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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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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BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 4.10.202, 4.10.205 relating to the Aerial Applicator	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On September 13, 2012, at 2:00 p.m. the Montana Department of Agriculture will hold a public hearing in Room 225 of the Scott Hart Building, 302 N. Roberts at Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Agriculture no later than 5:00 p.m. on September 7, 2012 to advise us of the nature of the accommodation that you need. Please contact Cort Jensen at the Montana Department of Agriculture, 302 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; phone: (406) 444-5402; fax: (406) 444-5409; or email: agr@mt.gov.

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

4.10.202 CLASSIFICATION OF PESTICIDE APPLICATORS (1) through (2) remain the same.

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

(m) Piscicide classification ~~include~~ includes applicators using or supervising the use of pesticides purposefully applied to waters to eliminate fish species as a fishery management tool.

(n) Aerial applicator classification includes applicators that apply pesticides by aircraft. Aerial applicators shall qualify in one or more of the classifications in (3)(a) through (m).

AUTH: 8-8-105, MCA
IMP: 8-8-105, MCA

4.10.205 SPECIFIC STANDARDS OF COMPETENCY FOR EACH APPLICATOR CLASSIFICATION (1) through (1)(m) remain the same.

(n) Aerial applicators shall demonstrate practical knowledge of laws and regulations for aerial applicator pilots, operation and application safety, preventing pesticide drift, aerial pesticide dispersal systems, calibrating aerial application equipment, and making an aerial pesticide application.

AUTH: 8-8-105, MCA
IMP: 8-8-105, MCA

REASON: The addition of an aerial applicator category was requested by the Association of Montana Aerial Applicators to the department in 2011. The addition of an aerial applicator category supports a national competency for the industry, increasing consumer and public confidence as well as streamlining reciprocal licensing for applicators who provide interstate services by air.

ECONOMIC IMPACT: The department anticipates that approximately 50-60 individuals would be affected by the category requirement, but they already were required to be licensed under a different category previously. The only real additional expense might be the new manual. Our estimate for the price of the manual is no more than $10.00.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Cort Jensen at the Montana Department of Agriculture, 302 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; telephone (406) 4440-5402; fax: (406) 444-5409; or e-mail: agr@mt.gov and must be received no later than September 20, 2012.

5. The Department of Agriculture 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 for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Montana Department of Agriculture, 302 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; fax: (406) 444-5409; or e-mail: agr@mt.gov or may be made by completing a request form at any rules hearing held by the Department of Agriculture.

6. An electronic copy of this Notice of Proposed Amendment is available through the department's web site at agr.mt.gov, under the Administrative Rules section. The department 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 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.

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

DEPARTMENT OF AGRICULTURE

/s/ Ron de Yong
Ron de Yong, Director

/s/ Cort Jensen
Cort Jensen, Rule Reviewer

Certified to the Secretary of State on August 13, 2012.

BEFORE THE BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the adoption of NEW RULE I minimum qualification standards for licensees to conduct psychological assessments	))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On September 18, 2012, at 2:00 p.m., a public hearing will be held in room 439, 301 South Park Avenue, Helena, Montana, to consider the proposed adoption of the above-stated rule.

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 Social Work Examiners and Professional Counselors (board) no later than 5:00 p.m., on September 12, 2012, to advise us of the nature of the accommodation that you need. Please contact Cyndi Breen, Board of Social Work Examiners and Professional Counselors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2392; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdswpc@mt.gov.

3. The proposed new rule provides as follows:

NEW RULE I – MINIMUM QUALIFICATION STANDARDS FOR LICENSEES TO CONDUCT PSYCHOLOGICAL ASSESSMENTS (1) Psychological assessment is a complex task that involves accurately administering, scoring, and interpreting the results of psychometric tests and integrating these results with other sources of information such as clinical interviews and medical records, before final conclusions can be drawn. The term psychological assessment does not apply to unstandardized questionnaires and unstructured behavior samples, or to teacher- or trainer-made tests used to evaluate performance in education or training.

(2) The competent and responsible use of a psychometric test requires a combination of knowledge, skills, abilities, training, and experience. The results of a given test must be viewed within the broader context of a psychological assessment.

(3) Psychological assessment may only be performed by a board-approved licensee, a licensed psychologist, or a person acting under the supervision of a board-approved licensee or licensed psychologist.

(4) A licensee may engage in psychological assessment only if the board has received and approved the following information demonstrating generic and specific qualifications to perform psychological assessment:

(a) Academic training. Each licensee must obtain the equivalent of six semester hours of education at the post-graduate level that provided adequate instruction on each of the following:

(i) psychometric theory, including issues of reliability, validity, reference group norms, limits of generalizability, and test construction;

(ii) theories of intelligence and human cognition, including the role of race and ethnicity in intellectual evaluations, and the administration and interpretation of intellectual instruments;

(iii) theory, administration, and interpretation of major self-report inventories, such as the MMPI-2 or the PAI, including applicability of specific population norms to individual clients;

(iv) appropriate selection of instruments to answer specific referral questions and the construction of a test battery;

(v) integration of data from multiple data sources, including interview, psychometric tests, and collateral sources;

(vi) test security;

(vii) communication of assessment results to different referring individuals and agencies and feedback to clients themselves; and

(viii) relationship between assessment and treatment;

(b) Supervised experience in psychological assessment. Each licensee shall conduct eight psychological assessments, including written reports of those assessments, while under supervision. Each of the psychological assessments must demonstrate the licensee's competence in each of the following:

(i) integration and interpretation of:

(A) clinical history utilizing a clinical interview conducted by the applicant;

(B) intelligence testing; and

(C) personality testing utilizing at least one objective personality inventory that is widely recognized and used in the field of psychology, has strong empirical foundations, and assesses global personality and psychological functioning;

(ii) the formulation of appropriate diagnoses using the five axes specified in the Diagnostic and Statistical Manual of Mental Disorders (DSM); and

(iii) the making of appropriate recommendations; and

(c) Endorsement from the supervisor. An affidavit in a form prescribed by the board, signed under oath by a professional qualified to supervise psychological assessment, attesting that the licensee has obtained the supervised experience required by this rule and is qualified, to the best of the supervisor's knowledge, to conduct psychological assessments.

(5) A licensed clinical social worker or licensed clinical professional counselor is qualified to perform psychological assessments and is not required to demonstrate that the licensee has met the qualifications set forth in (4) if the licensee:

(a) performed psychological assessments prior to October 14, 2011; and

(b) submits a sworn written declaration subscribed as true under penalty of perjury that the licensee is competent to perform psychological assessments under ARM 24.219.1005.

(6) An individual who is training to become competent in psychological assessment may perform psychological assessments under the supervision of a qualified supervisor. For purposes of this rule, a qualified supervisor is:

(a) a licensed psychologist; or

(b) a licensed clinical social worker or licensed clinical professional counselor who:

(i) is board-approved to perform psychological assessments;

(ii) has met the qualifications set forth in (4) or (5); and

(iii) has three years of postlicensure experience conducting psychological assessments.

(7) Each licensee shall obtain approval from the board before engaging in the independent practice of psychological assessments. To obtain approval from the board, the licensee shall submit an application to the board on a form prescribed by the board.

AUTH: 37-17-104, MCA
IMP: 37-17-104, MCA

REASON: The 2009 Legislature enacted Chapter 453, Laws of 2009 (SB 235), an act expanding the exemption from licensure as a psychologist to include psychological testing, evaluation, and assessment by qualified members of other professions, including licensed professional counselors. The bill was signed by the Governor on May 5, 2009.

The 2009 Legislature also enacted Chapter 199, Laws of 2009 (HB 530), an act revising the definition of social work to clarify that the term includes the administering, evaluating, and assessing of tests. The bill was signed by the Governor on April 9, 2009. Both bills became effective on October 1, 2009.

SB 235 amended 37-17-104, MCA, to require that the board adopt rules to qualify licensed social workers and professional counselors to perform psychological testing, evaluation, and assessment. Further, these rules must be consistent with the guidelines of the national associations of social workers and professional counselors. In MAR 24-219-22, the board previously adopted several new rules to initially set these qualification standards. The board is now proposing New Rule I to establish minimum qualification standards for licensees to perform psychological assessments in compliance with the statutory requirements and to further implement the legislation.

4. 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 Social Work Examiners and Professional Counselors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdswpc@mt.gov, and must be received no later than 5:00 p.m., September 26, 2012.

5. 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.swpc.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.

