ISSUE NO. 23

The Montana Administrative Register (MAR or Register), a twice-monthly publication, has three sections. The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 Adoption Section contains final rule notices which show any changes made since the proposal stage. All rule actions are effective the day after print publication of the adoption notice unless otherwise specified in the final notice. The Interpretation Section contains the Attorney General's opinions and state declaratory rulings. Special notices and tables are found at the end 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 Secretary of State's Office, Administrative Rules Services, at (406) 444-2055.

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PROPOSAL NOTICE SECTION

BEFORE THE STATE COMPENSATION INSURANCE FUND
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of ARM 2.55.320 and 2.55.327A, pertaining to classifications of employments and the construction industry premium credit program | ) ) ) ) ) | NOTICE OF PROPOSED AMENDMENT<br><br>NO PUBLIC HEARING CONTEMPLATED |

TO: All Concerned Persons

1. On January 27, 2012, the Montana State Fund proposes to amend the above-stated rules.

2. The Montana State Fund 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 Montana State Fund no later than 5:00 p.m. on December 30, 2011, to advise us of the nature of the accommodation that you need. Please contact Nancy Butler, Montana State Fund, P.O. Box 4759, 855 Front Street, Helena, Montana 59604-4759; telephone (406) 495-5138; fax (406) 495-5023; or e-mail nbutler@mt.gov.

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

2.55.320 METHOD FOR ASSIGNMENT OF CLASSIFICATIONS OF EMPLOYMENTS (1) and (2) remain the same.

(3) The State Fund staff shall assign its insureds to classifications contained in the classifications section of the State Compensation Insurance Fund Policy Services Underwriting Manual effective July 1, ~~2010~~ 2011, and assign new or changed classifications as approved by the board. That section of the manual is incorporated by reference. Copies of the classification section of the manual may be obtained from the Insurance Operations Support Department of the State Fund, 855 Front Street, P.O. Box 4759, Helena, Montana 59604-4759.

AUTH: 39-71-2315, 39-71-2316, MCA
IMP: 39-71-2311, 39-71-2316, MCA

REASON: This amendment to ARM 2.55.320 is reasonably necessary at this time to reflect the updates to the State Fund's Underwriting Manual (manual), effective July 1, 2011.

Under 39-71-2316(1)(e), MCA, after rules have been adopted, the State Fund is not subject to the rulemaking provisions of the Montana Administrative Procedure Act when changing classifications and premium rates.

The manual is used by State Fund staff in their usual duties of assigning classifications to insured employers of the State Fund. Each of these classifications has a premium rate that is adopted by the State Fund board in accordance with the board's ratemaking authority. This amendment is made each year to adopt the current version of the manual, which includes new rates, values, and classification code updates effective July 1, 2011. The classification code updates may be those adopted by the Classification Review Committee established in Title 33, chapter 16, MCA, or by the State Fund board of directors.

2.55.327A CONSTRUCTION INDUSTRY PREMIUM CREDIT PROGRAM

(1) and (2) remain the same.

(3) The following class codes are the construction codes eligible for the construction industry premium credit program:

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 3365 | 5059 | 5215 | 5445 | 5506 | ~~5651~~ | 6217 | 6400 | 9521 |
| 3719 | 5069 | 5221 | 5462 | 5507 | 5703 | 6229 | 7538 | 9534 |
| 3724 | 5102 | 5222 | 5472 | 5508 | 5705 | 6233 | ~~7601~~ | 9552 |
| 3726 | 5146 | 5223 | 5473 | 5511 | 6003 | 6251 | 7605 | |
| 5020 | 5160 | 5348 | 5474 | 5535 | 6005 | 6252 | ~~7611~~ | |
| 5022 | 5183 | 5402 | 5478 | 5537 | 6017 | 6306 | ~~7612~~ | |
| 5037 | 5188 | 5403 | 5479 | 5551 | 6018 | 6319 | ~~7613~~ | |
| 5040 | 5190 | 5437 | 5480 | 5610 | 6045 | 6325 | 7855 | |
| 5057 | 5213 | 5443 | 5491 | 5645 | 6204 | 6365 | 8227 | |

(4) through (6) remain the same.

AUTH: 39-71-2315, 39-71-2316, MCA
IMP: 39-71-2211, 39-71-2311, 39-71-2316, 39-71-2330, MCA

REASON: Section 39-71-2211, MCA, establishes a construction industry premium credit program. The statute provides that State Fund may adopt the plan filed by the advisory organization designated in 33-16-1023, MCA, which is the National Council on Compensation Insurance (NCCI). Currently, telephone company employees classified under code 7600 perform the same variety of tasks performed by employees assigned to code 7601 and contractors assigned to codes 7611, 7612, and 7613. Research by NCCI showed great similarity in the nature of the work performed by the risks and exposure assigned to the reviewed codes; therefore, it was decided to delete codes 7601, 7611, 7612, 7613, and combine them in code 7600. Code 7600 is not included in the rule because it is not an eligible classification code for the construction industry premium credit program. The definition of "construction industry" contained in 39-71-116(8), MCA, requires the code to be in major group 23 in the North American Industry Classification System Manual. Code 7600 is in major group 51.

NCCI's research also showed that the carpentry work for the two residential codes 5645 for one- or two-family homes, and 5651 for dwellings three stories or less, was so similar that it was decided to delete code 5651 and combine with code 5645. The changes were recommended by NCCI as part of its national research project to

ensure that the classification system remains healthy, viable, and responsive to the needs of the workers' compensation industry. The class code changes were adopted by the Montana Classification Review Committee for use in Montana. The Montana State Fund believes these changes make sense given the similarity of tasks performed by these workers. The changes also simplify the class codes.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Nancy Butler, Montana State Fund, P.O. Box 4759, 855 Front Street, Helena, Montana 59604-4759; telephone (406) 495-5138; fax (406) 495-5023; or e-mail nbutler@mt.gov. Any comments must be received no later than 5:00 p.m., January 10, 2012.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments, orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written comments to Nancy Butler at the above address no later than 5:00 p.m., January 10, 2012.

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 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 persons directly affected has been determined to be 2,700 persons based on 27,000 policyholders.

7. The Montana State Fund 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, e-mail, and mailing address of the person and specifies that the person wishes to receive notices regarding the Montana State Fund. If you prefer to receive notices by e-mail, please indicate this in your request. Such written request may be mailed or delivered to Nancy Butler, Montana State Fund, P.O. Box 4759, 855 Front Street, Helena, Montana 59604-4759; faxed to the office at (406) 495-5023; e-mail nbutler@mt.gov; or may be made by completing a request form at any rules hearing held by the Montana State Fund.

8. An electronic copy of this Notice of Proposed Amendment is available through the Secretary of State's web site at http://sos.mt.gov/ARM/Register. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that if a discrepancy exists 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 Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that

the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ Nancy Butler
Nancy Butler, General Counsel
Rule Reviewer

/s/ Elizabeth Best
Elizabeth Best
Chair of the Board

/s/ Michael P. Manion
Michael P. Manion, Chief Legal Counsel
and Rule Reviewer

Certified to the Secretary of State November 28, 2011.

BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
MONTANA STATE AUDITOR

| | | |
|---|---|---|
| In the matter of the amendment of ARM 6.6.6705, 6.6.6707, 6.6.6709, 6.6.6711, and 6.6.6713 pertaining to Valuation of Life Insurance Policies | ) ) ) ) | NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT |

TO: All Concerned Persons

1. On January 4, 2012, at 10:30 a.m., the Office of the Commissioner of Securities and Insurance, Montana State Auditor, Monica J. Lindeen, will hold a public hearing in the 2nd floor conference room, at the Office of the Commissioner of Insurance, Montana State Auditor, 840 Helena Ave., Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Office of the Commissioner of Securities and Insurance, Montana State Auditor, 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 no later than 5:00 p.m., December 28, 2011, to advise us of the nature of the accommodation that you need. Please contact Darla Sautter, Office of the Commissioner of Securities and Insurance, Montana State Auditor, 840 Helena Avenue, Helena, Montana, 59601; telephone (406) 444-2726; TDD (406) 444-3246; fax (406) 444-3499; or e-mail dsautter@mt.gov.

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

6.6.6705 DEFINITIONS For purposes of these rules:

(1) and (2) remain the same.

(a) The length of a particular contract segment shall be set equal to the minimum of the value *t* for which $G_t$ is greater than $R_t$ (if $G_t$ never exceeds $R_t$ the segment length is deemed to be the number of years from the beginning of the segment to the mandatory expiration date of the policy), where $G_t$ and $R_t$ are defined as follows:

$$G_t = \frac{GP_{x+k+t}}{GP_{x+k+t-1}}$$

where:

x = original issue age;

k = the number of years from the date of issue to the beginning of the segment;

t = 1, 2, ...; t is reset to 1 at the beginning of each segment;

$GP_{x+k+t-1}$ = Guaranteed gross premium per thousand of face amount for year t of the segment, ignoring policy fees only if level for the premium paying period of the policy.

$R_t = \frac{q_{x+k+t}}{q_{x+k+t-1}}$ However, $R_t$ may be increased or decreased by one percent in any policy year, at the ~~company's~~ insurer's option, but $R_t$ shall not be less than one;

where:

x, k and t are as defined above, and

$q_{x+k+t-1}$ = valuation mortality rate for deficiency reserves in policy year k+t but using the mortality of ARM 6.6.6707(2)(b) if ARM 6.6.6707(3) is elected for deficiency reserves.

However, if $GP_{x+k+t}$ is greater than 0 and $GP_{x+k+t-1}$ is equal to 0, $G_t$ shall be deemed to be 1000. If $GP_{x+k+t}$ and $GP_{x+k+t-1}$ are both equal to 0, $G_t$ shall be deemed to be 0.

(3) and (4) remain the same.

(5) "Maximum valuation interest rates" means the interest rates defined in 33-2-527, MCA, ~~(Computation of Minimum Standard by Calendar Year of Issue)~~ that are to be used in determining the minimum standard for the valuation of life insurance policies.

(6) remains the same.

(7) "Scheduled gross premium" means the smallest illustrated gross premium at issue for other than universal life insurance policies. For universal life insurance policies, scheduled gross premium means the smallest specified premium described in ARM 6.6.6711(3), if any, or else the minimum premium described in ARM 6.6.6711(4).

(8) through (12) remain the same.

AUTH: 33-1-313, MCA
IMP: 33-2-521, 33-2-522, 33-2-523, 33-2-524, 33-2-525, 33-2-526, 33-2-527, 33-2-528, 33-2-529, 33-2-531, 33-2-537, MCA

6.6.6707 GENERAL CALCULATION REQUIREMENTS FOR BASIC RESERVES AND PREMIUM DEFICIENCY RESERVES (1) At the election of the ~~company~~ insurer for any one or more specified plans of life insurance, the minimum mortality standard for basic reserves may be calculated using the 1980 CSO valuation tables with select mortality factors (or any other valuation mortality table

adopted by the NAIC after January 1, 2000, and promulgated by rule by the commissioner for this purpose). If select mortality factors are elected, they may be:

(a) remains the same.

(b) the select mortality factors in ARM 6.6.6713~~; or~~.

(2) ~~d~~Deficiency reserves, if any, are calculated for each policy as the excess, if greater than 0, of the quantity A over the basic reserve. The quantity A is obtained by recalculating the basic reserve for the policy using guaranteed gross premiums instead of net premiums when the guaranteed gross premiums are less than the corresponding net premiums. At the election of the ~~company~~ insurer for any one or more specified plans of insurance, the quantity A and the corresponding net premiums used in the determination of quantity A may be based upon the 1980 CSO valuation tables with select mortality. If select mortality factors are elected, they may be:

(a) through (c)(i) remain the same.

~~(ii) X shall not be less than 20%;~~

~~(iii) X shall not decrease in any successive policy years;~~

~~(iv)~~(ii) X is such that, when using the valuation interest rate used for basic reserves, ~~(2)(c)(iv)(A)~~ (2)(c)(ii)(A) is greater than or equal to ~~(2)(c)(iv)(B)~~ (2)(c)(ii)(B) as follows:

(A) and (B) remain the same.

(v) and (vi) remain the same, but are renumbered (iii) and (iv).

~~(vii)~~(v) the appointed actuary may decrease X at any valuation date as long as X ~~does not decrease in any successive policy years and as long as it~~ continues to meet all the requirements of (2)(c); and

(viii) and (ix) remain the same, but are renumbered (vi) and (vii).

(A) the appointed actuary shall annually prepare an actuarial opinion and memorandum for the ~~company~~ insurer in conformance with the requirements of ARM ~~6.6.6504(4)~~ 6.6.6505; ~~and~~

(B) the appointed actuary shall disclose, in the regulatory asset adequacy issues summary as required in ARM 6.6.6509, the impact of the insufficiency of assets to support the payment of benefits and expenses and the establishment of statutory reserves during one or more interim periods; and

(B) remains the same but is renumbered (C).

(d) through (5)(c) remain the same.

(6) The commissioner may require that the ~~company~~ insurer document the extent of the adequacy of reserves for specified blocks, including but not limited to policies issued prior to January 1, 2000. This documentation may include a demonstration of the extent to which aggregation with other nonspecified blocks of business is relied upon in the formation of the appointed actuary opinion pursuant to and consistent with the requirements of ARM 6.6.6505.

AUTH: 33-1-313, MCA

IMP: 33-2-521, 33-2-522, 33-2-523, 33-2-524, 33-2-525, 33-2-526, 33-2-527, 33-2-528, 33-2-529, 33-2-531, 33-2-537, MCA

6.6.6709 CALCULATION OF MINIMUM VALUATION STANDARD FOR POLICIES WITH GUARANTEED NONLEVEL GROSS PREMIUMS OR

GUARANTEED NONLEVEL BENEFITS (OTHER THAN UNIVERSAL LIFE POLICIES) (1) through (7) remain the same.

(8) If the assuming ~~company~~ insurer chooses this optional exemption, the ceding ~~company's~~ insurer's reinsurance reserve credit shall be limited to the amount of reserve held by the assuming company for the affected policies.

(9) ~~Optional exemption for attained-age-based yearly renewable term (YRT) life insurance policies.~~ At the option of the ~~company~~ insurer, the following approach for reserves for attained-age-based yearly renewable term (YRT) life insurance policies may be used:

(a) through (15)(c) remain the same.

AUTH: 33-1-313, MCA
IMP: 33-2-521, 33-2-522, 33-2-523, 33-2-524, 33-2-525, 33-2-526, 33-2-527, 33-2-528, 33-2-529, 33-2-531, 33-2-537, MCA

6.6.6711 CALCULATION OF MINIMUM VALUATION STANDARD FOR FLEXIBLE PREMIUM AND FIXED PREMIUM UNIVERSAL LIFE INSURANCE POLICIES THAT CONTAIN PROVISIONS RESULTING IN THE ABILITY OF A POLICYOWNER TO KEEP A POLICY IN FORCE OVER A SECONDARY GUARANTEE PERIOD (1) through (6) remain the same.

(7) Basic reserves for the secondary guarantees shall be the segmented reserves for the secondary guarantee period. In calculating the segments and the segmented reserves, the gross premiums shall be set equal to the specified premiums, if any, or otherwise to the minimum premiums, that keep the policy in force, and the segments will be determined according to the contract segmentation method as defined in ARM 6.6.6705~~(3)~~(2).

(8) through (9)(b) remain the same.

AUTH: 33-1-313, MCA
IMP: 33-2-521, 33-2-522, 33-2-523, 33-2-524, 33-2-525, 33-2-526, 33-2-527, 33-2-528, 33-2-529, 33-2-531, 33-2-537, MCA

6.6.6713 SELECT MORTALITY FACTORS (1) remains the same.

(2) The ~~6~~ six tables of select mortality factors contained herein include:

(a) through (e) remain the same.

(f) female, smoker.

(3) These tables apply to both age last birthday and age nearest birthday mortality tables.

(3) and (4) remain the same, but are renumbered (4) and (5).

AUTH: 33-1-313, MCA
IMP: 33-2-521, 33-2-522, 33-2-523, 33-2-524, 33-2-525, 33-2-526, 33-2-527, 33-2-528, 33-2-529, 33-2-531, 33-2-537, MCA

4. REASONABLE NECESSITY STATEMENT: The Commissioner of Securities and Insurance, Montana State Auditor, Monica J. Lindeen (commissioner), is the statewide elected official responsible for administering the

Montana Insurance Code and regulating insurers. The commissioner is a member of the National Association of Insurance Commissioners (NAIC). The NAIC is an organization of insurance regulators from the 50 states, the District of Columbia, and the U.S. territories. The NAIC provides a forum for the development of uniform policy and regulation when uniformity is appropriate.

Insurer solvency is a principal area in which uniformity is efficient and effective for insurers and regulators. Through development of model laws and rules, the NAIC promotes the standard valuation of life insurance policies issued by life insurers. Valuing the in-force life insurance policies is necessary in determining the liability reserves (reserves) to be held by life insurers.

In this regard, the NAIC has promulgated model rules about valuation of in-force life insurance policies. Valuation of the in-force life insurance policies is necessary to determine reserves to be held by life insurers to maintain solvency. Life insurers are required to report annually to the commissioner regarding the adequacy of their reserves.

The existing rules at ARM 6.6.6701 through 6.6.6713 are based on the NAIC's Valuation of Life Insurance Policies Model Regulation. The commissioner is proposing to amend the existing rules for consistency with the current NAIC model (2009). Additionally, the commissioner is proposing amendments to make corrections to the existing rules.

The commissioner is proposing to amend the existing rules to replace "company" with "insurer." The Montana Insurance Code does not define company, but does define insurer at 33-1-201(6), MCA. Additionally, these rules implement the standard valuation law of life insurance laws at 33-2-521 through 33-2-529, MCA, which use the term "insurer." This change is necessary to clarify that the rules apply to insurers.

With regard to ARM 6.6.6705(5), the commissioner is proposing to remove "(Computation of Minimum Standard by Calendar Year of Issue)" because this is not the correct caption or catchline for the statute referenced. The change is necessary to correct an error.

In ARM 6.6.6705(7), the commissioner is proposing to add references to the specific sections of ARM 6.6.6711. The change is necessary to make the rule clearer.

In ARM 6.6.6707(2)(c), the commissioner is proposing to remove (ii) and (iii), which impose certain restrictions on X in regard to durations in the first segment when select mortality factors are used in calculating deficiency reserves. Removing (ii) and (iii) would allow X to be less than 20% and to decrease in any successive policy years, thereby allowing actuarial judgment to be used in selecting an appropriate percentage to apply to the select mortality factors in ARM 6.6.6713. To assure that the percentage selected through actuarial judgment is reasonable, the appointed actuary is required under ARM 6.6.6505 to opine whether the mortality rates

resulting from the application of that percentage meet the requirements for deficiency reserves. Further, the actuarial opinion must be supported by an actuarial report subject to the appropriate Actuarial Standards of Practice promulgated by the Actuarial Standards Board of the American Academy of Actuaries. The changes to ARM 6.6.6707(2)(c) are necessary for consistency with the NAIC model.

In ARM 6.6.6707(2)(c)(iv), renumbered as ARM 6.6.6707(2)(c)(ii), the proposed change would revise the ARM citations referenced in the rule. This change is necessary to correct the citations to reflect new numbering resulting from other changes to the rule and is consistent with the NAIC model.

In ARM 6.6.6707(2)(c)(vii), renumbered as ARM 6.6.6707(2)(c)(v), the proposed change would remove the language about X not decreasing in any successive policy year. This change is necessary for consistency with other proposed amendments to ARM 6.6.6707(2)(c) and is consistent with the NAIC model.

The proposed change to ARM 6.6.6707(2)(c)(ix)(A), renumbered as ARM 6.6.6707(2)(c)(vii)(A), would revise the ARM citation referenced in the rule. This change is necessary to correct the citation and is consistent with the NAIC model.

The commissioner is proposing to add new (B) to ARM 6.6.6707(2)(c)(vii) which provides that the appointed actuary disclose in the regulatory asset adequacy issues summary the impact of the insufficiency of assets to support the payment of benefits and expenses and the establishment of statutory reserves during one or more interim periods. This change is necessary for consistency with proposed changes to the ARM 6.6.6509(3)(d) regarding Actuarial Opinions and published in MAR Notice No. 6-197 on October 27, 2011. This change is also consistent with the NAIC model.

The proposed changes to ARM 6.6.6709(9) would remove the phrase, "Optional exemption for attained-age-based yearly renewable term (YRT) life insurance policies" and would add "yearly renewable term" subsequently to clarify the YRT acronym. The phrase is not a sentence and seems to serve as a caption or catchline for (9). Removing the phrase does not change the substance of the rule and is necessary for consistency with the rule writing requirements of the Secretary of State's Office.

In ARM 6.6.6711(7), the commissioner is proposing to revise the ARM citation referenced in the rule. The change is necessary to correct the citation and is consistent with the NAIC model.

In ARM 6.6.6713, the commissioner is proposing to write out the number six and to revise (2) to make the last sentence a new (3). These changes are necessary to make the rule more clear and are consistent with the NAIC model.

5. Concerned persons may submit their data, views, or arguments concerning the proposed actions either in writing or orally at the hearing. Written

data, views, or arguments may also be submitted to Jennifer Massman, Staff Attorney, Office of the Commissioner of Securities and Insurance, Montana State Auditor, 840 Helena Ave., Helena, Montana, 59601; telephone (406) 444-2040; fax (406) 444-3499; or e-mail jmassman@mt.gov, and must be received no later than 5:00 p.m., January 12, 2012.

6. Jennifer L. Massman, Staff Attorney, has been designated to preside over and conduct this hearing.

7. The Office of the Commissioner of Securities and Insurance, Montana State Auditor maintains a list of concerned persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Such written request may be mailed or delivered to Darla Sautter, at the Office of the Commissioner of Securities and Insurance, Montana State Auditor, 840 Helena Ave., Helena, Montana, 59601; telephone (406) 444-2726; fax (406) 444-3499; or e-mail dsautter@mt.gov or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this Proposal Notice is available through the Secretary of State's web site at http://sos.mt.gov/ARM/Register. The Secretary of State strives to make the electronic copy of the 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 Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

9. Pursuant to 2-4-302, MCA, the bill sponsor contact requirements do not apply.

| | |
|---|---|
| /s/Brett O'Neil | /s/Jesse Laslovich |
| Brett O'Neil | Jesse Laslovich |
| Rule Reviewer | Chief Legal Counsel |

Certified to the Secretary of State November 28, 2011.

BEFORE THE BOARD OF BARBERS AND COSMETOLOGISTS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of ARM 24.121.301 definitions, 24.121.403 general requirements, 24.121.601, 24.121.603, 24.121.605, 24.121.607, and 24.121.611 licensing, 24.121.803, 24.121.805, and 24.121.807 school requirements, 24.121.1103 and 24.121.1105 teacher-training, 24.121.1517 salon preparation storage and handling, 24.121.2101 continuing education, and 24.121.2301 unprofessional conduct | ) ) ) ) ) ) ) ) ) ) ) ) | NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT |

TO: All Concerned Persons

1. On December 29, 2011, at 10:30 a.m., a public hearing will be held in room 439, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Labor and Industry (department) 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 Board of Barbers and Cosmetologists (board) no later than 5:00 p.m., on December 22, 2011, to advise us of the nature of the accommodation that you need. Please contact Shane Younger, Board of Barbers and Cosmetologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2335; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2309; e-mail dlibsdcos@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: The 2011 Montana Legislature enacted Chapter 100, Laws of 2011 (House Bill 94), an act that revised the barber and cosmetology laws regarding instructor training and licensing. The bill was signed by the Governor on April 1, 2011, and became effective on October 1, 2011. The board determined it is reasonably necessary to amend certain rules to implement HB 94 and align the rules with the revised statutory requirements, including requiring all instructor applicants to meet the same licensure criteria, regardless of the area of practice the applicant will teach.

Other changes replace out-of-date terminology for current language and processes, delete unnecessary or redundant sections, and amend rules for consistency, simplicity, better organization, ease of use, and correct grammar and punctuation. Where additional specific bases for a proposed action exist, the board will identify those reasons immediately following that rule.

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

24.121.301 DEFINITIONS (1) remains the same.

(2) "Beauty culture" means, but is not limited to, hairdressing, manicuring, and esthetics.

(3) remains the same.

(4) "Board-approved exam" means the written and practical examinations, collectively, that are approved by the board.

(4) through (6) remain the same, but are renumbered (5) through (7).

(8) "Chemical compounds" means professionally formulated makeup or cosmetic preparations, tonics, lotions, creams, waxes, depilatories, antiseptics, and other skin care and beautification products used in approved esthetics courses in Montana.

(7) through (11) remain the same, but are renumbered (9) through (13).

~~(12)~~ (14) "Direct supervision" means the ~~on-site~~ onsite physical presence of a supervisor in the clinic and basic areas of the school, where students perform educational activities and services requiring licensure, and includes communication, direction, observation, and evaluation on a consistent basis.

(13) remains the same, but is renumbered (15).

~~(14)~~ (16) "Distance education" means education such as ~~computer based~~ computer-based training, Internet, video tape, or other mode of distance delivery where the instructor and student are separated by distance and, in some cases, time.

(15) through (20) remain the same, but are renumbered (17) through (22).

~~(21)~~ (23) "Hairdressing" means performing any or all of the following on natural or artificial hair including, but not limited to, hairstyling (wet, dry, thermal, and braiding), chemical services (waving, relaxing, hair coloring, and lightening), hair cutting, and shampooing and scalp treatments.

(22) through (29) remain the same, but are renumbered (24) through (31).

~~(30)~~ (32) "Single use items" mean items which shall be discarded after being used one time. These items include, but are not limited to, emery boards, nonmetal files without documentation from the manufacturer stating the file is disinfectable, mandrels, and sanding bands for electric files, orangewood/birchwood sticks, wooden applicator sticks or spatulas, porous foot files, disposable gloves, paraffin liners, cotton balls, cotton strips, cotton swabs, neck strips or muslin strips, and any item that cannot be cleaned and disinfected and remain intact in its original condition.

(31) remains the same, but is renumbered (33).

~~(32)~~ (34) "Supplemental barbering course" means a course of study in a licensed school, which consists of at least 125 hours in clipper cuts and 25 hours in facial, neck, and outline shaving to licensed cosmetologists only, in order to meet the required educational needs for a barber license prior to taking ~~a national written~~ the board-approved exam.

(33) and (34) remain the same, but are renumbered (35) and (36).

AUTH: 37-1-131, 37-1-319, 37-31-203, 37-31-204, MCA
IMP: 37-31-101, 37-31-203, 37-31-204, 37-31-303, 37-31-305, 37-31-309, 37-31-311, MCA

REASON: The board is incorporating the definition of "board-approved exam" from elsewhere in the rules for simplicity and better organization. The board is also amending the "board-approved exam" definition to include a practical exam. The practical exam is a board requirement, but was previously administered by the schools. Now, both the practical exam and the written exam are being administered through an exam provider that has contracted with the department.

The board is defining chemical compounds to further clarify the scope of practice for licensed estheticians and provide guidance to licensees by clarifying that approved chemical compounds are those used in schools. The board intends for estheticians to determine if a product is appropriate by establishing whether the product is used in an approved esthetics course.

24.121.403 GENERAL REQUIREMENTS (1) remains the same.

(2) Applications received by the board will be reviewed for completeness. If the application is not complete, the applicant has ~~90~~ 180 days in which to supply the remaining information or documents. If the application is not completed within ~~90~~ 180 days, the application is rejected, and the applicant shall be required to submit a new application package and fees.

(3) All licensees, including salons, shops, and schools~~,~~ shall display all licenses conspicuously for members of the public to view. The address on the personal license may be covered.

(a) remains the same.

(b) Booth renters shall clearly label all other areas of the salon or shop maintained by the renter~~,~~ including, but not limited to, retail, ~~roll-abouts~~ "roll-abouts", carts, and manicure tables.

(4) Licensees shall ensure that their correct name and current mailing address is on file with the board by notifying the board of changes in name or address in writing within 30 days, and including the licensee's name, profession, and license number.

(5) remains the same.

(6) Licensees shall immediately notify the board of lost, damaged, or destroyed licenses and obtain a duplicate license by submitting a written request and appropriate fees to the board or through the board's ~~website~~ web site.

(7) All licensees practicing barbering, cosmetology, electrology, esthetics, or manicuring shall provide a suitable place equipped to provide adequate services to clients, as specified in rule, and subject to inspection by the department or board designee.

(8) through (10) remain the same.

AUTH: 37-1-131, 37-31-203, MCA
IMP: 37-31-301, 37-31-302, 37-31-303, 37-31-304, 37-31-305, 37-31-309, 37-31-311, MCA

REASON: The board determined it is reasonably necessary to amend this rule and allow additional time for applicants to submit a complete application packet to the board office. Now that the practical examination is administered by an exam provider, it is only offered every other month. The board realized that it may take applicants longer than 90 days to schedule, take, and provide the results of the practical exam to the board office. The additional 90 days will allow applicants adequate time to complete the application, according to established timelines.

24.121.601 APPLICATIONS FOR LICENSURE (1) Applicants for licenses to practice shall ~~apply for licensure~~ obtain a license within three years of the applicant's graduation date from a licensed school.

(2) ~~Previously~~ Applicants previously licensed ~~applicants~~ may apply for licensure within ~~ten~~ three years of termination of license by meeting current board licensing requirements and successfully passing ~~a national written~~ the board-approved exam.

(3) through (3)(b) remain the same.

(c) proof of high school graduation or equivalency. A manicurist applicant may provide a certificate of completion from a vocational-technical program;

(d) through (10) remain the same.

AUTH: 37-1-131, 37-31-203, MCA
IMP: 37-31-303, 37-31-304, 37-31-308, MCA

REASON: The board is amending (2) to require that previously licensed applicants apply within three years of license termination instead of ten. The board concluded that someone applying after only three years will have the recent knowledge and experience to allow them to re-enter the profession and practice competently.

In reviewing the rules, the board discovered a discrepancy in requirements for manicurist applicants. The board is amending (3)(c) to reconcile with the statutory requirements in 37-31-304(5), MCA, which allow these applicants to substitute a certificate of completion from a vocational-technical program.

24.121.603 OUT-OF-STATE APPLICANTS (1) Applicants other than barbers tested and licensed in states administering a ~~board approved~~ nationally recognized written and practical examination and having received a scaled score as required for licensure in Montana, may qualify for licensure by endorsement.

~~(a) "Board approved" means the examination is written and administered by any nationally recognized examination service.~~

(2) ~~To qualify for licensure by endorsement, an out-of-state barber shall submit an application including the following documentation:~~ A barber applicant will qualify for licensure by endorsement without examination by submitting a complete application, all required documentation, by meeting the requirements of 37-31-304, MCA, and the following:

(a) remains the same.

