy are not exempted from the requirements of this ~~rule~~ subchapter; or

(j) structure settlements.

(2) Registered contracts shall be exempt from the requirements of ARM 6.6.306(1)(b) and 6.6.308(1)(b) with respect to the provision of illustrations or policy summaries; however, premium or contract contribution amounts and identification of the appropriate prospectus or offering circular shall be required instead.

AUTH: Sec. 33-1-313, MCA
IMP: Sec. 33-18-204, MCA

6.6.305 DUTIES OF PRODUCERS (1) A producer who initiates an application shall submit to the insurer, with or as part of the application, a statement signed by both the applicant and the producer as to whether the applicant has existing policies or contracts. If the answer is "no," the producer's duties with respect to replacement are complete.

(2) If the applicant answered "yes" to the question regarding existing coverage referred to in (1), the producer shall present and read to the applicant, not later than at the time of taking the application, a notice regarding replacements in the form as described in Appendix A or other substantially similar form approved by the commissioner. However, no approval shall be required when amendments to the notice are limited to the omission of references not applicable to the product being sold or replaced. The notice shall be signed by both the applicant and the producer attesting that the notice has been read aloud by the producer or that the applicant did not wish the notice to be read aloud

(in which case the producer need not have read the notice aloud) and left with the applicant.

(3) The notice shall list all life insurance policies or annuities proposed to be replaced, properly identified by name of insurer, the insured or annuitant, and policy or contract number if available; and shall include a statement as to whether each policy or contract will be replaced or whether a policy will be used as a source of financing for the new policy or contract. If a policy or contract number has not been issued by the existing insurer, alternative identification, such as an application or receipt number, shall be listed.

(4) In connection with a replacement transaction the producer shall leave with the applicant, at the time an application for a new policy or contract is completed, the original or a copy of all sales material. With respect to electronically presented sales material, it shall be provided to the policy or contract owner in printed form no later than at the time of policy or contract delivery.

(5) Except as provided in ~~[New Rule I]~~ ARM 6.6.306(3), in connection with a replacement transaction, the producer shall submit to the insurer to which an application for a policy or contract is presented, a copy of each document required by this rule, a statement identifying any preprinted or electronically presented company approved sales materials used, and copies of any individualized sales materials, including any illustrations related to the specific policy or contract purchased.

AUTH: Sec. 33-1-313, MCA
IMP: Sec. 33-18-204, MCA

6.6.306 DUTIES OF REPLACING INSURERS THAT USE PRODUCERS

(1) Where a replacement is involved in the transaction, the replacing insurer shall:

(a) ~~maintain a system of supervision and control to assure compliance with the requirement of this subchapter that shall at a minimum,~~ verify that the required forms are received and are in compliance with this subchapter;

(b) notify any other existing insurer that may be affected by the proposed replacement within five business days of receipt of a completed application indicating replacement or when the replacement is identified if not indicated on the application, and mail a copy of the available illustration or policy summary for the proposed policy or available disclosure document for the proposed contract within five business days of a request from an existing insurer;

(c) be able to produce copies of the notification regarding replacement required in ARM 6.6.305(2), indexed by producer, for at least five years or until the next regular examination by the insurance department of a company's state of domicile, whichever is later; and

(d) provide to the policy or contract owner notice of the right to return the policy or contract within 30 days of

the delivery of the contract and receive an unconditional full refund of all premiums or considerations paid on it, including any policy fees or charges or, in the case of a variable or market value adjustment policy or contract, a payment of the cash surrender value provided under the policy or contract plus the fees and other charges deducted from the gross premiums or considerations or imposed under such policy or contract~~:~~.

~~(i)~~ sSuch notice may be included in Appendix A or C.

(2) In transactions where the replacing insurer and the existing insurer are the same or subsidiaries or affiliates under common ownership or control, allow credit for the period of time that has elapsed under the replaced policy's or contract's incontestability and suicide period up to the face amount of the existing policy or contract. With regard to financed purchases the credit may be limited to the amount the face amount of the existing policy is reduced by the use of existing policy values to fund the new policy or contract.

(3) If an insurer prohibits the use of sales material other than that approved by the company, as an alternative to the requirements of ARM 6.6.305(5) the insurer may:

(a) require with each application a statement signed by the producer that:

(i) represents that the producer used only company-approved sales material; and

(ii) states that copies of all sales material were left with the applicant in accordance with ARM 6.6.305(4); and

(b) within 10 days of the issuance of the policy or contract:

(i) notify the applicant by sending a letter or by verbal communication with the applicant by a person whose duties are separate from the marketing area of the insurer, that the producer has represented that copies of all sales material have been left with the applicant in accordance with ARM 6.6.305(4);

(ii) provide the applicant with a toll free number to contact company personnel involved in the compliance function if such is not the case; and

(iii) stress the importance of retaining copies of the sales material for future reference.

(c) be able to produce a copy of the letter or other verification in the policy file at the home or regional office for at least five years after the termination or expiration of the policy or contract.

AUTH: Sec. 33-1-313, MCA
IMP: Sec. 33-18-204, MCA

6.6.307 DUTIES OF INSURERS WITH RESPECT TO DIRECT RESPONSE ~~SALES~~ SOLICITATIONS (1) In the case of an application that is initiated as a result of a direct response solicitation, the insurer shall require, with or as part of each completed application for a policy or contract, a statement asking whether the applicant, by applying for the

proposed policy or contract, intends to replace, discontinue or change an existing policy or contract. If the applicant indicates a replacement or change is not intended or if the applicant fails to respond to the statement, the insurer shall send the applicant, with the policy or contract, a notice regarding replacement in Appendix B, or other substantially similar form approved by the commissioner.

(2) If the insurer has proposed the replacement or if the applicant indicates a replacement is intended and the insurer continues with the replacement, the insurer shall:

(a) provide to applicants or prospective applicants with the policy or contract a notice, as described in Appendix C, or other substantially similar form approved by the commissioner. In these instances the insurer may delete the references to the producer, including the producer's signature, and references not applicable to the product being sold or replaced, without having to obtain approval of the form from the commissioner. The insurer's obligation to obtain the applicant's signature shall be satisfied if it can demonstrate that it has made a diligent effort to secure a signed copy of the notice referred to in this rule. The requirement to make a diligent effort shall be deemed satisfied if the insurer includes in the mailing a self-addressed postage prepaid envelope with instructions for the return of the signed notice referred to in this rule; and

(b) comply with the requirements of ARM 6.6.306(1)(b), if the applicant furnishes the names of the existing insurers, and the requirements of ARM 6.6.306(1)(c), (1)(d) and (2).

AUTH: Sec. 33-1-313, MCA
IMP: Sec. 33-18-204, MCA

6.6.308 DUTIES OF THE EXISTING INSURER (1) Where a replacement is involved in the transaction, the existing insurer shall:

(a) retain and be able to produce all replacement notifications received, indexed by replacing insurer, for at least five years or until the conclusion of the next regular examination conducted by the insurance department of its state of domicile, whichever is later;

(b) send a letter to the policy or contract owner of the right to receive information regarding the existing policy or contract values including, if available, an in force illustration or policy summary if an in force illustration cannot be produced within five business days of receipt of a notice that an existing policy or contract is being replaced. The information shall be provided within five business days of receipt of the request from the policy or contract owner;

(c) upon receipt of a request to borrow, surrender or withdraw any policy ~~or contract~~ values, send a notice, advising the policy ~~or contract~~ owner that the release of policy ~~or contract~~ values may affect the guaranteed elements, non-guaranteed elements, face amount or surrender value of the policy ~~or contract~~ from which the values are released. The

notice shall be sent separate from the check if the check is sent to anyone other than the policy ~~or contract~~ owner. In the case of consecutive automatic premium loans ~~or systematic withdrawals from a contract~~, the insurer is only required to send the notice at the time of the first loan ~~or withdrawal~~.