6. 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 Social Work Examiners and Professional Counselors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2305; e-mailed to dlibsdswpc@mt.gov; or made by completing a request form at any rules hearing held by the agency.

7. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on March 21, 2012, by electronic mail.

8. Don Harris, attorney, has been designated to preside over and conduct this hearing.

BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
LINDA CRUMMETT, LCSW, 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 August 13, 2012

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

In the matter of the amendment of ARM 37.87.2202, 37.87.2205, and 37.87.2225 pertaining to non-Medicaid respite care services	))))	AMENDED NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On July 12, 2012 the Department of Public Health and Human Services published MAR Notice No. 37-592 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1338 of the 2012 Montana Administrative Register, Issue Number 13.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on August 27, 2012, to advise us of the nature of the accommodation that you need. Please contact Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena MT 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

3. The department is proposing to make additional amendments to two rules.

ARM 37.87.2205

The department is filing an amended notice to add moderate level therapeutic foster care as an eligibility requirement. Due to an oversight, the department inadvertently left out moderate level therapeutic foster care as an eligibility requirement in the original proposal notice.

ARM 37.87.2225

At the time the rules were being considered, there was one child placing agency providing therapeutic family care that was not a licensed mental health center, therefore the department added this provider type in the original draft. That child placing agency has recently become a licensed mental health center and in order to limit providers who can bill non-Medicaid respite concurrently with therapeutic family care, the department is removing this as a provider type.

4. ARM 37.87.2205 and 37.87.2225 are being amended as follows, new matter underlined, deleted matter interlined:

37.87.2205 MENTAL HEALTH SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE (SED) NON-MEDICAID RESPITE CARE SERVICES, LIMITATIONS (1) through (4) remain as proposed.

(5) Non-Medicaid respite care services shall only be provided to youth who receive Therapeutic Family Care (TFC) and moderate level therapeutic foster care (TFOC moderate) services or upon authorization by the department or its designee.

(6) and (7) remain as proposed.

AUTH: 53-2-201, 53-6-101, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-111, MCA

37.87.2225 MENTAL HEALTH SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE (SED) NON-MEDICAID RESPITE CARE SERVICES, PROVIDER PARTICIPATION (1) Licensed and enrolled mental health centers ~~and child placing agencies~~ may provide non-Medicaid respite care services upon approval by the department, provided they meet the requirements of this subchapter.

(2) through (6) remain as proposed.

AUTH: 53-2-201, 53-6-101, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-111, MCA

5. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: Kenneth Mordan, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena MT 59604-4210, no later than 5:00 p.m. on August 30, 2012. Comments may also be faxed to (406) 444-9744 or e-mailed to dphhslegal@mt.gov.

/s/ John Koch
Rule Reviewer

/s/ Jane Smilie for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State August 13, 2012.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I pertaining to the addition of beans and pulse crops to the listed commodities of Montana	))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On July 12, 2012 the Department of Agriculture published MAR Notice No. 4-14-209 pertaining to the public hearing on the proposed adoption of the above-stated rule at page 1308 of the 2012 Montana Administrative Register, Issue Number 13.

2. The department has adopted the above-stated rule as proposed: New Rule I (4.12.1031).

3. No comments or testimony were received.

/s/ Cort Jensen
Cort Jensen
Rule Reviewer

/s/ Ron de Yong
Ron de Yong
Director
Department of Agriculture

Certified to the Secretary of State August 13, 2012.

BEFORE THE MONTANA ARTS COUNCIL
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 10.111.701, 10.111.702, 10.111.704, 10.111.706, and 10.111.707, and repeal of ARM 10.111.705 and 10.111.708 pertaining to cultural and aesthetic project grant proposals	)))))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On March 22, 2012 the Montana Arts Council published MAR Notice No. 10-111-50 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 535 of the 2012 Montana Administrative Register, Issue Number 6.

2. The council has amended ARM 10.111.702, 10.111.704, and 10.111.707, and repealed ARM 10.111.705 and 10.111.708 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:

10.111.701 ELIGIBLE APPLICANTS (1) Any person, association, or representative of a governing unit may submit an application for funding of a cultural and aesthetic project from the income of the trust fund. The term "governing unit" includes state, regio~~al~~, county, city, town, or Indian tribe.

AUTH: 22-2-303, MCA
IMP: 22-2-301, MCA

10.111.706 EVALUATION CRITERIA (1) Evaluation criteria ~~is~~ are established in the application and guidelines.

AUTH: 22-2-303, MCA
IMP: 22-2-302, 22-2-306, MCA

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

COMMENT 1: ARM 10.111.704 Eligible Individuals: Section "B" is crossed out and next one is "C".

RESPONSE 1: The proposed amendments to ARM 10.111.704 follow the Secretary

of State's requirements for interlining deleted text and underlining new text. As amended, the text from ~~(C)~~ will now follow (B), and old (E) is renumbered to new (C). Therefore, the rule is being amended as proposed.

COMMENT 2: ARM 10.111.701 To keep the correct grammatical tenses, "regional" should be changed to "region" in the listing in part 1.

RESPONSE 2: Regional will be changed to region.

COMMENT 3: ARM 10.111.706 EVALUATION CRITERIA (1) Evaluation criteria is established in the application and guidelines. Grammatical correction: the word "criteria" is plural by definition, consequently "is" should be "are." In case anyone asks, the singular of "criteria" is "criterion." It is similar to the mistake practically everyone makes by referring to "data" in the singular when the word is truly plural; singular is "datum."

RESPONSE 3: "Is" will be changed to "are" to correct this grammatical error.

COMMENT 4: ARM 10.111.708 INCREMENTAL DISBURSEMENTS OF GRANTS, is found on page 10-1360 of the Administrative Rules of Montana. The deletion of this section is puzzling as there is nothing to replace it. Is the current practice to be followed, is there a new schedule, or none at all?

RESPONSE 4: This rule is a duplication of materials already in law, cited in 22-2-306, MCA. Information about incremental disbursement of grants will be outlined in the grant guidelines in concurrence with the law.

COMMENT 5: ARM 10.111.701 Clarification of who is eligible to apply. What is the definition of "representative of a governing unit" and who will be included, who excluded? On the face of it, with section (b) deleted and a narrow interpretation of "representative," exempt organizations would not be eligible to apply.

Several rewordings were suggested:

- Suggest reordering the list to read "Any representative of a governing unit, person or association may submit…"
- I think the following slight modification would make that sentence more clear: "Any person or association, or any representative of a governing unit, …"

RESPONSE 5: The language reflects the text in the law. The definition of eligible applicants is not being narrowed by this revision. Exempt organizations are eligible to apply. Clarification of the definitions will be outlined in the grant guidelines in concurrence with this law.

COMMENT 6: In the law the deadline for application is August 1. In the rules it is September 1. ARM 10.111.703 APPLICATION DEADLINE (1) Applications must display a postmark not later than September 1, of the year preceding the convening of a regular legislative session.

22-2-301. Cultural and aesthetic projects grants. (1) Any person, association, or representative of a governing unit seeking a grant for a cultural or aesthetic project from the income of the trust fund created in 15-35-108 must submit a grant proposal to the cultural and aesthetic projects advisory committee, in care of the Montana arts council, by August 1 of the year preceding the convening of a regular legislative session.

RESPONSE 6: ARM 10.111.703 APPLICATION DEADLINE will be repealed. It is in conflict with the law.

5. Based on comments the Montana Arts Council also repeals ARM 10.111.703.

10.111.703 APPLICATION DEADLINE

AUTH: 22-2-303
IMP: 22-2-301

/s/ Ann Gilkey
Ann Gilkey, Chief Legal Counsel
Office of Public Instruction
Rule Reviewer

/s/ Arlynn Fishbaugh
Arlynn Fishbaugh, Executive Director
Montana Arts Council

Certified to the Secretary of State August 13, 2012.

BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA

In the matter of the repeal of a temporary emergency rule closing Cooney Reservoir in Carbon County	)))	NOTICE OF REPEAL OF A TEMPORARY EMERGENCY RULE

TO: All Concerned Persons

1. On July 26, 2012 the Fish, Wildlife and Parks Commission (commission) adopted a temporary emergency rule closing Cooney Reservoir in Carbon County, published at page 1615 of the 2012 Montana Administrative Register, Issue No. 15. Cooney Reservoir was closed due to fire suppression efforts including several helicopters bucketing water from the reservoir. This situation constituted an imminent peril to the public health, safety, and welfare of anyone recreating on the reservoir.