(i) For the purposes of 37-1-304, MCA, "substantially equivalent" for barbers means 1500 hours of formal training and successful completion of a ~~board approved~~ board-approved examination by a passing score set forth in rule. Applicants who

have not completed 1500 hours of formal training shall be required to pass a ~~board approved~~ board-approved examination as specified in rule. Work experience obtained in the profession will not be considered as part of a barbering applicant's qualifications or credit for hours.

(ii) through (3)(a) remain the same.

(i) For the purposes of 37-1-304, MCA, "substantially equivalent" for cosmetologists means 2000 hours of formal training and successful completion of a ~~board approved~~ board-approved examination by a passing score set forth in rule. Applicants who have not completed 2000 hours of formal training shall be required to pass a ~~board approved~~ board-approved examination as specified in rule. Work experience obtained in the profession will not be considered as part of a cosmetologist applicant's qualifications or credit for hours.

(ii) through (4)(a) remain the same.

(i) For the purposes of 37-1-304, MCA, "substantially equivalent" for electrologists means 600 hours of formal training and successful completion of a ~~board approved~~ board-approved examination with a passing score set forth in rule. Applicants who have not completed 600 hours of formal training shall be required to pass a ~~board approved~~ board-approved examination as specified in rule. Work experience obtained in the profession will not be considered as part of an electrologist applicant's qualifications or credit for hours.

(ii) through (5)(a) remain the same.

(i) For the purposes of 37-1-304, MCA, "substantially equivalent" for estheticians means 650 hours of formal training and successful completion of a ~~board approved~~ board-approved examination with a passing score set forth in rule. Applicants who have not completed 650 hours of formal training shall be required to pass a ~~board approved~~ board-approved examination as specified in rule. Work experience obtained in the profession will not be considered as part of an esthetician applicant's qualifications or credit for hours.

(ii) through (6)(a) remain the same.

(i) For the purposes of 37-1-304, MCA, "substantially equivalent" for manicurists means 350 hours of formal training and successful completion of a ~~board approved~~ board-approved examination with a passing score set forth in rule. Applicants who do not possess 350 hours of formal training shall successfully pass a ~~board approved~~ board-approved examination as specified in rule. Work experience obtained in the profession will not be considered as part of a manicurist applicant's qualifications or credit for hours.

(ii) through (6)(e)(ii)(C) remain the same.

~~(7) To qualify for licensure by endorsement, an out-of-state instructor shall submit an application including the following documentation:~~

~~(a) proof of completion of the applicable minimum hours of teacher training required under 37-31-305, MCA;~~

~~(i) For the purposes of 37-1-304, MCA, "substantially equivalent" for instructors means the minimum hours of formal teacher training specific to the applicant's area of instruction and successful completion of a board approved examination with a passing score set forth in rule. Applicants who have not completed either the applicable minimum hours of formal training or the work experience provisions of ARM 24.121.607 shall be required to pass the board~~

~~approved examination as specified in rule.~~

~~(ii) Applicants shall be credited for the hours of formal training currently required in that state or the hours shown in the transcript or verification.~~

~~(b) copy of a birth certificate or other verifiable evidence of applicant's birth date;~~

~~(c) an original state board transcript or verification from each state in which the applicant holds or has held a license; and~~

~~(d) proof of high school graduation or equivalency; or~~

~~(e) in lieu of a high school diploma or equivalency, applicants may petition the board for an exception by submitting the following information:~~

~~(i) certified copies of applicant's high school transcripts; or~~

~~(ii) lists of courses completed including:~~

~~(A) adult education courses;~~

~~(B) postsecondary education courses; and~~

~~(C) other experiences providing evidence of equivalency to a high school diploma.~~

~~(8) Out-of-state applicants who are not currently licensed in another state shall:~~

~~(a) meet the requirements for licensure in the state of Montana;~~

~~(b) satisfy the statutes and rules of the board with regard to the formal training hour requirements; and~~

~~(c) pass a board approved examination in the field in which the training hours were received.~~

(9) remains the same, but is renumbered (7).

AUTH: 37-1-131, 37-31-203, MCA
IMP: 37-1-304, 37-31-303, 37-31-304, 37-31-305, 37-31-308, MCA

REASON: Because the board concluded that any nationally administered exam is adequate to protect the public and ensure an applicant is qualified for licensure, the board is amending (1) to clarify that any nationally administered examination is acceptable for licensing and does not need specific board approval. The board is amending (1) and (2) to clarify the specific procedure for licensing barbers by endorsement as set forth in 37-31-304(2)(c), MCA, which is different than other out-of-state applicants.

The board is deleting (7) and (8) to remove all references to instructor endorsement applicants. As a result of HB 94, all instructor applicants must first be licensed to practice in Montana, and these requirements are unnecessarily repetitive.

24.121.605 APPLICATION FOR SCHOOL LICENSURE (1) through (3)(a) remain the same.

(b) Cosmetology schools offering courses in barbering, esthetics, manicuring, teacher-training, and/or supplemental barbering shall be required to post a $5000 bond or other security for each course.

(4) Schools shall not allow the bond or other security to be cancelled or to expire as long as the school is licensed, and shall submit to the board proof of continuous annual renewal of the bond or other security.

(5) remains the same.

(6) Schools shall provide true and accurate copies of all current school policies, procedures, rules, student contracts, tuition costs, and required deposits, including, but not limited to, those policies, procedures, and rules addressing:

(a) through (7)(b) remain the same.

(8) As part of the inspection, investigation, or audit process, the board may use information found by or prepared for the Department of Education or other applicable national accrediting associations' or commissions' reviews.

AUTH: 37-1-131, 37-31-203, MCA
IMP: 37-31-302, 37-31-311, 37-31-312, MCA

REASON: The board is amending (3)(b) to require that cosmetology schools post a performance bond for teacher-training courses offered. It was recently brought to the attention of the board that teacher-training courses are exempt from the bond requirement under current rule language. The purpose of a bond is to ensure that a school can meet its obligations to students if the school does not complete the offered curriculum program, and the board concluded that this should apply equally to teacher-training courses.

24.121.607 APPLICATION FOR INSTRUCTOR LICENSE (1) ~~Applicants~~ In addition to a complete application, an applicant for ~~instructor's licenses~~ an instructor license shall submit the following documentation:

(a) ~~Applicants having completed the applicable minimum hours of teacher training required under 37-31-305, MCA, shall submit:~~

~~(i) hour records~~ record of hours showing the number of hours completed;

~~(ii)~~ (b) a diploma issued for a ~~teacher~~ teacher-training course;

~~(iii) a copy of a birth certificate or other verifiable evidence of applicant's birth date;~~

~~(iv) proof of current Montana licensure in barbering, cosmetology, electrology, esthetics or manicuring, in good standing; and~~

(c) an attestation that the applicant meets the requirement of being actively engaged in the particular practice as required in 37-31-305, MCA; and

~~(v)~~ (d) proof of passage of the ~~board approved examination~~ board-approved exam.

~~(b) Pursuant to 37-31-305, MCA, if the applicable hours of teacher training have not been obtained, the applicant may provide documented proof, such as employer/contractor affidavits and proof of income, i.e., W-2 or 1099 forms, verifying the applicant's three years of continuous full-time practice immediately prior to the application submission.~~

(2) Applicants ~~having graduated from a teacher-training course administered by a licensed school with an approved teacher's training program~~ shall ~~apply for~~ obtain a license within ~~five~~ three years of ~~the applicant's graduation date~~ graduating from an approved teacher-training course.

~~(3) Pursuant to 37-31-305, MCA, "immediately" means the last day of employment as a barber, cosmetologist, electrologist, esthetician or manicurist being not more than 90 days prior to taking the teacher's examination and "continuous years" means full-time employment of not less than 32 hours per week.~~

(4) remains the same, but is renumbered (3).

~~(5) Out-of-state student applicants shall meet the same requirements as in-state instructor students.~~

AUTH: 37-1-131, 37-31-203, MCA
IMP: 37-31-302, 37-31-303, 37-31-305, 37-31-308, ~~37-31-321,~~ MCA

REASON: The board is amending (1) to no longer require that instructor applicants provide copies of their birth certificates and Montana licenses. Instructors must hold personal licenses in Montana in the area of practice the person intends to instruct, and would have already submitted a birth certificate or other documentation verifying age. Further, the board can verify Montana licensure without requiring the applicant to provide information. Tax records and similar documents rarely assure that the applicant has been actively practicing prior to making application. The board believes an attestation of practice will be just as effective as these records, and will remove unnecessary documentation and delays from the process.

The board determined that instructor applicants should apply for a license within three years of completing the education requirements to be consistent with applicants for licenses to practice. Noting that the teaching profession evolves, the board concluded that someone with more than a three year gap between education completion and licensure would not be current in updated methods and materials instructed. The board is also striking (5) as it is a redundant statement that out-of-state applicants must meet the same requirement as in-state applicants.

Implementation cites are being amended to accurately reflect all statutes implemented through the rule and delete reference to a repealed statute.

24.121.611 EXAMINATION REQUIREMENTS AND PROCESS

(1) Applicants sitting for the ~~examination~~ board-approved exam shall adhere to the standards and requirements for admission to the ~~examination~~ examinations, including the payment of appropriate fees.

(2) Applicants shall obtain a scale score of at least 75 percent to pass the written examination and 75 percent to pass the practical examination ~~for licensure to practice or for an instructor's license~~.

(3) ~~In addition to the requirements of 37-31-308, MCA, candidates~~ Applicants who have ~~taken the~~ failed either the written or practical examination ~~and failed~~ shall apply to ~~be reexamined~~ retake the failed examination and pay the necessary examination fees as required.

(4) Applicants who fail the written examination three times must wait 60 days before each subsequent reexamination.

AUTH: 37-1-131, 37-31-203, MCA
IMP: 37-31-304, 37-31-305, 37-31-308, ~~37-31-321,~~ MCA

REASON: The board determined it is reasonably necessary to amend this rule and establish a passing score and reexamination requirement for each of the examinations that constitute the board-approved exam. Because each examination is administered independently, it is necessary to establish a separate passing score for each. The board is amending (3) to clarify that initial examination fees only cover the initial examination and that each subsequent exam administration must be accompanied by an examination fee.

The board is adding (4) to require a 60-day waiting period for applicants to retake the written examination after failing three times. Because the written examination is given daily, it is possible for an applicant who fails the exam to schedule and retake it repeatedly over a very short period of time. The board determined it is in the public's best interest to require the applicant to wait 60 days after failing a third time to allow the applicant to study and prepare for reexamination, and to ensure that the applicant actually knows the material, rather than simply mastering the examination.

Implementation cites are being amended to accurately reflect all statutes implemented through the rule and delete reference to a repealed statute.

24.121.803 SCHOOL REQUIREMENTS (1) through (8)(g)(i) remain the same.

(ii) ~~two~~ one stationary or ~~rollabout~~ "roll-about" portable hair ~~dryers~~ dryer;

(iii) through (9)(a) remain the same.

(b) one sink~~,~~ with hot and cold running water for hand washing, not used for restroom facilities;

(c) through (12) remain the same.

AUTH: 37-1-131, 37-31-203, 37-31-311, MCA
IMP: 37-31-311, MCA

REASON: The board determined it is reasonably necessary to amend this rule and eliminate the need for a school to provide two hair dryers per 15 students. Many of the procedures and products currently used in the industry no longer require the use of a dryer. Schools are still required to provide the necessary materials and equipment to teach their approved course. This amendment will allow the schools to determine the need, rather than the board.

24.121.805 SCHOOL OPERATING STANDARDS (1) through (14) remain the same.

(15) Upon completion by students of at least 90 percent of the required ~~hours of a~~ course of study~~,~~ ~~in barbering, cosmetology, electrology, esthetics, manicuring, instructing, or supplemental barbering course~~ and prior to graduating and receiving a diploma, the student ~~shall~~ may take the ~~school's~~ board-approved final practical examination. The final practical examination must include all components for evaluation as provided in ARM 24.121.807 for each course of study. ~~The final practical examination passing score shall be at least equal with the school's academic passing requirements.~~

AUTH: 37-1-131, 37-31-203, 37-31-311, MCA
IMP: 37-31-311, MCA

REASON: The board determined this amendment is necessary to clarify that students may register for and complete the practical examination prior to completing the formal training course, but only after completing 90 percent of the course. The practical examination is not given as frequently as the written examination, and the ability of a student instructor to take the practical exam before completing the formal training will allow them to obtain their instructor license as soon as possible, after completing the formal training and passing both exams that constitute the board-approved exam. The board is removing references to school examinations from (15) to reflect the recent decision to use a national examination.

24.121.807 SCHOOL CURRICULA (1) through (6) remain the same.

(7) Students seeking licensure in a state ~~other than Montana~~ that requires ~~additional~~ more hours of training~~, who do not possess a~~ than Montana ~~license~~, may remain enrolled in ~~the~~ school and be permitted to work on members of the public without obtaining a license.

(8) The board shall not grant credit for hours earned by students for postsecondary education~~,~~ under any circumstances.

AUTH: 37-1-131, 37-31-203, 37-31-311, MCA
IMP: 37-31-304, 37-31-305, 37-31-311, MCA

REASON: The board is amending this rule to address confusion among applicants by clarifying that students seeking licensure in jurisdictions requiring more training hours than Montana, may continue in school and work on the public as students, while obtaining the necessary additional hours of training, and without being required to obtain a license.

24.121.1103 INSTRUCTOR REQUIREMENTS - TEACHER-TRAINING PROGRAMS (1) through (3) remain the same.

(4) Upon application by the student or cadet instructor enrolled in a licensed school of barbering, cosmetology, electrology, esthetics, or manicuring, the board may grant credit for hours toward the teacher-training curriculum when the student or cadet instructor has completed, with not less than a "C" grade, a teacher-training course offered by an accredited postsecondary educational institution.

(5) and (6) remain the same.

(7) Upon completion by the student of at least 90 percent of the teacher-training course, and prior to graduation and issuance of a diploma, the ~~school shall administer a final~~ student may take the board-approved practical examination ~~that~~. The final practical examination must~~:~~

~~(a)~~ include all components for evaluation as provided in ARM 24.121.1105~~;~~ ~~and~~.

~~(b) be consistent with the school's academic passing requirements.~~

AUTH: 37-1-131, 37-31-203, 37-31-311, MCA

IMP: 37-31-305, 37-31-311, MCA

REASON: To align with recent changes to a nationally administered practical examination, the board is amending this rule to clarify that a student instructor may register for and complete the board-approved practical examination prior to completing the formal training course, but only after completing 90 percent of the course. The practical examination is not given as frequently as the written exam, and the ability of a student instructor to take the practical examination before completing the formal training will allow the applicant to obtain the applicant's license as soon as possible after completing the formal training and passing both parts of the board-approved licensing examination.

24.121.1105 TEACHER-TRAINING CURRICULUM (1) ~~Cosmetology, esthetics, and manicuring~~ The teacher-training ~~courses~~ course shall consist of 650 hours and include the following:

(a) through (1)(c)(vii) remain the same.

(d) advanced theory of cosmetology, esthetics, ~~or~~ manicuring, barbering, or electrology, and the chemistry, safety, sanitation, bacteriology, physiology, anatomy, and diseases and disorders that apply to each course - 75 hours; and

(e) 140 hours of instruction shall be at the discretion of the school ~~provided that the hours are within the applicable curriculum~~.

~~(2) Barbering teacher-training courses shall consist of 500 hours and include the following:~~

~~(a) teaching methods - 185 hours including:~~

~~(i) task analysis;~~

~~(ii) developing instructional objectives;~~

~~(iii) visual aids and their construction;~~

~~(iv) motivational tools;~~

~~(v) preparation of instructive materials;~~

~~(vi) lesson planning including:~~

~~(A) practical theory classes; and~~

~~(B) practical demonstration classes.~~

~~(vii) fundamentals of speech and public speaking;~~

~~(viii) methods of test construction;~~

~~(ix) methods of evaluation or grading; and~~

~~(x) curriculum planning and development.~~

~~(b) general psychology - 50 hours including:~~

~~(i) general principles in relation to teaching and counseling;~~

~~(ii) conflict resolution;~~

~~(iii) student counseling;~~

~~(iv) student and teacher relationships; and~~

~~(v) public relations.~~

~~(c) business methods - 90 hours including:~~

~~(i) recruitment;~~

~~(ii) job analysis;~~

~~(iii) student registration, withdrawal, and hours (tracking, completing, calculating, and verifying);~~

~~(iv) ethical employee and employer relationship;~~
~~(v) salon/booth rental relationship;~~
~~(vi) professional ethics; and~~
~~(vii) current state board laws and rules.~~
~~(d) advanced theory of barbering, and the chemistry, safety, sanitation, bacteriology, physiology, anatomy, and diseases and disorders that apply to each course - 45 hours; and~~
~~(e) 130 hours of instruction shall be at the discretion of the school provided that the hours are within the applicable curriculum.~~
~~(3) Electrology teacher-training courses shall consist of 100 hours and include the following:~~
~~(a) teaching methods - 55 hours including:~~
~~(i) task analysis;~~
~~(ii) developing instructional objectives;~~
~~(iii) visual aids and their construction;~~
~~(iv) motivational tools;~~
~~(v) preparation of instructive materials;~~
~~(vi) lesson planning including:~~
~~(A) practical theory classes; and~~
~~(B) practical demonstration classes.~~
~~(vii) fundamentals of speech and public speaking;~~
~~(viii) methods of test construction;~~
~~(ix) methods of evaluation or grading; and~~
~~(x) curriculum planning and development.~~
~~(b) general psychology - five hours including:~~
~~(i) general principles in relation to teaching and counseling;~~
~~(ii) conflict resolution;~~
~~(iii) student counseling;~~
~~(iv) student and teacher relationships; and~~
~~(v) public relations.~~
~~(c) business methods - ten hours including:~~
~~(i) recruitment;~~
~~(ii) job analysis;~~
~~(iii) student registration, withdrawal, and hours (tracking, completing, calculating, and verifying);~~
~~(iv) ethical employee and employer relationship;~~
~~(v) salon/booth rental relationship;~~
~~(vi) professional ethics; and~~
~~(vii) current state board laws and rules.~~
~~(d) advanced theory of electrology and the chemistry, safety, sanitation, bacteriology, physiology, anatomy, and diseases and disorders that apply to each course - five hours; and~~
~~(e) 25 hours of instruction shall be at the discretion of the school provided that the hours are within the applicable curriculum.~~

AUTH: 37-1-131, 37-31-203, 37-31-311, MCA
IMP: 37-31-305, 37-31-311, MCA

REASON: The board determined it is reasonably necessary to amend this rule to align with statutory changes affected by the passage of HB 94, which make the 650 hours of instructor education uniformly required for each discipline.

24.121.1517 SALON PREPARATION STORAGE AND HANDLING (1) and (2) remain the same.

(3) ~~Use~~ Possession or use of the following items is prohibited:

(a) through (3)(e)(iv) remain the same.

(4) No salon, shop, or school shall have on the premises cosmetic products containing hazardous substances which have been banned by the U.S. Food and Drug Administration (FDA) for use in cosmetic products.

(4) through (9) remain the same, but are renumbered (5) through (10).

AUTH: 37-1-131, 37-31-203, 37-31-204, MCA
IMP: 37-31-204, 37-31-312, MCA

REASON: The board determined it is reasonably necessary to amend (3) and specify that not only is it inappropriate for licensees to use prohibited items, it is also inappropriate for them to have the items in the salon or shop. The board determined that this amendment will increase the board's ability to enforce the prohibition of certain items, since licensees at times claim that they are not using prohibited items, even though the items are found on the premises and within the work area.

The board is adding (4) to clarify the inappropriateness of licensees using products banned by the FDA. While the board attempts to keep the prohibited item list current, the licensees are responsible to ensure that products they use do not contain banned substances. Additionally, it is impossible for the board to list every product containing every hazardous substance. Licensees are responsible to research products they use and ensure the products are safe for their intended use.

24.121.2101 CONTINUING EDUCATION - INSTRUCTORS/INACTIVE INSTRUCTORS (1) and (2) remain the same.

(3) Continuing education courses must be germane to the practice of barbering, cosmetology, electrology, esthetics, manicuring, or instructing.

(4) through (12) remain the same.

(13) Course approval will be for the current calendar year. All courses will expire ~~December 31~~ March 1 of each year.

(14) through (20) remain the same.

AUTH: 37-1-131, 37-1-319, 37-31-203, MCA
IMP: 37-1-141, 37-1-306, MCA

REASON: The board is amending the expiration date of instructors' continuing education course approval to align with the recent change to the instructor license renewal date. The board concluded that having different date for course approval

and continuing education will cause confusion as to whether a course is approved for the appropriate continuing education reporting period.

24.121.2301 UNPROFESSIONAL CONDUCT (1) through (1)(m) remain the same.

(n) acting in such a manner as to present a danger to public health or safety, or to any client including, but not limited to, incompetence, negligence, or malpractice;

(o) maintaining an unsanitary or unsafe salon, shop, booth, or school, or practicing under unsanitary or unsafe conditions;

(p) performing services or using machines and devices outside of the licensee's area of training, expertise, competence, or scope of practice or licensure, unless such services are not licensed or inspected by the state of Montana;

(q) through (1)(v) remain the same.

(w) failing to provide verification of completed continuing education when requested by the board; ~~or~~

(x) engaging in or teaching the practice of barbering, cosmetology, electrology, esthetics, or manicuring when the license has expired or terminated, has been suspended or revoked, or is on inactive status, except as allowed in ARM 24.121.805~~.~~;

(y) failing to comply with all completion and reporting requirements for continuing education as established by the board~~.~~; and

(z) failing to use implements, equipment, instruments, machines, devices, or products according to the manufacturer directions, with the exception of using only single-use plastic tips on microdermabrasion machines.

(2) remains the same.

AUTH: 37-1-131, 37-1-136, 37-1-319, 37-31-203, MCA
IMP: 37-1-136, 37-1-137, 37-1-141, 37-1-316, 37-31-301, 37-31-331, MCA

REASON: The board determined it is reasonably necessary to add (1)(z) to include as unprofessional conduct the use of implements or equipment inappropriately or for other than the intended purpose. The board intends that when licensees purchase equipment, they obtain the necessary knowledge and training to use the implements appropriately.

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Barbers and Cosmetologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2309, or by e-mail to dlibsdcos@mt.gov, and must be received no later than 5:00 p.m., January 6, 2012.

6. An electronic copy of this Notice of Public Hearing is available through the department and board's web site on the World Wide Web at www.cosmetology.mt.gov. The department strives to make the electronic copy of this 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 web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

7. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Barbers and Cosmetologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2309; e-mailed to dlibsdcos@mt.gov; or made by completing a request form at any rules hearing held by the agency.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on May 31, 2011, by regular mail.

9. Tyler Moss, attorney, has been designated to preside over and conduct this hearing.

BOARD OF BARBERS AND
COSMETOLOGISTS
WENDELL PETERSEN, CHAIRPERSON

/s/ DARCEE L. MOE
Darcee L. Moe
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State November 28, 2011

BEFORE THE BOARD OF PHARMACY
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of 24.174.301 definitions, 24.174.1201 wholesale drug distributor licensing, 24.174.2107 registered pharmacist continuing education and the adoption of NEW RULES I use of contingency kits, II definitions, III information required for submission, IV electronic format required for the transmission of information, V requirements for submitting prescription registry information, VI failure to report prescription information, VII registry information review and unsolicited patient profiles, VIII access to prescription drug registry information, IX registry information retention, X advisory group, XI prescription drug registry fee, XII release of prescription drug registry information to other entities, and XIII interstate exchange of registry information | ) ) ) ) ) ) ) ) ) ) ) ) ) ) ) ) ) ) ) | NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION |

TO: All Concerned Persons

1. On January 3, 2012, at 9:00 a.m., a public hearing will be held in room 439, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Labor and Industry (department) 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 Board of Pharmacy (board) no later than 5:00 p.m., on December 29, 2011, to advise us of the nature of the accommodation that you need. Please contact Ronald Klein, Board of Pharmacy, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2371; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2344; e-mail dlibsdpha@mt.gov.

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

24.174.301 DEFINITIONS ~~In addition to the term defined in 37-7-101, MCA, the following definitions apply to the rules in this chapter.~~

(1) through (3) remain the same.

(4) "Contingency kit" means a secured kit containing those drugs which may be required to meet the short-term therapeutic need of patients within an institution not having an in-house pharmacy or 24-hour access to dispensing services, and which would not be available from any other authorized source in sufficient time, and without which would compromise the quality of care of the patient.

(4) through (6) remain the same, but are renumbered (5) through (7).

~~(7)~~ (8) "Device" is defined in 37-2-101, MCA, and is required under federal law to bear the label "Caution: Federal law requires dispensing by or on the order of a physician" or "Rx only."

(8) through (12) remain the same, but are renumbered (9) through (13).

~~(13)~~ (14) "Facility" means an outpatient center for surgical services, a hospital and/or ~~long term~~ long-term care facility, or a home infusion facility.

~~(14)~~ (15) "Floor stock" means prescription drugs not labeled for a specific patient, which are maintained at a nursing station or other hospital department other than the pharmacy, and which are administered to patients within the facility pursuant to a valid drug order. Floor stock shall be maintained in a secure manner pursuant to written policies and procedures, which shall include, but not be limited to, automated dispensing devices.

(15) and (16) remain the same, but are renumbered (16) and (17).

~~(17)~~ (18) "Institutional pharmacy" means that physical portion of an institutional facility where drugs, devices, and other material used in the diagnosis and treatment of injury, illness, and disease are dispensed, compounded, and distributed to other ~~health care~~ healthcare professionals for administration to patients within or outside the facility, and pharmaceutical care is provided.

(18) remains the same, but is renumbered (19).

~~(19)~~ (20) "~~Long term~~ Long-term care facility" has the same meaning as provided in 50-5-101, MCA, and means a facility or part of a facility that provides skilled nursing care, residential care, intermediate nursing care, or intermediate developmental disability care to a total of two or more individuals, or that provides personal care.

~~(20)~~ (21) "Medical gas" means any gaseous substance that meets medical purity standards and has application in a medical environment. Examples of medical gases include, but are not limited to, oxygen, carbon dioxide, nitrous oxide, cyclopropane, helium, nitrogen, and air.

(21) through (27) remain the same, but are renumbered (22) through (28).

~~(28)~~ (29) "Provisional pharmacy" means a pharmacy licensed by the Montana Board of Pharmacy and includes, but is not limited to, federally qualified health centers as defined in 42 CFR 405.2401, where prescription drugs are dispensed to appropriately screened, qualified patients.

(29) through (33) remain the same, but are renumbered (30) through (34).

~~(34)~~ (35) "Security" or "secure system" means a system to maintain the confidentiality and integrity of patient records, which are being sent electronically.

~~(35)~~ (36) "Sterile pharmaceutical" means any dosage form containing no viable microorganisms~~,~~ including, but not limited to, parenterals and ophthalmics.

(36) remains the same, but is renumbered (37).

AUTH: 37-1-131, 37-7-201, 50-32-314, MCA
IMP: 37-7-102, 37-7-201, 37-7-301, 37-7-321, 37-7-406, 37-7-603, 37-7-604, 37-7-605, 50-32-314, MCA

REASON: The board determined it is reasonably necessary to add (4) to define and clarify contingency kits as the term is used in proposed New Rule I. Additional amendments correct grammatical errors and renumber or amend punctuation within the rule following internal amendments.

24.174.1201 WHOLESALE DRUG DISTRIBUTOR LICENSING (1) through (3) remain the same.

(4) Wholesale drug distributors located in Montana, applying for initial licensure, shall pass an inspection by a pharmacy inspector or other agent of the Board of Pharmacy before a license is issued.

(4) through (6) remain the same, but are renumbered (5) through (7).

AUTH: 37-7-201, 37-7-610, MCA
IMP: 37-7-603, 37-7-604, 37-7-605, 37-7-606, MCA

REASON: The board is amending this rule to address recent concerns of the pharmacy inspector raised after inspecting new wholesale drug distributors. It appears that these new applicants do not have viable business plans and/or adequate facilities to conduct a wholesale drug distribution business. By requiring new licensure applicants to successfully pass an inspection prior to licensure, the board is being proactive and continuing to ensure the safety and efficacy of the drug distribution system. Implementation cites are being amended to accurately reflect all statutes implemented through the rule.

24.174.2107 REGISTERED PHARMACIST CONTINUING EDUCATION - NONCOMPLIANCE (1) ~~Failure to meet the license renewal requirements set forth in ARM 24.101.413 will be cause for the license to lapse. For reinstatement, the applicant shall have completed the continuing education requirements and certify that fact to the board as stated in ARM 24.174.2103.~~ A pharmacist who submits a renewal application, but who has not completed the required continuing education requirements as set forth in ARM 24.101.413 and 24.174.2104, will have sixty days, following the end of the renewal period, to complete the requirements. The pharmacist shall:

(a) notify the board of the continuing education deficiency by checking the appropriate box on the renewal application;

(b) pay a fee equal to one hundred percent of the annual fee for licensure. This fee is in addition to the regular fee for licensure; and

(c) submit to the board office documentation of completion of continuing education requirements.

(2) Failure to complete continuing education requirements may be cause for disciplinary action by the board.

(3) An action taken under (2) is not a "disciplinary action" under ARM 24.101.404, for the purposes of publication and notice on the licensee look-up.

AUTH: 37-1-319, MCA
IMP: 37-1-141, 37-1-306, MCA

REASON: The board is amending the procedure for pharmacists who have not completed the continuing education (CE) requirements for licensure renewal. By allowing sixty days in which to complete the CE, the board seeks to avoid taking official disciplinary action as often, which attaches to the pharmacist's permanent record, while still ensuring competent licensed pharmacists.

4. The proposed new rules provide as follows:

NEW RULE I USE OF CONTINGENCY KITS IN CERTAIN INSTITUTIONAL FACILITIES (1) In an institutional facility that does not have an in-house pharmacy or 24-hour access to dispensing services, medications may be provided for use by authorized personnel through contingency kits, prepared by the registered pharmacist, providing pharmaceutical services to the facility. Such contingency kits must meet all of the following requirements:

(a) the supplying or consultant pharmacist and director of nursing shall designate nursing personnel who may obtain access to the drug supply;

(b) the supplying or consultant pharmacist and the designated practitioner or appropriate committee of the institutional facility shall jointly determine the contents and quantity of drugs to be included in the kit;

(c) the kit must be locked and stored in a secure area to prevent unauthorized access and to ensure a proper storage environment for the drugs contained therein;

(d) the supplying pharmacist and director of nursing will provide adequate controls to prevent drug diversion;

(e) medications in the kit must be prepackaged and properly labeled, including lot number and expiration date, and shall possess any additional information that may be required to prevent risk of harm to the patient; and

(f) the exterior of the kit must be clearly labeled to indicate:

(i) its contents and expiration date; and

(ii) the name, address, and telephone number of the supplying pharmacist.