AUTH: Sec. 33-1-313, MCA
IMP: Sec. 33-18-204, MCA

6.6.309 VIOLATIONS AND PENALTIES (1) Any insurer, agent, representative, officer or employee of such insurer failing to comply with the requirements of this sub-chapter shall be subject to such penalties as may be appropriate under the insurance laws of Montana.

(2) Any failure to comply with this subchapter shall be considered ~~prima facie evidence of~~ a violation of 33-18-204, MCA, Twisting Prohibited.

(3) ~~The following practices shall be considered violations of this subchapter~~ Examples of violations include:

(a) any deceptive or misleading information set forth in sales material;

(b) failing to ask the applicant in completing the application the pertinent questions regarding the possibility of financing or replacement;

(c) the intentional incorrect recording of an answer;

(d) advising an applicant to respond negatively to any question regarding replacement in order to prevent notice to the existing insurer; or

(e) advising a policy or contract owner to write directly to the company in such a way as to attempt to obscure the identity of the replacing producer or company.

(4) Policy and contract owners have the right to replace existing life insurance policies or annuity contracts after indicating in or as part of the applications for new coverage that replacement is not their intention; however, patterns of such action by policy or contract owners of the same producer shall be deemed prima facie evidence of the producer's knowledge that replacement was intended in connection with the identified transactions, and these patterns of action shall be deemed prima facie evidence of the producer's intent to violate this subchapter.

(5) Where it is determined that the requirements of this subchapter have not been met, the replacing insurer shall provide to the policy owner an in-force illustration if available or policy summary for the replacement policy or available disclosure document for the replacement contract and the notice regarding replacements in Appendix A or C.

AUTH: Sec. 33-1-313, 33-1-317, 33-1-318, 33-17-1001, MCA
IMP: Sec. 33-18-204, MCA

4. The State Auditor has adopted new RULE I, ARM 6.6.311, with the following changes, stricken matter interlined, new matter underlined:

RULE I (6.6.311) DUTIES OF ALL INSURERS THAT USE PRODUCERS (1) through (1)(e) will remain the same.

(f) ascertain that the sales material and illustrations used in the replacement meet the requirements of this subchapter and are complete and accurate for the proposed policy or contract; ~~and~~

(g) if an application does not meet the requirements of ~~this subchapter~~ ARM 6.6.305(5), notify the producer and applicant and fulfill the outstanding requirements; and

(h) will remain the same.

AUTH: Sec. 33-1-313, MCA
IMP: Sec. 33-19-204, MCA

5. The State Auditor's Office (SAO) received the following comments; SAO's responses follow. Some comments have been combined or grouped together to promote efficiency in the description of comments and in the responses. Comments that suggested only minor technical changes have not been specifically responded to; however, those changes have been made in the text of the rule.

COMMENT 1: Two commentors objected to removing the NAIC model language, "through a sponsoring or endorsing entity or individually solely," from the definition of "Direct-response solicitation" in ARM 6.6.303(1).

RESPONSE: No substantive reason for requesting this change was given, except a statement alleging that the language deviates from the NAIC model. The SAO reserves the right to deviate from the model if the model language appears to be unnecessary or confusing. SAO is fully aware of any deviation from the model language, and a request for language changes must be accompanied by a substantive reason for the requested change. The definition will remain as originally written.

COMMENT 2: One commentor pointed out that the words "or contract" were omitted, apparently by mistake, from the definition of "Existing Insurer" in ARM 6.6.303(2).

RESPONSE: The SAO agrees with the comment and has made the suggested change in the rule.

COMMENT 3: Five commentors argued against the deleting the NAIC model language, "for purposes of a regulatory review of an individual transaction only," and "and issued by the same company" from the definition of "financed purchase" in ARM 6.6.303(4). One of the commentors explained that this language limits the definition of "financed purchase" to internal replacements because the definition provides for a prima facie evidence standard. Companies should not be held to a prima facie evidence standard with regard to external replacements because companies have limited ability to monitor

external replacements. Nor should companies have to be concerned that every "withdrawal, surrender or borrowing" would be deemed prima facie evidence, instead of only those subject to regulatory review.

RESPONSE: SAO has carefully considered all of the comments and will restore the model language to the definition. In general the rules in this subchapter apply to all replacements, whether internal or external. The term "financed purchase" does not appear often in these rules, and the vast majority of the protections provided apply to both internal and external replacements.

COMMENT 4: Two commentors requested that SAO delete the language "or variable" from the definition of "illustrations" in ARM 6.6.303(5). One commentor suggested that the word variable may be redundant since "non-guaranteed" is used in the same text.

RESPONSE: SAO has removed this language from the definition of illustration because it does not appear to be necessary, and also because it differs from the definition of "illustration" found in the life insurance illustration rules.

COMMENT 5: One commentor questions why SAO removed the word "broker" from the NAIC model definition of "producer" in ARM 6.6.303(7).

RESPONSE: Montana insurance statutes do not define, nor do they recognize the term "broker."

COMMENT 6: Three commentors objected to the addition of the term "registered contract" to the definition of "replacement" in ARM 6.6.303(9). They argued that the addition of this term is unnecessary because both of the term "policy" and "contract" include "registered contract."

RESPONSE: These comments are well-taken, and SAO has removed the term "registered contract" from the definition of "replacement."

COMMENT 7: One commentor argues that the Montana rules should include an exception for pre-arranged funeral contracts in ARM 6.6.304(1) because the NAIC model rules provide for such an exception.

RESPONSE: Montana law does not allow pre-arranged funeral contracts. [Section 33-18-301, Montana Code Annotated (2001)]. Therefore, these rules will not provide for such an exception.

COMMENT 8: Three commentors objected to the removal of the following NAIC model language from ARM 6.6.304(1)(c) EXEMPTIONS: "or, when the existing policy or contract is being

replaced by the same insurer pursuant to a program filed with and approved by the commissioner." Some insurers wish to be able to make changes or improvements in policy form or content, across an entire block of business, with prior approval from the commissioner, and not have such changes constitute a "replacement" that would trigger all of the requirements of this subchapter. If such changes are not exempted, customers might not receive the benefit of improved products from their existing insurers.

RESPONSE: SAO agrees with the commentors and has made this change, adding back the NAIC model language to ARM 6.6.304(1)(c).

COMMENT 9: Three commentors objected to the addition of the language, "maintain a system of supervision and control to assure compliance with the requirements of this subchapter that shall at a minimum..." in ARM 6.6.306(1)(a), DUTIES OF REPLACING INSURERS THAT USE PRODUCERS. They argue that this language places an undue burden on replacing insurers, does not conform with the NAIC model language, and thereby defeats the goal of uniform life insurance rules for all states. In addition, this language already appears in new RULE I (ARM 6.6.311), DUTIES OF ALL INSURERS THAT USE PRODUCERS.

RESPONSE: Because this language already appears in new RULE I (ARM 6.6.311) and in the interests of conforming to the NAIC model language whenever possible, SAO has deleted this language from ARM 6.6.306(1)(a).

COMMENT 10: One commentor objects to the addition of the language, "the home or regional office" in ARM 6.6.306(3), as the location of the contents of the policy file. This commentor suggests that most information is held in an electronic state, rather than in physical locations, and that therefore it is unreasonable for SAO to demand that a company store its information at the home or regional office.

RESPONSE: ARM 6.6.306(3) states that the replacing insurer shall "be able to produce [...] at the home or regional office", but does not dictate where that information must be stored. If information is stored electronically, it should be a simple matter to transfer it to the home or regional office, so that it may be produced for the SAO. Furthermore, section 33-3-401, MCA, requires that records be kept at the home office or principal place of business in this state for the purpose of examinations by the SAO.

COMMENT 11: Two commentors object to the addition of the "or contract" to the following provision in ARM 6.6.308(1)(c), DUTIES OF AN EXISTING INSURER: "upon request to borrow, surrender or withdraw any policy or contract values, send a notice..." Adding the words, "or contract" to this provision means that it would apply to annuities, as well as life

insurance. One commentor points out that, unlike life insurance, reasonable people understand that withdrawal or surrender of values from an annuity will leave less value there, and therefore, sending a letter to them is unnecessary because the effect is obvious.