2. As conditions have substantially changed and public safety is no longer an issue, the temporary emergency rule closing Cooney Reservoir in Carbon County, MAR Notice No. 12-381, is no longer necessary. As this situation no longer constitutes an imminent peril to public health, safety, and welfare, the department is repealing the rule. The repeal of the rule will be sent as a press release to newspapers throughout the state. Also, signs informing the public of the closure will be removed at access points. The repeal notice will be sent to interested parties, and published in Issue No. 16 of the 2012 Montana Administrative Register.

3. The repeal of the temporary emergency rule is effective August 7, 2012.

/s/ Joe Maurier
Joe Maurier
Director
Department of Fish, Wildlife and Parks
Secretary
Fish, Wildlife and Parks Commission

/s/ Rebecca Jakes Dockter
Rebecca Jakes Dockter
Rule Reviewer

Certified to the Secretary of State August 7, 2012.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.29.601, 24.29.604, 24.29.607, 24.29.608, 24.29.610, 24.29.611, 24.29.616, 24.29.617, 24.29.618, 24.29.623, 24.29.908, 24.29.954, and 24.29.956, and the adoption of NEW RULES I and II, related to workers' compensation insurance coverage under compensation plan No. 1 and plan No. 2	)	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On April 12, 2012, the Department of Labor and Industry (department) published MAR Notice No. 24-29-263 regarding the public hearing on the proposed amendment and adoption of the above-stated rules at page 693 of the 2012 Montana Administrative Register, issue no. 7.

2. On May 4, 2012, the department held a public hearing in Helena regarding the proposed amendments and adoptions at which comments were made. Additional written comments were received by the closing of the comment period on May 11, 2012.

3. The department has amended the following rules as proposed:

24.29.601 DEFINITIONS

24.29.604 MONTANA SELF-INSURERS GUARANTY FUND--ACCEPTANCE REQUIRED FOR PRIVATE EMPLOYERS OR PRIVATE GROUPS

24.29.607 PUBLIC EMPLOYERS OTHER THAN STATE AGENCIES

24.29.608 ELECTION TO BE BOUND BY COMPENSATION PLAN NO. 1--ELIGIBILITY

24.29.610 WHEN SECURITY REQUIRED

24.29.611 SECURITY DEPOSIT -- CRITERIA

24.29.617 INITIAL ELECTION -- INDIVIDUAL EMPLOYERS

24.29.618 INITIAL ELECTION -- EMPLOYER GROUPS

24.29.908 PENALTIES, ADMINISTRATIVE FINES AND INTEREST

24.29.954 CALCULATION OF AMOUNT OF ADMINISTRATION FUND ASSESSMENT

24.29.956 COMPUTATION AND COLLECTION OF THE ADMINISTRATION FUND ASSESSMENT PREMIUM SURCHARGE RATE FOR PLAN NO. 2 AND NO. 3

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

24.29.616 EXCESS INSURANCE -- WHEN REQUIRED (1) through (3)(a) remain as proposed.

(b) ~~Its provisions or coverage may be altered only upon the prior approval of the department, with the concurrence of the guaranty fund. Proposed changes to provisions or coverage of the excess insurance policy must be submitted to the department at least 60 days in advance of the proposed effective date of the changes.~~ A self-insurer that anticipates that it may have material changes to the provisions or coverage of its excess insurance policy must notify the department of that possibility at least 30 days before the effective date of the changes.

(i) If there is a change in the provisions or coverage, the department has the authority to evaluate the changes related to the terms of the authorization to self-insure, and the department may, with the concurrence of the guaranty fund, make adjustments in the terms of that authorization accordingly.

(ii) In the event of a temporary extension of authority, the department may condition the renewal of self-insurance authority upon a suitable change in the amount of security required from the self-insurer.

(c) through (g) remain as proposed.

AUTH: 39-71-203, MCA
IMP: 39-71-403, 39-71-2101, 39-71-2103, MCA

24.29.623 RENEWAL REQUIRED (1) remains as proposed.

(a) In addition to the other information required in ARM 24.29.617, except as provided by (1)(b), the employer shall submit an independent actuarial analysis for the preceding year, completed by a qualified actuary as defined by the American Academy of Actuaries. The analysis must include, but is not limited to, a reserve analysis that includes all self-insured periods in Montana, through the most recent calendar year. ~~The~~ Except as provided by (1)(c), the results of the analysis must be summarized at the low level, middle (or expected) level, and high level, with the corresponding confidence level expressly stated for each.

(b) The department may waive the requirement of (1)(a) with the concurrence of the guaranty fund.

(c) If the self-insurer believes a different actuarial methodology other than that of confidence level is better for its business needs, the self-insurer in association with its independent actuary must present facts to the department that substantiate its position before it receives approval from the department, with the concurrence of the guaranty fund, to use that different methodology.

(2) through (2)(b) remain as proposed.

(c) an independent actuarial analysis for the preceding year, completed by a qualified actuary, as defined by the American Academy of Actuaries. ~~The~~ Except as provided by (2)(d), the results of the analysis must be summarized at the low level, middle (or expected) level, and high level, with the corresponding confidence level expressly stated for each. The analysis must include, but is not limited to:

(i) a reserve analysis that includes all self-insured periods in Montana, through the most recent calendar year; and

(ii) a premium/rate analysis that projects the total premium need and average rate for the upcoming year which is adequate to cover:

(A) all expected workers' compensation liability costs, whether past, present, or future, with respect to claims previously incurred or claims expected to be incurred in the upcoming year; and

(B) administrative expenses.

(d) If the self-insured group believes a different actuarial methodology other than that of confidence level is better for its business needs, the self-insured group in association with its independent actuary must present facts to the department that substantiate its position before it receives approval from the department, with the concurrence of the guaranty fund, to use that different methodology.

(3) remains as proposed.

AUTH: 39-71-203, MCA
IMP: 39-71-403, 39-71-2104, MCA

5. The department has adopted new rules as proposed:

NEW RULE I (24.29.631) SELF-INSURED EMPLOYERS AND GROUPS -- TRANSFER OF CLAIM LIABILITIES

NEW RULE II (24.29.709) SECURITY DEPOSITS FOR PLAN NUMBER TWO INSURERS -- REPORTS

6. 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: Commenters stated that because the exact terms of a policy of excess insurance are subject to negotiation, and pricing for those terms is typically not available until at or near the renewal deadline, it is not feasible for a self-insurer or group of self-insurers to provide the department with 60 days advance notice of a change of terms of a policy of excess insurance. A commenter stated that due to insurer's pricing practices, a self-insurer may not receive a price quote until a few

hours before the existing policy is set to expire. As a result of the uncertainty of pricing, a self-insurer will request price quotes on different coverage levels, and then select a coverage level that appears affordable.

RESPONSE 1: The department accepts the commenter's representation of the reality of the market for excess workers' compensation coverage. The department's interest in advance notification is to ensure that there is continuous coverage in place for employees, and that a last minute failure to obtain adequate excess coverage does not leave employees without adequate protection for the payment of compensation.

The department concludes if a self-insurer anticipates it may be changing the terms of its excess coverage, the department should be notified in advance. The advance notice should specify the type of change being considered by the self-insurer (typically the amount of coverage being obtained) so that the department can advise the self-insurer of how the change of coverage might affect the department's decision whether to approve renewal, or whether renewal approval is likely to be conditioned upon other changes, such as an increase in the amount of security that the self-insurer must post. The department has amended ARM 24.29.616 accordingly.

COMMENT 2: A commenter objected to the proposed requirement that the excess insurer be an admitted carrier in Montana.

RESPONSE 2: As described in the statement of reasonable necessity in the proposal notice, the department has the understanding that an excess carrier must be an admitted insurer in order to participate in Montana's insurance guaranty program. The department notes that the presence of an excess insurer serves to provide additional security for injured workers by limiting the financial exposure of a self-insurer on a high-value claim. The failure of an excess insurer would, by definition, expose the self-insurer to insolvency due to the unanticipated fiscal responsibility that would revert to the self-insurer. The department sets the security amount based (in part) upon the self-insurer's excess coverage. The collapse of an excess carrier, if not a member of the Montana insurance guaranty program, would significantly increase the financial effect on the already-incurred liability of a self-insurer, and thereby lead to the risk of nonpayment of the claim. The department concludes that it is unwise and imprudent to allow nonadmitted excess insurers to provide coverage to Montana self-insurers.

COMMENT 3: Two commenters stated that because not all actuaries base their actuarial reports on a basis that provides for a high, middle, and low confidence level, and that for some businesses or industries an alternative analytical model was appropriate, the department's proposal to require a high, middle, low confidence level was not a reasonable requirement.