(2) Drugs shall be removed from kits only by the supplying pharmacist or by authorized nursing personnel pursuant to a valid drug order or during inspection of the kit.

(3) Removal of any drug from the contingency kit by authorized nursing or pharmacy personnel must be recorded on a suitable form showing the following information:

(a) patient name;

(b) name, strength, and quantity of drug removed;

(c) date and time the drug was removed; and

(d) signature of the authorized personnel removing the drug.

(4) The supplying pharmacist shall ensure that:

(a) written policies and procedures are established to implement the requirements of this rule;

(b) all drugs are properly labeled;

(c) only prepackaged drugs are available in amounts sufficient for short-term therapeutic requirements to meet the needs of the facility when dispensing pharmacy services are unavailable;

(d) replacement of medications is performed in a timely manner by authorized personnel;

(e) at a minimum, the kit shall be inspected annually; and

(f) at least one copy of the documentation for all drugs that have been removed from the contingency kit shall be kept at the long-term care facility and one copy at the supplying pharmacy.

(5) The expiration date of a kit must be the earliest date of expiration of any drug supplied in the kit. On or before the expiration date, the supplying pharmacist shall replace the expired drug.

(6) All documentation must be readily available for inspection by the board.

AUTH: 37-7-201, MCA
IMP: 37-7-201, MCA

REASON: There are situations where long-term care facility residents require immediate care that may easily be provided by an emergency drug kit or a starter dose "contingency kit." These patients, especially those frail and elderly, cannot wait until the next day to receive their medications. The contingency kit allows the patient to receive an immediate dose of a medication not currently on that patient's medical chart.

Use of contingency kits is particularly important in rural areas where the closest pharmacy may be 50 miles away and especially in rural Montana, where often times a pharmacist is not available during evening/night hours, or on weekends and holidays. Additionally, many local pharmacies are unwilling to provide an on-call service twenty-four hours, seven days a week, as required under the Centers for Medicare and Medicaid Services (CMS) requirements for network long-term care pharmacies (NLTCPs). The board is proposing New Rule I to address these situations as they arise in long-term care facilities.

REASONABLE NECESSITY FOR NEW RULES II THROUGH XIII:

The 2011 Montana Legislature enacted Chapter 241, Laws of 2011 (House Bill 83), an act that created a prescription drug registry. The bill was signed by the Governor on April 21, 2011, and became effective on July 1, 2011. The legislation requires the board to electronically collect information on prescription drug orders involving controlled substances. The purpose of the registry is to improve patient safety by making a list of controlled substances prescribed to a patient, available to the patient or to the patient's healthcare provider, and allowing authorized board staff to review the registry for possible misuse and diversion of controlled substances. The board is proposing New Rules II through XIII to coincide with the statutory changes and further implement the legislation.

NEW RULE II DEFINITIONS (1) "Authorized user" means a prescriber, pharmacist, Board of Pharmacy staff, Montana Medicare or Medicaid programs, Tribal Health, Indian Health Service, and Veterans Affairs.

(2) "Authorized agent" means a designated person authorized access by an authorized user. An authorized agent for a pharmacist must be a pharmacy intern or certified pharmacy technician.

AUTH: 37-7-1512, MCA
IMP: 37-7-1512, MCA

NEW RULE III INFORMATION REQUIRED FOR SUBMISSION (1) Each entity registered by the board as a certified pharmacy or as an out-of-state mail service pharmacy that dispenses to patients in Montana shall provide the following controlled substances dispensing information to the board:

(a) pharmacy name, address, telephone number, and drug enforcement administration number;

(b) full name, address, telephone number, gender, and date of birth for whom the prescription was written;

(c) full name, address, telephone number, and drug enforcement administration registration number of the prescriber;

(d) date the prescription was issued by the prescriber;

(e) date the prescription was filled by the pharmacy;

(f) indication of whether the prescription dispensed is new or a refill;

(g) name, national drug code number, strength, quantity, dosage form, and days' supply of the actual drug dispensed;

(h) prescription number assigned to the prescription order; and

(i) source of payment for the prescription that indicates one of the following:

(i) cash;

(ii) insurance; or

(iii) government subsidy.

AUTH: 37-7-1512, MCA
IMP: 37-7-1502, 37-7-1503, 37-7-1512, MCA

NEW RULE IV ELECTRONIC FORMAT REQUIRED FOR THE TRANSMISSION OF INFORMATION (1) All prescription information submitted to the board pursuant to [New Rule III], must be transmitted in the format specified by the American Society for Automation in Pharmacy (ASAP), version 4.1, dated 2009, which is adopted and incorporated by reference. A copy of the ASAP standards may be obtained through the Board of Pharmacy, 301 South Park Avenue, P.O. Box 200513, Helena, Montana, 59620-0513.

AUTH: 37-7-1512, MCA
IMP: 37-7-1503, 37-7-1512, MCA

NEW RULE V REQUIREMENTS FOR SUBMITTING PRESCRIPTION REGISTRY INFORMATION TO THE BOARD (1) All prescription dispensing information submitted under this subchapter shall be submitted at least weekly.

(2) The information submitted shall be consecutive and complete from the date and time of the submitting pharmacy's last submission, and shall be reported no later than eight days after the date of dispensing.

(3) If a pharmacy has dispensed no reportable controlled substances during a reporting period, the pharmacy shall submit a timely "zero report."

(4) For the purposes of establishing a data history at the initiation of the prescription drug registry, each certified pharmacy and out-of-state mail service pharmacy shall submit a one-time batch submission of controlled substances, dispensed to Montana patients from July 1, 2011 forward to the date the registry is operational.

(5) In the event that a pharmacy cannot submit the required information as described in this rule, the pharmacy must report that fact on the appropriate board-approved form. This form is due to the board on or before the date that the weekly submission is otherwise due. The board office may grant an extension, at their discretion, when a pharmacy notifies the board that they are unable to submit their report.

(6) It is the responsibility of the submitting pharmacy to address any errors or questions about information that the pharmacy has submitted to the prescription drug registry.

AUTH: 37-7-1512, MCA
IMP: 37-7-1503, 37-7-1512, MCA

NEW RULE VI FAILURE TO REPORT PRESCRIPTION INFORMATION

(1) A pharmacy that fails to submit prescription information to the board as required is deemed to have committed unprofessional conduct for which discipline may be imposed under 37-1-312, MCA.

AUTH: 37-1-319, 37-7-1512, MCA
IMP: 37-1-312, 37-7-1513, MCA

NEW RULE VII REGISTRY INFORMATION REVIEW AND UNSOLICITED PATIENT PROFILES (1) The board or their designee(s) may review and compile information contained in the registry to identify evidence of possible misuse or diversion of controlled substances.

(2) In instances of possible misuse or diversion, the executive director will promptly report by telephone, e-mail, or postal mail the patient's profile information to practitioners and pharmacists who have provided care to that patient.

(3) The following factors are suggestive, but not conclusive evidence of misuse or diversion:

(a) four or more prescribers in a 60-day period; or

(b) four or more pharmacies in a 60-day period.

AUTH: 37-7-1512, MCA

IMP: 37-7-1502, 37-7-1504, MCA

NEW RULE VIII ACCESS TO PRESCRIPTION DRUG REGISTRY INFORMATION (1) The following persons may have direct online access to prescription drug registry information:

(a) licensed practitioners having authority to prescribe controlled substances, or that practitioner's authorized agent, for the purpose of providing medical and/or pharmaceutical care for their patients, or for patients referred for medical care and/or pharmaceutical care;

(b) licensed pharmacists authorized to dispense controlled substances, or that pharmacist's authorize agent, for the purpose of providing pharmaceutical care for their patients or for patients referred for care;

(c) designated representatives from the Montana Medicare or Medicaid programs, Tribal Health, Indian Health Service, and Veterans Affairs regarding program recipients;

(d) board staff, including executive director, inspectors, and program manager; and

(e) any vendor or contractor establishing or maintaining the prescription drug registry.

(2) To access registry information, each user must first:

(a) successfully complete the board's educational program;

(b) complete the registration form and confidentiality agreement provided by the board;

(c) complete a written agreement assuring that the user's access and use of the prescription drug registry is limited to that authorized by law;

(i) in the case of a licensed practitioner having authority to prescribe controlled substances, or that practitioner's authorized agent, access is restricted to:

(A) the practitioner's own prescribing information; or

(B) prescription records for a patient of the practitioner to whom the practitioner is providing or considering providing medical and/or pharmaceutical care;

(ii) in the case of a licensed pharmacist, pharmacy intern, or certified pharmacy technician, access is restricted to prescription records for a patient for whom the pharmacy is actually dispensing or considering dispensing a prescription;

(iii) in the case of a designated representative of the Montana Medicare or Medicaid programs, Tribal Health, Indian Health Service, and Veteran Affairs, access is restricted to prescription records related to a participant in the program;

(iv) in the case of authorized representatives of the board, access is restricted to:

(A) that necessary to respond to legitimate inquiries; or

(B) that necessary for legitimate inquiries under ARM 24.174.1705;

(v) in the case of an authorized vendor or contractor, access is restricted to technical work necessary to establish or maintain the prescription drug registry databank; or

(vi) in every user's case:

(A) information accessed from the prescription drug registry must be kept confidential;

(B) information accessed from the prescription drug registry must not be disclosed to any unauthorized person; and

(C) user account information, login names, and passwords must not be shared with any person, regardless of whether that person is also an authorized user of the prescription drug registry.

(3) Prior to granting access to the registry, the board shall verify that the applicant is licensed to prescribe or dispense controlled substances or legend drugs, or in the case of an agency applicant, the board shall verify that the applicant is the designated representative of the Montana Medicare or Medicaid programs, Tribal Health, Indian Health Service, or Veterans Affairs.

(4) Upon verification of all requirements, the board shall issue the appropriate information necessary for online access to the prescription drug registry.

(5) Upon receipt of written notification that an authorized user no longer possesses authority to prescribe, dispense, or represent Medicare or Medicaid programs, Tribal Health, Indian Health Services, Veterans Affairs, or the board, the board shall terminate the user's access to the prescription drug information.

(6) Persons authorized in [HB 83 section 7(1)(d)(e)], MCA, to obtain information from the prescription drug registry must apply for that information by:

(a) completing the form provided by the board and returning the completed form, along with proof of identification and authorization required by the board, to the board's office; or

(b) serving upon the board or its designee, an investigative subpoena directing the board to release a profile to the county coroner or a peace officer employed by a federal, state, tribal, or local law enforcement agency.

(7) Individual patients may request their own prescription registry information from the board or their provider. If requesting from the board, the requestor shall personally appear at the program office and produce a positive photo identification at the time of their request. A single copy of the information will be provided at no charge to the individual.

(8) If the prescription drug registry receives evidence of inappropriate or unlawful use or disclosure of prescription registry information by an authorized user, the board shall file a complaint with the user's licensing board.

AUTH: 37-7-1506, 37-7-1512, MCA
IMP: 37-7-1506, 37-7-1512, MCA

NEW RULE IX REGISTRY INFORMATION RETENTION (1) Patient information contained in the registry shall be destroyed three years after the original date of submission of the information to the registry.

(2) Pursuant to 37-7-1508, MCA, a government entity or law enforcement agency may request that specific information in the registry, related to an open investigation, be retained beyond the three-year destruction requirement by submitting a written request to the board on a form provided by the board.

AUTH: 37-7-1512, MCA
IMP: 37-7-1508, MCA

NEW RULE X ADVISORY GROUP (1) The board shall establish a prescription drug registry advisory group, to provide information and advice about the development and operation of the prescription drug registry.

(2) The advisory group shall consist of, but is not limited to, representatives of:

(a) Montana boards of pharmacy, medical examiners, nursing, and dentistry;

(b) Montana pharmacy associations, medical associations, nursing associations, dental associations, and associations that advocate for patients;

(c) tribal health, Medicaid and Medicare, and public health agencies;

(d) the Department of Justice; and

(e) the Montana Legislature.

(3) The members of the advisory group shall serve at the pleasure of their respective appointing authorities.

(4) The members of the advisory group shall elect a chair and a vice chair whose duties shall be established by the advisory group.

(5) The advisory group shall establish policies and procedures necessary to carry out duties.

(6) The board shall establish a time and a place for regular meetings of the advisory group, which shall meet at least once a year.

AUTH: 37-7-1510, 37-7-1512, MCA
IMP: 37-7-1510, MCA

NEW RULE XI PRESCRIPTION DRUG REGISTRY FEE (1) Every person licensed under Title 37, MCA, who is authorized to prescribe or dispense controlled substances, shall pay a fee to the board for the purpose of establishing and maintaining the prescription drug registry.

(2) The fee shall be paid annually to the board.

(3) Upon payment of the fee, the board shall issue authorized prescribers and dispensers a controlled substances registration.

(4) The annual prescription drug registry fee is $15.

AUTH: 37-7-1512, MCA
IMP: 37-7-1511, 37-7-1512, MCA

NEW RULE XII RELEASE OF PRESCRIPTION DRUG REGISTRY INFORMATION TO OTHER ENTITIES (1) The board shall provide prescription registry information to public or private entities for public research, policy, or educational purposes, but only after removing information that identifies or could reasonably be used to identify individuals or entities whose information is contained in the registry.

(2) The board may charge a fee to a person who requests information under this rule.

AUTH: 37-7-1512, MCA
IMP: 37-7-1506, MCA

NEW RULE XIII INTERSTATE EXCHANGE OF REGISTRY INFORMATION

(1) The board may enter into agreements with other states to exchange prescription drug registry information if the other states restrict disclosure and maintain confidentiality to the same extent as provided in 37-7-1506, MCA, and this subchapter.

AUTH: 37-7-1512, MCA
IMP: 37-7-1506, MCA

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Pharmacy, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2344, or by e-mail to dlibsdpha@mt.gov, and must be received no later than 5:00 p.m., January 12, 2012.

6. An electronic copy of this Notice of Public Hearing is available through the department and board's web site on the World Wide Web at www.pharmacy.mt.gov. The department strives to make the electronic copy of this 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 web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

7. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Pharmacy, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2344; e-mailed to dlibsdpha@mt.gov; or made by completing a request form at any rules hearing held by the agency.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on May 5, 2011, by regular mail.

9. Mike Fanning, attorney, has been designated to preside over and conduct this hearing.

BOARD OF PHARMACY
LEE ANN BRADLEY, RPH, PRESIDENT

/s/ DARCEE L. MOE
Darcee L. Moe
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State November 28, 2011

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the adoption of New Rules I through III, relating to the use by brewers and distillers of ingredients containing alcohol | ) ) ) ) | NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION |

TO: All Concerned Persons

1. On January 9, 2012, at 10:00 a.m., a public hearing will be held in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the adoptions of the above-stated rules.

Individuals planning to attend the hearing shall enter the building through the east doors of the Sam W. Mitchell Building, 125 North Roberts, 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 no later than 5:00 p.m., January 3, 2012, 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 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov.

3. The department is proposing to adopt these new rules to implement Senate Bill 389 enacted by the 2011 Legislature in order to be compliant with the administration of the alcohol beverage code. It is the policy of the state of Montana through the Montana Alcoholic Beverage Code to ensure the entire control of the manufacture, sale, importation, and distribution of alcohol beverages within the state for the protection of public health and safety. These new rules seek to increase the beer and distilled spirits manufacturers' understanding of the process to acquire, use, and account for alcohol or ingredients containing alcohol from an external source for the use in the manufacturing process to reduce confusion, increase consistency, and to protect public health and safety.

4. The proposed new rules do not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rules provide as follows:

NEW RULE I DEFINITIONS The following definition applies to a term used in this subchapter:

(1) "Flavors and nonbeverage ingredients containing alcohol" means any intermediate product containing alcohol that is used in the production of beer.

AUTH: 16-1-303, MCA
IMP: 16-1-401, 16-1-404, 16-3-214, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule I to define the term "flavors and nonbeverage ingredients containing alcohol" as it is used in the rules contained in this subchapter. The department is including the definition to make it clear and easy for the brewer to understand the term's meaning and to emphasize that all intermediate products containing alcohol are included within this definition.

NEW RULE II USE OF FLAVORS AND NONBEVERAGE INGREDIENTS CONTAINING ALCOHOL IN THE MANAFACTURING OF BEER (1) A brewery licensed by the department and located in Montana that uses flavors and other nonbeverage ingredients containing alcohol in their blending and manufacturing processes is required to request such products through the department on a form supplied by the department.

(2) The department will process the request and notify the supplier, specified by the brewery, of the quantities and sizes of the various flavors and nonbeverage ingredients containing alcohol to be delivered to the brewery.

(3) For beer with alcohol content of 6 percent or less alcohol by volume, flavors and other nonbeverage ingredients containing alcohol may contribute no more than 49 percent of the overall alcohol content of the finished product.

(4) For beer with an alcohol content of more than 6 percent alcohol by volume, no more than 1.5 percent of the volume of the finished product may consist of alcohol derived from added flavors and other nonbeverage ingredients containing alcohol.

(5) All brewery beer formulas, for beer containing flavors and other nonbeverage ingredients containing alcohol, must be approved by the Alcohol and Tobacco Tax and Trade Bureau (TTB), prior to state approval. Brewers requesting label approval by the state, for beer containing flavors and other nonbeverage ingredients containing alcohol, must include a copy of their TTB formula approval letter.

(6) The brewery must keep all flavors and nonbeverage ingredients containing alcohol on its licensed premises.

(7) Flavors and nonbeverage ingredients containing alcohol can only be used for blending and manufacturing purposes and may not be resold, transferred, or given away. A brewery must receive approval from the department to destroy or dispose of any flavors or nonbeverage ingredients containing alcohol.

(8) A brewery must document and maintain records at their place of business of all flavors and nonbeverage ingredients containing alcohol used for blending and manufacturing purposes. The department may make an examination of any brewery's records and otherwise check the accuracy of the alcohol content of any malt beverage manufactured by the brewery.

AUTH: 16-1-303, MCA
IMP: 16-1-401, 16-1-404, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule II to provide guidance to the breweries on the proper use of flavors and

nonbeverage ingredients containing alcohol for manufacturing purposes. These rules ensure the entire control of the importation, storage, and use of these ingredients protect the health and safety of Montana citizens. The department finds that it is in the best interest of the state to regulate these alcoholic ingredients consistent with the Montana Alcoholic Beverage Code, due to the high alcohol content and potential harm these alcoholic ingredients could cause if not properly used and accounted for.

Section (1) is proposed to ensure these types of ingredients are controlled in a manner that is consistent with alcoholic beverages to protect public health and safety.

Section (2) is proposed to reduce confusion and increase consistency by establishing a uniform process for all breweries to request flavors and nonbeverage ingredients containing alcohol.

Sections (3) and (4) are proposed to increase the brewer's understanding of the federal requirements by mirroring the Code of Federal Regulations (27 CFR 25.15 Materials for the Production of Beer).

Section (5) is proposed to ensure the product is properly classified and has been approved by the Alcohol and Tobacco Tax and Trade Bureau.

Sections (6), (7), and (8) are proposed to protect public health and safety by ensuring that all flavors and nonbeverage ingredients containing alcohol, imported for blending and manufacturing purposes, are properly accounted for.

NEW RULE III USE OF OUTSOURCED ALCOHOL IN THE MANUFACTURING OF DISTILLED SPIRITS (1) A distillery or microdistillery licensed by the department and located in Montana that uses alcohol from another distilled spirits plant in order to distill, rectify, blend, or manufacture its own alcoholic beverages is required to request such products through the department on a form supplied by the department.

(2) A distillery or microdistillery may only obtain alcohol from sources authorized by the federal government, such as an entity that holds a basic permit or industrial permit.

(3) The department will process the request and notify the distilled spirits plant, specified by the distillery or microdistillery, of the quantities, proof, and sizes of alcohol to be delivered to the distillery or microdistillery.

(4) The distillery or microdistillery may not bottle and sell alcohol acquired from the distilled spirits plant without using it in their own distilling, rectifying, blending, or manufacturing process first.

(5) The distillery or microdistillery must keep all alcohol acquired from a distilled spirits plant on the licensed premises and may not resell, transfer, or give away the alcohol. A distillery or microdistillery must receive approval from the department to destroy or dispose of any alcohol the distillery or microdistillery acquired from another distilled spirits plant.

(6) A distillery or microdistillery must document and maintain records at their place of business of all alcohol acquired from a distilled spirits plant. The department may make an examination of any distillery or microdistillery's records as it pertains to this section.

AUTH: 16-1-303, MCA
IMP: 16-1-401, 16-1-404, 16-3-214, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule III to provide guidance to the distilleries and microdistilleries concerning the use of outsourced alcohol for manufacturing purposes. These rules ensure the entire control of the importation, storage, and use of alcohol to protect the welfare, health, and safety of the citizens of Montana.

Section (1) is proposed to protect public health and safety by eliminating unregulated alcohol from entering the state of Montana.

Section (2) is proposed to ensure the outsourced alcohol has been properly manufactured and acknowledged by the federal government.

Section (3) is proposed to reduce confusion and increase consistency by establishing a uniform process for distilleries and microdistilleries to request alcohol from an external source.

Section (4) is proposed to ensure distilleries and microdistilleries are in compliance with the Montana Alcoholic Beverage Code.

Sections (5) and (6) are proposed to ensure public health and safety by requiring all alcohol imported for distilling, rectifying, blending, and manufacturing purposes is properly accounted for.

5. 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 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov and must be received no later than January 13, 2012.

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

7. An electronic copy of this notice is available on the department's web site at www.revenue.mt.gov. Locate "Legal Resources" in the left hand column, select the "Rules" link and view the options under the "Notice of Proposed Rulemaking" heading. The department strives to make the electronic copy of this 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 web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

8. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding particular subject

matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the person in 5 above or faxed to the office at (406) 444-4375, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill, SB 389, sponsor, Senator Kendall Van Dyk was notified on June 13, 2011, by regular mail, and subsequently notified on November 16, 2011, by regular mail, and again on November 23, 2011, by electronic mail.

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| /s/ Cleo Anderson | /s/ Dan R. Bucks |
| CLEO ANDERSON | DAN R. BUCKS |
| Rule Reviewer | Director of Revenue |

Certified to Secretary of State November 28, 2011

BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
MONTANA STATE AUDITOR

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| In the matter of the amendment of ARM 6.6.6501, 6.6.6502, 6.6.6503, 6.6.6504, 6.6.6505, 6.6.6508, and 6.6.6509, pertaining to Actuarial Opinions | ) ) ) ) ) | NOTICE OF AMENDMENT |

TO: All Concerned Persons

1. On October 27, 2011, the Office of the Commissioner of Securities and Insurance, Montana State Auditor published MAR Notice No. 6-197 regarding the public hearing on the proposed amendment of the above-stated rules at page 2199 of the 2011 Montana Administrative Register, issue number 20.

2. On November 16, 2011, the Office of the Commissioner of Securities and Insurance, Montana State Auditor held a public hearing to consider the proposed amendment of the above-stated rules

3. No comments were heard at the hearing, and no written comments were received up to the comment deadline of November 25, 2011.

4. The commissioner has amended ARM 6.6.6501, 6.6.6502, 6.6.6503, 6.6.6504, 6.6.6505, 6.6.6508, and 6.6.6509 exactly as proposed.

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| /s/ Brett O'Neil | /s/ Jesse Laslovich |
| Brett O'Neil | Jesse Laslovich |
| Rule Reviewer | Chief Legal Counsel |

Certified to the Secretary of State November 28, 2011.

BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
MONTANA STATE AUDITOR

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| In the matter of the amendment of ARM 6.6.2801, 6.6.2803, 6.6.2804, 6.6.2808, 6.6.2809, and 6.6.2810 regarding Surplus Lines Insurance Transactions | ) ) ) ) ) | NOTICE OF AMENDMENT |

TO: All Concerned Persons

1. On September 22, 2011, the Office of the Commissioner of Securities and Insurance, Montana State Auditor published MAR Notice No. 6-198 regarding the public hearing on the proposed amendment of the above-stated rules at page 1857 of the 2011 Montana Administrative Register, issue number 18.

2. On October 13, 2011, the Office of the Commissioner of Securities and Insurance, Montana State Auditor held a public hearing to consider the proposed amendment of the above-stated rules.

3. The commissioner has amended ARM 6.6.2801, 6.6.2804, 6.6.2808, 6.6.2809, and 6.6.2810 exactly as proposed.

4. The commissioner has amended 6.6.2803 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

6.6.2803 FILING OF SUBMISSIONS, EXAMINATION OF SUBMISSIONS AND RECORDS RETAINED (1) through (5) remain as proposed.

(6) If coverage is procured through a surplus lines insurance producer, that surplus lines insurance producer shall stamp or notate the first page of each insurance contract, cover note, declarations page, or certificate of insurance procured and delivered as surplus lines insurance with the following completed statement:

NOTICE: This coverage is issued by an unauthorized insurer that is an eligible surplus lines insurer. If this insurer becomes insolvent, there is no coverage by the Montana Insurance Guaranty Association under the Montana Insurance Guaranty Association Act.

_____ _____
Printed Name of Surplus Lines Insurance Producer Montana License Number

_____
Signature of Surplus Lines Insurance Producer

(7) through (8) remain as proposed.

5. Comments were heard at the hearing and written comments were received and appear with the responses from the Office of the Commissioner of Securities and Insurance, Montana State Auditor (CSI). Comments were received from: Bob Biskupiak, representing the Independent Insurance Agents' Association of Montana and the Montana Surplus Lines Insurance Agents' Association; Roger McGlenn, representing ALPS, also known as the Attorney Liability Protection Society; Bruce Spencer, representing the Property and Casualty Insurers Association of America; and Jacqueline Lenmark, representing the National Association of Professional Surplus Lines Offices, Ltd.

The CSI did not summarize or respond to comments that did not pertain to the proposed rule amendments.

COMMENT I: One commenter stated that ARM 6.6.2810 should be amended to include a new (7) stating that when Montana is the home state, the entire gross premium – regardless of whether a multistate risk is covered – will be taxed at the Montana tax rate. The premium tax will be remitted to the state of Montana until such time as the commissioner is participating in an agreement with other states to allocate and distribute premium taxes attributable to multistate risks. The commenter indicated that members of the represented organization had complained about states attempting to tax at other states' rates on multistate risks when the home state of the insured is not participating in a premium tax allocation and distribution agreement. The commenter noted that, under 33-2-311, MCA, when Montana is the home state of the insured, the gross premium will be taxed at the Montana tax rate regardless of whether a multistate risk is involved. The commenter also noted that, under 33-2-323, MCA, the tax process (at 33-2-311, MCA) only changes if Montana participates in an agreement with other states to collect, allocate, and distribute premium taxes on multistate risks. The commenter also urged the CSI "to continue to tax at 100% of the premium where [Montana] is the home state until such time as it is participating in a tax sharing system with other states."

RESPONSE I: As recognized by the commenter, the CSI has not imposed, nor attempted to impose, other states' premium tax rates on the portion of the risk located or to be performed in other states in regard to policies covering multistate risks when Montana is the home state of the insured. As noted by the commenter, the Montana Insurance Code at 33-2-311, MCA, provides that when Montana is the home state of the insured, the entire premium (gross premium) will be taxed at the Montana tax rate in 33-2-705, MCA, regardless of whether the coverage includes risks or exposures partially located or to be performed in another state. As further noted by the commenter, this tax process can only be changed under 33-2-232, MCA, if Montana participates in an agreement with other states to collect, allocate, and distribute premium taxes on multistate risks. The premium tax rate imposed, and allocation and distribution of taxes, are addressed in the statutes and therefore the CSI declined to adopt a new (7) to ARM 6.6.2810.

COMMENT II: Regarding the proposed amendments to ARM 6.6.2804, one commenter stated that although the proposed elimination of the stamping fee for electronically filed submissions and the reduction of the stamping fee from 1% to .25% for paper submissions was appreciated, the stamping fee should be eliminated for all submissions.

RESPONSE II: Pursuant to 33-2-321(1), MCA, the commissioner may establish a stamping fee by rule commensurate with the expenses of regulating surplus lines insurance. The proposed reduction in the stamping fee reflects the savings due to the widespread use of the electronic filing system for surplus lines insurance submissions. The stamping fee cannot be eliminated because there are still expenses incurred by the CSI in regulating surplus lines insurance and the Legislature has not approved an alternative source of funding for these expenses. The commissioner will adopt the amendment as proposed.

COMMENT III: One commenter stated that the organization he represented had received feedback from a member regarding proposed new (6) in ARM 6.6.2803. The proposed language providing that surplus lines insurance producers stamp or notate each contract, cover note, declarations page, or certificate of insurance procured with the notice to the insured, would result in excess work for surplus lines insurance producers with numerous transactions annually.

RESPONSE III: The language in proposed new (6) in ARM 6.6.2803 is substantially similar to 33-2-303, MCA, prior to the enactment of SB 331 (2011). No change is anticipated to the practice under former 33-2-303, MCA. Surplus lines insurance producers will still stamp or notate the first page of each insurance contract, cover note, declarations page, or certificate of insurance procured and delivered as surplus lines insurance with the stated notice to the insured. For clarification, the commissioner will adopt the amendment as proposed with additional language stating that "the first page of" each insurance contract, cover note, declarations page, or certificate of insurance procured and delivered as surplus lines insurance must be stamped or notated with the notice to the insured.

COMMENT IV: One commenter stated that the organization he represented had received feedback from a member that under the proposed amendment to ARM 6.6.2804(4), the surplus lines insurance producer may end up "eating" or carrying the burden of the stamping fee. The commenter also stated that it was the responsibility of the insurance producers involved in the transaction to explain to their customers that the stamping fee is nonrefundable from the CSI once the policy or monied endorsement becomes effective. However, the customer may want a refund if the policy is cancelled midterm and some producers may refund the stamping fee out of the producers' own funds.