RESPONSE: SAO agrees that this particular protection is not as critical for annuity owners, and therefore in the interests of maintaining conformity with the NAIC model, has deleted the words "or contract" from ARM 6.6.308(1)(c).

COMMENT 12: One commentor objects to the portion of ARM 6.6.309(2) that states that any violation of this subchapter is considered to be a violation of anti-twisting laws. In particular, they object to the language that makes a violation of this subchapter prima facie evidence of a violation of 33-18-204, MCA, twisting prohibited. They argue that minor, technical violations of this subchapter should not be considered prima facie evidence of twisting.

RESPONSE: In response to this comment, SAO has amended the language in this rule to reflect the NAIC model language exactly, and in particular, has deleted the words "prima facie evidence of" in ARM 6.6.309(2).

COMMENT 13: Numerous commentors stated that they were concerned about the September 7, 2001, proposed effective date for these rules. Many insurers voiced concern about insufficient time to prepare their systems for these new requirements.

RESPONSE: In light of these comments, SAO has changed the effective date of these rule amendments to January 1, 2002, as suggested by most commentors.

6. These amendments and adoptions will be effective January 1, 2002.

JOHN MORRISON, State Auditor
and Commissioner of Securities

By: /s/ Angela Caruso
Angela Caruso
Deputy Insurance Commissioner

By: /s/ Elizabeth L. Griffing
Elizabeth L. Griffing
Rules Reviewer

Certified to the Secretary of State on October 29, 2001.

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE OF THE STATE OF MONTANA

In the matter of the adoption of new RULES I through XVIII pertaining to life insurance illustrations	))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On July 19, 2001, the State Auditor and Commissioner of Insurance published a notice of proposed adoption of new RULES I through XVIII pertaining to life insurance illustrations at page 1244 of the 2001 Montana Administrative Register, Issue No. 14.

2. The State Auditor has adopted new RULES I (6.6.701), II (6.6.702), III (6.6.703), V (6.6.705), VI (6.6.706), XII (6.6.712), XIII (6.6.713), XIV (6.6.714), XVI (6.6.716), and (6.6.717) as proposed.

3. The State Auditor has adopted the following rules as proposed, with the following changes, stricken matter interlined, new matter underlined:

RULE IV (6.6.704) DEFINITIONS For the purposes of this subchapter:

(1) "Actuarial ~~s~~Standards ~~b~~Board" means the board established by the American academy of actuaries to develop and promulgate standards of actuarial practice.

(2) through (7)(b) will remain the same.

(8) "Illustration" means a presentation or depiction that includes ~~guaranteed and~~ non-guaranteed elements of a policy of life insurance over a period of years and that is one of the three types defined below:

(8)(a) through (c) will remain the same.

(9) "Illustration actuary" means an actuary meeting the requirements of ARM 6.6.715 who certifies to illustrations based on the standard of practice promulgated by the ~~a~~Actuarial ~~s~~Standards ~~b~~Board.

(10) through (15) will remain the same.

(16) "Self-supporting illustration" means an illustration of a policy form for which it can be demonstrated that, when using experience assumptions underlying the disciplined current scale, for all illustrated points in time on or after the fifteenth policy anniversary or the twentieth policy anniversary for second-or-later-to-die policies (or upon policy expiration if sooner), the accumulated value of all policy cash flows equals or exceeds the total policy owner value available. For this purpose, policy owner value will include cash surrender values and any other illustrated benefit amounts available at the policy owner's election.

(17) will remain the same.

AUTH: Sec. 33-20-150, MCA

IMP: Sec. 33-18-202 and 33-20-150, MCA

RULE X (6.6.710) STANDARDS FOR BASIC ILLUSTRATIONS - STATEMENTS (1) Statements substantially similar to the following shall be included on the same page as the numeric summary and signed by the applicant, or the policy owner in the case of an illustration provided at time of delivery, as required in this ~~rule.~~ subchapter:

(2) and (3) will remain the same, but are renumbered (1)(a) and (b).

AUTH: Sec. 33-20-150, MCA
IMP: Sec. 33-18-202 and 33-20-150, MCA

RULE XV (6.6.715) ANNUAL CERTIFICATIONS (1) will remain the same.

(2) The illustration actuary shall certify that the disciplined current scale used in illustrations is in conformity with the ~~a~~Actuarial ~~s~~Standard of ~~p~~Practice for ~~c~~Compliance with the NAIC model regulation on life insurance illustrations promulgated by the ~~a~~Actuarial ~~s~~Standards ~~b~~Board and that the illustrated scales used in insurer-authorized illustrations meet the requirements of this subchapter.

(3) will remain the same.

(a) be a member in good standing of the American ~~a~~Academy of ~~a~~Actuaries;

(b) through (f)(ii) will remain the same.

(iii) a generally recognized expense table based on fully allocated expenses representing a significant portion of insurance companies and approved by the NAIC or by the commissioner.

(4) through (9) will remain the same.

AUTH: Sec. 33-20-150, MCA
IMP: Sec. 33-18-202 and 33-20-150, MCA

RULE XVIII (6.6.718) EFFECTIVE DATE (1) This subchapter shall become effective ~~[September 7, 2001, or effective date set in subchapter, whichever is later]~~ January 1, 2002, and shall apply to policies sold on or after the effective date.

AUTH: Sec. 33-20-150, MCA
IMP: Sec. 33-18-202 and 33-20-150, MCA

4. The State Auditor has adopted the following new rules with changes to the catchphrases. The text of the rules remains as proposed:

RULE VII (6.6.707) STANDARDS FOR BASIC ILLUSTRATIONS - FORMAT (1) through (1)(n) will remain the same.

AUTH: Sec. 33-20-150, MCA
IMP: Sec. 33-18-202 and 33-20-150, MCA

RULE VIII (6.6.708) STANDARDS FOR BASIC ILLUSTRATIONS -

NARRATIVE SUMMARY (1) through (1)(e)(i) will remain the same.

AUTH: Sec. 33-20-150, MCA
IMP: Sec. 33-18-202 and 33-20-150, MCA

RULE IX (6.6.709) STANDARDS FOR BASIC ILLUSTRATIONS - NUMERIC SUMMARY (1) through (3) will remain the same.

AUTH: Sec. 33-20-150, MCA
IMP: Sec. 33-18-202 and 33-20-150, MCA

RULE XI (6.6.711) STANDARDS FOR BASIC ILLUSTRATIONS - TABULAR DETAIL (1) through (3) will remain the same.

AUTH: Sec. 33-20-150, MCA
IMP: Sec. 33-18-202 and 33-20-150, MCA

5. The Department has thoroughly considered all comments and testimony received. Some comments have been combined or grouped together to promote efficiency in the description of comments and in the responses. Comments that suggested only minor technical changes, such as commas, have not been specifically responded to; however, those changes have been made in the text of the rule. Those comments and the Department's responses thereto, are as follows:

COMMENT 1: Two commentors object to deleting the word "reasonably" from the NAIC model language in the definition of "disciplined current scale" in new RULE IV(4) (ARM 6.6.704). They argue that the use of the word "reasonably" is important in order to avoid confusion in cases where a company's actual experience may be limited.

RESPONSE: SAO routinely avoids words like "reasonably" when drafting administrative rules or statutes because of the difficulty in defining what "reasonably" means. If a company has limited historical experience upon which to base actuarial findings, that company may obviously rely on the "standards established by the Actuarial Standards Board" as described in new RULE IV(4)(a) through (d) (ARM 6.6.704). The Auditor's office has an existing and ongoing duty to act reasonably when determining "disciplined current scale."