RESPONSE 3: The department concludes that it will review requests to use alternative analytical models in actuarial reports on a case-by-case basis. The

department has amended ARM 24.29.623 to allow it to approve, with the concurrence of the guaranty fund, use of an alternative methodology.

COMMENT 4: A commentor questioned whether authorization for a private self-insurer or group to continue to self-insure required the approval of the department and the guaranty fund, versus the approval of either the department or the guaranty fund.

RESPONSE 4: The department concludes that the law requires the approval of both the department and the guaranty fund of a private self-insurer or group to renew its self-insurance privilege. The guaranty fund does not have any role in the approval of a public sector self-employer or group.

COMMENT 5: A commenter objected to the department's proposed use of the term "benefits" instead of "compensation benefits", noting that a variety of court cases over the past 25 years have held that the term "compensation" includes medical and other benefits.

RESPONSE 5: The department believes that while the term "compensation benefits" has been recognized to include medical and other benefits besides wage-loss compensation, there is little risk that specifically defining the term "benefits" as including wage loss, medical, rehabilitation and other benefits will change Montana law. The department concludes that given the definition's express inclusion of benefits other than wage-loss replacement payments, there is no reasonable possibility that anyone will plausibly believe that the defined term "benefits", as used in ARM Title 24, chapter 29, part 6, will be misconstrued as not including all benefits payable under the Workers' Compensation Act.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

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

Certified to the Secretary of State August 13, 2012

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

In the matter of the adoption of New Rules I through IV and amendment of ARM 37.85.206 pertaining to Medicaid diabetes and cardiovascular disease prevention services	)))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On March 8, 2012, the Department of Public Health and Human Services published MAR Notice No. 37-575 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 483 of the 2012 Montana Administrative Register, Issue Number 5.

2. The department has adopted New Rule I (37.86.5401), II (37.86.5402), III (37.86.5403), IV (37.86.5404) as proposed. The department has amended ARM 37.85.206 as proposed.

3. 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 comment was received that diabetes prevention services should be directed to mental health centers, mental health professionals, and primary care physicians who care for individuals suffering from severe mental illness.

RESPONSE #1: Providers of diabetes and cardiovascular disease prevention services will outreach to all Medicaid eligible individuals, including persons living with severe mental illness. Outreach will be conducted at mental health centers and to mental health professionals and primary care providers.

4. The department intends the proposed new and amended rules to be applied retroactively to February 2, 2012. There is no negative impact to Medicaid clients or providers by applying the new rules retroactively. People have been participating in the program and they justifiably expect to get paid as proposed. The Centers for Medicare and Medicaid Services (CMS) have requested that this rulemaking be effective on February 2, 2012 and is in compliance with the department's proposed State Plan Amendment with CMS.

/s/ John Koch
Rule Reviewer

/s/ Jane Smilie for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State August 13, 2012.

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

In the matter of the amendment of ARM 37.57.102, 37.57.105, 37.57.106, 37.57.109, 37.57.110, 37.57.111, 37.57.117, and 37.57.118 pertaining to children's special health services	))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On June 7, 2012, the Department of Public Health and Human Services published MAR Notice No. 37-588 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1126 of the 2012 Montana Administrative Register, Issue Number 11.

2. The department has amended ARM 37.57.102, 37.57.105, 37.57.106, 37.57.109, 37.57.110, 37.57.111, and 37.57.117 as proposed.

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

37.57.118 PROGRAM RECORDS (1) The department will retain specialty clinic participants ~~records~~ case files of CSHS services provided for a client for a period of five years after the child reaches the age of 18 as set forth in the Montana Secretary of State records ~~management form #1, record series profile, program code 6901073~~ retention schedule, records series title "Specialty Clinic Participant Case Files."

(2) Prior to destroying specialty clinic participant ~~records~~ case files, the department will advertise that the ~~records~~ case files may be obtained by those to whom they pertain by publishing a notice in Montana's major newspapers once per week for three consecutive weeks.

(3) ~~Records~~ Case files remaining unclaimed for three months after the public notice described in (2) is completed will be destroyed after the department receives the approval of the state records committee required by 2-6-212, MCA.

(4) The department will retain CSHS financial assistance ~~client records~~ case files for five years from the last ~~contact~~ service date, as set forth in the Montana Secretary of State records retention schedule, records series title "Financial Assistance Case Files."

(5) The financial assistance ~~records~~ case files will be destroyed after the program receives approval from the state records committee required under 2-6-212, MCA.

(6) The department will retain all electronic data ~~permanently~~ as set forth in the Montana Secretary of State records ~~management form #1, record series profile program code 6901073~~ retention schedule, records series title "CHRIS Files."

AUTH: 50-1-202, MCA
IMP: 50-1-202, 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: A comment was received requesting clarification and a response regarding the potential reduced capacity of a county registered dietician, social worker, or public health nurse due to the department removing language found in ARM 37.57.110(5).

RESPONSE #1: The department deleted this text because it was determined this language was not needed as this is standard operation of the Children's Special Health Services Section. The amendment does not cause potential reduction of capacity.

COMMENT #2: A comment was received noting the need to further amend language in ARM 37.57.118 in order to reference the Secretary of State's record retention policies.

RESPONSE #2: The department has amended ARM 37.57.118 to accurately reflect the Secretary of State's record-retention procedures for case files, formerly referenced as "records." Additional amendments, made by the department, are the removal of "form numbers" and the addition of a reference to the Secretary of State's retention schedule.

/s/ Shannon L. McDonald
Rule Reviewer

/s/ Jane Smilie for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State August 13, 2012

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

In the matter of the amendment of ARM 37.40.307 and 37.40.361 pertaining to nursing facility reimbursement	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On June 21, 2012, the Department of Public Health and Human Services published MAR Notice No. 37-590 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1248 of the 2012 Montana Administrative Register, Issue Number 12.

2. The department has amended the above-stated rules as proposed.

3. 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: The department received several comments requesting that the rates not be cut for any nursing facility and opposing the reduction in rates to 21 of 82 nursing facilities. Most of the facilities slated for cuts are small rural facilities such as those located in Baker, Big Sandy, Broadus, Browning, Chinook, Crow Agency, Fort Benton, Hamilton, Jordan, Lewistown, Livingston, Plentywood, and Sheridan. Even a small cut is a hardship for these facilities.

Because of the way the reimbursement system incorporates the case mix adjustment for acuity in the rate calculation process, some facilities will see their reimbursement cut anywhere from a fraction of one percent up to almost four percent in part because of the increase in the statewide case mix index (CMI) when compared to the facility CMI. When there is no additional funding added to the reimbursement system, an anomaly occurs because the overall increase in care needs of Medicaid beneficiaries is not funded, instead funding is reallocated from the facilities whose case mix did not increase. While the system provides for some fluctuation upward and down due to the case mix, the cost of statewide increases should not be borne by 21 facilities that end up with a rate decrease. The cost of caring for nursing facility residents is increasing but instead of an inflationary increase to account for these costs, the rates are being cut.

Commenters believe that the reductions can be ameliorated within the funding levels appropriated by the Legislature for nursing homes either by reducing the number of Medicaid bed days utilized in the rate calculation due to declining caseload or by recognizing the differences in the rates of FMAP utilized during the legislative session for appropriation purposes and the FMAP rates that will be utilized for

payment purposes throughout the year. Also, commenters believe that there was no intent on the part of the Legislature to cut the rates of any nursing facility.

RESPONSE #1: The department has utilized the funding that was appropriated in HB 2 by the 2011 Montana Legislature in its calculation of the Medicaid rates that were distributed for provider comments. The corresponding bed days were reflected in the rate sheet based on the funding provided by the Legislature to cover this caseload estimate and supported by the utilization of Medicaid days by facilities during the 2012 rate year.

Additionally, the department has looked at current trends in patient contribution from paid claims data to determine what level of patient contribution will be available for the 2013 rate calculation. The department utilized the legislative approved increase of patient contribution that is being passed on to nursing facilities at an estimated 3% increase in the COLA. It is not yet certain if there will be a COLA increase for fiscal year (FY) 2013 or what level of increase retirement plans will have that may impact the patient contribution provided by nursing facility residents under Medicaid for rate year 2013.

After reassessing the variables utilized in the draft rate sheet and looking at the impact that the rate adjustments will have on small rural providers the department has determined that there is a need to mitigate these reductions in rates. We agree that there was no specified intent that rates be reduced for any nursing facility and that the reallocation of the case mix with no new money in the system results in rate swings and decreases that could not have been known at the time the Legislature was in session. The department will hold harmless, at the established 2012 Medicaid rate, the 22 nursing facility providers that were to receive a rate reduction.