RESPONSE IV: The CSI agrees with the commenter that insurance producers are responsible for advising their customers about the circumstances in which the stamping fee will be refunded by the CSI. The proposed amendment to ARM 6.6.2804(4) actually expands the circumstances in which the stamping fee will be

refunded by the CSI. The existing rule allows the department to retain all stamping fees for the underlying surplus lines insurance policy and any monied endorsements as soon as any premium for the policy is earned. Under the existing rule, if a monied endorsement is cancelled before becoming effective and before any premium for that endorsement is earned, the stamping fee could be retained by the CSI as long as the policy becomes effective. The amendments provide that if the surplus lines insurance transaction generating the stamping fee, whether by the underlying policy or a monied endorsement, is cancelled before becoming effective and before the associated premium is earned, the associated stamping fee will be refunded by the CSI. Additionally, with the elimination of the stamping fee for electronically filed submissions, surplus lines insurance producers could avoid imposition of the stamping fee entirely by filing electronically. The commissioner will adopt the amendment as proposed.

COMMENT V: One commenter stated that independently procured insurance is rare, but that he was in agreement with the proposed amendments to the rules.

RESPONSE V: The commissioner appreciates the support for the proposed amendments.

COMMENT VI: With regard to proposed new (6) in ARM 6.6.2803, one commenter stated that the notice to the insured may not be necessary because consumers buying surplus lines insurance policies are more knowledgeable than standard insurance consumers. The commenter also stated if the policy is sent directly to the consumer by the surplus lines insurer, the surplus lines insurance producer would not have the opportunity to affix the notice to the insured.

RESPONSE VI: The language in proposed new (6) in ARM 6.6.2803 is substantially similar to 33-2-303, MCA, prior to the enactment of SB 331 (2011). No change is anticipated from the practice under former 33-2-303, MCA. Under that statute, surplus lines insurance producers stamped or notated the first page of each insurance contract, cover note, declarations page, or certificate of insurance procured and delivered as surplus lines insurance with the stated notice to the insured. Furthermore, it is common industry practice for the surplus lines insurance producer to deliver the surplus lines insurance policy to either the producing insurance producer or to the insured. In the event that the surplus lines insurance policy was delivered by the insurer directly to the insured, the stated notice would not be affixed by a surplus lines insurance producer. The commissioner will adopt the amendment as proposed.

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| /s/ Brett O'Neil | /s/ Jesse Laslovich |
| Brett O'Neil | Jesse Laslovich |
| Rule Reviewer | Chief Legal Counsel |

Certified to the Secretary of State November 28, 2011.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

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| In the matter of the adoption of NEW RULE I concerning change in business entity type, and amendment of ARM 23.16.117, 23.16.125, 23.16.126, 23.16.1101, 23.16.1713, 23.16.1901, and 23.16.1908, concerning transfer of interest to a new owner; change of liquor license type; change of location for a licensed manufacturer, distributor, or route operator; card game tournaments; licensure of sports tab sponsors; video gambling machine bill acceptors; and software specifications for video keno machines | ) | NOTICE OF ADOPTION AND AMENDMENT |

TO: All Concerned Persons

1. On October 27, 2011, the Department of Justice published MAR Notice No. 23-16-223, regarding the public hearing on the proposed adoption and amendment of the above-stated rules at page 2205, 2011 Montana Administrative Register, Issue Number 20.

2. The Department of Justice has adopted Rule I (23.16.127), and amended ARM 23.16.117, 23.16.125, 23.16.126, 23.16.1101, 23.16.1713, 23.16.1901, and 23.16.1908 exactly as proposed.

3. A public hearing was held on November 17, 2011. Oral comments were received from Neil Peterson for Gaming Industry Association of Montana, Inc. and Ronda Wiggers, Montana Coin Machine Operators Association, both of whom spoke in support of the proposed rules. No adverse comments were offered at the public hearing or in writing.

By: /s/ Steve Bullock
STEVE BULLOCK
Attorney General, Department of Justice

/s/ J. Stuart Segrest
J. STUART SEGREST
Rule Reviewer

Certified to the Secretary of State November 28, 2011.

BEFORE THE BOARD OF DENTISTRY
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

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|---|---|---|
| In the matter of the amendment of ARM 24.138.509 dental hygiene limited access permit, 24.138.2719 medical assistance program relapse, amendment and transfer of 24.138.3201 through 24.138.3209 regarding dentist administration of anesthesia, and the adoption of NEW RULES I through III anesthesia definitions, committee, and permits | ) ) ) ) ) ) ) ) ) ) | NOTICE OF AMENDMENT, AMENDMENT AND TRANSFER, AND ADOPTION |

TO: All Concerned Persons

1. On September 8, 2011, the Board of Dentistry (board) published MAR notice no. 24-138-68 regarding the public hearing on the proposed amendment, amendment and transfer, and adoption of the above-stated rules, at page 1791 of the 2011 Montana Administrative Register, issue no. 17.

2. On October 3, 2011, a public hearing was held on the proposed amendment, amendment and transfer, and adoption of the above-stated rules in Helena. Several comments were received by the October 11, 2011, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments received and the board's responses are as follows:

ARM 24.138.3203 (24.138.3221)

COMMENT 1: One commenter suggested that the word "education," in (1)(a) should be changed to "accreditation" to reflect the correct name of the Commission on Dental Accreditation.

RESPONSE 1: The board agrees with the comment and is amending this rule accordingly.

COMMENT 2: One commenter suggested that the connector between (1)(a)(i) and (1)(a)(ii) should be changed from "and" to "or", because a dentist may administer deep sedation/general anesthesia after completing either an oral and maxillofacial surgery residency or an advanced general dentistry education program in dental anesthesiology, but both are not required.

RESPONSE 2: The board agrees with the comment and is amending this rule accordingly.

NEW RULE I

COMMENT 3: One commenter suggested that the title of New Rule I should be changed to DEFINITIONS RELATED TO ANESTHESIA, since the definitions specifically pertain to the anesthesia rules.

RESPONSE 3: The board agrees with the comment and is amending the title accordingly.

COMMENT 4: One commenter suggested that (1) should be changed to read "administration is as follows," to remove redundancy in this subsection.

RESPONSE 4: The board agrees with the comment and is amending the rule accordingly.

4. The board has amended ARM 24.138.509 and 24.138.2719 exactly as proposed.

5. The board has amended and transferred ARM 24.138.3201 (24.138.3217), 24.138.3202 (24.138.3219), 24.138.3204 (24.138.3223), 24.138.3205 (24.138.3225), 24.138.3206 (24.138.3227), 24.138.3207 (24.138.3229), 24.138.3208 (24.138.3231), and 24.138.3209 (24.138.3215) exactly as proposed.

6. The board has adopted New Rule II (24.138.3233) and New Rule III (24.138.3213) exactly as proposed.

7. The board has amended ARM 24.138.3203 and transferred the rule to ARM 24.138.3221 with the following changes, stricken matter interlined, new matter underlined:

24.138.3203 (24.138.3221) MINIMUM QUALIFYING STANDARDS (1) remains as proposed.

(a) No dentist shall be permitted to administer deep sedation/general anesthesia until he or she has satisfactorily completed residencies accredited by the Commission on Dental ~~Education~~ Accreditation in the following areas:

(i) a minimum of four years in an oral and maxillofacial surgery residency; ~~and~~ or

(ii) through (6) remain as proposed.

8. The board has adopted New Rule I (24.138.3211) with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I DEFINITIONS RELATED TO ANESTHESIA (1) ~~"~~Administration ~~of anesthesia" is the route by which an agent~~ is ~~administered to a patient~~ as follows:

(a) through (11) remain as proposed.

BOARD OF DENTISTRY
DALE CHAMBERLAIN, DDS, PRESIDENT

/s/ DARCEE L. MOE
Darcee L. Moe
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State November 28, 2011

BEFORE THE DEPARTMENT OF LIVESTOCK
STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of ARM 32.3.201, 32.3.212, 32.3.501, 32.3.502, 32.3.503, 32.3.505, 32.3.506, 32.3.507 and 32.3.508 pertaining to definitions, additional requirements for cattle, official trichomoniasis testing and certification requirements, reporting trichomoniasis, movement of animals from test positive herds and epizootic areas, epidemiological investigations and exposed herd notification, common grazing and grazing associations, and penalties | ) | NOTICE OF AMENDMENT |

TO: All Concerned Persons

1. On August 11, 2011, the Department of Livestock published MAR Notice No. 32-11-221 regarding the proposed amendment of the above-stated rules at page 1470 of the 2011 Montana Administrative Register, issue number 15.

2. The Department of Livestock has amended the following rules: 32.3.201, 32.3.502, 32.3.503, 32.3.506, 32.3.507, and 32.3.508 exactly as proposed.

3. The department has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

32.3.212 ADDITIONAL REQUIREMENTS FOR CATTLE (1) through (5) remain as proposed.

~~(6) All sexually intact female cattle over 12 months of age must be either:~~

~~(i) spayed within 30 days of arrival; or~~

~~(ii) verified as a virgin by owner/agent affidavit; or~~

~~(iii) verified by an accredited veterinarian to be greater than 120 days pregnant; or~~

~~(iv) verified to be not exposed to an intact bull within the last 120 days by owner/agent affidavit; or~~

~~(v) be destined directly to slaughter or to a feedlot and then to slaughter.~~

(7) remains as proposed but is renumbered (6).

AUTH: 81-2-102, 81-2-103, 81-2-707, MCA
IMP: 81-2-102, 81-2-703, MCA

32.3.501 DEFINITIONS In this subchapter:

(1) through (13) remain as proposed.

(14) "Individual trichomoniasis identification" means a Montana official trichomoniasis tag or other official individual identification as determined by the state veterinarian that must be placed in the ear at the time of the first test. ~~Other acceptable means of identification may be approved by the state veterinarian.~~

(15) through (29)(b) remain as proposed.

~~(c) Teton County;~~

~~(d) Cascade County;~~

~~(e) Carbon County;~~

(f) remains as proposed but is renumbered (c).

~~(g)~~ (d) Big Horn County~~;~~.

~~(h) Treasure County;~~

~~(i) Rosebud County;~~

~~(j) Powder River County.~~

(30) through (32) remain as proposed.

AUTH: 81-2-102, 81-2-103, MCA
IMP: 81-2-102, MCA

32.3.505 MOVEMENT OF ANIMALS FROM TEST POSITIVE HERDS AND EPIZOOTIC AREAS (1) through (4) remain as proposed.

~~(5) All sexually intact female cattle over 12 months of age that are sold, loaned, leased, or otherwise acquired in or from epizootic areas; and all sexually intact female cattle over 12 months of age from trichomoniasis test positive herds must comply with ARM 32.3.212(6)(i) through (v).~~

AUTH: 81-2-102, 81-2-103, MCA
IMP: 81-2-102, 81-2-108, MCA

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

Comment #1: Does MDOL have information on the number of animals impacted by the trichomoniasis epizootic area?

Response #1: Based upon the number of cattle inspected in the field, approximately 13,000 cows and 4,700 bulls will be impacted. These numbers do not include animals that move through livestock markets. Movement of livestock through Montana markets cannot be sorted by county of origin. Movement data for the three livestock markets in closest proximity to the proposed epizootic area are included below.

| Market | Total | Bulls | Cows |
|---|---|---|---|
| | **2010** | | |
| Great Falls | 57,581 | 1,314 | 7,671 |
| PAYS | 107,191 | 2,447 | 14,280 |
| BLS | 86,171 | 1,967 | 11,480 |
| | **2011 (YTD)** | | |
| Great Falls | 20,234 | 852 | 3,126 |
| PAYS | 37,667 | 1,587 | 5,820 |
| BLS | 30,280 | 1,276 | 4,679 |

Comment #2: Powder River should not be included in the trichomoniasis epizootic area.

Response #2: MDOL agrees. The proposal of the ten counties for the trichomoniasis epizootic area was based upon proximity of counties to known areas of exposure. MDOL wanted to ensure that the border created by the epizootic area was effective in ensuring that trichomoniasis is not spread to areas where trich testing would no longer be required. Historical knowledge of Powder River suggests that, despite proximity to a known area of exposure, the risk in this county is low enough to allow its exclusion.

Comment #3: All bulls at market should be required to test, regardless of origin.

Response #3: While MDOL recognizes that this approach would significantly contribute to identifying positive bulls, the financial and logistical requirements to test all bulls at market prevent this approach from being a reasonable option. Running bulls through market facilities for testing reasons is dangerous for market and brands personnel; is hard on facilities; is time consuming; is expensive; and would result in shrink that cattle buyers would not find acceptable.

Comment #4: In lieu of the open cow rule, all slaughter bulls should be required to test prior to sale.

Response #4: Please see response to comment #3.

Comment #5: Opposition to the creation of trich epizootic area. Bull testing requirements should remain in place statewide.

Response #5: After five years of testing data, and approximately 10,000 bulls tested annually statewide, Montana consistently has less than 1% of bulls test positive for trichomoniasis. Certain parts of the state have been identified as having an increased risk of trichomoniasis exposure. MDOL gets regular feedback from

industry that continued testing in areas where there is no historical evidence of the disease is an unnecessary burden for producers.

Comment #6: Support of the creation of the proposed trichomoniasis epizootic area based upon the information that has been obtained through five years of surveillance, recognizing that the proposed area includes both common areas of exposure and common counties with positive tests.

Response #6: Please see response to Comment #5. The intent of surveillance is to test animals at greatest risk of testing positive.

Comment #7: We support testing only in epizootic areas and limiting those areas to historical data provided by DOL on their web site. Further we request the area not include the ten counties as suggested in the proposed rules. We do not believe the DOL has provided scientific information to verify the inclusion of the ten counties identified in the rules.

Response #7: Please see the response to comments #2 and #5. Based upon feedback received from industry, MDOL will limit the epizootic areas to a four-county area where the highest risk of exposure to trichomoniasis exists. The four-county area will include Glacier, Pondera, Yellowstone, and Big Horn.

Comment #8: Require an annual test on all test eligible bulls within the trichomoniasis epizootic area vs. only those bulls sold, loaned, leased, or otherwise acquired within or bulls inspected out of the trichomoniasis epizootic area.

Response #8: An annual test requirement in epizootic areas would certainly assist MDOL in identifying positive animals and moving forward with further elimination of the disease in cattle. The presence of Indian reservations in the epizootic areas makes implementation of such an approach difficult. MDOL has no authority on Indian reservations.

Comment #9: How will MDOL handle cases of trichomoniasis that may be diagnosed outside of the trichomoniasis epizootic area? Will counties who clean up their problem be able to get out of the epizootic area? How frequently will these areas be reassessed?

Response #9: Trichomoniasis will continue to be a reportable disease for all of Montana. Cases of trichomoniasis that may be diagnosed outside of the boundary of the proposed trichomoniasis epizootic area will be managed as positive herds identical to positive herds within the epizootic areas. MDOL will continue to monitor all trichomoniasis testing throughout Montana and will continue to monitor the source of exposure based upon the results of positive herd investigations. Counties who demonstrate that the risk of disease has been mitigated will be considered for removal from the epizootic area. Likewise, if a trichomoniasis problem is detected in a new region of the state and an epidemiologic investigation suggests that a

reservoir of trichomoniasis exists, the area may be categorized as epizootic for trichomoniasis.

Comment #10: We periodically have had cattle come up positive for trich in Meagher and Wheatland counties. Has this occurred in other counties as well? I am concerned that if we do not continue to look for trich, we may miss it. We have never determined the source for trich in Wheatland and/or Meagher County, but it seems to hit a herd every five to six years.

Response #10: Please see the response to comment #9. MDOL regularly sees positive cases diagnosed that were tested for a reason other than required by current regulations. As trichomoniasis is a disease of management, MDOL encourages all producers to consider adopting practices that will help in control of the disease, including testing of bulls if the suspicion of disease exists.

The following comments pertain to the open cow rule and are so designated with OC following the comment number.

Comment #11OC: A seasonal open cow rule would allow MDOL to target the highest risk population of open cows.

Response #11OC: MDOL agrees that open cows carry some risk of transmission of the disease to other herds. Additionally, MDOL recognizes that cows come up open for a myriad of reasons. This was the rationale for including open cow movement/sales and imports from epizootic areas and from out of state in the draft rule. A seasonal rule would provide controls during the time the greatest numbers of cows are sold. However, an open cow rule during this time would have the greatest economic and financial impact on producers selling open cows.

Comment #12OC: The open cow rule will have a negative impact on the open cow market and industry created by such companies as TransOva who purchase open cows for qualification and use in their recipient program.

Response #12OC: MDOL agrees that the open cow rule is likely to have an impact on operations that currently purchase and rebreed open cows. TransOva and similar operations that send open cows out-of-state to be bred would not be impacted by the proposed rule.

Comment #13OC: The open cow rule will have a negative impact on ranchers who purchase light bred cows.

Response #13OC: MDOL agrees that the flexibility of ranchers that desire to purchase open cows for rebreeding would be reduced in that they could only purchase cows for such a program from counties that are not included in the epizootic area. MDOL has received significant feedback in opposition to the open cow rule. Based on this feedback, predicted difficulties in enforcement, and the fact

that the proposed rule could be easily circumvented, MDOL has elected to drop this provision.

Comment #14OC: The open cow rule should only apply to positive herds.

Response #14OC: MDOL agrees that open cows from positive herds have the greatest risk of transmitting the disease to other herds. For additional information, please see response to comment #11OC.

Comment #15OC: Slaughter only sales of cows that are not more than 120 days pregnant, or held away from the bull for greater than 120 days or are virgin heifers. These cows could be sold out of state if the state would accept them. This is what South Dakota has done since 2006, but does not allow any cow to be sold back into SD unless she is greater than 90 days bred or is a virgin.

Response #15OC: MDOL agrees that open cows carry an increased risk of trichomoniasis transmission compared to pregnant cattle. However, for a number of reasons, MDOL has elected to not include regulations on open cows in the final rule, except for positive herds. For additional information, please see response to comment #11OC.

Comment #16OC: The open cow rule does not address what is the actual problem in Montana. Until trichomoniasis is addressed on the Indian reservations in Montana, the implementation of an open cow rule will only punish producers who are not contributing to the problem.

Response #16OC: A significant number of Montana trich cases have a history consistent with exposure on tribal lands. This is partly due to increased testing requirements in these areas. By placing our surveillance emphasis on a four-county area, MDOL will be able to effectively work to ensure that the disease is not spread back into other areas of the state and will give MDOL a smaller, clearly defined area to focus our enforcement efforts. Additionally, MDOL is continually working towards the development of a cooperative relationship with tribes to ensure that we are working together towards a common goal.

Comment #17OC: Support of open cow rule for imports only.

Response #17OC: Please see the response to comment #11OC.

Comment #18OC: Based upon the success of rebreeding of open cows purchased by such companies as TransOva and the successful rebreeding of many put-together herds, an open cow rule in Montana is not needed.

Response #18OC: MDOL agrees that the prevalence of trichomoniasis in the Montana cattle herd is likely less than one percent. Based on this low prevalence, and feedback received on the draft rule as explained in response to comment

#11OC, MDOL has dropped the regulations on open cows except from positive herds.

Comment #19OC: Much of the opposition to the open cow rule has come from cattle buyers who would potentially be financially impacted by an open cow rule, but as a small producer, I am in support of the open cow rule to protect my herd. As a start-up producer, I could not survive the economic impact that trich would have on my herd.

Response #19OC: MDOL agrees that individuals that frequently buy or sell open cows would face the greatest impact from regulations on selling open cows for breeding. Further, MDOL agrees that open cows carry an increased risk of trichomoniasis transmission compared to pregnant cattle, and suggests that producers exercise caution prior to introducing open cows into their breeding herd; particularly if the health history of the source herd is suspect or unknown. Producers will continue to manage their herds for a level of disease risk that is acceptable for their operation.

Comment #20OC: The current trich program in Montana has allowed us to get a handle on the disease. The next level of control of the disease requires that open cows be addressed.

Response #20OC: MDOL has evaluated numerous conflicting comments on the proposed rule. Montana producers have generally supported the trichomoniasis program as a control, rather than an eradication effort. MDOL has strived to balance these various comments in the final rule. Responses to comments #11OC and #17OC provide additional background to the decision to not include regulations on open cows except for positive herds in the final rule.

Comment #21OC: The open cow rule should not be implemented in the trichomoniasis epizootic area if there are no controls implemented for cattle imported into Montana. In particular, Texas origin cattle who we know are moving in large numbers secondary to the drought this year pose a particular risk.

Response #21OC: MDOL agrees. MDOL feels that open cows from epizootic areas pose a greater risk than imported open cows and therefore did not plan to implement open cow restrictions in epizootic areas without an import requirement. Ultimately, MDOL decided to not include open cow restrictions in the final rule except for positive herds. Please see responses #11OC and #17OC for a more complete explanation.

Comment #22OC: The "open cow" rules on cattle coming from known positive herds seem logical. But for how long would that herd be required to operate under "open cow" rules if the rancher were to eventually test clean?

Response #22OC: The proposed changes to the ARM clearly define when a herd is no longer considered a trichomoniasis positive herd and thus no longer subject to

open cow requirements. Open cow requirements will be in place for positive herds until the herd has completed a post-breeding negative test on all test eligible bulls.

The following comments pertain to the mandatory use of the Montana Trich Tag and are so designated with MTT following the comment number:

Comment #23MTT: Any form of federally approved ID should be adequate for use. Trich tags are redundant when used in animals for export testing as they are not an allowable form of official identification for interstate movement.

Response #23MTT: MDOL agrees. Animals that are tested for export out of Montana and that will therefore require official individual identification should not be required to have a second form of identification placed in their ear. Therefore, the final rule will allow for the use of individual official identification (a silver metal USDA clip or 840 series tag) at the discretion of the testing veterinarian.

Comment #24MTT: Management of tag inventory difficult due to annual color change, especially for veterinarians who perform small numbers of trich tests.

Response #24MTT: MDOL recognizes the additional burden of keeping another form of identification on hand. To ease this burden for veterinarians, MDOL allows veterinarians to purchase tags in quantities as few as five and using a rotational schedule for the color of tags. Tags that may not be used for the current year can be kept in inventory and used in five year cycles. Also please see response to comment #23MTT.

Comment #25MTT: Support for mandatory use of the Montana trich tag for those animals tested for reasons other than export. The tag is a simple and valuable tool for identifying bulls and for determining test status of the animal.

Response #25MTT: MDOL agrees that the Montana trich tag has value for not only the accurate identification of trich positive animals, but provides a rapid and safe means for identifying the test status and owner of bulls. In fact, MDOL has confirmed one example where the wrong bull was sent to slaughter because of misidentification. Nevertheless, the final rule will allow the use of official identification in lieu of the Montana trich test tag based on comments #23MTT and #24MTT.

The following comments pertain to allowable exemptions for cattle grazing in common and are so designated with OC following the comment number:

Comment #26CGC: If a bull is issued an exemption for a specific grazing district and the bull changes districts, would the exemption move with the bull?

Response #26CGC: No, the exemption is specific to the grazing district.

Comment #27CGC: Grazing associations should not be subjected to restrictions on open cows in their associations to meet an annual test exemption if the rest of the state or the epizootic areas are not held to the same standard.

Response #27CGC: A testing exemption is provided to grazing associations based on an initial negative test of all bulls, and herd management practices that minimize the risk of introduction of trichomoniasis that could potentially impact many owners. The introduction of open cows is not consistent with this goal; however, MDOL may provide flexibility on a case-by-case basis.

Comment #28CGC: "Co-mingled grazing herds may be exempt from annual testing provided that a signed, written health plan including best management practices for all of the individual herds grazing in common exists." Who is going to decided what is considered best management practices? Who decides what herds need to create this health plan?

Response #28CGC: Best management practices and recommendations for the management of trichomoniasis are readily available in scientific literature and often include pregnancy checking, involvement of a veterinarian in herd health, not utilizing old bulls, and not retaining open cows into the next breeding season. There is no requirement for the creation of a herd health plan for any herd grazing in common; however, herds grazing in common must be able to offer convincing argument that the risk of introduction of trichomoniasis is minimal. For this reason, health plans when submitted for testing exemption, will need to be reviewed by a private veterinarian and approved by the Montana state veterinarian.

DEPARTMENT OF LIVESTOCK

*/s/ Christian Mackay*
Christian Mackay
Executive Officer
Department of Livestock

*/s/ George H. Harris*
George H. Harris
Rule Reviewer

Certified to the Secretary of State November 28, 2011.

BEFORE THE BOARD OF LAND COMMISSIONERS AND
THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of ARM 36.25.110 regarding the rental rate for state grazing leases | ) ) ) | NOTICE OF AMENDMENT |

To: All Concerned Persons

1. On August 11, 2011, the Department of Natural Resources and Conservation published MAR Notice No. 36-22-148 regarding a notice of public hearing on the proposed amendment of the above-stated rule at page 1479 of the 2011 Montana Administrative Register, Issue No. 15.

2. The amendments to the rule are reasonably necessary to obtain the current full market value of grazing forage on state school trust lands while providing for prudent management of these grazing resources and they allow the board to obtain sustainable long-term revenue for the trust beneficiaries. The reduction in the multiplier from 13.18 to 11.65 reflects and recognizes the contractual duty of the lessee to control noxious weeds and the cost of that function. A further reduction in the multiplier from 11.65 to 10.48 serves to encourage the use of rest-rotation grazing and it reflects the uncertainty of forage being available for use due to drought and other natural weather conditions. The provision allowing a lessee to apply to the department for a 50% reduction where forage is unavailable for use acknowledges that where forage cannot be put to any economic use it should be subject to a lesser rental rate. The five-year phase-in provision for an increase in the minimum grazing rental rate allows the board to obtain the full market value for these trust assets while allowing the grazing lessees to economically adjust their operations to this increase over a reasonable period of time.

3. The department has amended ARM 36.25.110 as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

36.25.110 MINIMUM RENTAL RATES

(1) and (2) remain as proposed.

(3) The rental rate for all grazing leases and licenses shall be on the basis of the animal-unit-month (AUM) carrying capacity of the land to be leased or licensed. The minimum annual rental rate per AUM is the weighted average price per pound of beef cattle on the farm in Montana as determined by the Montana Agricultural Statistics Service of the U.S. Department of Agriculture (USDA NASS) for the previous year, multiplied by: ~~13.18.~~

(a) 8.13 in calendar year 2012;

(b) 8.72 in calendar year 2013;

(c) 9.3 in calendar year 2014;

(d) 9.89 in calendar year 2015; and

(e) 10.48 in 2016 and all calendar years thereafter.

(4) A lessee may nominate to the department a tract of land containing grazing acres to be placed into a nonuse category.

(a) In order to qualify for the nonuse category:

(i) the nomination must be for the entire or remaining portion of a lease term, and the lessee must agree that no livestock use shall occur during that time; and

(ii) the grazing lands must be intermingled with agricultural acres in the tract, or otherwise possess characteristics which prohibit livestock use.

(b) All nominations are subject to review and approval by the department. If the nonuse is approved by the department, beginning in 2013 the annual rental rate charged for the grazing acres shall be one-half the amount calculated under (3), and shall become effective in the next billing cycle.

(4) through (7) remain as proposed but are renumbered (5) through (8).

4. A summary of the written comments and oral testimony from the four hearings held between September 12 and September 15, 2011, appears below with the department's responses.

COMMENT 1: DNRC received 62 comments in support of the proposed rules.

RESPONSE 1: DNRC appreciates the interest in this rulemaking process.

COMMENT 2: Commenters said that state lands grazing leases are not for exclusive use. State grazing leases are subject to recreational use (which can result in damage to improvements), oil and gas development, logging, use by easement holders, and gravel permits, which is typically not the case with private leases. Ergo, a comparison to private leases in not appropriate.

RESPONSE 2: All state leases are issued with a provision that DNRC reserves the right to issue permits for other uses on the land. If those uses conflict with or limit grazing utilization, DNRC will adjust and reduce the carrying capacity accordingly. DNRC believes that many nonexclusive situations occur on private grazing leases as well. For example, if the surface owner who has leased out grazing does not have the mineral rights to that property, mineral development may occur. DNRC is also aware that landowners may lease grazing to one individual and outfitting to another.

COMMENT 3: In setting the multiplier, DNRC should consider the cost of weed control that a lessee must pay for full suppression.

RESPONSE 3: The issue of weed management is an area that DNRC closely monitors when completing renewal inspections for leases. Staff may require a lessee enter into a weed management plan that specifically outlines the steps a lessee will use to manage and control weeds. Given the important nature of controlling weeds to protect long-term productivity of the lands, DNRC agrees and has reduced the multiplier to account for costs incurred by lessees.

COMMENT 4: Commenters stated DNRC should account for the fact that a lessee must pay the full grazing rental even if the AUMs are not utilized. Reasons for nonuse include drought or insects, fire, if the lessee is in a rest/rotation grazing system, or if the state land is contained within a Bureau of Land Management (BLM) allotment.

RESPONSE 4: The previous two multipliers set by the board did account for periodic nonuse during a lease term. For areas where grazing lands are intermingled with crop land and not used, or topography or other features restrict use, the board has amended the rule so that a lessee may be allowed to nominate those lands for nonuse for the entire lease term and only pay a grazing rental at half the new rate. The board has also reduced the multiplier to encourage rest-rotation grazing and to recognize that forage may be occasionally reduced due to drought or other natural conditions.

COMMENT 5: Commenters spoke of costs of improvements to the state land borne solely by the lessees. Most commenters focused on fencing and water improvements, and many provided actual costs associated with those improvements. Many noted the fact that the costs associated with improvements have outpaced the returns they are receiving for their livestock. In addition, improvements such as water developments benefit wildlife as well.

RESPONSE 5: DNRC agrees that the state does not share in the cost associated with the development of water, fencing, and other livestock improvements. In the recommendations of the 2011 Duffield study, this is the primary basis for the reduction of 30% from the private lease rate.

COMMENT 6: Commenters stated the comparison between state and private lease rates is not appropriate.

RESPONSE 6: Under 77-1-106, MCA, the board must consider the trust asset and be in the best interests of the state with regard to the long-term productivity of the school trust lands, while optimizing the return to the school trust. DNRC believes that fair market value can be achieved by looking at private lease rates with adjustments made for lessee expense as required under this statute.

COMMENT 7: Commenters stated Duffield's recommendation of a 30% reduction to account for differences between a private and state lease was not adequate. Commenters noted costs for water developments, fencing, rangeland renovation, type of pasture, the security of state lease, costs of livestock management, costs of fire suppression, costs of salt and others. Some commenters included lease-specific costs while others referred to studies that discussed costs for public and private leases.

RESPONSE 7: The work in the Duffield report relied on three primary sources of information to support the recommendation that state leases should be approximately 70% of the private rate. Those were: the Hedonic model; the

average competitive bid rate for state leases; and the 1998 report by Torell et al. The model was intended to identify characteristics of leases that influence the prices paid for them. The characteristics identified included location; whether the lease was new (less than one year old); terms (length); whether fence maintenance or water development was provided by the lessor; and land type (dryland or irrigated). Other characteristics such as in-holdings, productivity, and operating expenses were not included in the model because they did not add to it given the characteristics noted above. Duffield's work also noted that competitive bids on state lands averaged 78% of the private rate and that the Torell study found that approximately 30% of the private lease rate was the amount paid for services.