COMMENT 2: Two commentors object to the addition of the words "guaranteed and" to the model definition of "illustration" in new RULE IV(8) (ARM 6.6.704). The NAIC model definition of illustration includes only non-guaranteed elements of a policy. The commentors correctly point out that this is the most central definition in the entire subchapter. They state that the "guaranteed and" addition could create a dangerous loophole because the proposed rule could be interpreted as excluding materials that contain only non-guaranteed elements from the scope of this subchapter. They further argue that supplemental illustrations that have

already been created and programmed by companies to comply with the NAIC model will not be usable nationwide, which would destroy the uniformity that was the NAIC's goal. The commentors also suggest that illustrations for guaranteed elements of a policy should be addressed in separate rules on "life insurance advertising."

RESPONSE: After careful consideration, SAO agrees to delete the words "and guaranteed" from the definition of illustration because of the "dangerous loophole" argument made by the commentors. Also, upon further reflection, it appears that the addition of this language would be a "material change" from the model rule, which is prohibited by 33-20-150, MCA.

COMMENT 3: One commentor wishes to add the term "basic illustrations" to the catchphrases in new RULE VIII (ARM 6.6.708), new RULE IX (ARM 6.6.709), and new RULE XI (ARM 6.6.711) in order to clarify that these rules, dealing with format, narrative summary, numeric summary, etc., apply specifically to basic illustrations only. Also, the NAIC model includes that language in its titles.

RESPONSE: SAO agrees that this is an important clarification and has added the term, "basic illustrations" to all of these catchphrases.

COMMENT 4: Two commentors object to the change to the record retention period in new RULE XIII(4)(b) (ARM 6.6.713) from three years (in the NAIC model) to five years. They argue that such a change compromises uniformity among the states.

RESPONSE: In this case, deviation from the model language is necessary because a statute in the insurance code, 33-3-401, MCA, requires that an insurance company maintain records for five years. For purposes of insurance department exams, including market conduct exams, an insurance company is required to keep all records of their "transactions and affairs," including all documents relating to individual life insurance policies sold, for a minimum of five years. Adding illustration records to the inventory of documents already being retained for five years should not be a significant additional burden. In any case, it is required by Montana statute.

COMMENT 5: Two commentors objected to the deletion of the following model language in new RULE XV(3)(f)(iii) (ARM 6.6.715): "a" from the beginning of the first phrase, and "NAIC or by the" from the final phrase in the subsection (approved by the commissioner.) They argue that NAIC approval of the relevant tables should be acceptable under the rule. The addition of this language would serve to eliminate uncertainty in situations where the Montana commissioner has

not approved any table, but the NAIC has approved a table that is generally in use by the industry.

RESPONSE: These comments are well-taken, and SAO has made the suggested changes in the text of the rule.

COMMENT 6: One commentor requested that the NAIC model language in new RULE XV (ARM 6.6.715), which capitalized "Actuarial Standard of Practice for Compliance," "Actuarial Standards Board," and "American Academy of Actuaries," be restored. These capital letters serve to prevent any argument that there can be competing academies of actuaries, or competing standards, and also to clarify that the rule is actually naming an organization and a standard and not merely describing them.

RESPONSE: SAO agrees with this suggestion and has made the requested change.

COMMENT 7: Numerous commentors state that they were concerned about the September 7, 2001, proposed effective date for these rules. Many insurers voiced concern about insufficient time to prepare their systems for these new requirements.

RESPONSE: In light of these concerns, SAO has changed the effective date of these rule amendments to January 1, 2002, as suggested by most commentors.

6. These rules will be effective January 1, 2002.

JOHN MORRISON, State Auditor
and Commissioner of Securities

By: /s/ Angela Caruso
Angela Caruso
Deputy Insurance Commissioner

By: /s/ Elizabeth L. Griffing
Elizabeth L. Griffing
Rules Reviewer

Certified to the Secretary of State on October 29, 2001.

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE OF THE STATE OF MONTANA

In the matter of the amendment of ARM 6.6.802 and ARM 6.6.805 pertaining to annuity disclosures, and updating references to the buyer's guide contained in appendix A	))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On July 19, 2001, the State Auditor and Commissioner of Insurance published a notice of public hearing on the proposed amendment of ARM 6.6.802 and 6.6.805 pertaining to annuity disclosures, and updating references to the appendix titled "Buyer's Guide," at page 1275 of the Montana Administrative Register, Issue Number 14.

2. The State Auditor has amended ARM 6.6.802 and 6.6.805 exactly as proposed.

3. No comments or testimony were received.

JOHN MORRISON, State Auditor and Commissioner of Securities

By: /s/ Angela Caruso
Angela Caruso
Deputy Insurance Commissioner

By: /s/ Elizabeth L. Griffing
Elizabeth L. Griffing
Rules Reviewer

Certified to the Secretary of State on October 29, 2001.

BEFORE THE BOARD OF PUBLIC ACCOUNTANTS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 8.54.410, pertaining to fees	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On June 21, 2001 the Board of Public Accountants published notice of the proposed amendment of ARM 8.54.410 at page 1020 of the 2001 Montana Administrative Register, Issue Number 12. On September 6, 2001, the Board published an amended notice at page 1707 of the 2001 Administrative Register, Issue Number 17, rescheduling the public hearing on the proposed amendment.

2. On September 26, 2001, a public hearing was held in Helena, Montana, to consider the amendment of the above-noted rule. Written comments were received prior to the closing of the comment period.

3. After consideration of the comments received, the Board has amended ARM 8.54.410 exactly as proposed.

4. The following comments were received from the public, with the Board's response to each comment:

Comment 1: A CPA licensed in Montana but residing out-of-state commented in favor of the proposed fee increases.

Response 1: The Board acknowledges the expression of support for the increased fees.

Comment 2: A commenter questioned the need for a fee increase when the Board has a projected cash balance of $177,915, suggesting that the amount of "surplus cash" should not be more than $100,000.

Response 2: The Board notes that the term "cash balance", in the parlance of state government financing, does not represent a "surplus"; it represents the working capital for timely payment of the expenses of the Board's programs as well as for contingent expenses. The increased fees will fund a cash balance that is between 100% and 200% of the Board's annual spending authority, as provided by 17-2-302, MCA. The Board's appropriation for fiscal year 2002 is $278,000, and thus a cash balance in the range of $278,000 to $556,000 is appropriate.

Comment 3: Another commenter stated that according to his recent analysis of certain state accounting records pertaining to the Board, the Board has an increasing cash balance, not a decreasing cash balance.

Response 3: The Board respectfully disagrees with the commenter, and believes that the commenter may not have been using the correct amounts in his calculations. The Board acknowledges that the original Notice of Public Hearing, dated June 11, 2001, incorrectly understated the FY 2001 beginning cash balance by approximately $4,000. Using the actual expense and revenue information obtained after the close of the state's fiscal year 2001 on June 30, there was a decrease in the beginning cash balance for FY 2001 from (approximately) $212,000 to a beginning cash balance for FY 2002 of (approximately) $202,000. The Board notes that the revenue and expense projections, as described in the statement of reasonable necessity portion of the Notice of Public Hearing, were made before the end of fiscal year 2001, in accordance with the timetable for administrative rules projects. Actual FY 2001 revenues were higher than projected and actual paid expenses were less than budgeted, although there are some year-end expenses incurred in FY 2001 that will not be paid until sometime in FY 2002, in the amount of approximately $18,000. The Board points out the difference between "fund balance" and "cash balance". The fund balance takes into account both accrued expenses and encumbrances, and therefore tends to present a more accurate representation of the financial condition of the Board and its programs. As discussed in Response 2, above, the beginning cash balance for FY 2002 is within the statutory limits. The Board concludes that increasing certain fees is the appropriate method to address the issue of having a sufficient cash balance.

Comment 4: The same commenter suggested that if increasing costs were directly attributable to examinations, or to the monitoring of practice units, the persons being examined or the practice units being monitored should pay those higher costs.