The department monitors on an ongoing basis the rate setting variables and the utilization trends and will continue to do so for rate year 2013 for nursing facility providers to determine the impact that these adjustments to rates, for these 22 providers, will have on the level of funding available for nursing facility reimbursement.

The department usually has adopted a July 1st effective date for Medicaid nursing facility rules and rate changes because the funding is available July 1st. The original draft rate spreadsheet that was the basis of the proposed rate changes would have resulted in decreased reimbursement for some providers. Consequently, the department could not retroactively decrease rates as this would have resulted in an adverse impact on those providers. Therefore, the department proposed a September 1, 2012 effective date. Based on comments the department received during the public comment period, it decided not to adopt decreased rates, thus removing the possibility of adverse impact upon providers. Therefore, the department has adopted the new rates retroactive to July 1, 2012.

The department is barred by 2-4-306(5), MCA from implementing the new rates prior to adoption of these rules. Providers can act on them upon publication of this notice in the MAR on August 23, 2012.

COMMENT #2: In the statement of reasonable necessity the department indicates that it is implementing legislative funding as well as continuing a price-based reimbursement approach to help mitigate conditions affecting nursing facilities. We ask the department to clarify how an overall rate increase of just .39% and rate cuts for 25% of all facilities takes these issues and values into account. Please provide any data developed by the department to determine that these cuts are reasonable and necessary to achieving the goal of quality of care and the ability to meet state and federal regulations. The department also indicates that it considered the impact of rate changes on efficiency, economy, quality of care, and access to Medicaid services and concluded that the rates are still sufficient to meet the requirements of 42 USC 1396(a)(3)(A).

The cost of caring for residents is increasing but instead of an inflationary increase to account for these costs, the rates are being cut. The department's own consultant determined that for FY 2011, the cost of caring for a Medicaid beneficiary was $185.24 per day. The department is setting rates two years later at an average of $162.52 per day. If one considers even minimal inflation of 2.55% per year, the cost of a day of care will be $194.62 during the period for which these rates are being set. On average the state will be paying only 83.5% of actual costs.

RESPONSE #2: Federal laws or regulations do not mandate that established Medicaid rates must cover all of the actual costs incurred by nursing facility providers. This is not a standard by which the legal adequacy of rates has been measured in the past nor is it the standard that will be utilized in the future.

The department has developed rates which are reasonable and adequate and in compliance with all requirements. The price is reflective of many factors that impact the ways that nursing facilities do business and is set at a level that is fair when considering all of those factors together.

The statewide price is determined through a public process. Factors that are considered in the establishment of this price include the cost of providing nursing facility services, Medicaid recipient's access to nursing facility services, the quality of nursing facility care, as well as budgetary or funding levels. The price-based rate reflects a rate commensurate with the services that are required to be provided by nursing facility providers when meeting federal and state requirements. Predictability of the reimbursement calculation is one of the required features of the price-based reimbursement approach, as is the recognition of the changes in acuity of the residents in a facility over time.

Each nursing facility receives the same operating per diem rate, which is 80% of the statewide price. The remaining 20% of the statewide price represents the direct resident care component of the rate and is acuity adjusted. Each facility's direct

resident care component rate is specific to that facility and is based on the acuity of Medicaid residents served in that facility. As acuity changes in each facility based on the level of complexity of the residents being served relative to the statewide acuity, facility rates adjust upward or downward to account for this change in acuity. This was a component that was considered necessary when the price-based system of reimbursement was first adopted to account for and reflect the level of complexity of residents being served and adjusted accordingly to account for this change in acuity in each facility. In order to minimize the volatility of the rates from year to year, which was a negative feature of the previous reimbursement system, only 20% of the overall price is adjusted for these changes in acuity.

With no increases in the overall funding in the system of reimbursement, facility rates will adjust upward or downward based on the acuity of their residents, especially if the acuity level is significantly higher or lower than the acuity of the prior year for that facility. This is one feature that providers believed was important in a rate system, the recognition of changes in the level of acuity of residents in each facility.

Montana contracts with Myers and Stauffer LC to prepare an annual analysis of each nursing facility's cost of providing nursing facility services to Medicaid recipients, and each facility's reimbursement rate. The analysis provides the department with an evaluation tool as to the adequacy of the statewide pricing for Montana nursing facilities and has done so since 2002. The annual rate to cost analysis that is performed for the rate setting process indicates for state fiscal year (SFY) 2011 that Montana's Medicaid day-weighted average total rate that includes all supplemental payments (IGT and direct care wages) was $179.50 compared to the Medicaid inflated cost of $185.24, or that on average Medicaid is covering approximately 96.9% of cost through the various forms of reimbursement to nursing facility providers. This rate comparison supports the determination as to the adequacy of the Medicaid reimbursement rates for nursing facilities.

Montana nursing facilities received additional funding from the IGT program in fiscal year 2012. The department took the opportunity to increase the IGT reimbursement by taking advantage of the ability to match existing county funds with enhanced federal funds up to the higher Medicare Upper Payment Limit (UPL) amount thus providing an enhanced IGT payment to Montana nursing facilities in 2012. County nursing facilities received total combined funding from Medicaid reimbursement, to the UPL or at a minimum a net gain of $18.62 per day, while noncounty facilities received IGT funding of almost $8.35 per day in addition to their reimbursement rates and direct care wage funds to support their Medicaid residents in fiscal year 2012. These amounts were significantly higher than expected and were passed on to Montana nursing facilities.

Providers will continue to participate and benefit from the IGT program that provides supplemental payments in addition to the Medicaid payment rate set through the reimbursement methodology during fiscal year 2013. The IGT program provides funding separately to both county and noncounty facilities.

In fiscal year 2013 Montana nursing facilities will continue to receive increases from direct care wage (DCW) funding through an appropriation that is separate and in addition to the provider rate funding provided through the price-based methodology. The DCW program provides funding separately from the reimbursement rate calculation to help facilities provide wage increases to its direct care workforce and will provide over $3.9 million dollars in ongoing funding during this fiscal year that can only be used to provide for lump sum bonus' or to sustain or increase wage payments to direct care and ancillary workers in nursing facilities. This is approximately $3.81 per Medicaid day that will be passed on to facilities to provide for wage or bonus increases for direct care and ancillary workers. This funding should serve to mitigate some of the concerns related to providing wages and bonuses to facility workers during the next fiscal year.

Occupancy in Montana for nursing facility care has been declining for some time but has slowed in recent years. The current statewide occupancy level is at 70% with several facilities operating at occupancy levels of under 50%. With these levels of occupancy there are open and available beds for those individuals that seek to access nursing facility placements. While some facilities are operating at a much fuller occupancy level there is capacity in many of Montana's nursing facilities to place individuals that require this level of service. If some facilities feel that they can no longer admit Medicaid residents that is unfortunate, but we believe that there will be other facilities that will admit these residents and provide Medicaid funded nursing facility services.

COMMENT #3: A comment was received stating we support the lump sum distributions appropriated by the Legislature for direct care workers and the methodology outlined for distribution of these funds.

RESPONSE #3: The department concurs with this comment and will continue to implement the direct care wage funding for nursing facility direct care workers.

4. The department intends to apply these rules retroactively to July 1, 2012. A retroactive application of the proposed rules does not result in a negative impact to any affected party.

/s/ John Koch
Rule Reviewer

/s/ Jane Smilie for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State August 13, 2012.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.20.105 and 42.20.107 relating to the valuation of real property	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 12, 2012, the department published MAR Notice Number 42-2-879 regarding the proposed amendment of the above-stated rules at page 730 of the 2012 Montana Administrative Register, Issue Number 7.

2. A public hearing was held on May 14, 2012, to consider the proposed amendments. Nancy Schlepp, President of the Montana Taxpayers Association, appeared and testified at the hearing. Ms. Schlepp also provided written comments subsequent to the hearing. In addition, the department received written comments from Mike Green, an attorney with Crowley Fleck, PLLP, and Todd Llewellyn, a member of the Montana Association of Realtors. The oral and written comments received are summarized as follows, along with the responses of the department.

COMMENT NO. 1: Ms. Schlepp commented, relative to ARM 42.20.105 (2)(a), that the common elements language should not be stricken. She stated that inserting the word "townhomes" after condominiums instead would clarify the language, but leave important guidance to appraisers.