COMMENT 8: Commenter stated there is a substantial difference in private versus state lease rates in the fact that private lease rates are standalone units and state lands are not.

RESPONSE 8: DNRC recognizes that state leases represent a variety of ownership patterns. Some tracts represent in-holdings contained within larger pastures, some make up individual pastures themselves, while other state blocks have several pastures. The Duffield study noted that in its statistical model, in-holdings did not add any predictive power given the other identified variables.

COMMENT 9: Commenters suggested that the 2011 Duffield study was not appropriate to use because it did not use the data gathered by the 1993 and 1994 advisory council; it was based on the original study that was rejected by the 1993 Legislature; or because it was based on a previous study that the board rejected.

RESPONSE 9: The original 1993 Duffield report represented significant work in estimating full market value for various uses on state lands. Because of the controversy surrounding those recommendations, SB424 was passed by the 1993 Legislature directing the Land Board to set rental rates after first taking recommendation from an advisory council they appointed. Although the advisory council elected to base their grazing rate recommendations on other factors, they did adopt the recommendations of the Duffield report for recreational use on state lands. DNRC feels both the 1993 and 2011 work contain relevant information relevant to the rulemaking.

COMMENT 10: Commenters stated Duffield's use of competitive bidding to establish the value of forage is not appropriate because it does not consider what value the bidder is attributing to the long-term addition of those lands to their operation as well as other possible benefits for the livestock owner.

RESPONSE 10: While DNRC agrees that the motivation for competitive bidding may involve many factors, it does fundamentally give an indication of the underlying value of that forage and lease. If competitive bids were being

used as the sole basis for justifying an increase to the multiplier, further study into the individual characteristics might be warranted. Competitive bidding is only one factor in the supporting evidence utilized by the board in setting the multiplier for the minimum grazing rental rate.

COMMENT 11: Commenter suggested that the quality of forage in the Great Plains states Duffield used in the study is not comparable to Montana.

RESPONSE 11: DNRC agrees that the rental rates charged in the plains states may not, for various reasons, be directly applicable. DNRC does not agree that forage quality in the plains states is superior to that found in Montana.

COMMENT 12: Commenter was concerned with the work utilized in the Duffield study on the BIA AUM rates. In particular, very little data was given to support these rates and what services these leases provide.

RESPONSE 12: The statements that BIA leases are similar to state leases were first noted in the 1993 Duffield report.

COMMENT 13: Commenter said the Duffield study stated that the BLM/United States Forest Service (USFS) rate was subsidy, and therefore the rate was removed from the comparison and that this statement was conjecture on the part of the study.

RESPONSE 13: The Duffield report stated that the federal rate may be intended to provide a subsidy based on a 2005 Government Accountability Office (GAO) report.

COMMENT 14: Commenter stated the proposed multiplier could result in significantly higher rates in the near future ($15 to $17 per AUM) due to increasing cattle prices.

RESPONSE 14: The basis for the existing formula is that prices received should be reflective of a lessee's ability to pay. If the board adopts a multiplier of 13.31, the average price per pound of beef cattle would need to reach $1.13 per pound for the AUM to be $15.00/AUM.

COMMENT 15: Commenters stated the proposed multiplier fails to consider profit margin and that ranchers will lose money if the multiplier is raised to this level. The operational costs required to harvest forage are increasing much faster than the prices received for livestock.

RESPONSE 15: 77-1-106, MCA, outlines what factors the board should consider in establishing rental rates. To date those costs have been specific to improvement costs associated with utilization of the lease. Given the wide

variety of types of livestock operations in the state, DNRC does not agree that the rental rate should use profit margin in this analysis.

COMMENT 16: Commenter suggested the Duffield study does not recognize the fact that private leases are competitively bid while 95% of state leases are not competitive bid.

RESPONSE 16: DNRC disagrees in that state leases are available for competitive bidding when they are issued or renewed. There are many reasons why a lease may or may not receive bids. The intent of the grazing rate formula is to ensure that full market value is being achieved if no competing bids are submitted.

COMMENT 17: The Duffield study is biased in the sense it first determined a conclusion, and then found evidence to support that conclusion while ignoring that evidence that did not support the predetermined conclusion.

RESPONSE 17: DNRC disagrees. The original work by Duffield in 1993 used extensive survey information along with a statistical model to estimate what characteristics influence the values of grazing lease rates. The current study was intended to consider updated information to provide DNRC with an estimate market value for state leases.

COMMENT 18: The Charles M. Russell Wildlife Refuge increased their rental value to $18.40/AUM a number of years ago which has resulted in an increase in the number of vacant CMR allotments. The 2011 Duffield report did not consider that the same could occur on state land.

RESPONSE 18: The Duffield study suggested that the wildlife refuge rates may support a state land rate higher than 70% of the private rates, although it was acknowledge that federal leases may provide more services than under a state lease.

COMMENT 19: Commenters suggested the private lease rate that Duffield utilized was inaccurate. The value does not consider that as a private lease term goes on, the value often goes down. As a result the multiplier that has been recommended is an arbitrary number.

RESPONSE 19: The private lease rate as reported by Montana Agriculture Statistics is an average lease rate. This average lease rate would include values with various factors including the length of the existing lease. As such, DNRC believes that it is a representative value.

COMMENT 20: Commenter suggested the forage grown on state land is generally not comparable in quality to that harvested off of private land and therefore, the Duffield comparison is not appropriate.

RESPONSE 20: State land ownership generally includes sections 16 and 36 of each township, as well as other blocks and individual parcels around the state. Because of this random ownership, it is a true representation of the landscapes present across the state. Some lands may be of poorer quality while others are extremely productive, and collectively would be of average production. As such, DNRC disagrees with the claim that the rental rate should be lower due to the poor quality of the lands.

COMMENT 21: Commenters addressed how the carrying capacity is set and used on state lands. Particularly, the allocation of AUMs (based on a 1000-lb cow) and a rancher's use of the AUM (cows weigh between 1300 and1500 lbs). Questions were raised that actual livestock usage would not support DNRC-assessed AUMs.

RESPONSE 21: DNRC utilizes Natural Resources Conservation Service's (NRCS) Montana Grazing Guides to determine rangeland condition and the stocking rate or carrying capacity. The range guides use specific factors including topography, precipitation zone, soil type, and the existing native vegetation to determine range sites. Existing vegetation on each range site is compared to climax vegetation on each range site to determine range condition. Range condition is the present state of the vegetation compared to the kind and amount of native vegetation that site is capable of producing (MSU Mont. Guide MT198515 AG). AUMs per acre are then calculated by percent of climax vegetation multiplied by the suggested initial stocking rate.

77-6-507(1)(a), MCA, defines "animal unit" as one cow, one horse, five sheep, or five goats. Section (b) further defines "animal unit month carrying capacity" as that amount of natural feed necessary for the complete subsistence of one animal unit for one month. The animal unit month (AUM) is the basic unit of grazing capacity and is defined as the potential forage intake (animal demand) of one animal unit for one month (Vallentine – grazing management 1990). The Society for Range Management defines an animal unit as one mature 1000-lb cow.

DNRC has found that when monitoring pastures where AUM utilization was known, this system is generally conservative in the carrying capacities that are calculated. DNRC believes if AUMs are utilized in accordance to the lease agreement, the range will maintain good condition and continue to sustainably support livestock grazing, even given the difference between the statutorily defined animal unit and the definition used by range science professionals.

COMMENT 22: Commenter discussed the ramifications of increasing/doubling the rate. If fees are raised, there may be a significant increase in vacancies which will result in decreased revenues and DNRC will lose good stewards of the land. Also since many tracts do not have public access, they may remain vacant and DNRC will be liable for costs associated with those lands (weed control or fencing out livestock).

RESPONSE 22: DNRC recognizes that raising the rental rate may result in increased vacancies. If vacancies occur, DNRC will attempt to release those lands. For any lands that remain vacant, DNRC will be responsible for any associated management costs.

COMMENT 23: Commenters stated DNRC needs to consider how the forest management Habitat Conservation Plan (HCP) and the USFW Comprehensive Conservation Strategy impact grazing leases

RESPONSE 23: DNRC's HCP is only applicable to grazing licenses on forested lands within the HCP project area. The primary commitments apply to bull trout, westslope cutthroat and redband trout, which are found on less that 2% of the total grazing area. These commitments are actually very similar to those previously adopted in 1996 in the State Forest Land Management Plan. If any grazing management issues are identified on those tracts, DNRC will work with lessees to address them. However, given the very small percentage of acreage this affects and because these commitments are already being implemented, DNRC does not believe adjustments to the rate are warranted for this issue. The USFW Comprehensive Conservation Strategy has not been adopted by DNRC, nor has DNRC had involvement in that plan.

COMMENT 24: Commenters suggested the current formula and multiplier is fair and ensures that the rate increases when livestock prices increase.

RESPONSE 24: The current formula is established in statute and requires the board to set the multiplier used to calculate the annual rental. Under 77-1-106, MCA, the board must optimize the return to the trusts while considering long-term productivity and expenses borne by the lessee when setting the multiplier. The recent work by Duffield suggests that the current multiplier does not achieve full market value, and was the basis for initiating the rulemaking process.

COMMENT 25: Commenters suggested the board should be at the rule hearings, listen to the tapes of the meetings, review all of the submitted written comments, reject the Duffield studies, appoint an advisory board, commission a new study, meet with randomly selected lessee to discuss costs, and take more time to understand issues.

RESPONSE 25: DNRC conducts the administrative rulemaking process on behalf of the board. The rulemaking process allows for comments and information to be submitted, and all information from that process is made available for the board to consider and review in order to determine what may be relevant for their decision.

COMMENT 26: The board is required by law to consider lessee's expenses, and to meet their legal fiduciary responsibilities.

RESPONSE 26: DNRC agrees, as this is required under 77-1-106, MCA.

COMMENT 27: The board needs to ensure recreationists are paying full market value for recreating on state lands.

RESPONSE 27: The board may at any time review rentals being charged for various uses to ensure full market value is being received. Recreational use fees were last reviewed in 2007, while the grazing multiplier was last updated in 2001. Recreational use fees are beyond the scope of this rulemaking process.

COMMENT 28: The last two previous increases by the Land Board were approximately 12% each. An increase of 75% as proposed would be a significant burden for lessees and will result in less monies being available for improvements and conservation measures.

RESPONSE 28: The board is responsible to ensure that the trusts receive fair market value regardless of the percent increase that may result.

COMMENT 29: The board should defer the grazing rental rate to a ballot initiative in order to remove politics from the process.

RESPONSE 29: The responsibilities and duties of the board are established in Article X, Section 4 of the Montana Constitution. Additionally, under 77-6-507, MCA, the board is responsible for establishing the multiplier used to calculate the annual grazing rate. These responsibilities cannot be transferred to a ballot initiative.

COMMENT 30: The board should phase the rate increase in over a ten-year period in order to allow lessees to budget and acclimate to the change.

RESPONSE 30: Under 77-6-502(2), MCA, and the terms of the lease agreement, any increased rental enacted by the board may become immediately effective for the lease. The board agrees that a five-year phase-in of the minimum grazing rate is appropriate to allow lessees to economically adjust to the rental increases.

COMMENT 31: Such an increase will result in damage to the resource because lessees will always be compelled to use the AUMs they have been paying for, and because a rate increase reduces the monies that are available to a lessee to make improvements to a lease.

RESPONSE 31: As discussed in previous responses, the process DNRC uses to establish carrying capacities results in fairly conservative numbers. On a case-by-case basis, if grazing management problems develop as a result of the lessee utilizing the set carrying capacity, DNRC will work with the lessee to address or adjust those issues.

COMMENT 32: Commenters stated lessees pay for AUMs that wildlife use.

RESPONSE 32: The carrying capacity established by DNRC is typically conservative and should allow for general wildlife use without impacting the lessee's ability to utilize the AUMs they pay for. On site-specific cases where concentrated or heavy wildlife use is occurring, DNRC can adjust the carrying capacity to account for that use.

COMMENT 33: DNRC is required to comply with the Montana Environmental Policy Act (MEPA) in the rulemaking process.

RESPONSE 33: DNRC agrees. A MEPA analysis utilizing the public hearings is being conducted.

COMMENT 34: Commenter suggested that leases of any value are already competitively bid.

RESPONSE 34: DNRC disagrees. In general, competitive bidding of state leases amounts to less than 5% of the annually renewed leases. There are a number of possible reasons why this is rather low, including location and access to the lease, the preference right of existing lessees, or the reluctance to bid against neighbors. As such, many productive and desirable leases receive no bids at renewal.

COMMENT 35: Commenter said the current formula overprices the state AUM rate.

RESPONSE 35: DNRC has received no evidence that supports that the current rate is above full market value, or that resultant vacancies exist.

COMMENT 36: Commenter stated that in areas where significant acreages of state lands exist, doubling the rate will negatively affect the local economies.

RESPONSE 36: Daniels County has the largest percentage of state land. If the board adopted the multiplier as proposed, the total increase in grazing rentals would be approximately $188,000, or an average of approximately $280 per lease.

COMMENT 37: Commenter said that doubling the fee will force the Department of Fish, Wildlife and Parks (FWP) to increase license fees in order to pay for their state land leases.

RESPONSE 37: As with any lessee, FWP's possible actions to pay increased grazing rentals is beyond the scope of DNRC rulemaking.

COMMENT 38: Commenter suggested doubling the fee could force landowners to charge access fees to recreate on their private land in order to raise the necessary funds to pay the increased rentals on state land.

RESPONSE 38: Although this may be an action implemented by some lessees, the board is constitutionally required to ensure full market value is being received for uses on state land.

COMMENT 39: Commenter asserted that a lessee has acquired under the provisions of the 1866 Mining Act (14 U.S. Statute 252, Revised Statute 2339) water rights upon various parcels of state lands which pre-date the state's ownership, and which in turn, grant fee simple title of those parcels to them.

RESPONSE 39: DNRC disagrees with this legal analysis. Although DNRC acknowledges that water and ditch rights established on state trust lands prior to the state's acquisition of title could theoretically encumber state title to such lands, such rights would not divest the state of the fee simple title to those lands.

Section 9 of the 1866 Mining Act (Revised Statutes 2339 and 2340) provided only for the acquisition of water rights and ditch rights upon federal public lands:

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed;...".
>
> "All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section".

A state grazing lease provides livestock forage for the use of a lessee on a designated parcel of trust land. DNRC does not warrant title to the ownership of its lands or the water rights upon those lands. An applicant for a grazing lease has the obligation to review the title to the trust lands offered for lease and determine whether to bid upon them. No one is obligated to lease trust lands. Lessees may review the title to the trust lands that they lease and make their own decisions as to whether they should continue to lease those trust lands. Nonetheless, a determination of the quantity, ownership, and priority date of water rights upon state trust lands is beyond the scope of this rulemaking.

COMMENT 40: Commenters stated BLM allotment managers do not recognize the carrying capacity for state lands that are included in the BLM allotments. If the state ratings are higher than the BLM ratings, the lessee is paying for unusable forage.

RESPONSE 40: Based on discussions with BLM staff, DNRC's carrying capacities are generally considered and used for the state lands contained within BLM allotments. In situations where they are not, a lessee may request that DNRC

review and further discuss with BLM staff, the appropriate carrying capacity for the state lands.

COMMENT 41: Commenters suggested DNRC and/or board should take a portion of the grazing rental and set it aside to be used for improved monitoring and/or management of the lease, or that a portion should be given back to the lessee as a reward for improving the production of the lease.

RESPONSE 41: All revenues generated from grazing lands are annually distributed to the trusts except those monies deposited into the trust land administration account established under 77-1-108, MCA. Monies in this account are appropriated by the Legislature for management of state lands, and increases for monitoring and management would require legislative approval. By law and the Montana Constitution, diversion of revenues to lessees would not be allowed.

COMMENT 42: Commenter said the state should sell all scattered, underdeveloped parcels and utilize the monies for schools existing within the county of the sold property.

RESPONSE 42: Under the DNRC Land Banking Program, low-producing isolated parcels of state land are being sold. However, 77-2-337, MCA, provides DNRC direction on the distribution of sale revenues for specified trust beneficiaries and would prohibit returning those revenues solely to the schools that exist within the county where the lands were sold.

COMMENT 43: Commenters suggested FWP should contribute approximately 5% of their license fees or a portion of the license fee to the school trust since their wildlife grazes state land.

RESPONSE 43: DNRC is unaware of FWP paying any landowner for wildlife grazing. Additionally, wildlife belong to all the residents of the state, so utilizing only sportsman's license monies to pay such a fee would be inappropriate and outside the scope of this rulemaking.

COMMENT 44: Commenter said the rate should be based on lease productivity.

RESPONSE 44: DNRC determines stocking rates based on the productivity, topography, soils, and other factors of the land and as set by law. The rental is based on the carrying capacity. The fee charged from 1961 through 1991 did have an additional adjustment factor based on productivity; however, at DNRC's request that adjustment was removed as it was a disincentive to improve range condition.

COMMENT 45: Commenter said if the AUM fee was set at $12/AUM, then the total amount a lessee could charge through a pasturing agreement would be $24/AUM. The rate of $24/AUM is too high.

RESPONSE 45: ARM 36.25.120(2) allows under a pasturing agreement, a lessee to charge a third-party livestock owner a management fee up to the current year's minimum grazing rate. The appropriate management fee is established by the lessee and livestock owner.

COMMENT 46: Commenter stated that a reduction to the AUM rate should not be granted based on improvements costs when the rancher owns these improvements and sells them when the lease agreement is transferred.

RESPONSE 46: 77-1-106, MCA, requires the board to consider lessee expenses for management, water development, weed control, and other costs when establishing rental rates.

COMMENT 47: Commenters stated the Duffield study strengths are that the multiplier takes into account the adjustment to the cattle market and that it recognizes that the federal rate is a subsidy.

RESPONSE 47: DNRC concurs that the Duffield study does present relevant information that the board can consider in reviewing the grazing rental rate. As previously stated, comments in the report regarding the federal rate were made based on a 2005 GAO report.

COMMENT 48: Commenter supported the proposed rate of $12.88/AUM because it is similar to the rate of $15.62/AUM used by the Department of Revenue (DOR) to establish grazing land values for property taxation.

RESPONSE 48: The private lease rate used by DOR is a seven-year Olympic average of private lease rates reported by the Montana Agricultural Statistics Service for the years 2001 through 2007. DNRC believes using the current Montana Agricultural Statistics Service private lease rate is appropriate with consideration given to costs as required under 77-1-106, MCA.

COMMENT 49: Commenter stated that ranchers who do not have a state lease would be happy to lease it for $12/AUM and pay for improvements.

RESPONSE 49: DNRC appreciates the comment and agrees that there are ranchers in the state who are willing to pay a higher rate while paying the costs of improvements.

COMMENT 50: Commenter asked if the state was going to reduce mills charged for education if DNRC raises the AUM rate.

RESPONSE 50: The funding levels for public schools are established by the Legislature and by local governments, which is beyond the scope of this rulemaking.

COMMENT 51: Commenter stated DNRC should consider the leasehold value or cost to acquire the state lease in determining the fair market value of the AUM.

RESPONSE 51: Under ARM 36.25.118, assignments which result in a profit to the assignor over and above the value of improvements may result in cancellation of the lease. As such, DNRC does not consider use of leasehold interest appropriate in determining an appropriate multiplier. Additionally, leasehold value may be an indicator that the current rate is below market value.

COMMENT 52: Commenter suggested that DNRC should be comparing state lease AUM rates to federal lease AUM rates in order to remove the variables that are present in private leases.

RESPONSE 52: The board is required by law to ensure fair market value. The rental rate is to be set by taking the previous year's beef cattle price times a multiplier they establish in rule. The rate established by the federal Public Rangelands Improvement Act (PRIA) formula uses forage value index, beef cattle price index, and prices paid index, and does not have the requirement to achieve full market value that is required under Article X, Section 11 of the Montana Constitution. Due to these differences, DNRC does not believe it is appropriate to consider the PRIA rate.

COMMENT 53: Commenter stated that the Montana University System would directly increase their revenues by the increase in grazing rates.

RESPONSE 53: DNRC concurs. Grazing rentals are distributable revenues for the university system. Any rental increase would result in an increase in university revenues.

COMMENT 54: Commenters suggested that not all grazing revenues will be directly given to the school system.

RESPONSE 54: All grazing revenues generated on trust lands are distributed to the beneficiaries, except for that portion used to fund trust land management activities, and 5% of annual grazing revenues placed into the permanent fund as directed by Article X, Section 5 of the Montana Constitution. The funding level for the costs of trust administration is set by the Legislature through the biennial appropriation process.

COMMENT 55: Commenter said the original work of the 1991 Duffield and subsequent advisory board resulted in an approximate 45% reduction from the private lease rate. Since this figure was appropriate then, DNRC should continue to use the reduction figure and apply it to the new rate. If DNRC does not use the former reduction figure, then it should update the appropriate costs and expenses that are different in comparison of the private versus state.

RESPONSE 55: The 45% reduction resulted from the work of the advisory council using the private lease rate with deductions and additions to reflect the difference between state and private leases. DNRC initially recommended that the board use

the 2011 Duffield study as a basis to review the current multiplier. The 2011 Duffield Study recommended a 30% reduction. In setting the multiplier, the board has directed that additional reductions in the multiplier be made for weed control, to encourage rest-rotation grazing, to recognize that forage may be reduced by drought, and to allow for lower rental rates where the forage cannot be economically utilized.

COMMENT 56: Commenter stated concern with state lands intermingled within BLM lands. A fee increase would make it difficult to implement or maintain rest/ rotation grazing systems; encourage lessees to graze each year regardless of resource conditions; encourage lessees to fence state lands from BLM lands and that those fences can impact wildlife movement; and that in pastures with steep topography and riparian areas, the riparian will be overgrazed because it may not be possible to utilize the forage in the steeper areas.

RESPONSE 56: As stated previously, DNRC feels the carrying capacity established on state lands is at a sustainable level that can be used every year. If lessees request to fence state lands separate from federal lands, DNRC will encourage use of wildlife-friendly fencing designs. For lands where topography may cause uneven utilization levels, DNRC will work with lessees to address any management issues that may develop.

COMMENT 57: Commenter suggested that instead of increasing the multiplier to raise revenue, DNRC should work with lessees on range renovations to increase the productivity and carrying capacity of grazing lands, which in turn will increase revenues.

RESPONSE 57: Although there may be opportunities for renovation projects, the basis for the proposed increase is to ensure that the rental being charged is full market value as required under the Montana Constitution.

COMMENT 58: Commenter suggested that Duffield's assertion that state lease rates are falling behind the increasing private rates is flawed because the increase in private rates is due to the increased costs to produce an AUM.

RESPONSE 58: While rising costs may be one reason for increasing private lease rates, others likely include weather conditions, availability, as well as increasing cattle prices.

COMMENT 59: Commenter stated that the decision to adjust the multiplier should not be based solely on the Duffield work.

RESPONSE 59: DNRC and the board considered information from the Duffield study as well as the public comments and data submitted, to make the adjustment to the proposed multiplier.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

| | |
|---|---|
| /s/ Mary Sexton | /s/ Tommy Butler |
| MARY SEXTON | Tommy Butler |
| Director | Rule Reviewer |

Certified to the Secretary of State November 28, 2011.

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

| | | |
|---|---|---|
| In the matter of the adoption of New Rules I and II, the amendment of ARM 37.115.104, 37.115.105, 37.115.301, 37.115.302, 37.115.303, 37.115.306, 37.115.307, 37.115.311, 37.115.312, 37.115.313, 37.115.316, 37.115.317, 37.115.319, 37.115.321, 37.115.504, 37.115.505, 37.115.508, 37.115.509, 37.115.513, 37.115.517, 37.115.518, 37.115.521, 37.115.522, 37.115.602, 37.115.603, 37.115.604, 37.115.605, 37.115.701, 37.115.707, 37.115.804, 37.115.807, 37.115.902, 37.115.905, 37.115.1001, 37.115.1002, 37.115.1003, 37.115.1006, 37.115.1007, 37.115.1009, 37.115.1011, 37.115.1101, 37.115.1202, 37.115.1301, 37.115.1302, 37.115.1307, 37.115.1308, 37.115.1309, 37.115.1314, 37.115.1402, 37.115.1403, 37.115.1406, 37.115.1501, 37.115.1505, 37.115.1507, 37.115.1601, 37.115.1602, 37.115.1701, 37.115.1704, 37.115.1803, 37.115.1809, 37.115.1810, 37.115.1811, 37.115.1814, 37.115.1815, 37.115.1817, 37.115.1819, 37.115.1823, 37.115.1837, 37.115.1839, 37.115.1840, 37.115.1845, 37.115.1905, 37.115.2101, the repeal of 37.115.314, 37.115.904, 37.115.1021, and 37.115.2102 pertaining to pools, spas, and other water features | ) | NOTICE OF ADOPTION, AMENDMENT, AND REPEAL |

TO: All Concerned Persons

1. On August 11, 2011, the Department of Public Health and Human Services published MAR Notice No.37-553 pertaining to the public hearing on the

proposed adoption, amendment, and repeal of the above-stated rules at page 1482 of the 2011 Montana Administrative Register, Issue Number 15.

2. The department has adopted New Rule I (37.115.1022) as proposed.

3. The department has amended ARM 37.115.306, 37.115.307, 37.115.311, 37.115.313, 37.115.316, 37.115.319, 37.115.321, 37.115.504, 37.115.505, 37.115.509, 37.115.518, 37.115.521, 37.115.522, 37.115.602, 37.115.701, 37.115.707, 37.115.804, 37.115.807, 37.115.902, 37.115.1001, 37.115.1003, 37.115.1007, 37.115.1009, 37.115.1011, 37.115.1202, 37.115.1302, 37.115.1314, 37.115.1406, 37.115.1505, 37.115.1701, 37.115.1704, 37.115.1809, 37.115.1810, 37.115.1811, 37.115.1815, 37.115.1817, 37.115.1819, 37.115.1823, 37.115.1837, 37.115.1839, 37.115.1840, 37.115.1845, 37.115.1905, 37.115.2101 and repealed ARM 37.115.314, 37.115.904, 37.115.1021, and 37.115.2102 as proposed.

4. The department has decided to repeal ARM 37.115.603 and 37.115.1814 based on comments received.

5. The department has adopted the following rule as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

NEW RULE II (37.115.1020) EQUIPMENT ROOM (1) The equipment room shall be so located that it cannot be entered directly from the shower rooms. If the equipment room is accessed from a public area, the equipment room must be kept locked at all times when not attended.

(2) through (4) remain as proposed.

6. The department has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

37.115.104 REQUIRED UPGRADING TO EXISTING FACILITIES AND OPERATIONS (1) Existing licensed public swimming pools, spas, or other water features that were in use or under construction prior to March 1, 2010 and which do not fully comply with the upgraded requirements for the physical plants set out in ARM Title 37, chapter 115, subchapters 5 through 10, but met the rules in effect at the time of construction, may continue to be operated as long as the facility meets the requirements of the grandfather clause in ARM 37.115.1905 and the operating requirements in this chapter, poses no significant health or safety risks, and is operated and maintained as designed, except that:

(a) remains as proposed.

(b) Existing public swimming pools, spas, and other water features, must comply with the barrier requirements set out in ~~ARM 37.115.601, 37.115.602, 37.115.603, and 37.115.604~~ subchapter 6 by December 31, ~~2012~~ 2013~~, or later date set in these rules~~. Facilities that do not meet this requirement will not be licensed after December 31, 2013.

(c) and (d) remain as proposed.

(e) License holders of indoor pools, spas, or other water features that currently use isocyanurates or forms of chlorine stabilized with cyanuric acid as a disinfectant must convert to an unstabilized disinfectant system no later than March 1, 2011.

(f) and (2) remain as proposed.

37.115.105 DEFINITIONS In addition to the definitions in 50-53-102, MCA, the following definitions apply to these rules.

(1) through (71) remain as proposed.

(72) "Hydrotherapy pool" or "therapeutic pool" or "therapy pool" means a unit that may have a therapeutic use~~; a heated pool used for aerobic exercise classes or physical therapy which may be prescribed by a physician and excludes general swimming recreation~~. Its features may include, but are not limited to:

(a) through (172) remain as proposed.

37.115.301 CRITICAL HEALTH AND SAFETY VIOLATIONS THAT REQUIRE IMMEDIATE CLOSURE (1) The following items are critical health and safety violations that require a pool owner or operator to immediately close a pool, spa, or other water feature and related facilities until the safety violations have been resolved:

(a) through (o) remain as proposed.

(p) pH of the water is less than 7.0 or higher than 7.8, except flow through hot springs which may have a pH up to 9.4; and

(q) the pool, spa, or other water feature does not comply with the requirements of the VGBPSSA based on a visual inspection ~~from the pool or spa deck, and documentation~~.

(2) remains as proposed.

(3) The pool owner or operator shall prepare and maintain a record of each instance in which the pool is self-closed to correct a safety violation under this rule. The ~~report~~ record shall be signed by the person responsible for correcting the safety violation and it shall document:

(a) through (e) remain as proposed.

(4) If any drowning or other serious accident has occurred, ~~the~~ a report shall be submitted to the department within 48 hours of the incident by faxing it to the Food and Consumer Safety Division, Department of Public Health and Human Services, (406) 444-5055.

(5) remains as proposed.

37.115.302 VIOLATIONS THAT MAY REQUIRE IMMEDIATE POOL CLOSURE (1) remains as proposed.

(2) The department ~~or its designee~~ may order immediate closure of any swimming pool, spa, or other water feature that is operating without a valid license.

(3) The department may close any pool, spa, or other water feature for any of the violations listed in ARM 37.115.301 or 37.115.1309.

(4) remains as proposed.

37.115.303 REQUIRED INSTALLATION OF ULTRAVIOLET OR OZONE SECONDARY DISINFECTION SYSTEM (1) remains as proposed.

(2) If the corrective action fails to bring the disease outbreak under control, the department will require that the facility install and utilize ~~an ultraviolet~~ a secondary disinfection system approved by the department, such as ultraviolet or other proven systems to control disease. ~~as a secondary disinfection system or other type of additional disinfection approved by the department that has been proven to control disease outbreaks as a secondary disinfection system.~~

(3) remains as proposed.