Response 4: The Board generally agrees with the principle that the persons who incur the costs should be the ones who pay those costs. The Board concludes, however, that it is impractical to design a fee schedule that creates a perfect balance among users and costs. The Board notes the new fee proposed, the late filing fee, is intended to place the cost of untimely reporting to the practice unit that generates those costs. The Board also notes that the incremental costs of adding staff are not directly correlated to increase in workload from a specific area, and that the addition of staff is often made because of a backlog of work created by an increase in the number and scope of duties over a several year period, rather than the addition of an entirely new task. The Board, with the assistance of the Department of Labor and Industry, continues to review its allocation of costs.

Comment 5: The same commenter also suggested that the Board contract for the monitoring of practice units with unacceptable ratings.

Response 5: The Board presently does contract for those services.

Comment 6: The commenter also asked what are the "other board programs" for which the additional staff was needed, as described in the Board's statement of reasonable necessity.

Response 6: The "other board programs" include:

(a) the office registration program (the number of registered offices has doubled in size in the last 10 years);

(b) the profession monitoring program;

(c) the continuing professional education regulations (which in addition to applying to increasing numbers of permit holders, those rules now require specific ethics course credits, which require additional compliance monitoring); and

(d) overall database and records-keeping operations.

The Board added a second staff member in March 1997 to facilitate timely responses to licensees and public inquiries, processing applications and renewals, and performing general office functions.

BOARD OF PUBLIC ACCOUNTANTS
BERYL ARGALL STOVER, CPA
CHAIR

By: /s/ WENDY J. KEATING
Wendy J. Keating,
Acting Commissioner
DEPARTMENT OF LABOR & INDUSTRY

By: /s/ KEVIN BRAUN
Kevin Braun,
Rule Reviewer

Certified to the Secretary of State: October 29, 2001.

**BEFORE THE BOARD OF OIL AND GAS CONSERVATION
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 36.22.1242 relating to the privilege and license tax rates on oil and gas	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 23, 2001, the Board of Oil and Gas Conservation published notice of the proposed amendment of ARM 36.22.1242 concerning the privilege and license tax at page 1576 of the 2001 Montana Administrative Register, Issue Number 16.

2. The board has amended ARM 36.22.1242 as proposed.

**AUTH: 82-11-111, MCA
IMP: 82-11-123, 82-11-131, and 82-11-133, MCA**

3. No comments or testimony were received.

/s/ Donald D. MacIntyre
DONALD D. MACINTYRE
Rule Reviewer

/s/ Terri Perrigo
TERRI PERRIGO
Executive Secretary
Board of Oil and Gas Conservation

Certified to the Secretary of State October 29, 2001.

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

In the matter of the repeal of ARM 16.4.101, 16.4.102, 16.4.103, 16.4.104, 16.4.105 and 16.4.106 pertaining to distribution of funds for local health services	))))))	NOTICE OF REPEAL

TO: All Interested Persons

1. On August 23, 2001, the Department of Public Health and Human Services published notice of the proposed repeal of the above-stated rules at page 1580 of the 2001 Montana Administrative Register, issue number 16.

2. The Department has repealed ARM 16.4.101, 16.4.102, 16.4.103, 16.4.104, 16.4.105 and 16.4.106 as proposed.

3. No comments or testimony were received.

/s/ Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State October 29, 2001.

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

In the matter of the repeal of ARM 16.22.101, 16.22.102, 16.22.103, 16.22.104, 16.22.105, 16.22.106, 16.22.107, 16.22.108, 16.22.109, 16.22.110, 16.22.111, 16.22.112, 16.22.113 and 16.22.114 pertaining to fluoridation of public water supplies	)	NOTICE OF REPEAL

TO: All Interested Persons

1. On August 23, 2001, the Department of Public Health and Human Services published notice of the proposed repeal of the above-stated rules at page 1578 of the 2001 Montana Administrative Register, issue number 16.

2. The Department has repealed ARM 16.22.101, 16.22.102, 16.22.103, 16.22.104, 16.22.105, 16.22.106, 16.22.107, 16.22.108, 16.22.109, 16.22.110, 16.22.111, 16.22.112, 16.22.113 and 16.22.114 as proposed.

3. No comments or testimony were received.

/s/ Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State October 29, 2001.

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

In the matter of the transfer of ARM 16.38.290, 16.38.291, 16.38.292, 16.38.307, 16.38.505, 16.38.506, 16.38.507, 16.38.801 and 16.38.802 pertaining to approval of laboratories, laboratory fees, and prenatal and premarital test requirements	)	NOTICE OF TRANSFER

TO: All Interested Persons

1. Pursuant to Chapter 546, Laws of Montana 1995, effective July 1, 1995, the laboratories chapter is transferred from the Department of Health and Environmental Sciences to the Department of Public Health and Human Services, Title 37. The rules will be renumbered as follows:

OLD	NEW	
16.38.290	37.12.201	Registration
16.38.291	37.12.205	Approval
16.38.292	37.12.206	Inspections
16.38.307	37.12.401	Laboratory Fees for Analyses
16.38.505	37.12.601	Certificate Form
16.38.506	37.12.603	Procedures
16.38.507	37.12.608	Exemptions From Requirement for Serological Testing
16.38.801	37.12.801	Approved Tests
16.38.802	37.12.802	Approved Laboratory

2. The transfer of rules is necessary because this chapter was transferred from the Department of Health and Environmental Sciences to the Department of Public Health and Human Services by the 1995 legislature by Chapter 546, Laws of Montana 1995.

/s/ Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State October 29, 2001.

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

In the matter of the adoption of new rule I and the amendment of ARM 37.86.2401, 37.86.2402, 37.86.2405, 37.86.2502, 37.86.2505, 37.86.2601, 37.86.2602 and 37.86.2605 pertaining to medicaid transportation and ambulance services	)))))))))	CORRECTED NOTICE OF AMENDMENT

TO: All Interested Persons

1. On May 10, 2001, the Department of Public Health and Human Services published notice of the proposed adoption and amendment of the above-stated rules at page 759 of the 2001 Montana Administrative Register, issue number 9, and on July 5, 2001 published notice of the adoption and amendment on page 1183 of the 2001 Montana Administrative Register, issue number 13.

2. This corrected notice is being filed to correct an error in ARM 37.86.2602.

3. The rule is corrected as follows:

37.86.2602 AMBULANCE SERVICES, REQUIREMENTS (1) through (5) remain as proposed.

~~(6) Air ambulance service is covered when:~~

~~(a) great distances or other obstacles to effective ground transportation are involved in transporting the patient to the nearest appropriate facility;~~

~~(b) an emergency exists which necessitates air transport; and~~

~~(c) all other applicable requirements for ambulance service are met.~~

(6) through (12) remain as proposed.

AUTH: Sec. 53-6-113, MCA
IMP: Sec. 53-6-101, 53-6-113 and 53-6-141, MCA

4. ARM 37.86.2602 specifies the requirements a medicaid provider must meet to be reimbursed for ambulance services. When ARM 37.86.2602 was amended recently, subsection (6) containing the requirements for air ambulance services was revised. The old subsection (6) should have been deleted and the amended subsection (6) inserted in its place. Instead, the old subsection (6) was inadvertently left in the rule. As a result, ARM 37.86.2602 contains two subsections (6). It is necessary to delete the old subsection (6) so that those who read the rule will know which requirements will be applied to air ambulance services.

5. All other rule changes adopted and amended remain the same.

/s/ Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and Human Services

Certified to the Secretary of State October 29, 2001.

**BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 42.21.113, 42.21.123, 42.21.131, 42.21.137, 42.21.138, 42.21.139, 42.21.140, 42.21.151, 42.21.153, 42.21.155, 42.21.163, and 42.22.1311 relating to trending schedules for property tax rules	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On September 20, 2001, the department published notice of the proposed amendment of the above-stated rules relating to trending schedules for property tax rules at page 1814 of the 2001 Montana Administrative Register, issue no. 18.