Mr. Green commented that they are concerned about various aspects of the proposed rule amendments, and stated that while much of the proposed amendments are appropriate in carrying out the statutory changes and requirements, some of the department's proposed amendments go far beyond changes necessary to incorporate the statutory changes, and create the possibility for significant appraisal errors as well as taxpayer compliance issues.

He further commented that they oppose eliminating the "common elements" language in ARM 42.20.105(2)(a), because it is an accurate statement of both Montana law and basic appraisal theory, and because it provides guidance for appraisers and taxpayers that was made even more important by the changes enacted through House Bill 132 authorizing unified values of land and improvements. Mr. Green suggested a more appropriate change in this language may be to just simply add the term "and townhomes" after the term "condominiums" to reflect that a townhome owner's undivided interest in common elements, if any, is inherent in the sales comparison approach. Mr. Green's proposed language would retain the proposed stricken language in (2)(a) and it would read as follows: "The common elements of residential condominiums and townhomes are inherent in the individual unit values when the sales comparison approach is employed."

Mr. Green stated that to the extent the language being added in the second to last paragraph in (2)(a) is intended to provide guidance to appraisers, the language should be amended to clarify that in cases of disparate use or values, the

department appraiser can use an individual cost approach for a condominium or townhome unit separate from the common elements, and suggested that similar language should be added to (2)(b).

Ms. Schlepp suggested the department change the proposed amendment to the second from the last sentence in (2)(a), to read as follows: "Allocation of value for each condominium unit will be determined by multiplying the percentage, expressed as a decimal, by the appraised value of the entire condominium/townhome project or by adding the individual unit cost to the individual unit's allocation of those elements deemed common." Use of either allocation should ensure that the total of individual condominiums/townhomes not be greater than the whole of the project.

RESPONSE NO. 1: The department agrees with Mr. Green's comments. The stricken language in ARM 42.20.105(2)(a) will be reinserted and "townhomes" added. It will read as follows: "The preferred approach for the appraisal of residential condominium/townhome units is the sales comparison approach, where comparable sales are available. The common elements of residential condominiums/townhomes are inherent in the individual unit values when the sales comparison approach is employed." The department will also add the word "townhome" in the second sentence following this change, which reads: "Allocation of value for each condominium/townhome unit will be determined by multiplying the percentage . . ."

The department further agrees with Mr. Green's comments regarding (2)(b) and will add language to this section, to read as follows: "Allocation of value for each condominium/townhome unit will be determined by multiplying the percentage, expressed as a decimal, by the appraised value of the entire condominium/townhome project or by adding the individual unit cost to the individual unit's allocation of those elements deemed common."

While the department appreciates Ms. Schlepp's comments, unit improvements and ownership changes from a condominium to a townhome may increase the value as a whole, because unlike a condominium owner, a townhome unit owner holds separate title to the land beneath his/her unit. As a result, the land value is added to a townhome unit's value, whereas, in a condominium unit it is not. Therefore, it is quite possible for the whole project's value to change, depending upon the facts related to a particular individual property and the proper application of market appraisal methods to those facts.

COMMENT NO. 2: Ms. Schlepp stated that the Montana Taxpayers Association requests that the word "should" remain in ARM 42.20.105(2)(a) and (b), so that the department has the latitude to fix any outlier issues in percentage valuations. She further commented that by making use of ownership percentages stated in condominiums and townhome declarations mandatory, the department loses its discretion to resolve inappropriate valuations.

Mr. Green provided opposition to the changes to ARM 42.20.105(2)(a) and (b), and commented that the department is making use of ownership percentages stated in condominium and townhome declarations mandatory for allocation of a cost approach by changing the word "should" to "will." He also commented that the

current language using the word "should" states a preference for use of the declaration percentage of ownership interests for purposes of allocating a condominium project cost value to individual units, and in situations where this approach led to improper valuations, the department's appraisers and managers maintained the discretion to alter the valuation and allocation methodology. Mr. Green stated that the department should maintain that discretion and eliminate this proposed change to the rules.

Mr. Green further commented, in reference to the current language of ARM 42.20.105(2)(a) and (b), that the language was adopted in 2003 to comply with a legal opinion issued by the department's Office of Legal Affairs, and to address issues that have been raised by appellants in recent tax appeals. Mr. Green stated that the State Tax Appeal Board (STAB) previously declared an earlier version of ARM 42.20.105(1)(b) to be arbitrary and capricious, because it required the department to allocate value based on condominium declaration percentages. He further stated that the department's proposed amendment to substitute "will" for "should" restores the mandatory language declared improper in that case, and that the department should not unravel an important policy correction which was made in 2003, and more importantly should not revert to rule language that STAB has already declared arbitrary and capricious. He suggested that this will only lead to another invalidation of the rule and create uncertainty for the department and taxpayers alike.

Mr. Green stated that the mandatory use of declaration statements to allocate tax appraisal values is an improper extension of the declaration percentages, which only refer as a matter of law, to each unit owner's percentage of ownership of undivided common elements (70-23-043, MCA). These ownership percentages are usually not based on a comparison of fair market values and are not required to be (70-23-403(1), MCA). It is much more common for unit ownership declarations to be tied to some objective measures such as a comparison of square footage. He stated that the declaration percentages are set at a point in time very early in the condominium project's life. The department's mandatory use of the declaration percentages ignores that the percentages are not required to conform to market value differences, and also ignores that even if originally tied to market value comparisons, those values can change over time.

Mr. Green also commented that while the declaration ownership percentages may provide an administratively convenient method for allocating the cost approach, the department must maintain its appraisers' and managers' discretion to use more appropriate allocation methods where the ownership percentages do not conform to actual market values of individual units. He further commented that the department's intent to use ownership percentages in the declarations for townhomes is entirely inappropriate, because the common elements associated with a particular unit will likely be insignificant.

RESPONSE NO. 2: The department agrees with the limitations expressed by both Ms. Schlepp and Mr. Green regarding the replacement of "should" with "will." The word "should" is being reinserted into ARM 42.20.105(2)(b) in place of "will."

COMMENT NO. 3: Mr. Green opposed the new requirements for townhome

declarations in the proposed new (3) and (4) in ARM 42.20.105. He commented that the language imposes new nontax related requirements on both new and existing townhome projects and exceeds the department's authority. He further commented that the new provisions add the requirement that townhome declarations identify location and dimensions of each townhome unit's lot and would require amendment of existing townhome declarations, adding that these requirements exceed the department's rulemaking authority and contradict Montana law.

Mr. Green commented that House Bill 460, L. 2011, authorized the department to adopt rules to value townhomes and townhouses, but did not authorize the department to require townhome or townhouse declarations, or to alter the statutory criteria for declarations.

Mr. Green further commented that House Bill 460, L. 2011, allows for a townhome declaration to be filed pursuant to the Unit Ownership Act by townhome developers as an option, but does not require such a filing. He stated that if a townhome developer or group of owners wants to submit a declaration pursuant to the new provisions, they are electing to subject themselves to the Unit Ownership Act, and must comply with the requirements of the Act. Mr. Green further commented that nothing in the bill or the Unit Ownership Act grants the department authority to alter the requirements for declarations that are filed or to require the filing of a declaration.

Mr. Green stated that the department does not have the authority through rule to require developers of new townhome projects to file a declaration, nor to require owners of existing townhome projects to prepare or to consent to amendment of townhome declarations. He further stated that the department's proposal seems to ignore that the declarations of the Unit Ownership Act are not tax documents, that rather they are real property documents which govern and effect interests in property. Mr. Green commented that owners' interests in their townhome properties are prescribed by the documents in existence at the time of their conveyance and that the department cannot require an owner to consent to amendment of their existing interests in property or to accept conversion to a unit governed by the Unit Ownership Act.

Mr. Green further stated that even if the department had the authority to adopt proposed new (3) and (4), the language fails to address the practical problems created by such requirements. For example, in the case of an existing townhome project, there will likely be multiple unit owners who must all consent to either the filing of a declaration or the amendment of the declaration. He commented that the department's new requirement that an amended declaration "must be filed" does not indicate who is obligated to prepare and file such an amended declaration or how the newly required contents of the declaration would be determined by the owners. Mr. Green further commented that this issue illustrates just one of many problems created by adopting real property restrictions in the form of a tax rule.

Ms. Schlepp also commented that the Montana Taxpayers Association opposes the addition of (3) and (4) in ARM 42.20.105, citing the same reasoning provided by Mr. Green.