(4) The department ~~or its designee~~ may require a supplemental UV or ozone disinfection system on a pool, spa, or other water feature in a plan of corrective action when health and safety is threatened as indicated by repeated and documented violations.

37.115.312 PAYMENT OF PLAN REVIEW FEES (1) and (2) remain as proposed.

(3) If the department requires ~~plan review~~ site visits at identified phases of construction of water parks or complex projects to ensure that the construction is in compliance with the plans, any interim fee outlined in Table 1 must be paid at the time of each such additional ~~review~~ site visits. The fee applies to each pool, spa, or other water feature.

(4) remains as proposed.

37.115.317 PLAN REVIEW DURING CONSTRUCTION PHASE

(1) remains as proposed.

(2) Depending upon the complexity of the project, the department ~~or its designee~~ may require interim site visit reviews to be conducted at phases of construction that the department identifies to the applicant during the initial plan review.

(3) through (5) remain as proposed.

37.115.508 DRAINS AND SUCTION OUTLETS (1) through (3) remain as proposed.

(4) Existing covers that do not have a VGBPSSA stamp on it, ~~certificate~~, such as site-made covers, must provide a letter by licensed structural/mechanical engineer stating that the cover meets VGBPSSA.

37.115.513 LIGHTING (1) All ~~indoor~~ pools, spas, or other water features and their deck areas that operate at night or that have insufficient natural light to meet the clarity requirements in ARM 37.115.1315 must install and use safe artificial light that is adequate to meet those clarity requirements at all times during operation of the pool, spa, or other water feature. Such lights shall be spaced to provide illumination so that all portions of the pool, spa, or other water feature, including the bottom and drains, may be readily seen without glare.

(2) remains as proposed.

37.115.517 DECK AREAS (1) through (7) remain as proposed.

(8) ~~All deck width requirements must be met and require that no~~ No deck equipment or furniture ~~occupies the~~ may occupy the deck area. Additional decking area must be ~~added~~ provided for lounging use, seating, or storage of pool equipment.

37.115.604 BARRIERS FOR INDOOR POOLS (1) remains as proposed.

(2) ~~Existing or new indoor p~~Pools or spas located in an atrium or common area with direct access by lodging or room doors or from other common areas must have a minimum four foot high, see-through barrier or fence with lockable gate which does not create a hazard.

(3) ~~Any new or existing p~~Pools or spas located in locker rooms or separated by an unsecured door during hours of use must either utilize a self-closing mechanism and latch on a door or put in place a barrier with a minimum height of four feet and a latch for the barrier ~~at 54 inches high~~ on the pool side of the gate facing the pool, spa, or other water feature at least three inches from the top of the gate and may not have openings greater than one-half inch within 18 inches of the latch, or another design approved, in writing, by the department. Existing pools or spas must meet this requirement no later than December 31, 2013.

37.115.605 DEADLINE FOR RETROFITTING BARRIERS IN EXISTING FACILITIES (1) Existing public pools, spas, and other water features must install barriers that meet the requirements of these rules on or before December 31, ~~2011~~ 2013 except existing splash decks.

37.115.905 BABY CHANGING TABLES (1) ~~All dressing rooms or restrooms must provide at least one baby changing table with an adjacent waste receptacle with lid which shall be located in an area not obstructing a hallway.~~ A pool, spa, or other water feature must have a baby changing table in a convenient, useable area.

(2) ~~If the dressing rooms or restrooms in existing facilities are too small for installation of a baby changing table, there may be a common area on the outside wall used as a diaper changing station located within 25 feet of a hand sink and include a barrier, or demarcation designed around the changing area which is approved by the department to prevent general traffic from passing through.~~ A hand sink must be within 25 feet of the baby changing table.

(3) ~~If a restroom or bathroom does not exist for facilities built before March 1, 2010, another location shall be created near the pool side. The area must be restricted with a barrier, or demarcation designed to prevent general traffic passage. A hand washing station or covered receptacle must be provided in the diaper changing area and approved by the department.~~ The table must be constructed of cleanable, durable, and nonabsorbent material.

(4) ~~All diaper changing stations shall post a CDC or similar sign stating how to wash properly including washing of the child's bottom as well as the child's hands and post it in the diaper changing vicinity.~~ The table must be kept clean at all times.

(5) ~~Any nonabsorbent surface dedicated to diaper changing must be designed to prevent the infant from falling while not creating any other hazard. All surfaces must be nonabsorbent and cleanable.~~ A lined garbage can must be near the baby changing table.

(6) ~~Any facility that allows only bathers older than diaper age may present documentation of exclusion of children on the premises, for consideration to exempt the facility from the diaper changing area requirement.~~ A facility that does not allow diaper-aged children is not required to provide a baby changing table.

37.115.1002 TURNOVER RATES (1) through (4) remain as proposed.

(5) When a pool, spa, or other water feature is designed with multiple sections, the most stringent turnover rate must be applied to the entire system, unless otherwise approved by the department.

37.115.1006 INLETS (1) through (5) remain as proposed.

(6) ~~If floor inlets from the circulation system are used, they must be flush with the floor. Floor inlets shall be placed at maximum 15-foot intervals. The distance from floor inlets to a pool wall shall not exceed 7.5 feet if there are no wall inlets on that wall. Each floor inlet must be designed such that the flow can be adjusted to provide sufficient head loss to ensure balancing of flow through all inlets. All floor inlets must be designed such that the flow cannot be adjusted without the use of a special tool to protect against swimmers being able to adjust the flow. The return supply piping must be sized to provide less than 2.5 feet of head loss to the most distant orifice to ensure approximately equal flow through all orifices.~~ Floor inlets must:

(a) be flush with the floor;

(b) provide equal balanced flow through all inlets; and

(c) be adjustable with the use of a specialized tool to prevent bathers from adjusting the flow.

37.115.1101 OPERATOR QUALIFICATIONS (1) and (2) remain as proposed.

(3) The certified pool operator for the facility shall be at the facility whenever it is open or available to respond by phone or in person to the pool, spa, or other water feature within 30 minutes of being telephoned. Failure to respond in the prescribed time shall be treated as any other violation, and a documented history may require a corrective action plan be submitted to the department ~~or its designee~~.

(4) through (6) remain as proposed.

37.115.1301 TEST KITS (1) Water testing shall measure the following parameters using an FAS-DPD test kit which measures concentrations with precision through the process of ~~filtration~~ titration:

(a) and (b) remain as proposed.

(c) pH (colorimetric test);

(d) through (5) remain as proposed.

(6) ~~Electronic testers may be approved for use by the department or its designee if the accuracy of said kit meets or exceeds parameters listed above.~~ The department may approve an alternative testing method if the method can accurately measure the parameters listed in ARM 37.115.1301(1).

37.115.1307 DISINFECTANT USE (1) remains as proposed

(2) All pools, spas, and other water features ~~when open or in use~~ must be continuously disinfected by a chemical that imparts a residual effect and must maintain an alkaline pH. Dispersal of the disinfectant agent must occur by mechanical means when bathers are present.

(3) through (5) remain as proposed.

37.115.1308 WATER CHEMISTRY PARAMETERS (1) Water chemistry, temperature, and clarity measurements must fall within the parameters set forth in Table 6:

Table 6.

| Parameter | Acceptable | Ideal | ~~Maximum/Comments~~ |
|---|---|---|---|
| Chlorine | 2-8ppm | 3-5ppm | ~~8ppm~~ |
| Combined chlorine | 0 to 0.5ppm | 0.0 | ~~0.5ppm~~ |
| Bromine | 2-10ppm | 2-8ppm | ~~10ppm~~ |
| Total Alkalinity | 60-220ppm (varies by chemical type and pool surface) | 80-100ppm for Cal Hypo, lithium hypo, and sodium hypochlorite; 100-120ppm for Sodium dichlor, trichlor, chlorine gas and bromine compounds | ~~220ppm~~ |
| Oxidation Reduction Potential (ORP or HRR, which stands for High Resolution Reduction) | 650 minimum millivolts (mV) | 650-750 minimum millivolts (mV) | ~~no maximum~~ |
| pH | 7.2-7.8 | 7.4-7.6 | ~~flow-through hot springs may have a pH up to 9.4 with proper signage~~ |
| Cyanuric Acid (allowed only in outdoor pools) | 0-~~50~~ 100ppm | 10-50ppm | ~~100ppm~~ |
| Calcium Hardness | Pools 150-1,000ppm | Pools 200-400ppm; Spas 150-250ppm | |
| Temperature | ~~Varies~~ Pools may not exceed 100º F | ~~Varies~~ | ~~Spas 104ºF maximum Pools 100ºF~~ |

| | | | |
|---|---|---|---|
| | Spas may not exceed 104ºF<br><br>Flow through hot springs may not exceed 106ºF | | ~~maximum EXCEPTION: flow-through hot spring pools and spas, which may have a maximum temperature of 100ºF for pools and 106ºF for spas~~ |
| Clarity | ~~In the deepest part of the pool, spa, or other water feature, the main drain shall be clearly visible and sharply defined.~~ NTUs must be in the range of 0.0-1.0. See ARM 37.115.1315(1) | ~~In the deepest part of the pool, spa, or other water feature, the main drain shall be clearly visible and sharply defined. NTUs must be less than .5~~ 0 NTU | ~~greater than 1.0 NTU is "poor" and the facility closed~~ |

(2) remains as proposed.

37.115.1309 CLOSURE OF POOL BASED ON WATER CHEMISTRY READINGS (1) A pool, spa, or other water feature shall be closed immediately whenever a reading falls into one or more of the following categories:

(a) through (c) remain as proposed.

(d) pH of the water is less than 7.0 or higher than 7.8 ~~or pH is 7.8 and the chlorine or bromine reading is at or near the minimum required levels~~ except flow through hot springs which can have a pH up to 9.4.

(2) and (3) remain as proposed.

37.115.1402 GENERAL POOL SIGN REQUIREMENT (1) and (2) remain as proposed.

(3) Pools and other water features must post signs with the following wording or substantially similar wording:

(a) and (b) remain as proposed.

(d) "Nonswimmers and children under age 14 shall not use the pool without a responsible adult ~~or lifeguard~~ in attendance";

(e) through (6) remain as proposed.

37.115.1403 SPA SIGNS (1) The following rules shall be posted adjacent to the spa. The wording shall be in the following language or substantially similar language:

(a) through (e) remain as proposed.

(f) "Staying in a spa too long may result in dizziness, fainting, and nausea"; and

(g) "Heat stroke warning - Users limited to 15 minutes in spa".~~; and~~

~~(h) flow-through hot springs shall post a separate sign indicating current temperature and pH if said pH is above 7.8 as well as child health warning as described in ARM 37.115.1845(1)(f).~~

(2) All ~~non-flow-through~~ spas must have a sign in letters not less than one inch high stating: "Children age 5 and under are not allowed in the spa".

(3) and (4) remain as proposed.

37.115.1501 SAFETY EQUIPMENT (1) Every pool, spa, and other water feature involving pooled water must have the following equipment readily available on-site:

(a) remains as proposed.

(b) a shepherd's crook or reaching pole ~~(made from nonconductive material if underwater lights are used)~~.

(2) and (3) remain as proposed.

37.115.1507 TELEPHONE REQUIRED (1) A telephone with an attached handset shall be affixed to the wall near the new or existing pool, spa, or other water feature for the purpose of contacting emergency medical services except ~~for flow-through and recirculation~~ splash decks.

(2) through (4) remain as proposed.

37.115.1601 WHEN LIFEGUARDS ARE REQUIRED (1) remains as proposed.

(2) Water slides that are 11 feet or greater in height may be required to provide a lifeguard at the bottom of the slide and an attendant at the top of the slide as decided by the department ~~or its designee~~.

(3) through (9) remain as proposed.

37.115.1602 WHEN LIFEGUARDS ARE NOT REQUIRED (1) remains as proposed.

~~(2) A tourist home providing a pool, spa, or other water feature to its guests must post a sign as required in ARM 37.115.301(1)(ii), but is exempt from the requirements of (1)(b).~~

~~(3) No lifeguards are required during organized competitive events or swim lessons when swimmer supervision has already been addressed.~~

37.115.1803 WATER SLIDES GENERALLY (1) When a water slide is provided in conjunction with a pool, the slide must:

(a) through (d) remain as proposed.

(e) water slides that are 11 feet or greater in height may be required to provide a lifeguard at the bottom of the slide and an attendant at the top of the slide when no clear line of sight is possible from the slide entrance platform to slide exit; and

(f) through (6) remain as proposed.

7. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: A commenter stated that there are times during testing, maintenance, or product delivery, the room may be unlocked, but attended. The commenter would like clarification to New Rule II (37.115.1020).

RESPONSE #1: The department agrees and has added language to allow for times when the chemical storage room may be unlocked while attended by pool operators or facility staff.

COMMENT #2: A commenter stated that there are conflicting compliance dates for retrofitting barriers in ARM 37.115.104(1)(b), 37.115.604(3), and 37.115.605(1).

RESPONSE #2: The department has changed the compliance dates for retrofitting barriers at existing facilities allowing reasonable time for corrections to be made.

COMMENT #3: A commenter stated that ARM 37.115.105(72) relating to hydrotherapy pools, was too limiting.

RESPONSE #3: The department agrees and language has been returned to original content.

COMMENT #4: A commenter stated that the requirement for immediate closure in ARM 37.115.301(1)(p) as related to pH does not take "flow through hot springs" into account.

RESPONSE #4: The department agrees and has added language to accommodate flow through hot springs where a higher pH is allowed.

COMMENT #5: A commenter proposed that ARM 37.115.301(1)(q) be changed to allow the operator to verify that appropriate actions have been taken to remain in compliance with the VGBPSSA.

RESPONSE #5: The department has changed the language to allow the operator to determine lack of compliance. However, the language in ARM 37.115.301 allows the pool owner or operator to take steps to resolve the safety violations. Furthermore, the pool must still comply with the requirement in ARM 37.115.508.

COMMENT #6: A commenter stated concern over the use of the words "record" and "report" in ARM 37.115.301(3).

RESPONSE #6: The department believes "record" is an indication of the need to keep documentation, and "report" is to be turned into the department. The language has been clarified in the rule.

COMMENT #7: Several commenters stated that the term "or their designee" was unnecessary because it is already addressed in the definition of "department" in ARM 37.115.302(2).

RESPONSE #7: The department agrees and has removed the language.

COMMENT #8: A commenter requested clearer language as it related to acceptable secondary disinfection methods in ARM 37.115.303(2).

RESPONSE #8: The department agrees, and has added language to allow for proven methods of disinfection that the department may approve.

COMMENT #9: A commenter noted that in ARM 37.115.312(3) the plan review is done off site, and site visits are part of the construction process.

RESPONSE #9: The department agrees, and has added language for clarification.

COMMENT #10: A commenter had suggestions for reworking ARM 37.115.321(1).

RESPONSE #10: The department believes the existing language is substantially similar and the wording will remain as proposed.

COMMENT #11: A commenter suggested adding language consistent with the requirements of the VGBPSSA, and drain covers are required to have a stamp on them.

RESPONSE #11: The department agrees and has changed the language in ARM 37.115.508(4).

COMMENT #12: A commenter noted that the language in ARM 37.115.513(1) only addresses "indoor" pools, and lighting is needed at outdoor facilities operating after dark.

RESPONSE #12: The department agrees and "indoor" has been removed to account for lighting requirements at outdoor pools.

COMMENT #13: A commenter suggested new language for ARM 37.115.517(2) pertaining to deck areas surrounding pools.

RESPONSE #13: The department believes the proposed language is substantially similar and will remain as proposed.

COMMENT #14: Several commenters suggested more concise "decking" language in ARM 37.115.517(8).

RESPONSE #14: The department agrees and has consolidated language.

COMMENT #15: A commenter suggested using "ing" on deck to be consistent with ARM 37.115.513.

RESPONSE #15: The department believes the language is substantially similar and conveys the intent. The language will remain as proposed.

COMMENT #16: A commenter noted that the requirements for barriers around splash decks already exists in ARM 37.115.602.

RESPONSE #16: The department agrees and has removed ARM 37.115.603 as it was redundant.

COMMENT #17: A commenter agreed with language and suggested adopting FCS Circular 1 in reference to water supply.

RESPONSE #17: The department agrees with the commenter's assessment of Circular 1, but believes this would be a substantial change that will be addressed in the next administrative rule proposal. Substantial changes require a public comment period. Since the intent is still met, the language will remain as proposed.

COMMENT #18: A commenter noted that this section appears to only deal with pools, while (3) deals with both pools and spas, in ARM 37.115.604(2).

RESPONSE #18: The department agrees and added language to include spas.

COMMENT #19: Several commenters noted that language concerning gate latches at 54 inches and a fence at 48 inches was confusing and apparel a physical impossibility.

RESPONSE #19: The department concedes, while there are mechanisms to achieve this, new language consistent with the International Code Council was put in place of previous language in ARM 37.115.604(3).

COMMENT #20: Commenter noted that a compliance date in ARM 37.115.605(1) was in conflict with ARM 37.115.144 and 37.115.605.

RESPONSE #20: The department agrees and has changed said date to be consistent with ARM 37.115.104(1)(b).

COMMENT #21: A commenter suggested adding language in ARM 37.115.902(1)(b) to specify flooring conductive to wet areas and be nonslip.

RESPONSE #21: The department believes this issue is already addressed in building code and the language will remain as proposed.

COMMENT #22: Commenter felt language in ARM 37.115.902 was confusing and suggested a wording change.

RESPONSE #22: The department believes the existing language is substantially similar, and will remain as proposed.

COMMENT #23: Several commenters suggested simplified language in reference to Baby Changing Tables, in ARM 37.115.905.

RESPONSE #23: The department concurs, thus language was simplified and condensed, while maintaining adequate health and safety.

COMMENT #24: A commenter was concerned about multisection pools and turnover rates in "multiuse" pools, in ARM 37.115.1002(5).

RESPONSE #24: The department believes there is a misunderstanding as the term "multiuses" is actually "multisection" in the latest proposal. Wording was added however, for situations brought to light by the commenter of situations that require further site specific evaluation.

COMMENT #25: Commenter suggested simplified language concerning floor inlets, in ARM 37.115.1006(6).

RESPONSE #25: The department concurs and believes the suggested language addresses all health and safety requirements intended.

COMMENT #26: Commenter was concerned the authority to require adequately trained staff was going to be limited, or eliminated in ARM 37.115.1101(4).

RESPONSE #26: The department believes the requirement for qualified operators has been addressed in ARM 37.115.1101(2) and will the changes will be amended as shown in the notice.

COMMENT #27: Several commenters noted errors in naming method of testing for individual parameters, and that proposed language in ARM 37.115.1301(6) could be simplified and expanded.

RESPONSE #27: The department agrees and has corrected grammatical errors and modified language in (6) to better define alternative methods that may be employed.

COMMENT #28: A commenter felt it is unrealistic to require testing four times per day in some pools as required in ARM 37.115.1302.

RESPONSE #28: The department believes sampling every four hours is necessary to monitor pool chemistry and will not change the language.

COMMENT #29: Several commenters noted the language in ARM 37.115.1307(2) implied sanitizer only need be introduced when the pool or spa is open, and that occasional hand dosing is necessary.

RESPONSE #29: The department agrees and removed language implying sanitizing only done during open hours, and language added to accommodate hand dosing when bathers are not present.

COMMENT #30: Several comments noted errors in ARM 37.115.1308, Table 6 from grammatical to conflicting and confusing parameters. The primary and prominent concern was that concerning the upper limit of Cyanuric Acid (CYA). While this comment was not universally agreed upon, empirical data was submitted and reviewed; several professionals and equipment manufacturers were contacted.

RESPONSE #30: The department agrees with the vast majority of commenters that in field studies a level of CYA up to 100ppm does not significantly interfere with the efficacy of chlorine, and automatic equipment when properly maintained and calibrated is not hindered by CYA levels up to 100ppm: The department will return the maximum CYA level at 100ppm. Several other changes were made to the table for consistency, clarification, and simplification. The last column was eliminated as it was unnecessary to outline parameters.

COMMENT #31: Commenter noted that language in ARM 37.115.1309 was not concise and open to interpretation and further, did not take into account that Flow Through Hot Springs are allowed to reach a pH of 9.4.

RESPONSE #31: The department agrees and has removed unclear language and accounted for Flow Through Hot Springs.

COMMENT #32: In ARM 37.115.1402(3)(d), several commenters noted that "lifeguards are not baby sitters", and undue burden of watching unattended children may cause more risk for other bathers.

RESPONSE #32: The department agrees and the new language has been removed.

COMMENT #33: A commenter noted that the additional sign requirement in ARM 37.115.1403(1)(h) is covered in the more appropriate section ARM 37.115.1845(4) dealing specifically with Flow Through Hot Springs.

RESPONSE #33: The department agrees and language has been removed from ARM 37.115.1403(l)(h).

COMMENT #34: A commenter noted that proposed language was confusing and unnecessary in ARM 37.115.1403(2).

RESPONSE #34: The department agrees and has removed proposed language from ARM 37.115.1403(2).

COMMENT #35: A commenter noted that the language in ARM 37.115.1501(1)(b), is not achievable as all hooks have components that are conductive.

RESPONSE #35: The department agrees and has removed the proposed language.

COMMENT #36: A commenter was opposed to removing language addressing recirculated water in a splash deck in ARM 115.1406(1)(c).

RESPONSE #36: The department believes a single sign for all splash decks, not just recirculating splash decks is more inclusive and appropriate. The language will remain as proposed.

COMMENT #37: A commenter noted that there was proposed language in ARM 37.115.1507(1) that was unnecessary to define a splash deck.

RESPONSE #37: The department agrees and has removed superfluous language.

COMMENT #38: A commenter was concerned about enforceability of lifeguards being "attentive" in ARM 37.115.1601(9).

RESPONSE #38: The department believes that this is an avenue to document a situation that is observed at the time of inspection and does not extend liability beyond the time of inspection. The language will remain as proposed.

COMMENT #39: A commenter noted that tourist home pools and spas, ARM 37.115.1602(2), are not licensed, therefore have no signage requirements in this rule.

RESPONSE #39: The department agrees and has deleted ARM 37.115.1602(2).

COMMENT #40: Regarding ARM 37.115.1602(3), several commenters stated that during organized events such as swim meets and swim lessons the attending staff may be easily distracted, whereas a lifeguard should be attentive to all swimmers at all times.

RESPONSE #40: The department agrees. The proposed language in ARM 37.115.1602(3) has been deleted.

COMMENT #41: Several commenters noted that without further guidance the requirement remains unclear in reference in ARM 37.115.1803(1)(e) to attendance at water slides eleven feet in height or greater.

RESPONSE #41: The department acknowledges the issue and has added further clarification as to when an attendant may be required.

COMMENT #42: A commenter noted that restroom requirements in ARM 37.115.1814, have previously been addressed in ARM 37.115.902 and ARM 37.115.903.

RESPONSE #42: The department agrees. ARM 37.115.1814 has been deleted.

COMMENT #43: A comment was made regarding ARM 37.115.1845(4), the enforceability of restricting children under five from hot water environments.

RESPONSE #43: While the department acknowledges the difficulty with restricting children from hot water environments, the department believes notification to parents is necessary. The proposed language will remain as proposed.

/s/ Shannon L. McDonald
Rule Reviewer

/s/ Hank Hudson for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State November 28, 2011

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the adoption of New Rule I (ARM 42.20.173), amendment of ARM 42.20.432, and repeal of ARM 42.20.172, relating to validating sales information and extension of statutory deadline for assessment reviews | ) ) ) ) ) ) | NOTICE OF ADOPTION, AMENDMENT, AND REPEAL |

TO: All Concerned Persons

1. On August 25, 2011, the department published MAR Notice No. 42-2-866 regarding the proposed adoption, amendment, and repeal of the above-stated rules at page 1646 of the 2011 Montana Administrative Register, issue no.16.

2. A public hearing was held on September 19, 2011, to consider the proposed adoption, amendment, and repeal. Ms. Nancy Schlepp, President of the Montana Taxpayers Association, appeared at the hearing and also provided written comments subsequent to the hearing. Also appearing at the hearing was Joe Roberts, representing the Montana Association of Realtors. Mr. Roberts stated he supported the comments provided by Ms. Schlepp. Her comments are summarized as follows along with the response of the department:

COMMENT NO. 1: Ms. Schlepp provided comments regarding the proposed amendments to ARM 42.20.432(3), stating that this is a clear misuse of the authority to implement administrative rules, and that the language being added here is language that Governor Schweitzer tried to amendatory veto into HB 333 and failed.

Ms. Schlepp also included the following quote from the Governor's veto letter to the Secretary of State: "I delivered to the Legislature an amendatory veto of HB 333 to require that distressed sales be considered when such sales comprised at least 20 percent of sales, consistent with industry standards, but the Legislature did not pass my proposed amendments. I have now chosen to veto HB 333, as I believe the changes directed by the bill would diminish the fairness of our current property appraisal standards."

Ms. Schlepp added that even with the conversation between the Senate and the department having occurred, as referenced under the reasonable necessity for this proposed rule amendment, this is a legislative decision, not an administrative rule decision, and that the Montana Taxpayers Association opposes the changes and requests that the department reject and not adopt the proposed amendments to ARM 42.20.432.

RESPONSE NO. 1: The department appreciates Ms. Schlepp's and Mr. Robert's interest in this rulemaking action.

The understanding between the department and the Senate Taxation Committee was for the department to proceed with implementing the IAAO distressed sale standard within the context of SB 295, L. 2011 and adopt or amend

the rules to implement the required changes to the property tax appeals process. New Rule I (ARM 42.20.173) is proposed by the department to follow-up on that understanding with the 2011 Senate Taxation Committee. Although the IAAO standard was included in House Bill 333, which was proposed and failed before the 2011 Legislature, the department feels the intention of the discussions and agreement with the Senate Taxation Committee was to propose a rule to address this issue in any case.

The department does not believe that this rule represents a misuse of the department's authority. As the Legislature may, through its rules review oversight process, step into this rulemaking action if the context of the rule were considered to be contrary to the legislative intent or interpreted incorrectly by the department. To date, there has been no legislative intercession into the process, including the sponsor of Senate Bill 295, who served as the co-chairman of the 2011 Senate Taxation Committee and was fully informed of this proposed rule.

3. Therefore, the department adopts New Rule I (42.20.173), amends ARM 42.20.432, and repeals ARM 42.20.172 as proposed.

4. An electronic copy of this notice is available on the department's web site at www.revenue.mt.gov. Locate "Legal Resources" in the left hand column, select the "Rules" link and view the options under the "Notice of Proposed Rulemaking" heading. The department strives to make the electronic copy of this 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 web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

| | |
|---|---|
| /s/ Cleo Anderson | /s/ Dan R. Bucks |
| CLEO ANDERSON | DAN R. BUCKS |
| Rule Reviewer | Director of Revenue |

Certified to Secretary of State November 28, 2011

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of ARM 42.21.158 and 42.21.160 relating to the aggregation of property tax for certain property | ) ) ) ) | NOTICE OF AMENDMENT |

TO: All Concerned Persons

1. On August 25, 2011, the department published MAR Notice No. 42-2-867 regarding the proposed amendment of the above-stated rules at page 1650 of the 2011 Montana Administrative Register, issue no. 16.

2. A public hearing was held on September 19, 2011, to consider the proposed amendment. Ms. Nancy Schlepp, President of the Montana Taxpayers Association (MonTax), appeared and testified at the hearing. Oral testimony and written comments subsequently received are summarized as follows along with the response of the department:

COMMENT NO. 1: Ms. Schlepp asked, relative to ARM 42.21.158(2), how the $20K exemption is going to be handled. She commented that it appears in the proposed rule that the department is still going to want people with only $20K or less to keep reporting every year. Ms. Schlepp explained that the reason they are hopeful this is amended out is because in a recent Council on State Taxation (COST) scorecard, Montana received an A rating for the exclusion of de minimis values for exempting $20K and below, and with this rule amendment it would be required where it wasn't before.

In addition to testifying at the hearing, Ms. Schlepp provided follow-up written comments in which she added that MonTax opposes adoption of the entire portion of this rule and requests that the requirement remain as it has been since 2005, because it is an increased and unnecessary reporting requirement, and the exclusion for de minimis property values is one of the key components to fostering open and transparent tax collections.

RESPONSE NO. 1: The department appreciates Ms. Schlepp's comments, participation in this rulemaking action, and the opportunity to confirm that the current $20,000 exemption from taxation threshold for personal property remains in effect. If an individual's or business entity's aggregate market value is $20,000 or less, the class eight property is exempt from taxation. The proposed amendment to ARM 42.21.158 does not change the existing exemption threshold for class eight personal property.

The class eight property reporting requirements also remain unchanged, although, the department restructured the sentence for readability only. The current reporting requirements were first adopted in 2006 and updated in 2010 and implemented with taxpayers early in 2011. Individuals or business entities with class eight property that has an aggregate market value of $20,000 or less are required to

report biennially. Individuals or business entities with class eight property that has an aggregate market value of $20,000 or more are required to report annually.

The proposed amendment to ARM 42.21.158 does not change the existing reporting requirements.

COMMENT NO. 2: In her written comments, Ms. Schlepp also requested that the department provide a list of all items considered business equipment.

RESPONSE NO. 2: Section 15-6-138, MCA, provides detailed descriptions of the types of business equipment that the department considers "class eight property." The proposed amendment to ARM 42.21.158 does not change the existing statutory description.

COMMENT NO. 3: Mr. John Bennion, Government Relations Director for the Montana Chamber of Commerce, provided written comments about the proposed amendments to ARM 42.21.158. Mr. Bennion commented that in order for a business to be exempt from class eight property, the total business equipment tax value for the business must be under $20K, a threshold that was created in the 2005 Legislative Session; and that as far as he knows, no reporting changes have been made since then, including the business equipment tax reductions contained in Senate Bill 372, L. 2011. He further stated that, as such, this reporting requirement for businesses with less than $20K in equipment appears to be just one more tedious reporting requirement from a government agency.

Mr. Bennion further commented that the cost of complying with government regulation is significant, especially for small businesses. He wrote that a small, new reporting requirement may not seem like a significant burden to a government agency, but any new, unnecessary regulation would be adding to an already substantial amount of regulation and forms required to run a business. Mr. Bennion added that this is why they have routinely lobbied in support of requiring agencies like the Department of Revenue to look at the compliance costs of additional regulations before introducing them.

Mr. Bennion stated that the new reporting requirement is likely to impact smaller businesses, since they are often the entities with the least amount of business equipment. He further stated if this requirement has not been necessary since the creation of the 2005 threshold, they would encourage the department to continue the practice of excusing exempt businesses from reporting every other year.