2. No comments were received regarding these rules.

3. The department has amended the rules as proposed.

4. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. The Department strives to make the electronic copy of this Adoption Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme
KURT G. ALME
Director of Revenue

Certified to Secretary of State October 29, 2001

VOLUME NO. 49 **OPINION NO. 9**

WITHDRAWN

VOLUME NO. 49 **OPINION NO. 10**

CORRECTIONAL FACILITIES – Grant funding for housing Indian youth in regional detention facilities pursuant to Tribal Court order;
COUNTIES – Inclusion of Indian youth in funding base for Board of Crime Control grants for housing youthful offenders in regional detention facilities;
COURTS – Housing Indian youth in regional detention facility;
INDIANS - Housing Indian youth in regional detention facility;
JUVENILES - Housing Indian youth in regional detention facility;
YOUTH COURT ACT - Housing Indian youth in regional detention facility;
ADMINISTRATIVE RULES OF MONTANA – Rules 23.15.601 to 23.15.607;
MONTANA CODE ANNOTATED - Sections 41-5-1801 to -1807, -1803(2)(e), (g), (4), -1804, -1901 to -1908;
UNITED STATES CODE – Title 18, section 1152.

HELD: The Montana Board of Crime Control may reimburse counties for detention costs for Indian youth placed in a regional youth detention facility pursuant to an order of a tribal court.

October 18, 2001

Mr. Jim Oppedahl
Executive Director
Montana Board of Crime Control
P.O. Box 201408
Helena, MT 59620-1408

Dear Mr. Oppedahl:

You have asked my opinion on the following question:

> **May the Montana Board of Crime Control make reimbursements to counties for Indian youth who are placed in a regional youth detention facility by a tribal court?**

For the reasons that follow, I conclude that the MBCC may, indeed must, reimburse counties for youth detention services provided to tribal youth adjudicated pursuant to a tribal court order and placed in a regional juvenile detention facility.

As you have noted, the Montana Board of Crime Control ("MBCC") provides state grants to counties for regional youth detention services pursuant to Mont. Code Ann. §§ 41-5-1901 to -1908 and Mont. Admin. R. 23.15.601 to 23.15.607. Counties are required to provide youth detention services to assure that youth are not detained with adults, and to assure that detained youth

are provided with the needed educational programs during their detention. Mont. Code Ann. § 41-5-1803. To fulfill their obligations, counties may enter into contracts and interlocal agreements with other counties to establish regional detention facilities, contract with other governmental entities, including Indian tribes, to use a secure detention facility, and contract with school districts to provide for the education of youths detained in the facilities. Mont. Code Ann. §§ 41-5-1803(2)(e), (g), (4), -1804. The legislation contemplates the counties working together as regions to coordinate the provision of these services and construction and operation of the necessary detention facilities. Such cooperation is intended to assure that the best possible services are provided to Montana youth, and to maximize scarce resources by coordinating and combining resources to provide those services. Mont. Code Ann. §§ 41-5-1801 to -1807. The MBCC provides grant money to the counties and regions, to assist in paying for the services under the grant program established at Mont. Code Ann. §§ 41-5-1901 to -1908. Counties in Montana have combined to create the regions as contemplated in the statutes.

The region in issue is the North Central region, as that is the region of which Blaine County is a member. As a member of the North Central region, Blaine County submits a budget to the region. The region in turn submitted a grant application to MBCC, which included the Blaine County budget for partial reimbursement from the MBCC. Most of the Fort Belknap Reservation lies within Blaine County. The County and the Tribe have contracted to allow detention in the Blaine County facility of youth determined to be in need of detention by a tribal court. The minutes of a meeting of representatives of the North Central region of April 23, 2001, which were included within the 2001 year grant application, reflect that Blaine County included the tribal youth population in its population survey of youth to be served. Such inclusion may be required by federal law, since the tribal member youth are Montana citizens and therefore entitled to be offered the state services in the same manner as any other Montana youth. The fact that a tribal court adjudicates the youth does not disqualify those youth from receipt of state services, if the youth are otherwise similarly situated and entitled to the service. Pursuant to federal law, Tribes have exclusive jurisdiction over the domestic relations of its members. Fisher v. District Court, 424 U.S. 382 (1976); Williams v. Lee, 358 U.S. 217 (1959); In re Marriage of Skillen, 1998 MT 43, ¶ 44, 287 Mont. 399, 956 P.2d 1; State ex rel. Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973). Under federal law, the tribes also have exclusive jurisdiction to prosecute for criminal misdemeanor violations where the defendant or the victim is an Indian and the criminal acts occur on a reservation. 18 U.S.C. § 1152. Thus, tribal courts have jurisdiction over tribal member youth. However, those youth remain citizens of Montana as well as citizens of

the tribes, and if the tribe does not provide similar services for the youth, they are appropriately covered in a county's grant application. Here, those youth are included in Blaine County's population projection.

A question has arisen about the proper funding for these youth, given that the language in the current statutes does not appear to contemplate that MBCC may grant money directly to the Tribe, but rather indicates that the grant recipients are limited to counties through their regions. Mont. Code Ann. § 41-5-1902. Blaine County has entered into an agreement with the Tribes to provide the service. Nothing in state law prevents the MBCC from reimbursing Blaine County for services it renders to these youth. The State-Tribal Cooperative Agreements Act, Mont. Code Ann. §§ 18-11-101 to -112, includes broad authority for counties to enter into agreements with tribes for delivery of services to their citizens. In this case, the grant application submitted by Blaine County includes the population numbers of tribal youth expected to be served. When the county applies for reimbursement for each youth served, regardless of whether the youth is a tribal member or not, the MBCC is required to reimburse for the tribal youth served in the same manner as for other youth served.

THEREFORE, IT IS MY OPINION:

> The Montana Board of Crime Control may reimburse counties for detention costs for Indian youth placed in a regional youth detention facility pursuant to an order of a tribal court.

Very truly yours,

/s/ Mike McGrath

MIKE McGRATH
Attorney General

mm/sab/dm

VOLUME NO. 49 OPINION NO. 11

BUILDING CODES - Adoption of building code enforcement program;
BUILDING CODES - Municipal jurisdictional areas;
ELECTIONS - Proper voters in election regarding building code enforcement program;
STATUTORY CONSTRUCTION - Construing plain meaning of words of statute;
STATUTORY CONSTRUCTION - Resort to legislative history materials to find legislative intent;
STATUTORY CONSTRUCTION - Specific provisions control more general ones;
MONTANA CODE ANNOTATED - Sections 2-15-501(7), 13-2-301, 13-19-102, -102(2), -104, -106, 50-6-101, 50-50-101(6), 50-60-101(11), (13), (14).

HELD: 1. The owners of real property who may vote in the elections contemplated by SB 242 are those owners specifically listed within the definition of Mont. Code Ann. § 50-60-101(14) whose interests appear in the real property records in the office of the county clerk and recorder 30 days before the election.

2. Municipal jurisdictional areas existing under Mont. Code Ann. § 50-60-101(11) prior to the effective date of SB 242 lose jurisdiction to enforce municipal building code provisions as of the effective date of the bill, but such jurisdiction may be revived if it is approved by the voters in the election required by section 8 of SB 242 prior to December 31, 2001.

October 19, 2001

Mr. Dennis Paxinos
Yellowstone County Attorney
217 North 27th Street
P.O. Box 35025
Billings, MT 59107-5025

Dear Mr. Paxinos:

You have requested my opinion on the following questions, which I have rephrased as follows:

1. Who should vote in the elections authorized by Senate Bill 242?

2. Does a municipality that acquired authority to enforce its building code within a municipal jurisdictional area beyond the city limits

> prior to the effective date of SB 242 retain that jurisdiction until the election required by section 8 of the bill?