RESPONSE NO. 3: The department's original intent was not to modify unit ownership, but to receive necessary information from the unit owner for the purpose

of properly allocating each unit's value in a way that would be easy for the taxpayer.

As stated in Response No. 1, the ownership change from a condominium to a townhome allows the unit owner to hold separate title to the land beneath the owner's unit. The unit owner must, therefore, inform the department as to the amount of land that the unit owner will acquire after the conversion to a townhome, as well as, the deeds conveying such land. The department can properly allocate the unit value by either the square footage or acreage of land associated with the unit.

The department appreciates and considered the comments from Mr. Green and Ms. Schlepp. An amended declaration is not a proper method for obtaining a unit's square footage or acreage. The department will further amend the rule to delete the proposed language. In lieu of an amended declaration, however, the department will develop a form for the taxpayer to complete with the required information.

COMMENT NO. 4: Mr. Green further commented that proposed new (5) in ARM 42.20.105 imposes improper and arbitrary deadlines on the filing of townhome declarations. He stated that the department's proposed rule ignores its lack of statutory authority for imposing such deadlines and the practical reality that townhome declarations are filed in accordance with development and local planning regulation requirements. Mr. Green stated that the department's January 1 deadline as stated is confusing and improper. He further stated that the department's June 1 deadline for tax year 2012, even if legally permissible, does not provide townhome owners a reasonable opportunity to comply with the department's rules given that the comment period on this proposed rule does not close until May 18, 2012.

Ms. Schlepp also commented that the Montana Taxpayers Association opposes the addition of (5) in ARM 42.20.105, citing the same reasoning provided by Mr. Green.

RESPONSE NO. 4: The department appreciates Mr. Green's and Ms. Schlepp's comments regarding proposed new (5) in ARM 42.20.105. The law requires the department to assess all real property as of January 1 of any given tax year. The department requires specific information from the property owner to accurately assess the owner's property. As stated in Response No. 3, the department will provide a form to the property owner requesting such information. The form and requested documentation must be submitted by January 1 to be considered for that tax year. Forms and requested documentation received after January 1 will be considered for the following tax year.

The rule process takes time, but it serves a valuable purpose by allowing the public to participate and requiring the department to respond. The department takes all comments seriously, and thoroughly researches issues raised in the comments. In this case the rule process took nearly a year, impeding on the time allowed for affected property owners to apply for a townhome ownership in the current tax year. Since the adoption of the proposed rule will occur by August 31, 2012, the department will extend the deadline for tax year 2012 to October 1.

COMMENT NO. 5: Ms. Schlepp further stated the Montana Taxpayer's

Association wanted to reiterate its understanding that the proposed rule changes would not result in an increase to condominium and townhome appraisal values and asks that the department make this clear to all department appraisers who will be dealing with this rule. She expressed that this understanding was because the fiscal note for House Bill 132, L. 2011, was zero, and there was no fiscal note for House Bill 460, L. 2011.

RESPONSE NO. 5: The department recognizes the concern that values may increase when a unit's ownership type changes from a condominium to a townhome. As stated in Response No. 1, a townhome unit owner holds separate title to the land beneath the unit as opposed to a condominium unit owner who does not own the land beneath the unit. As such, the land value must be attributed to the townhome unit.

The current reappraisal cycle began January 1, 2009, and will end December 31, 2014. The department values property as of a specific date in time. The 2007 Legislature determined July 1, 2008, to be the valuation date for the current reappraisal cycle. On July 1, 2008, the department valued condominium units without an individual land value because the condominium unit owner did not own the land beneath the unit. To properly allocate the land value to a converted condominium unit or newly designated townhome unit, the department would need a land valuation model to account for nontypical parcel sizes. Given the short time frame between now and the upcoming cycle, the department will not develop a midcycle model to account for the land value. Therefore, the department will not add the land values to the converted condominium units for the remainder of this cycle.

However, in the event that the townhome unit owner makes improvements to the property during the current reappraisal cycle, as with all other properties, the department will reassess the unit value based upon the structural improvements. The department anticipates developing a land valuation model for the next reappraisal cycle beginning January 1, 2015, at which time the land values for converted condominium units will be added to the property's value.

Ms. Schlepp's comments concerning fiscal notes are appreciated but her concerns are misplaced. The fiscal note for House Bill 132 and the lack of a fiscal note for House Bill 460 are of no significance or relevance to appraising individual townhome properties. The department is required to value properties at 100 percent of market value. Individual property values may change without producing any measurable revenue effect. This is in part because the individual value changes would likely be too small to produce any cumulative changes in statewide mill revenue large enough to actually estimate in a fiscal note.

Further, even if value changes for an individual property were significant at the local level (up or down), there would be no net revenue effect for local governments because of the automatic adjustment of mill levies under 15-10-420, MCA. That is, if a townhome value goes up, the taxes assigned to that townhome might go up (depending upon local budgets), but taxes would go down for other property owners. The net effect on revenues would be zero, even if values for townhomes were changing.

The department concludes that the comments offered with regard to fiscal notes are not relevant to these rules.

COMMENT NO. 6: Mr. Llewellyn stated that the purpose of House Bill 460, L. 2011, was to provide a definition in Montana statute under the Unit Ownership Act for townhomes, because not having a definition for townhomes has caused a hardship on consumers either trying to buy or sell their properties.

Mr. Llewellyn commented that what was to be changed in the Department of Revenue is the classification showing a townhome, and having that classification in the public records. He further commented that the value of the condominiums has been declining due to the lack of financing or the cost of financing, while townhomes are maintaining their values when the change in classification has been completed. Mr. Llewellyn also provided a letter from a licensed appraiser regarding values, and copies of listings for two Billings properties that recently sold for cash at discounted prices because of the classification.

Mr. Llewellyn stated that making the change in the classification will be a big help to the owners and consumers by making the properties financeable at reasonable rates, and explained that townhomes are financed the same as single family homes, while condominiums have increased rates and must be certified by the Housing and Urban Development as a high cost. Mr. Llewellyn requests the department complete the classification rules for these properties.

RESPONSE NO. 6: The department recognizes Mr. Llewellyn's explanation of the purpose of House Bill 460, L. 2011, from a financial perspective. Similar to the financing distinction between a condominium and a townhome, there is a property valuation distinction between the two. The department values property by its physical characteristics and attributes in the market. As stated in Response Nos. 1, 3, and 5, due to the unit owner holding separate title to the land beneath the unit, more than just a "property type" change occurs. The amount of land each unit owner holds separately must be provided to the department so it can be properly identified and assessed, which will change the characteristics for each unit owner and the complex as a whole.

3. As a result of the comments received the department amends ARM 42.20.105 as follows, stricken matter interlined, new matter underlined:

42.20.105 CONDOMINIUMS/TOWNHOMES (1) remains as proposed.

(2) The department will employ the following appraisal and assessment methodology for the appraisal of condominiums/townhomes, except for time-share condominiums.

(a) The preferred approach for the appraisal of residential condominium/townhome units is the sales comparison approach, where comparable sales are available. The common elements of residential condominiums/townhomes are inherent in the individual unit values when the sales comparison approach is employed. When comparable sales are not available, the cost approach must be used. In that instance, the condominium/townhome declaration's percentage of ownership interest required by 15-8-511, 70-23-301, and 70-23-403, MCA, ~~will~~ should be used to allocate the value. Allocation of value for each condominium/townhome unit will be determined by multiplying the percentage,

expressed as a decimal, by the appraised value of the entire condominium/townhome project or by adding the individual unit cost to the individual unit's allocation of those elements deemed common. The common elements are deemed to be inherent in the individual unit's declaration percentage when the cost approach to value is determined and allocated as specified in this subsection.

(b) The preferred approach for the appraisal of commercial condominium units is the income approach where reliable condominium income and expense data are available. The common elements of income-producing condominiums are inherent in the individual unit values when the income approach is employed. When reliable income and expense data are not available, the cost approach must be used. In that instance, the condominium declaration's percentage of ownership interest required by 15-8-511, 70-23-301, and 70-23-403, MCA, ~~will~~ should be used to allocate the value. Allocation of value for each condominium/townhome unit will be determined by multiplying the percentage, expressed as a decimal, by the appraised value of the entire condominium/townhome project. The common elements are deemed to be inherent in the individual unit's declaration percentage when the cost approach to value is determined and allocated as specified in this subsection.

(3) ~~For new townhome projects, a townhome declaration must identify the location and dimensions of each townhome unit's lot and must have been filed with the County Clerk and Recorder~~ Unit owners seeking conversion from a condominium property type to a townhome property type will require changing the legal ownership of the land for the entire complex, on which the unit is located. Therefore, all unit owners of the complex shall acknowledge, consent, and attest to the validity of the property type change.