RESPONSE NO. 3: The department understands the reporting requirement challenges that face small businesses and appreciates Mr. Bennion's participation in this rulemaking action. Mr. Bennion is correct, the Legislature approved the $20,000 threshold in 2005, and that has remained unchanged. The department is required by the Montana Constitution to assess and equalize the valuation of all property. To ensure the equalization of taxes, the department requires, at a minimum, the biennial reporting of all class eight property. As noted in Response No. 1, the current biennial reporting requirement is substantially unchanged. It was first adopted in 2006, updated in 2010 and implemented with the taxpayers early in 2011.

As noted in Response No. 4, the biennial reporting is necessary to ensure proper compliance with the $20,000 threshold. The department is exploring ways to make the reporting process less burdensome for all class eight property taxpayers.

COMMENT NO. 4: Mr. Jake Cummins, Executive Vice President of the Montana Farm Bureau Federations, also provided written comments on the proposed amendments to ARM 42.21.158(2). He stated their concern is that businesses and individuals would have to report all exempt business equipment, even if the total amount falls under the $20K exemption level. Mr. Cummins explained that this requirement will only cause added and unnecessary paperwork for anyone and everyone who owns any amount of business equipment and will also create added and unnecessary work for department staff. He further questioned if the property is exempt as stated in the law, "why must it be reported?"

RESPONSE NO. 4: The department appreciates Mr. Cummins' interest and comments on the proposed rule amendments.

The law requires the department to ensure that all property taxpayers are paying their fair share of taxes. The law does not allow the department to assume that once an individual's or business entity's aggregate market value is $20,000 or less, that it will not change. The department adheres to the constitutional and statutory stipulation of equalization by requiring biennial reporting of all individual's and business entity's class eight property to ensure proper compliance with the $20,000 threshold.

COMMENT NO. 5: Mr. Cummins also expressed concern with striking (3) in ARM 42.21.158, because it is important that the department continue to provide educational information about class eight property exemptions to everyone who owns class eight property. He further stated that this is especially important because of the changes made to the law in 2011. He also explained that their members pay many types of taxes and the rules can be quite confusing and, therefore, anything the department can provide to help clarify any and all tax law would be appreciated.

RESPONSE NO. 5: The department appreciates Mr. Cummins bringing his concerns regarding this proposed amendment to the department's attention. The department agrees with his concerns. Upon further review, it was determined that the department struck (3) of ARM 42.21.158 in error. The rule is being further amended, as shown below, to correct the error and replace that section. The department will continue to provide educational information on its web site, personal property reporting forms, and in the local revenue offices.

3. Based on the comments received, the department further amends ARM 42. 21.158 as follows, stricken matter interlined, new matter underlined:

42.21.158 PROPERTY REPORTING REQUIREMENTS (1) and (2) remain as proposed.

(3) The department will provide educational information on the class eight

personal property exemption to all individual taxpayers or business entities the department is aware of that currently have class eight business personal property.

(3) remains as proposed but is renumbered (4).

~~(4)~~(5) Statements postmarked after March 15 will be assessed the penalty provided in ~~(3)~~(4) unless:

(a) the taxpayer provides evidence of their inability to comply with the timeframes set forth in ~~(3)~~(4) due to hospitalization, physical illness, infirmity, or mental illness; and

(b) evidence that this/these condition(s), while not necessarily continuous, existed at sufficient levels in the period of January 1 to March 15 to prevent timely filing of the reporting form.

(5) through (9)(b) remain as proposed, but are renumbered (6) through (10)(b).

AUTH: 15-1-201, 15-9-101, MCA
IMP: 15-1-121, 15-1-303, 15-6-138, 15-8-104, 15-8-301, 15-8-303, 15-8-309, 15-9-101, 15-24-902, 15-24-903, 15-24-904, 15-24-905, MCA

4. Therefore, the department amends ARM 42.21.158 with the amendments listed above and amends ARM 42.21.160 as proposed.

5. An electronic copy of this notice is available on the department's web site at www.revenue.mt.gov. Locate "Legal Resources" in the left hand column, select the "Rules" link and view the options under the "Notice of Proposed Rulemaking" heading. The department strives to make the electronic copy of this 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 web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State November 28, 2011

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the adoption of New Rule I (42.9.110), New Rule II (42.9.111), New Rule III (42.9.502), and New Rule IV (42.9.107), and the amendment of ARM 42.9.102, 42.9.106, 42.9.203, and 42.15.120 relating to pass-through entities | ) ) ) ) ) ) ) | NOTICE OF ADOPTION AND AMENDMENT |

TO: All Concerned Persons

1. On September 22, 2011, the department published MAR Notice No. 42-2-869 regarding the proposed adoption and amendment of the above-stated rules at page 1992 of the 2011 Montana Administrative Register, issue no. 18.

2. A public hearing was held on October 17, 2011, to consider the proposed adoption and amendment of the above-stated rules. Leo Berry, Attorney representing the National Association of Publicly Traded Partnerships (NAPTP), appeared and testified at the hearing. Subsequent to the hearing, the department also received written comments from Lindsay Sander, of NAPTP, William Gregory Turner, Attorney for the Council On State Taxation (COST), Jane Egan, of the Montana Society of Certified Public Accountants (MSCPA), and Nancy Schlepp, of the Montana Taxpayers Association (MonTax). Oral and written comments received are summarized as follows along with the responses of the department.

COMMENT NO. 1: Leo Berry, NAPTP, appeared and testified at the hearing stating that there is a lack of statutory authority for enactment of the rules. He also questioned what changes were made to the statute that prompted the rule proposals.

Lindsay Sander, NAPTP, also provided written comments stating that she does not believe the cited statutes provide clear and specific authority to adopt the rules as required by 2-4-305, MCA, nor do the statements of reasonable necessity provide adequate reasons for their adoption as required by law.

RESPONSE NO. 1: The department appreciates Mr. Berry's and Ms. Sander's questions regarding the proper citations for the proposed rules and rule amendments. However, the department respectfully disagrees about the lack of statutory authority. Sections 15-1-201 and 15-30-2620, MCA, provide direct statutory authority for the department to adopt administrative rules and rule amendments to administer revenue laws.

These statutes are included in each proposed new rule and rule amendment in the published proposal notice; however, when preparing the responses to the comments it was noticed that that all of the applicable statutes for every rule were not included. The statutes that were inadvertently omitted are added to the rules as shown below. These omissions may have led to the need for clarification as

evidenced by some of the comments. The department apologizes for any confusion that was caused by these omissions.

All of the cited statutes were effective prior to the 2011 legislative session, and were not amended in that session. The department believes that the reasonable necessities for each proposed new rule and rule amendment clearly describe the purpose for the proposal and, if problems or circumstances arose that prompted the rule proposals, they were identified in the reasonable necessities for each rule contained in the proposal notice.

COMMENT NO. 2: Mr. Berry asked which legislative sponsors were notified of the proposed rulemaking action, as was indicated in the opening statement of the rule hearing.

RESPONSE NO. 2: Cleo Anderson, the department's administrative rule hearings officer, responded to Mr. Berry's comment during the hearing, apologizing for the confusion and explaining that the department is required, under 2-4-302(a), MCA, to notify legislative sponsors and interested parties regarding a proposed rulemaking action within 3 days of publication of the proposal notice. As part of the standard introduction to each hearing, the hearings officer informs the attendees that the department has complied with this requirement. Ms. Anderson further explained that, in this particular rulemaking action, the department determined that sponsor notification did not apply. This determination was also noted on page 2004, of proposal notice 42-2-869 in the 2011 Montana Administrative Register, No. 18.

COMMENT NO. 3: Mr. Berry and Ms. Sander, requested a meeting with the department prior to the adoption and amendment of these rules in order to discuss the problems that NAPTP and the publicly traded partnership (PTP) industry foresees with the adoption of the proposed rules. Nancy Schlepp, MonTax, also requested that the department host a meeting with MonTax and other interested parties before the rules are implemented.

RESPONSE NO. 3: The Montana Administrative Procedure Act does not provide for additional or ad hoc means for public input during the rulemaking proceeding. Consequently, the department respectfully declines to afford the representatives of these two entities more input than other members of the public have been or will be given.

COMMENT NO. 4: Mr. Berry commented that it's unclear how the proposed rules impact PTPs and other pass-through entities in multi-tier pass-through entity structures. Ms. Sander and Mr. Berry further explained that the industry and the department have different understandings of what is a second-tier or a lower-tier pass-through entity versus a higher tier pass-through entity. Mr. Berry and Ms. Sander also commented that several other states extend the withholding exemption for PTPs to the lower-tier owners as well.

RESPONSE NO. 4: The department thanks Mr. Berry and Ms. Sander for the opportunity to clarify how the proposed rules apply to PTPs and lower-tier pass-

through entities in which these entities have direct and indirect ownership interests.

Because a PTP is a pass-through entity, the applicable statutes and rules that affect pass-through entities also generally affect PTPs. However, PTPs are exempt from the requirement under 15-30-3313(1), MCA, to elect composite tax or remittance of tax if the PTP complies with 15-30-3302(4) and 15-30-3313(7), MCA. The responses to Comment No. 15 and Comment No. 20, explain in further detail, the exceptions for PTPs in regard to the proposed new rules and rule amendments.

The department confirms that the rules consistently use the same order and diagram form used in Securities and Exchange Commission reports, tax treatises, and professional publications in describing tiered entities – that is the PTP (and other owners) are at the top of the ownership pyramid and the owned entities are below.

The responsibility of a first-tier pass-through entity to remit tax or file a composite return on behalf of a second-tier pass-through entity (which does not establish that its share of Montana source income is fully accounted for on Montana returns) is statutory. According to the department's information, no other state has this particular requirement.

Some states that adopted pass-through reporting and remittance statutes in years after Montana's enactment require that all pass-through entities withhold for all owners. The Montana provision was crafted in 2003 with the help of MSCPA to address the fact that the first-tier pass-through entity usually knows only its own owners and that there is no effective means of tracing Montana source income through higher tiers. The provision was intended to impose a tax liability on the second-tier pass-through entity (if a composite return was not filed) except in the instance, usually involving small entities above which there was no further tiering, when the second-tier pass-through entity could identify all owners to which its share of income was ultimately passed and establish that Montana tax was being paid.

A refundable credit for the second-tier pass-through entity's paid tax was provided so that, like any other Montana tax credit available to owners of pass-through entities, it would be reflected in the owners' distributable share of tax items that are passed through and could be claimed by the ultimate owner when they file a Montana return reporting the Montana income. The credit was made refundable so that even if the ultimate owner owed a lesser amount (or no) Montana tax, the owner's share of the amount paid would be recoverable by that recipient of Montana source income.

COMMENT NO. 5: Jane Egan, MSCPA, provided an overall comment that the administrative rules process is in place to clarify existing law, stating "however this new rule appears to be expanding or changing existing law and circumventing the legislative process." Ms. Egan also commented that it is similar to SB 396, L. 2011, which did not pass the 2011 Legislature.

Nancy Schlepp, MonTax, also commented that the language for proposed New Rule III actually originated from possible substitute language to SB 396 of the 2011 Legislative Session. Senate Bill 396 did not make it through the process and thus substitute language was not considered.

RESPONSE NO. 5: The department appreciates Ms. Egan's and Ms.

Schlepp's comments and participation in this rulemaking process. While Ms. Egan presented this as an overall comment, only one of the proposed new rules, New Rule III, relates to SB 396. Ms. Egan's only specific comment on proposed New Rule III is that it provides clarity.

In regard to Ms. Schlepp's comment, SB 396 was related to the sale of an interest in a pass-through entity (partnerships, S corporations, and disregarded entities). In the course of the department's work and through the SB 396 hearings, the department is aware that some taxpayers drop assets into single member LLCs and then sell the interest in the LLC, rather than the assets, to avoid reporting the sale of the assets as Montana source income.

For both federal and Montana purposes, a disregarded entity is disregarded for all tax purposes. If parties formulate a sale, as a sale of the member interest in a disregarded entity rather than a sale of the assets of the disregarded entity, the disregarded entity is disregarded and the transaction is treated as a sale of assets by the owner.

The department included the section that describes this treatment of disregarded entities in SB 396, only to clarify the appropriate treatment under existing state law, not to expand the existing law. New Rule III simply reflects the department's interpretation of current statute and is included to inform the public of this interpretation.

COMMENT NO. 6: Ms. Egan commented that wherever the phrase "audit adjustments" are referenced in proposed New Rule I, the phrase should be changed to "agreed upon audit adjustments," and that if audit adjustments affect allocation, the pass-through entity must be notified. She suggested the following language be added regarding the notification: "Once the adjustments are agreed upon by DOR and entity partners, the pass-through entity will prepare revised schedule(s) K-1 and distribute them. If DOR assesses the pass-through without agreement, DOR will schedule out adjustments and provide them to the pass-through entity."

Ms. Schlepp asked whether the audit adjustments discussed in proposed New Rule I are agreed upon adjustments or unilateral adjustments by the department, how the audit adjustments would be handled if there is no taxpayer agreement between the department and the taxpayer about the adjustments, and whether the department would send out a new schedule(s) K-1 once changes are agreed upon.

RESPONSE NO. 6: The department appreciates Ms. Egan's and Ms. Schlepp's comments on proposed New Rule I. There is no statutory provision for agreed upon audit adjustments. As proposed New Rule I(1) explains, the details of an audit adjustment of a pass-through entity's information return will also be reported to the pass-through entity and owners of the pass-through entity. The department reports details of audit adjustments in audit reports that describe the adjustments and, if applicable, any increase or decrease in tax as a result of the audit adjustments. If the department adjusts a pass-through entity return, the department does not send out new schedule(s) K-1.

Because Montana's legislature has not adopted the Tax Equity and Fiscal Responsibility Act (TEFRA) -like unified partnership audit procedures, the

department must assess any additional tax liability to the owner (regardless of the status of any proceeding by the pass-through entity contesting the audit adjustment) before the owner's statute of limitations expires. For example, the owners of partnerships may be individuals, corporations, or other pass-through entities; the ultimate taxpayer to which a pass-through entity's items of income, deduction, or credit pass, may be either an individual, with a five-year statute of limitations or a corporation, with a three-year statute of limitations.

TEFRA-like unified partnership audit procedures would require a pass-through entity's tax matters partner to be responsible for all partnership level issues. In addition, the unified partnership audit procedures would bind other partners to proceedings that involve that tax matters partner and statutes of limitation would be extended to impose any additional tax that is attributable to final TEFRA-like partnership audit adjustments.

In the absence of these procedures, the department must determine the tax liability and adjust the ultimate owner's tax return. The pass-through entities themselves, who file only information returns and do not have a tax liability (except for composite tax), are sent the audit adjustments only so they may appear and be part of resolving the department's audit adjustments that result in changes to the ultimate owners' Montana tax liability. The audit adjustment may be appealed as provided for in 15-1-211, MCA. The department added additional implementing statutes for this rule proposal as described in the response to Comment No. 1.

COMMENT NO. 7: Ms. Schlepp also asked how proposed New Rule I would affect individual partners of a pass-through entity.

RESPONSE NO. 7: If the department sends an audit adjustment to a pass-through entity, under the provisions of proposed New Rule I, the department would also send the details of the audit adjustment to an individual owner of the pass-through entity as provided in proposed New Rule I(1). In addition, if the audit adjustment affects an individual owner's distributive share of items that were passed through during the audit period, the department may, if necessary, adjust the individual's tax return to reflect the audit adjustments to the owner's distributive share of pass-through items.

If this occurs, the department will also notify the individual owner of these adjustments as provided in proposed New Rule I(3). If the individual owner has not filed a tax return for the audit period, and it is necessary that the individual owner file a return to report Montana source income, then the department may request that the individual owner file a tax return. If the individual owner does not file a tax return after being requested to do so, the department may estimate the owner's tax liability as provided in proposed New Rule I(4).

COMMENT NO. 8: Ms. Schlepp commented that proposed New Rule I places the responsibility on the taxpayer for appealing an estimated assessment or adjustment with no clear guidance or authority.

RESPONSE NO. 8: The department has attempted to provide the necessary clarity for appealing an audit adjustment or an estimated assessment that originated

with a pass-through entity in the response to Comment No. 6. The purpose of proposed New Rule I is to explain the circumstances under which the department can provide information to owners of pass-through entities and also to explain the type of information that the department can provide. Proposed New Rule I does not address appeals of audit adjustments or estimated assessments.

COMMENT NO. 9: For proposed New Rule I, Ms. Schlepp asked if the department could provide data regarding the increased number of pass-through entities over the past 10 years.

RESPONSE NO. 9: The following chart summarizes the number of Montana returns filed by C corporations, S corporations, and partnerships since fiscal year 2000.

| Returns Filed in Fiscal Year | Corporation License Returns | S-Corporation Returns | Partnership Returns |
|---|---|---|---|
| 2000 | 16,972 | 14,249 | 10,398 |
| 2001 | 16,250 | 15,060 | 10,905 |
| 2002 | 16,706 | 16,471 | 11,548 |
| 2003 | 16,383 | 17,828 | 11,717 |
| 2004 | 16,296 | 19,328 | 12,475 |
| 2005 | 16,200 | 21,591 | 13,500 |
| 2006 | 16,193 | 21,670 | 15,719 |
| 2007 | 17,492 | 25,063 | 17,683 |
| 2008 | 17,997 | 26,452 | 19,200 |
| 2009 | 17,276 | 27,445 | 20,290 |
| 2010 | 17,673 | 27,713 | 21,286 |

COMMENT NO. 10: In regard to proposed New Rule I, Ms. Schlepp requested more information about the confidentiality issues that have been identified by the department.

RESPONSE NO. 10: The department regularly encounters tiered entity structures that have multiple layers. For example, a 95 percent interest in the first-tier pass-through entity is owned by a partnership (the second-tier entity); a 60 percent interest in the second-tier entity is owned by another partnership (the third-tier entity); a 35 percent interest in the third-tier entity is owned by another partnership (the fourth-tier entity); an 80 percent interest in the fourth-tier entity is owned by another partnership (the fifth-tier entity); the fifth-tier entity is owned 50 percent by a C corporation and 50 percent by an S corporation (the sixth-tier entity); the S corporation is owned 80 percent by individual A, and 20 percent by individual B. Sections 15-30-2618 and 15-31-511, MCA, limit what tax information can be disclosed and to whom. These disclosure restrictions make no exceptions for the tiered entity structures.

The department interprets the statutes as restricting the disclosure of information about the first-tier entity's items of income, deduction, credit, or the

identity of its partners to the owners of the second, third, fourth, fifth, or sixth-tier entities, or other owners, without the first-tier entity's consent, or to permit the department to disclose adjustments it makes to the returns of individuals A or B resulting, in whole or in part, from adjustments made to the first-tier entity's information return without the consent of individuals A and B.

Corporations that file combined reports, as provided in ARM 42.26.204, are not affected by this rule and do not present similar confidentiality concerns. There are no equivalent provisions for combined reports by controlled pass-through entities.

COMMENT NO. 11: Ms. Schlepp further commented that there is concern about how New Rule I(7) fits with the apportionment principles for multi-state, multi-tier structures.

RESPONSE NO. 11: Proposed New Rule I(7) does not address or affect the apportionment of income by entities engaged in multi-state business. The department's responses to Comments No. 6, 7, and 10 provide a necessary explanation of the purpose and function of proposed New Rule I.

COMMENT NO. 12: Ms. Sander, Ms. Egan, and Ms. Schlepp objected to the language in (1) of proposed New Rule II, which states that the department may revise any return of an entity if, in the opinion of the department, it is incorrect in any essential respect.

Ms. Sander stated that this provision grants the department broad and excessive jurisdiction to change facts and figures without audit or other due processes and requests this provision be removed or amended. Ms. Egan requests the sentence be changed to add the words "with cause" and to strike the opinion language, and Ms. Schlepp stated that the department should not have opinions, but should follow statute explicitly. Ms. Schlepp further stated that the term "essential respect" is not defined anywhere and should not be used in the rules, and added that MonTax opposes legislating through rulemaking and requests that the department not adopt New Rule II.

William Gregory Turner, COST, stated the language was not supported by the authority cited by the department and is causing taxpayer confusion because it suggests the department has authority to revise returns whenever the department concludes that a return is "incorrect in any essential respect."

Mr. Berry commented that the rule proposal allows the department to modify filed returns, and he expressed concern that the ability to modify filed returns was an overreach in the department's statutory authority.

RESPONSE NO. 12: The department appreciates the comments to proposed New Rule II, but the listed statutory authority, 15-30-2605(1), MCA, specifically states "If, in the opinion of the department, any return of a taxpayer is in any essential respect incorrect, it may revise the return." The beginning of proposed New Rule II merely states existing statutory audit authority to provide context for the subsequent language in the proposed rule.

Proposed New Rule II relates to audit adjustments. Section (1) identifies why

the department would revise a return. Sections (2) through (6) describe the period of time within which the department will make those revisions. Partnerships may have a partner that is a corporation (subject to a 3-year statute of limitations on audit adjustments) and a partner that is an individual (subject to a 5-year statute of limitations on audit adjustments). The rule simply addresses the department's procedure for handling the different time limits.

To clarify the scope of proposed New Rule II, the department will amend the title of the rule to read "Pass-through Entities – Statute of Limitations for Audit Adjustments" as shown below.

COMMENT NO. 13: Ms. Egan asked for clarification of how the department would treat a composite tax return assessment if a C corporation was an eligible participating owner and the assessment took place outside of the corporate statute of limitations under the provisions of proposed New Rule II.

RESPONSE NO. 13: Proposed New Rule II(3) explains that, regardless of the entity type of the eligible participating taxpayer, the statute of limitations is 5 years for the composite tax return. A foreign C corporation can be an eligible participating taxpayer in a composite return, but if it elects for the pass-through entity to file a composite tax return on its behalf, then the applicable statute of limitations for the composite tax return is 5 years instead of 3 years. Composite tax returns and corporation license tax returns are two separate tax returns with separately applicable statutory provisions.

COMMENT NO. 14: Mr. Turner and Ms. Sander further commented that in proposed New Rule IV the department makes a distinction between operations income and flow-through income without the statutory authority to do so. Mr. Turner also commented that the reasonable necessity does not provide an explanation for the distinction.

RESPONSE NO. 14: The department respectfully disagrees that there is a lack of statutory authority for making a distinction between operations income and flow-through income. Section 15-1-201, MCA, provides direct statutory authority for the department to adopt administrative rules and rule amendments to administer revenue laws. In the course of developing rules, the department must often identify the meaning of certain terms as they apply to specific circumstances.

In pass-through entity structures with many tiers through which more than one entity's distributable shares of income pass, it is often difficult to clearly explain how rules may or may not apply. This rule uses the term 'operational income' to identify the income an entity in the tiered structure generates itself and the term 'flow-through income' to identify the income it receives from lower-tier pass-through entities. The department chose to use these descriptive terms because there are no terms in existing parlance that draw this distinction - a distinction that is important to achieve a proper tax result under Montana law and to assist taxpayers in preparing returns to comply with the law.

In the course of administering the tax reporting requirements of pass-through entities, the department has found that entities in tiered structures are not

consistently categorizing or reporting business and nonbusiness income, and that some upper-tier entities are simply lumping the flow-through income they receive with their own operations income. In proposed New Rule IV, the meanings of the terms 'operations income' and 'flow-through income' are limited to the rule itself in (1).

COMMENT NO. 15: Ms. Sander and Mr. Berry questioned how proposed New Rule IV applies to multi-tier structures that include one or more PTP.

RESPONSE NO. 15: Proposed New Rule IV, which addresses the reporting requirements of multi-tier pass-through entity structures, may affect how PTPs will report their Montana source income when filing their Montana pass-through entity information returns.

As is the case with any other business entity or individual, a PTP may own an interest in a pass-through entity (a "lower-tier" pass-through entity). Every pass-through entity with Montana source income is required to file an information return with the Montana Department of Revenue, as provided in 15-30-3303, MCA, which requires that pass-through entities report their income from all sources as well as the part of that total income that is Montana source income. A pass-through entity is also required to report this information to its owners on Montana Schedule(s) K-1, so the owners may appropriately report that income when filing their Montana tax returns.

If a pass-through entity's owner is another pass-through entity, the owner may or may not also be engaged in business producing its own Montana source income. If the owner does not have its own Montana source income, it will report its distributive share of Montana source income when it files its Montana information return. It will also report this Montana source income to its owner(s) when it sends them Montana Schedule(s) K-1.

The Montana Schedule(s) K-1 is provided to owner(s) so that they may appropriately report Montana source income when filing their Montana tax returns. The PTP, as an owner of one or more pass-through entities, should receive Montana Schedule(s) K-1 that report the total amount of Montana source income that is being passed through to the PTP. The PTP would then add the amount of any Montana source income it generates from its own activities or investments to the amount passed through to it and report that amount on its Montana pass-through entity information return, and on the Montana Schedule(s) K-1 that it provides to its partners.

Section 15-30-3313(7), MCA, provides that, unlike other pass-through entities, certain PTPs are not required to remit tax or file a composite return on behalf of its owners. Nothing about proposed New Rule IV affects this statutory provision.

COMMENT NO. 16: In regard to proposed New Rule IV, the department received several comments concerning the determination of business and nonbusiness income as well as concerns that the proposal required additional allocation and apportionment provisions.

Mr. Turner commented that the requirement to separately identify income as

business or nonbusiness was an "added complication to taxpayer filings."

Ms. Sander commented that the statement "the entity must then determine what part of this business and/or nonbusiness income is Montana source," in proposed New Rule IV(2), was not necessary because it restated statute.

Ms. Egan commented that they expect the department to follow federal definitions for business income and nonbusiness income per 15-31-501, MCA.

Ms. Schlepp also questioned why an entity would have to further separate its sources of income between the business or nonbusiness character of its income.

Mr. Berry, Ms. Sander, and Ms. Schlepp questioned the need for additional allocation and apportionment provisions.

RESPONSE NO. 16: The department thanks Mr. Turner, Mr. Sander, Ms. Egan, Ms. Schlepp, and Mr. Berry, for their comments, and welcomes this opportunity to further explain the purpose of the rule proposal.

Many partnerships and S corporations are now engaged in business in more than one state. Multi-state businesses that are subject to the reporting requirements of 15-30-3302, MCA, and in Title 15, chapter 31, part 3, MCA, need to separately identify business income and nonbusiness income so they may properly apportion a part of the business income to Montana (using Montana's three factor apportionment formula) and appropriately allocate any nonbusiness income to Montana or another state.

While the department may agree with Ms. Sander's comments that the rule appears to be saying what the law already requires, the department has found that pass-through entities in tiered structures are not consistently doing what the statute requires, which is why the department is providing additional and specific guidance for pass-through entities that are a part of a multi-tier structure.

The definitions of business income and nonbusiness income are provided in 15-1-601 (the Multistate Tax Compact), and 15-31-302, MCA. The federal definitions for business and nonbusiness income are not applicable to this rule under 15-31-501, or 15-30-2620, MCA, (which provide that if a term is not defined in the chapter, it has the same meaning as it does when used in a comparable context in the IRC). The terms "business" and "nonbusiness income" as used in the Multistate Tax Compact and in these rules are applicable only to state taxes and are the basis for apportioning multi-state income. There are no comparable terms or concepts in the federal tax system, which has no limits based on state boundaries. The Internal Revenue Code does use the same terms but in a completely different context. The federal definitions for these terms are limited to the calculation of net operating losses (IRC section 172) and have a completely different meaning.

The department included additional implementing statutes for this rule proposal as described in the response to Comment No. 1

COMMENT NO. 17: Ms. Schlepp and Ms. Sander commented in regard to proposed New Rule IV(6), that it gives the department "additional power to determine the business or nonbusiness character of an entity's operations or the Montana source character of an entity's flow-through income."

RESPONSE NO. 17: The department provided a detailed explanation for the

definitions of business income and nonbusiness income in its response to Comment No. 16. The character of an entity's income is either business or nonbusiness income. The department and taxpayers also must follow statutory provisions for the determination of Montana source income, and the rule proposal does not grant the department additional authority in regard to this determination.

The department must be able to determine if a taxpayer has correctly identified its income as business income and nonbusiness income, as well as whether or not the income is sourced to Montana, to confirm that the taxpayer correctly reported its income. The purpose of (6) is to ensure that the new rule does not limit the department's ability to perform this review as it is required to under 15-30-2605, MCA.

COMMENT NO. 18: For the proposed amendments to ARM 42.9.102, Ms. Egan asked what needs to be filed under the rule and what is an explanation for an event. She also requested examples.

RESPONSE NO. 18: No substantive amendments to ARM 42.9.102 are being proposed. ARM 42.9.102, needs to be followed in conjunction with the other rules that are part of the same chapter. Details about each type of information return that a pass-through entity is required to file are located in a separate subchapter for each type of entity. Partnership rules are in subchapter 3, S corporations rules are in subchapter 4, and disregarded entity rules are in subchapter 5.

ARM 42.9.510, which describes the filing requirements of a partnership that has elected under Section 761 of the IRC to be excluded from some or all of the partnership tax rules, is an example of an information return that is required to be filed only on the happening of an event. The rule provides that the partnership has to file the Montana disregarded entity return form, DER-1, within 90 days after making that federal election.

COMMENT NO. 19: The department received various related comments about the proposed amendments to ARM 42.9.106.

Ms. Egan commented that very few states have similar reporting requirements and this process is not business friendly. Ms. Sander, Mr. Turner, Ms. Schlepp, and Ms. Egan all commented that the requirement of the second-tier pass-through entity to establish that all taxes will be paid adds another level of compliance that places businesses in the position to enforce compliance, when this is the department's responsibility. They also commented that the statements "establishes to the satisfaction of the department" and "fully accounted for" create ambiguity for the taxpayer.

Ms. Egan asked why the extra compliance is needed when by filing Form PT-AGR, the agreement is in place to ensure that proper reporting is taking place, and Ms. Schlepp inquired about how many states require a PT-STM Form.

RESPONSE NO. 19: The department appreciates the comments on the proposed amendments and agrees that the reporting procedures that are currently established for the Form PT-STM are unnecessarily complex. To reduce this complexity, the department will further amend the rule so that the first-tier, instead of

the second-tier, pass-through entity completes and files the Form PT-STM with the department.

The department acknowledges the observation that most states do not have similar reporting requirements, but respectfully disagrees that the reporting requirements are not business friendly. Currently, the waiver of the first-tier pass-through entity's requirement to file a composite return or remit tax on behalf of a second-tier pass-through entity is an annual request.

The proposed amendments provide first-tier pass-through entities with an opportunity to receive a multiple year waiver if the owners who report their share of the second-tier pass-through entity's Montana source income are compliant with tax filings and payments.