Senate Bill 242 was introduced during the 2001 legislature and amended the statutes governing building construction standards. Prior to the enactment of SB 242, Montana law had provided authority for municipal governments, with the consent of the counties in which they were located, to exercise building code enforcement jurisdiction in an area within 42 miles of the city limits known as the "municipal jurisdictional area," Mont. Code Ann. § 50-60-101(11) (1999), or, more colloquially, as the "donut area." SB 242 was introduced for the purpose of eliminating this extraterritorial municipal jurisdiction. As it made its way through the legislative process, however, amendments were made which have created questions about the effect of the bill.

I.

Your first question involves the several provisions of SB 242 providing for county elections on the various provisions allowing for either county or municipal building code enforcement.

Section 4 of the legislation allows for the designation of a county jurisdictional area. Procedurally, it requires the board of county commissioners to pass a resolution of intent to adopt a county jurisdictional area. Under SB 242, "county jurisdictional area" is defined as "the entire county, or an area or areas within the county, designated by the board of county commissioners as subject to the county building code, excluding any area that is within the limits of an incorporated municipality." SB 242, § 2, enacting Mont. Code Ann. § 50-50-101(6) (2001).

In order to adopt a county jurisdictional area, the commissioners must give notice to the public, hold a public hearing, and accept written protests and receive general protests and comments. SB 242, § 4. Subsection (2) of section 4 provides:

> If a written protest is submitted by owners of real property in the proposed county jurisdictional area representing more than 10% of the owners of real property in the proposed area, the board of county commissioners may not adopt the county jurisdictional area for a county building code in the proposed area without submitting to an election, as provided in [section 6], the question of adoption of the code enforcement program as approved by the department of commerce.

Section 6 is titled "Election on questions of adoption of code enforcement program." It sets forth the manner in which the board of county commissioners must submit the question of whether to adopt the code enforcement program within the county jurisdictional area to an election in which "the record owners of real property located within the designated area" may vote.

Section 8 of SB 242, entitled "Special election required--notice--termination of certain municipal jurisdictional areas," also contemplates an election. As the title suggests, section 8 outlines the procedures by which the county commissioners of a county in which a municipal jurisdictional area had previously been established beyond the corporate limits of the municipality must submit the question of continuation of the municipal jurisdictional area "to a vote by the record owners of real property within the jurisdictional area beyond those limits."

These sections of the bill establish election processes that declare owners of real property in the jurisdictional area in question to be the proper electorate. The term "owner" is defined in the existing statute and was not amended by SB 242. Pursuant to Mont. Code Ann. § 50-60-101(13) (1999), "'Owner' means the owner or owners of the premises or lesser estate, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, or other person, firm, or corporation in control of a building."[1]

Applying the well-accepted principle of statutory construction that "statutory language must be construed according to its plain meaning and, if the language is clear and unambiguous, no further interpretation is required," Dahl v. Uninsured Employers' Fund, 1999 MT 168, ¶ 16, 295 Mont. 396, 901 P.2d 363, it is my opinion that the owners of real property who may vote in the elections contemplated by the bill are those persons specifically listed within the definition of Mont. Code Ann. § 50-60-101(13), whose names appear in the property records in the county clerk and recorder's office.

The term "owner" as defined is quite broad, but it is modified by the provision in sections 6 and 8 of SB 242 limiting voting to the "record owner." This provision appears to be intended to allow voting only by persons or entities whose "ownership" interest is recorded in the office of the county clerk and recorder. To hold otherwise would create an administrative nightmare for county election officials, requiring them to investigate, by means not specified in the bill, the ownership of every parcel of real property in the jurisdictional area. I also note that the statute ties the right to vote to

[1] SB 242 renumbers this as subsection (14) of Mont. Code Ann. § 50-60-101.

ownership, but does not express an intent that persons who may have ownership interests in multiple parcels in the donut area would receive more than one vote. Therefore, it is my opinion that the bill contemplates that persons or entities who fit the definition of "owner" and whose ownership appears of record are entitled to one vote in the elections provided in the bill, regardless of the number of parcels in which they may have an interest. It is also my opinion that where a piece of property has multiple owners, each owner with a recorded interest has the right to vote.

I note that the term "owner" includes "owners of a lesser estate" in the property and "a mortgagee or vendee in possession." The legislature thus clearly intended to extend the right to vote to, for example, mortgagees, grantors of trust indentures, and persons occupying property under a contract for deed, to the extent those interests appear "of record." Thus, when compiling the list of eligible voters to whom mail ballots must be sent, election officials should review the record documents and include on the list the holders of these lesser interests as shown in the records.

SB 242 also amended Mont. Code Ann. § 13-19-106, which sets forth the general requirements for mail ballot elections. Subsection 2 was amended to read as follows:

> 13-19-106. General requirements for mail ballot election--exception for county building code jurisdiction election. . . .
> . . . .
> (2) (a) Except as provided in subsection (2)(b), an official ballot must be mailed to every qualified elector of the political subdivision conducting the election.
>
> (b) In an election to determine whether to adopt a building code enforcement program within a county jurisdictional area, as defined in 50-60-101 and designated by a board of county commissioners pursuant to [section 4], an official mail ballot must be mailed to every record owner of real property in the county jurisdictional area.

Thus, in order to carry out the elections provided for in SB 242, a ballot mailing list must be compiled which includes every record owner of real property in the county or municipal jurisdictional area. In sum, I conclude that every person or entity who fits the definition of "owner" and whose ownership interest appears of record should be on the ballot mailing list. As outlined by section 13-19-102(2) a mail ballot election must be "conducted by mail pursuant to 13-19-104 and in compliance with the procedure set forth in 13-19-106." Since SB 242 makes no provision to the contrary, election

officials should use the property records as they exist on the date 30 days prior to the election day to determine who is eligible to vote. Cf. Mont. Code. Ann. § 13-2-301 (registration closes thirty days prior to election day).

Questions have been raised as to whether the limitation of the franchise to property owners in the affected area violates constitutional guarantees of equal protection. Compare Johnson v. Killingsworth, 271 Mont, 1, 11, 894 P.2d 272 (1995) (statutory requirement that irrigation district voters be "freeholders" not violative of equal protection), with Sadler v. Connolly, 175 Mont. 484, 489, 575 P.2d 51 (1978) (statutory requirement that city commission candidate be "freeholder" within city limits violative of equal protection); see also Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (statute limiting franchise in school district elections to real property owners and parents of students held violative of equal protection). It has long been the policy of the Attorney General to refrain from issuing opinions as to the constitutionality of statutes. Two sound policy reasons support this practice. First, only courts have the power to declare statutes unconstitutional. It would violate the doctrine of separation of powers for the Attorney General to issue an opinion, having the force of law until overturned by a court, see Mont. Code Ann. § 2-15-501(7), which declares a statute unconstitutional. Second, when the constitutionality of statutes is challenged, it frequently falls to the Attorney General to defend their constitutionality. Performance of this duty might be impaired if the Attorney General had previously issued an opinion on the matter at issue in such a case.

Under the authorities quoted above, the question of the constitutionality of the franchise limits in SB 242 is a serious one. Nothing in this opinion should be read as expressing the Attorney General's opinion on that question.

II.

Your second question asks, What is the status of the extended municipal jurisdictional areas created prior to the effective date of SB 242? SB 242 amended the definition of "municipal jurisdictional area," limiting the jurisdictional area for a municipal building code to the area within the limits of an incorporated city. As defined by SB 242, municipal jurisdictional area "means the area within the limits of an incorporated municipality." SB 242, § 2(12).

Section 12 of the Bill made this definition retroactively applicable to municipal jurisdictional areas created before the effective date of the act. The Bill had an immediate applicability date and became law when it was signed by Governor Martz on May 1, 2001. Thus, reading the definition of municipal jurisdictional area and applying the retroactive

applicability clause, I would ordinarily conclude that the Bill had the effect of eliminating municipal authority to enforce the building code in any jurisdictional area that lay beyond the limits of an incorporated municipality.

However, this conclusion becomes questionable when the amended definition of "municipal jurisdictional area" is read in conjunction with section 8, which requires that the board of county commissioners submit the question of continuation of the jurisdictional area beyond the corporate limits of the municipality to a vote. Section 8 provides in relevant part:

> Section 8. Special election required--notice--termination of certain municipal jurisdictional areas. No later than December 31, 2001, the county commissioners of a county in which a municipal jurisdictional area, as defined in 50-6-101, has been established beyond the corporate limits of a municipality before [the effective date of this act], shall submit the question of the continuation of the jurisdictional area beyond the corporate limits of the municipality, to a vote by the record owners of real property within the jurisdictional area beyond those limits. The election required by this section must be a special election conducted by mail ballot election as defined in 13-19-102.

Section 8 was also made retroactively applicable. SB 242, § 12. Reading the amended definition of municipal jurisdictional area in conjunction with section 8, and applying the retroactive applicability clause to both, creates an ambiguity: Is it the intent of the law immediately to eliminate the extended municipal jurisdictional areas, commonly referred to as donut areas, or is it the intent of the law that the extended municipal jurisdictional areas should continue until the special elections provided for in section 8 are held? Because an ambiguity exists between the amended definition of municipal jurisdictional area and the application of the special election provision found in section 8, I must resort to extrinsic aids to statutory construction. See Dorn v. Board of Trustees of Billings Sch. Dist. No. 2, 203 Mont. 136, 144, 661 P.2d 426, 430 (1983).

In this case, the legislative history of the bill provides some assistance in resolving the ambiguity. It shows that SB 242 as originally introduced would clearly have eliminated all "donut" jurisdiction by deleting from the definition of "municipal jurisdictional area" the language allowing a municipality to assume jurisdiction outside the city limits. This intention remained intact when the bill was placed in a free conference committee after the House and Senate could not agree on amendments to the bill. This free conference committee added the election provisions found in section 8 of the bill. The minutes of the free conference committee, in

particular the testimony of the attorney who drafted the amendment which created section 8, suggest that the amendment's intent was to eliminate municipal jurisdiction in the donut areas unless the voters chose to revive it. Mins., Meeting of Free Conference Comm. on SB 242, Apr. 18, 2001 (remarks of David Niss). This evidence suggests an intent to eliminate municipal jurisdiction in the donut areas unless the voters choose to revive it in the election provided in section 8.

Arrayed against this legislative history evidence are two considerations drawn from the text of the bill that suggest the contrary conclusion. First, the language of section 8 of the bill suggests that the election's purpose would be to approve the continuation of existing jurisdiction. It refers in subsection 8(1) to holding an election on "the continuation" of the existing municipal jurisdiction, language which implies that municipal jurisdiction was not interdicted by the enactment of SB 242. Similarly, subsection 8(3) requires giving a notice to the voters, which must include "a clear synopsis of the building code *then in effect within the municipal jurisdictional area beyond the corporate limits of the municipality."* (Emphasis added.) The use of the language "then in effect" suggests that the extended municipal jurisdiction would be in effect when the notice was given, a result that would not occur if the extended jurisdiction area terminated on the effective date of SB 242.

Additionally, subsection 8(4) provides: "If a majority of those persons returning mail ballots vote in favor of *retention of the municipal jurisdictional area beyond the corporate limits of the municipality, the area must continue in existence as provided in the law.*" (Emphasis added.) The words "retention" and "continue in existence" clearly suggest that the extended jurisdiction area did not terminate on the effective date of SB 242. Finally, subsection 8(5) provides for the possibility that a municipal jurisdictional area outside a city limit may "be terminated pursuant to this section." It allows enforcement of a building permit issued "before the termination of the area." Reading all of these provisions together, it seems plausible that the legislature contemplated that existing "donut areas" would continue in effect unless terminated after the mandatory election provided in section 8 of SB 242.

This conclusion is also consistent with the rule of statutory construction that specific provisions of a statute should control over more general ones. The Supreme Court has stated:

> In construing apparently conflicting statutes, the Court has stated that where one statute deals with a subject in general and comprehensive terms, and another deals with a part of the same subject in a

> more minute and definite way, the latter will prevail over the former to the extent of any necessary repugnancy between them. City of Billings v. Smith (1971), 158 Mont 197, 211, 490 P.2d 221, 229. Further the principle of statutory construction that a specific law controls over the general applies only where the specific statute conflicts with the general statute and then only to the extent of the repugnancy.

Jones v. Jones, 226 Mont. 14, 16, 736 P.2d 94, 95 (1987). Applying the principle of statutory construction outlined above, it could be argued the definition of municipal jurisdictional area is a general provision having application to more than just the municipal jurisdictional areas in existence at the time of the enactment of SB 242. The definition also serves to prevent the creation of any new extended municipal jurisdiction areas after the effective date of the bill. The extended jurisdiction areas in existence are dealt with in the separate and more specific provisions of section 8 of the bill, which, as indicated above, seem to contemplate that the existing regime remain in place until displaced through an election.

In resolving these unclear and conflicting provisions, I am guided by the rule that in construing an ambiguous statute I should adopt the interpretation most consistent with the evident legislative intent. Delaware v. K-Decorators, Inc., 1999 MT 13, ¶ 33, 293 Mont. 97, 105, 973 P.2d 818, 824 (1999). Here, that intent cannot be conclusively gleaned from the conflicting language of the statute itself. In such circumstances, the Court has approved resort to legislative history materials for evidence of legislative intent. Dorn, 203 Mont. at 144. The legislative history of the amendment that created section 8 of the bill seems clear in stating that the drafters intended the retroactive application provisions of section 12 of the bill to override the existing municipal jurisdiction pending the outcome of the election. I therefore hold that municipal jurisdictional areas existing under Mont. Code Ann. § 50-60-101(11) prior to the effective date of SB 242 lost jurisdiction to enforce municipal building code provisions as of May 1, 2001, but such jurisdiction may be revived if it is approved by the voters in the election required by section 8 of SB 242 prior to December 31, 2001.

THEREFORE, IT IS MY OPINION:

1. The owners of real property who may vote in the elections contemplated by SB 242 are those owners specifically listed within the definition of Mont. Code Ann. § 50-60-101(14) whose interests appear in the real property records in the office of the county clerk and recorder 30 days before the election.

2. Municipal jurisdictional areas existing under Mont. Code Ann. § 50-60-101(11) prior to the effective date of SB 242 lose jurisdiction to enforce municipal building code provisions as of the effective date of the bill, but such jurisdiction may be revived if it is approved by the voters in the election required by section 8 of SB 242 prior to December 31, 2001.

Very truly yours,

/s/ Mike McGrath

MIKE McGRATH
Attorney General

mm/ans/dm

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee:

- **Department of Agriculture;**
- **Department of Commerce;**
- **Department of Labor and Industry;**
- **Department of Livestock;**
- **Department of Public Service Regulation; and**
- **Office of the State Auditor and Insurance Commissioner.**

Education and Local Government Interim Committee:

- **State Board of Education;**
- **Board of Public Education;**
- **Board of Regents of Higher Education; and**
- **Office of Public Instruction.**

Children, Families, Health, and Human Services Interim Committee:

- **Department of Public Health and Human Services.**

Law and Justice Interim Committee:

- **Department of Corrections; and**
- **Department of Justice.**

Revenue and Transportation Interim Committee:

- **Department of Revenue; and**
- **Department of Transportation.**

State Administration, and Veterans' Affairs Interim Committee:

- **Department of Administration;**
- **Department of Military Affairs; and**
- **Office of the Secretary of State.**

Environmental Quality Council:

- **Department of Environmental Quality;**
- **Department of Fish, Wildlife, and Parks; and**
- **Department of Natural Resources and Conservation.**

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is PO Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: **Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.**

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject	**1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.**
Statute Number and Department	**2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.**

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through June 30, 2001. This table includes those rules adopted during the period July 1, 2001 through September 30, 2001 and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through June 30, 2001, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 2000 and 2001 Montana Administrative Registers.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number. These will fall alphabetically after department rulemaking actions.

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