The multiple year waiver was requested by MSCPA for taxpayer convenience and simplification, and the department agreed that this provision would further reduce the complexity of filing the Form PT-STM while not violating the statutory reporting requirements of first-tier pass-through entities in regard to their second-tier pass-through owners.

The department respectfully disagrees that the statements "establishes to the satisfaction of the department" and "fully accounted for" will create ambiguity and place entities in a position of enforcing revenue laws. Section 15-30-3313(1)(c)(ii), MCA, clearly establishes the role of a first-tier pass-through entity with regard to tax compliance. This section of law states that if a first-tier pass-through entity does not file a composite return or remit tax on behalf of a second-tier pass-through entity, then a statement must be filed setting forth the name, address, and social security or federal identification number of each of that entity's partners, shareholders, members, or other owners and information that establishes that its share of Montana source income will be fully accounted for on individual income or corporation license or income tax returns filed with the state.

The proposed amendments do not require additional forms to be filed with the department. The Form PT-AGR is not addressed in ARM 42.9.106 because the rule addresses the filing requirements of second-tier pass-through entities and the Form PT-AGR is filed by individuals, corporations, estates and trusts. Second-tier pass-through entities do not file the Form PT-AGR.

The department did not conduct an analysis of other states to determine if they have an equivalent form to Montana's Form PT-STM. Most states do have reporting requirements for pass-through entities. However, the governing statutes and regulations, as well as the resulting filing requirements, differ among the states.

COMMENT NO. 20: The department received several related comments in regard to the proposed amendments to ARM 42.9.106.

Ms. Sander requested clarification of several provisions relating to lower-tier partnerships that impact not only NAPTP members, but potentially all pass-through entities. Ms. Sander also commented that NAPTP would like the department to confirm that nothing within the proposed rulemaking will impact the current exemption.

Mr. Berry, Ms. Sander, and Mr. Turner commented that the proposed rule amendments do not address how pass-through entities that are owned by PTPs should apply the reporting provisions in the rule.

RESPONSE NO. 20: ARM 42.9.106, which addresses how first-tier pass-through entities must remit tax or file composite returns on behalf of their owners who are themselves pass-through entities (second- or "upper-" tier pass-through entities), does not directly affect PTPs. As noted, these entities are subject to the special provision under 15-30-3313(7), MCA, that prevents PTPs from having to remit or file composite returns.

The rule may, however, affect them indirectly, in that PTPs may receive a refundable Montana tax credit attributable to a lower-tier pass-through entity through which Montana source income has been passed. This will occur when a lower-tier pass-through entity must either remit tax or file a composite return on behalf of an owner that is also a pass-through entity (an upper-tier pass-through entity) because that upper-tier pass-through entity cannot establish that its share of Montana source income from the lower-tier entity is fully accounted for on Montana tax returns.

If a PTP, as second-tier pass-through entity, could not establish that its share of income from one or more first-tier pass-through entities would be reported in Montana tax returns, the first-tier pass-through entity would be required to remit tax or file a composite return on behalf of the PTP.

COMMENT NO. 21: Ms. Egan and Ms. Schlepp commented in regard to the proposed amendments for ARM 42.9.106, that not all taxpayers are eligible to file composite tax returns and requiring them to do so will not improve compliance. Ms. Schlepp also asked if all returns will have to be composite.

RESPONSE NO. 21: The proposed amendments to ARM 42.9.106, do not require taxpayers to elect composite tax returns. A taxpayer can only elect composite tax treatment if it is a nonresident or domiciled outside of Montana and has no other Montana source income unless other Montana source income is also reported on composite income tax returns.

Under 15-30-3313, MCA, first-tier pass-through entities are not required to include second-tier pass-through entities in a composite return. It is one of three methods that a first-tier pass-through entity has for reporting the Montana source income that it distributes to second-tier pass-through entities. The first-tier pass-through entity may also choose to remit tax on behalf of the second-tier pass-through entity or file a statement (Form PT-STM) with the department that identifies all higher-tier owners and establishes that all Montana source income is accounted for on income tax or corporation license tax returns.

COMMENT NO. 22: Mr. Berry, Mr. Turner, and Ms. Sander commented that allowing higher-tier owners in a multi-tier pass-through entity structure to claim a refundable credit equal to their distributive share of the remittance that the first-tier pass-through entity pays on behalf of the second-tier pass-through entity, as provided in the proposed amendment to ARM 42.9.106, would create confusion among taxpayers and be burdensome for the department to administer.

RESPONSE NO. 22: The department appreciates the opportunity to further explain the history of the refundable credit provision in 15-30-3313(4), MCA.

Allowing the ultimate taxpayers to claim their share of the taxes paid by the first-tier pass-through entity as a refundable tax credit was a 2003 legislative action. The legislation was crafted with the help of MSCPA to ensure that the ultimate taxpayer paid no more tax than they owed on their share of Montana source income. In addition, the legislation assured that taxes would be paid on Montana source income and that this income would not lose its identity as it passes through multi-tier entity structures.

The department administers the credit similarly to any other Montana tax credit that may be claimed by the owners of a pass-through entity. The department included an additional implementing statute for this rule as described in the response to Comment No. 1.

COMMENT NO. 23: Ms. Sander, Mr. Turner, and Ms. Schlepp commented that the amendment to ARM 42.9.106, requiring the Form PT-STM to be filed 45 days before the filing deadline of the first-tier pass-through entity, was an unnecessary complication and would be impossible for many taxpayers to fulfill.

RESPONSE NO. 23: The department thanks Ms. Sander, Mr. Turner, and Ms. Schlepp for the opportunity to further explain why the Form PT-STM must be filed in advance of the due date of the first-tier pass-through entity's information return.

The form is required to be filed sufficiently in advance of the first-tier pass-through entity's tax filing deadline so that the department has adequate time to review it and notify the first-tier pass-through entity of whether the entity is relieved of the obligation to remit tax, or file a composite return, on behalf of the second-tier pass-through entity. The filing deadline is set at 45 days to allow the department 30 days to review and respond to the first-tier pass-through entity and still allow the first-tier pass-through entity enough time to file its return accordingly.

COMMENT NO. 24: In reference to a statement within the department's reasonable necessity for the proposed amendments to ARM 42.9.106, that the department's current practices were not sufficient to ensure proper tax collection because the national growth of complex pass-through entity structures with nonresident owners, Ms. Schlepp questions what quantifiable measurement of this quote has been assessed. Ms. Schlepp further stated that MonTax disagrees with creating and changing rules if there are not good data points as reference.

RESPONSE NO. 24: The following chart summarizes the number of federal returns filed by C corporations, S corporations, and partnerships from tax year 1997 to 2008 (most recent year available) as provided by the Internal Revenue Service (http://www.irs.gov/taxstats/bustaxstats/article/0,,id=152029,00.html).

As evidenced by the chart, the number of returns filed by pass-through entities for federal purposes has increased significantly.

| Tax Year | Corporation License Returns | S-Corporation Returns | Partnership Returns (GL, LP, LLP and LLC) |
|---|---|---|---|
| 1997 | 2,248,065 | 2,452,254 | 1,758,627 |
| 1998 | 2,249,970 | 2,588,088 | 1,855,348 |
| 1999 | 2,198,740 | 2,725,775 | 1,936,919 |
| 2000 | 2,172,705 | 2,860,478 | 2,057,500 |
| 2001 | 2,136,756 | 2,986,486 | 2,132,117 |
| 2002 | 2,100,074 | 3,154,377 | 2,242,169 |
| 2003 | 2,047,593 | 3,341,606 | 2,375,374 |
| 2004 | 2,027,613 | 3,518,334 | 2,546,877 |
| 2005 | 1,974,961 | 3,684,086 | 2,763,625 |
| 2006 | 1,955,147 | 3,872,776 | 2,947,116 |
| 2007 | 1,865,232 | 3,989,893 | 3,096,334 |
| 2008 | 1,782,478 | 4,049,944 | 3,146,006 |

The department findings concerning the increase of complexity in pass-through entity structures and the challenges that trend poses for the compliance by non-resident owners are based on its substantial compliance work with regard to pass-through entities and nonresident owners. The department's knowledge of complexity in this area is also informed by its participation, along with a small number of other states, in a special Internal Revenue Service pass-through entity project. The department has provided information to the Revenue and Transportation Interim Committee in past years on the complexity of pass-through and entity structures and nonresident owner tax compliance issues.

COMMENT NO. 25: Ms. Schlepp also commented that if the proposed amendments to ARM 42.9.106, were adopted, it would subject taxpayers to double taxation. She further explained that taxpayers could be required "to pay a Montana tax without getting a corresponding state credit in their own state either because the taxpayer lives in a state without an income tax or the state does not allow a full credit against a Montana tax paid."

RESPONSE NO. 25: The department respectfully disagrees that the proposed amendments create a double taxation effect. If a taxpayer lives in a state without an income tax, there is no potential for double taxation. All states with an income tax allow a credit against a resident's tax liability for income taxes paid to another state which prevents double taxation.

COMMENT NO. 26: In regard to ARM 42.9.106, Mr. Turner commented that the requirement that a taxpayer establishes to the satisfaction of the department that its distributive share of income will be fully accounted for on Montana tax returns lacks an objective test that taxpayers can rely upon to know whether they will be entitled to a waiver.

He also commented that the proposed rule language that allows the department to generally waive the requirements to pay or file a composite return if it can determine that all income for the three most recent tax years has been reported

on timely filed returns and all tax due under those returns has been paid is confusing, leaving him to wonder when the department would not issue a waiver or if taxpayers are subject to the whims of the department.

RESPONSE NO. 26: The department appreciates the opportunity to further explain the statutory basis for the proposed amendments to ARM 42.9.106, and how the department is implementing the statutory language. Section 15-30-3313(1)(c)(ii), MCA, requires a taxpayer to establish that a second-tier pass-through entity's share of Montana income will be fully accounted for on Montana tax returns.

The department disagrees that the conditions for obtaining a waiver are not guided by objective standards. As provided in Montana's Administrative Procedure Act, 2-4-102(11)(a), MCA, a rule is a statement of general applicability that implements, interprets, or prescribes law or policy of the agency. A rule cannot, and is not required to, state or anticipate every possible fact, situation, or exception. It will be the policy of the department, generally, to waive the requirement to pay or file composite in the described circumstances, just as the rule explains. There may be circumstances, however, when the department would not waive the requirement even if, for the past three years, the second-tier pass-through entity's share of Montana income was accounted for on returns and the taxes were paid.

For example, if an interest in the partnership had been transferred to someone who has never filed a return or is delinquent in paying Montana taxes. A taxpayer is not entitled to unilaterally determine that they have established that the conditions for waiver have been met, or to demand a waiver regardless of changes in circumstances. A taxpayer who disagrees with a department's decision may contest it under the uniform dispute resolution procedures adopted under 15-1-211, MCA, including review by the independent State Tax Appeal Board.

COMMENT NO. 27: Ms. Egan and Ms. Schlepp requested that the department provide an example for ARM 42.9.203(2). Ms. Schlepp also requested an example for ARM 42.9.203(5).

RESPONSE NO. 27: The department thanks Ms. Egan and Ms. Schlepp for the suggestion to provide more examples, and agrees that an example for (2) may help clarify the intent of the proposed amendments. The department will add the example provided below to the rule as part of its adoption notice:

Example 1a. composite tax ratio: Assume a partnership's federal income from all sources (as reported on Form PR-1, line 15) is $60,000 and the partnership's Montana source income (as reported on Form PR-1, line 21) is $20,000. The composite tax ratio is $20,000/$60,000 = 33.3333%

Example 1b. composite tax liability: Assume that the partnership in Example 1a. has one electing eligible participant in the composite tax return, an individual. To determine the electing partner's share of federal taxable income, multiply the partner's ownership percentage (as reported on the Montana Schedule III) by federal income from all sources (as reported on Form PR-1, line 15).

Electing partner's ownership percentage 50%

| | |
|---|---|
| Partnership's federal income from all sources | $60,000 |
| Electing partner's distributive share of federal income from all sources | $30,000 |

Reduce the electing partner's distributive share of federal income from all sources by the allowable standard deduction for a single individual and one exemption allowance.

| | |
|---|---|
| Electing partner's distributive share of federal income from all sources | $30,000 |
| Standard deduction | ($4,110) |
| Exemption allowance | ($2,190) |
| | $23,700 |

Using the tax rates as set forth in 15-30-2103, MCA, assume the tax is $1,123. Multiply the resulting tax by the composite tax ratio determined in Example 1a.

| | |
|---|---|
| Tax on the distributive share of federal income | $1,123 |
| Composite tax ratio (from Example 1.a.) | 33.3333% |
| Total composite tax | $374 |

The department respectfully disagrees that an example for (5) would help taxpayers determine the amount of their quarterly estimated payments of composite tax. The rule specifically refers to statute for the calculation of quarterly estimated tax payments and the department believes that (1) clearly explains that the composite tax that an entity owes is the sum of each electing eligible participant's composite tax liability.

COMMENT NO. 28: Ms. Sander and Ms. Schlepp also commented about the proposed amendments to ARM 42.15.120, which cross-reference the corporation license administrative rules applicable to apportionment and allocation of business and nonbusiness income, and which add a section to specify that a taxpayer may request or the department may require an alternative method of reporting multi-state income. They stated that this section should be deleted because it is giving the department authority and is not supported by statute. Ms. Schlepp also asked what alternative method is being considered, and how it is fair to treat certain taxpayers different than others.

RESPONSE NO. 28: The department respectfully declines to delete this added section because it accurately describes the taxpayer's right to request, and the department's power to require, alternative reporting for multi-state business activity and because deleting the section would not change this right or power.

The amendment clearly states that the taxpayer may petition for, or the department may require, an alternative method of reporting activity as provided in the Multistate Tax Compact, adopted in 15-1-601, MCA. The compact in Article IV, section (18) describes when the alternative reporting method can be requested or imposed and what the alternative reporting methods can include.

If allocation and apportionment provisions of this article do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition

for, or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors;

(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(d) the employment of any other method to accomplish an equitable allocation and apportionment of the taxpayer's income.

These alternative reporting methods are provided for in 15-1-601(18), MCA.

COMMENT NO. 29: Ms. Egan asked that the department provide a more specific reference in 15-1-601, MCA, in the proposed amendments for ARM 42.15.120.

RESPONSE NO. 29: To comply with the rule formatting standards, the department is not able to provide a more specific subpart statutory reference within the rule language. However, for the purposes of being responsive to the question, a more specific reference is 15-1-601(18), MCA.

3. Based on the comments received, the department adopts New Rule I (42.9.110), New Rule II (42.9.111), and New Rule IV (42.9.107), and further amends ARM 42. 9.106, and 42.9.203, as follows, stricken matter interlined, new matter underlined:

NEW RULE I (42.9.110) PASS-THROUGH ENTITIES – AUDIT ADJUSTMENTS (1) through (7)(b) remain as proposed.

AUTH: 15-1-201, 15-30-3312, MCA
IMP: 15-30-2512, 15-30-2605, 15-30-2618, 15-30-3302, 15-30-3311, 15-30-3312, 15-31-511, 35-1-1107, 35-8-405, 35-10-103, 35-10-402, 35-12-508, MCA

NEW RULE II (42.9.111) PASS-THROUGH ENTITIES – STATUTE OF LIMITATIONS FOR AUDIT ADJUSTMENTS (1) through (6) remain as proposed.

AUTH: 15-1-201, MCA
IMP: 15-30-2605, 15-30-2606, 15-30-2607, 15-30-3302, 15-31-509, MCA

NEW RULE IV (42.9.107) MULTI-TIERED PASS-THROUGH ENTITY STRUCTURES WITH MONTANA SOURCE INCOME – REPORTING REQUIREMENTS (1) through (6) remain as proposed.

AUTH: 15-1-201, MCA
IMP: 15-1-601, 15-30-3302, 15-30-3311, 15-31-301, MCA

42.9.106 COMPOSITE RETURN, WITHHOLDING, OR WAIVER FOR PARTNERS, SHAREHOLDERS, MANAGERS, AND MEMBERS THAT ARE SECOND-TIER PASS-THROUGH ENTITIES (1) remains as proposed.

(2) The department may waive the requirements to remit tax or pay composite tax on behalf of the second-tier pass-through entity for the current tax year as set forth in (1) if the ~~second~~ first-tier pass-through entity:

(a) completes and submits the Form PT-STM for the year to the department at least 45 days before the original due date of the first-tier pass-through entity's tax return; and

(b) establishes to the satisfaction of the department that ~~its~~ the second-tier pass-through entity's distributive share of Montana source income for the current year will be fully accounted for in individual income, corporation license, or other income tax returns filed with the state.

(3) The department will notify the first ~~and second~~-tier pass-through ~~entities~~ entity of its decision to waive or not waive the requirement to file a composite return or remit within 30 days after receipt of the completed Form PT-STM. The department will generally waive the requirement if it can determine that all of the income for the three most recent tax years has been reported on timely filed tax returns and that all tax due under those returns has been paid.

(4) The department may grant a conditional waiver that lasts longer than one year on written request included with the Form PT-STM if, in addition to the conditions provided in (3), the ~~second~~ first-tier pass-through entity:

(a) agrees to notify the department if the ownership of the second-tier pass-through entity and, if applicable, the ownership of any higher-tier pass-through entities changes;

(b) agrees to remit the amount provided under (1) within 60 days after notice from the department that ~~its~~ the second-tier pass-through entity's distributive share was not fully accounted for on corporation license, individual income, or other tax returns filed with the department; and

(c) agrees to be subject to the personal jurisdiction of the state for the collection of the remittance.

(5) through (8) remain as proposed.

AUTH: 15-1-201, 15-30-2620, MCA
IMP: 15-1-201, 15-30-2620, 15-30-3302, 15-30-3312, 15-30-3313, MCA

42.9.203 COMPUTATION OF COMPOSITE TAX (1) remains as proposed.

(2) The composite return liability of each eligible consenting participant is calculated as follows:

(a) compute the entity's composite tax ratio by:

(i) calculating the entity's federal income from all sources as determined for federal income tax purposes;

(ii) calculating the entity's Montana source income;

(A) if the entity is only doing business in Montana, the entity's Montana source income is the net taxable income after Montana additions and deductions to income as allowed in 15-30-3302, MCA; or

(B) if the entity is engaged in multistate business, the entity's Montana source income is determined as provided in ~~[NEW RULE IV]~~ ARM 42.9.107; and

(iii) dividing the entity's Montana source income by the entity's federal income from all sources;

(b) subtract the allowable standard deduction for a single individual and one exemption allowance from each participant's share of the entity's federal taxable income as determined for federal income tax purposes. Determine the tax that would be imposed on the result using the rates specified in 15-31-121, MCA, for C corporations and the rates specified in 15-30-2103, MCA, for all other eligible participants; and

(c) multiply the amount determined in (b) by the composite tax ratio computed in (a).

(i) Example 1a. composite tax ratio: Assume a partnership's federal income from all sources (as reported on Form PR-1, line 15) is $60,000 and the partnership's Montana source income (as reported on Form PR-1, line 21) is $20,000. The composite tax ratio is $20,000/$60,000 = 33.3333%.

(ii) Example 1b. composite tax liability: Assume that the partnership in Example 1a. has one electing eligible participant in the composite tax return, an individual. To determine the electing partner's share of federal taxable income, multiply the partner's ownership percentage (as reported on the Montana Schedule III) by federal income from all sources (as reported on Form PR-1, line 15).

| | |
|---|---|
| Electing partner's ownership percentage | 50% |
| Partnership's federal income from all sources | $60,000 |
| Electing partner's distributive share of federal income from all sources | $30,000 |

Reduce the electing partner's distributive share of federal income from all sources by the allowable standard deduction for a single individual and one exemption allowance.

| | |
|---|---|
| Electing partner's distributive share of federal income from all sources | $30,000 |
| Standard deduction | ($4,110) |
| Exemption allowance | ($2,190) |
| | $23,700 |

Using the tax rates as set forth in 15-30-2103, MCA, assume the tax is $1,123. Multiply the resulting tax by the composite tax ratio determined in Example 1a.

| | |
|---|---|
| Tax on the distributive share of federal income | $1,123 |
| Composite tax ratio (from Example 1.a.) | 33.3333% |
| Total composite tax | $374 |

(3) through (5) remain as proposed.

AUTH: 15-1-201, 15-30-2620, 15-30-3312, MCA
IMP: 15-30-2103, 15-30-2512, 15-30-3302, 15-30-3312, 15-31-121, MCA

4. Therefore, the department adopts New Rule I (42.9.110), New Rule II (42.9.111), New Rule IV (42.9.107), and amends 42.9.106, and 42.9.203 with the amendments shown above, and adopts New Rule III (42.9.502), and amends ARM 42.9.102, and 42.15.120 as proposed.

5. An electronic copy of this notice is available on the department's web site at www.revenue.mt.gov. Locate "Legal Resources" in the left hand column, select the "Rules" link and view the options under the "Notice of Proposed Rulemaking" heading. The department strives to make the electronic copy of this 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 web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State November 28, 2011

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of 42.23.801 and 42.26.233 relating to net operating losses and consistency in reporting with respect to property | ) ) ) ) | NOTICE OF AMENDMENT |

TO: All Concerned Persons

1. On October 13, 2011, the department published MAR Notice No. 42-2-871 regarding the proposed amendment of the above-stated rules at page 2125 of the 2011 Montana Administrative Register, issue no. 19.

2. No public hearing was held and no comments were received.

3. The department amends ARM 42.23.801 and 42.26.233 as proposed.

4. An electronic copy of this notice is available on the department's web site at www.revenue.mt.gov. Locate "Legal Resources" in the left hand column, select the "Rules" link and view the options under the "Notice of Proposed Rulemaking" heading. The department strives to make the electronic copy of this 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 web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State November 28, 2011

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of ARM 1.2.419 regarding the scheduled dates for the 2012 Montana Administrative Register | ) ) ) ) | NOTICE OF AMENDMENT |

TO: All Concerned Persons

1. On October 13, 2011, the Secretary of State published MAR Notice No. 44-2-179 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 2128 of the 2011 Montana Administrative Register, Issue Number 19.

2. The Secretary of State has amended the above-stated rule as proposed.

3. No comments or testimony were received.

/s/ Jorge Quintana
JORGE QUINTANA
Rule Reviewer

/s/ Linda McCulloch
LINDA MCCULLOCH
Secretary of State

Dated this 28th day of November, 2011.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the petition of the Yellowstone Boys and Girls Ranch Foundation regarding the application of 15-30-2539, MCA and ARM 42.17.603, which address royalty withholding, to a proposed limited liability company to which certain tax-exempt entities would transfer fractional mineral interests in exchange for proportionate LLC membership interests | ) | Docket No. DO-11-19<br><br>DECLARATORY RULING |

## INTRODUCTION

1. The Montana Department of Revenue ("Department"), received a letter from the Yellowstone Boys and Girls Ranch Foundation ("Petitioner") dated July 15, 2011, which was supplemented by the additional representations and exhibits referenced in this ruling, and have deemed those documents as a petition for declaratory ruling. The petition and any other documents submitted or representations made comprise the Department's records of this declaratory ruling proceeding, as provided in ARM 42.2.105. This ruling will be published as provided in 2-4-501, MCA.

## FACTS

2. The following facts are set forth in your petition:

(a) Eleven 501(c)(3) nonprofit organizations received fractional Montana mineral interests from a donor that are proving very difficult for the charities to administer. The nonprofits are Petitioner Yellowstone Boys and Girls Ranch Foundation, Montana Children's Home and Hospital, with the assumed business name Shodair Children's Hospital, University of Great Falls, Roman Catholic Bishop of Great Falls, Montana, Concordia College Corporation, Rocky Mountain College, Episcopal Diocese of Montana, Scobey Lutheran Church, Scobey United Methodist Church, Scobey Assembly of God, and Daniels Memorial Hospital Foundation. In order to promote development and effective administration of the mineral interests, the Petitioner proposes to form a Montana limited liability company (LLC), Paulsen, LLC, to which each would transfer its interest in exchange for a proportionate interest.

(b) Under the proposed working agreement, the LLC manager would be comprised of three of the charities.

(c) The proposed working agreement would authorize the LLC manager to negotiate and, unless a supermajority of the LLC member interests do not consent, execute a mineral, royalty or similar lease of the combined mineral interests.

(d) The proposed working agreement contains provisions for termination and transfer of a member's interest that are designed to limit the ability of members to transfer to a transferee that is not itself a tax-exempt entity or that might otherwise

jeopardize the tax-exempt status of any of the member charities, including granting members the right of first refusal.

3. At the Department's request, the Petitioner has also specifically represented the following additional facts:

(a) The LLC, as proposed, would not apply to the U.S. Department of Treasury or the Montana Department of Revenue for a determination that the LLC itself qualifies as a nonprofit entity and it would file federal and Montana partnership information returns. The Montana return and Montana K-1s would disclose the names of each of the members and each member's distributive share of royalty income as Montana source income.

(b) The LLC would not elect to be taxed as a corporation so that it would be treated in default of an affirmative entity classification election as a partnership for federal and Montana tax purposes, and would not itself, as a pass-through entity, be subject to federal or Montana income tax (absent unusual circumstances that the Petitioner does not contemplate occurring).

(c) The Petitioner is not aware of any circumstance under which the distributive share of the royalty income the charities may receive would constitute unrelated business taxable income for federal or Montana tax purposes.

(d) The donor of the transferred mineral interests would not be a party to any mineral lease contemplated to be entered into by the LLC, directly or indirectly through a related party. The donor of the transferred mineral interests did not retain mineral interests, the lease of which will be negotiated jointly with the LLC interests.

ANALYSIS

4. Section 15-30-2538, MCA, requires those who pay mineral royalties to remit withholding tax to the Department. The duty to remit is subject to exceptions listed in 15-30-2539, MCA. Under 15-30-2539(1)(e), MCA, withholding is not required if the royalty owner is an organization exempt from taxation under 15-31-102, MCA. Section 15-30-2539(2)(d), MCA requires these tax-exempt entities to report to the remittor and the Department under oath, on a form prescribed by the Department, all information necessary to establish that the remittor is not required to withhold tax for royalty payments made to the organization.

5. Pursuant to the rulemaking authority granted in 15-30-2547, MCA, the Department adopted ARM 42.17.603 which provides in relevant part as follows:

> (11) Section 15-30-2539, MCA, allows for an organization that is exempt from taxation under 15-31-102, MCA, to be exempt from the withholding requirements of 15-30-2536, MCA, provided the exempt organization, who is a royalty owner, submits a report to both the remittor and the department. The report, which can be in the form of a letter, must contain the exempt organization's letterhead and request exemption from 15-30-2536, MCA. The request must be received by the remittor and the department prior to November 1 of the year prior to the calendar year in which the exempt organization requests exemption. Upon receipt of the report, the department

shall notify the exempt organization and the remitter of either acceptance or denial of the request within 30 days. The election does not need to be repeated annually unless requested by the department.

The rule did not contemplate or address mineral interests being held by entities wholly owned and controlled by tax-exempt entities that are not themselves also tax-exempt.

6. The Petitioner's petition seeks the Department's determination that 15-30-2539, MCA, and ARM 42.17.603 may be applied to the eleven nonprofits' proposed LLC under the facts and circumstances described in paragraphs 2 and 3, and that the Department will accept a request for waiver from the LLC.

7. If the Department did not rule that this particular LLC may apply for and obtain exemption from backup withholding under the facts and circumstances described, the following tax consequences would follow:

(a) The remittor would be required to withhold 6% from the royalties payable to the LLC.

(b) When the LLC filed its Montana partnership information return:

(i) it would report the royalties formerly directly received by the charities (decreased by the 6% withholding) as distributable royalty income; and

(ii) it would report the 6% withheld from the royalties and remitted to the state on behalf of the LLC royalty owner as taxes paid by the tax-exempt entities; and

(c) the tax-exempt entities, which would have no tax liability, would be required to file a corporation or fiduciary return, as applicable, to recover their share of the 6% backup withholding.

8. The LLC structure would enable LLC expenses to be paid from the royalties, resulting in the charities reporting a lower amount of royalties received for tax purposes. The LLC structure could result in nonprorata allocations of gain or loss. Neither of these prospects however should have any Montana effect so long as all members are tax-exempt entities. So long as the LLC files its Montana partnership information return, the return will disclose the identity of all members. Thus, no additional notice provisions, such as those discussed in the Petitioner's July 15, 2011, letter would be required in the working agreement.

9. The mineral withholding required by 15-30-2538, MCA, is legally and factually "backup" withholding that was imposed to ensure that the royalty payments attributable to Montana mineral production do not escape taxation. When no tax is imposed, as in this case and, as represented, the transaction is not being undertaken for other tax avoidance reasons, no issue of escaped tax arises.

## DECLARATORY RULING

10. The Department rules, based on the particular facts and circumstances of this case, that the Department will interpret 15-30-2539, MCA, and ARM 42.17.603 as permitting Paulsen, LLC, once formed (by some or all of the eleven nonprofit

organizations previously identified in paragraph 2(a)) and a party to a lease pursuant to which royalty payments could be made, to apply for and receive a determination that backup withholding on royalty payments with respect to the mineral interests transferred by the tax-exempt organizations is not required.

11. This ruling applies only to the tax-exempt organizations and the limited liability company that are the subject of this ruling and, only so long as there is no change in a material fact on which this determination is based. For purposes of this ruling, neither the assignment or other transfer by one of the identified tax-exempt organizations of some or all of its mineral or royalty interests to one or more of the other identified tax-exempt organizations, nor the expiration of the lease term and entry into another lease with the same or another lessee/remittor will be considered a change in a material fact on which the determination is based.

Dated this 17th day of November, 2011.

MONTANA DEPARTMENT OF REVENUE

/s/ Dan R. Bucks
DAN R. BUCKS,
Director

NOTICE: Petitioner has the right to appeal the decision of this agency by filing a petition for judicial review in district court within 30 days after service of this decision. Judicial review is conducted pursuant to 2-4-702, MCA.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 28th day of November 2011, a true and correct copy of the foregoing has been served by placing same in the U.S. mail, postage prepaid, addressed as follows:

Yellowstone Boys and Girls Ranch Foundation
2050 Overland Avenue
Billings, MT 59102

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

## 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;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

**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.

**Energy and Telecommunications Interim Committee:**

- Department of Public Service Regulation.

**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 P.O. 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 or Register)** 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

2. Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers.

# ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through June 30, 2011. This table includes those rules adopted during the period July 1, 2011, through September 30, 2011, and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through June 30, 2011, 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 2011 Montana Administrative Register.

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

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