(4) ~~For existing townhome projects, an amended townhome declaration must be filed that includes a description of the size in square footage or acreage of land associated with each townhome unit, and identify the remaining square footage or acreage associated with the common land and/or improvement elements.~~

~~(5) The deadline for filing new or amended townhome declarations is January 1~~ The unit owner or unit owner's designated entity must file an application for a property type change on a form available from the local department office before January 1 of the year for which the property change is sought. Applications received after January 1 will be considered for the following tax year. For tax year 2012 only, the deadline ~~for filing new and amended townhome declarations is June 1~~ is October 1.

(5) The department requires the following information before changing a property type from a condominium to a townhome:

(a) a description of the size in square footage or acreage of land associated with each townhome unit;

(b) the amount of remaining square footage or acreage of land associated with each townhome unit;

(c) if a designated entity, documentation authorizing the designated entity to represent the unit owners; and

(d) signatures of all unit owners of the complex in which the property type change is located.

(6) through (6)(c) remain as proposed.

AUTH: 15-1-201
IMP: 15-7-103, 15-8-511, 70-23-102, 70-23-103, 70-23-301, 70-23-403, MCA

4. The department amends ARM 42.20.107 as proposed.

5. An electronic copy of this notice is available on the department's web site at www.revenue.mt.gov. Select the "Legal Resources" link in the left hand column, and click on the "Rules" link within to view the options under the "Current Rule Actions – Published Notices" 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. While the department also strives to keep its web site accessible at all times, in some instances it may be temporarily unavailable due to system maintenance or technical problems.

/s/ Laurie Logan for:
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State August 13, 2012

VOLUME NO. 54 OPINION NO. 8

PEACE OFFICERS - Effect of a break in service on the peace officer training requirements;
MONTANA CODE ANNOTATED - Sections 1-2-101, 7-32-303(1)(a), (2), (5)(a), (b), (c), (6), (7), 44-4-404;
OPINIONS OF THE ATTORNEY GENERAL - 48 Op. Atty. Gen. No. 22 (2000).

HELD: A peace officer who has a break in service during the one-year time period provided in 7-32-303(5)(a) has the remainder of the one-year period, plus any additional time as granted by the public officer standards and training council, in which to attend and successfully complete a basic training course. If the break in service extends beyond one year from his or her initial appointment and the officer has not completed a basic training course within one year of the initial appointment as required by 7-32-303(5)(a), the officer forfeits his or her position as peace officer and cannot serve in that capacity until he or she attends and successfully completes a basic training course.

August 10, 2012

Ms. Winnie Ore, Chairperson
Montana Public Safety Officer
Standards &Training Council
2260 Sierra Road East
Helena, MT 59602

Dear Ms. Ore:

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

> How long does a peace officer have to complete a basic training course if the officer has a break in service during the one-year time period provided in Mont. Code Ann. § 7-32-303(5)(a)?

The general requirement is that a peace officer must attend and successfully complete an appropriate peace officer basic training course within one year of his or her initial appointment:

> Except as provided in subsections (5)(b) and (5)(c), it is the duty of an appointing authority to cause each peace officer appointed under its authority to attend and successfully complete, within 1 year of the initial appointment, an appropriate peace officer basic course certified by the Montana public safety officer standards and training council. Any peace officer appointed after September 30, 1983, who fails to meet

> the minimum requirements as set forth in subsection (2) or who fails to complete the basic course as required by this subsection (5)(a) forfeits the position, authority, and arrest powers accorded a peace officer in this state.

Mont. Code Ann. § 7-32-303(5)(a). This requirement applies to all state, county, and city law enforcement officers described in Mont. Code Ann. § 7-32-303(1)(a).

The one-year deadline may be extended by the public safety officer standards and training council (POST council) for a period of up to 180 days as provided in subsection (6):

> The Montana public safety officer standards and training council may extend the 1-time requirements of subsections (5)(a) and (5)(c) upon the written application of the peace officer and the appointing authority of the officer. The application must explain the circumstances that make the extension necessary. Factors that the council may consider in granting or denying the extension include but are not limited to illnesses of the peace officer or a member of the peace officer's immediate family, absence of reasonable access to the basic equivalency course, and an unreasonable shortage of personnel within the department. The council may not grant an extension to exceed 180 days.

Mont. Code Ann. § 7-32-303(6). As determined in a prior opinion of this office, the 180-day deadline may be extended only once. 48 Op. Atty. Gen. No. 22 (2000).

The Montana Department of Justice offers a 12-week law enforcement officer basic course which has been approved by the POST council and is available three times a year through the Montana Law Enforcement Academy. Topics covered include education and training in the fundamentals of policing, including law, human behavior, police function, patrol operations, investigation, traffic enforcement, and police proficiencies. See https://doj.mt.gov.mlea/basic-programs-3/. Successful completion of the training requirement and other qualifications, including a one-year probationary period, allows the officer to apply to the POST council for a basic certificate certifying that the officer has met all the basic qualifying peace officer standards of this state. Mont. Code Ann. § 7-32-303(7).

Your question involves a peace officer who is appointed by a law enforcement agency but has a break in service prior to completing the basic course described in Mont. Code Ann. § 7-32-303(5)(a). I will analyze your question in two parts: (1) the first scenario assumes that the officer leaves and returns to service within the one-year time period provided in Mont. Code Ann. § 7-32-303(5)(a); and (2) the second scenario assumes that the officer leaves but does not return to service within the one-year time period provided in Mont. Code Ann. § 7-32-303(5)(a).

I will assume for purposes of this opinion that the peace officer has never been issued a basic certificate (so that the provisions of Mont. Code Ann. § 7-32-303(5)(b)

do not apply); that the officer has not previously completed a basic peace officer's course taught by a federal, state, or United States military law enforcement agency (so that the provisions of Mont. Code Ann. § 7-32-303(5)(c) do not apply); and that the officer is appointed after September 30, 1983 (so that the provisions of Mont. Code Ann. § 7-32-303(5)(a) are applicable).

I.

In the first scenario, a peace officer appointed by an agency has a break in service during the one-year time period described in Mont. Code Ann. § 7-32-303(5)(a). The following dates are representative:

January 1, 2012:	The officer is appointed by the agency.
May 1, 2012:	The officer leaves employment.
October 1, 2012:	The officer returns to employment.

Because the break in service occurs before the one-year period expires in January 2013, the officer does not forfeit his/her position, authority, or arrest powers by virtue of the fact that he or she did not complete basic training within one year of his/her initial appointment. Mont. Code Ann. § 7-32-303(5)(a). The officer may thus return to service under the terms of his or her initial appointment (assuming he or she still meets the qualifications of Mont. Code Ann. § 7-32-303(2)), and has the remainder of the one-year period (or until January 1, 2013) in which to complete basic training, plus any additional time extended by the POST council pursuant to Mont. Code Ann. § 7-32-303(6).

You question whether the one-year deadline could be extended by the length of the break in service or, stated another way, whether the one-year deadline should be tolled during the officer's absence. Using the above example, the officer would have until May 1, 2013, or an additional five months, to complete basic training.

I find no statutory support for the proposition that the one-year deadline can be extended based solely on the employment circumstances of an individual officer. The rules of statutory construction require me to "ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. § 1-2-101; (AG Opinion cite). The deadlines in Mont. Code Ann. § 7-32-303 are clear and unambiguous. 48 Op. Atty. Gen. No. 22 (2000). There is no mention of "tolling" or any extensions beyond 180 days as provided in Mont. Code Ann. § 7-32-303(6). There is no indication that the Legislature intended an individual officer or appointing agency to avoid the deadlines in Mont. Code Ann. § 7-32-303(5)(a) simply by terminating and reinstating his or her appointment at will.

By the same reasoning, an individual or appointing agency may not avoid the statutory deadlines by maintaining a break in service for less than one year, returning to a different agency, maintaining another break in service for less than

one year, and potentially repeating this process without ever completing basic training. For example:

January 1, 2010:	The officer is appointed to the agency (Agency A).
June 15, 2010:	The officer leaves employment at Agency A.
January 1, 2011:	The officer is appointed to another agency (Agency B).
June 15, 2011:	The officer leaves employment at Agency B.
January 1, 2012:	The officer is appointed to another agency (Agency C).
June 15, 2012:	The officer leaves employment at Agency C.

The clear intent of § 7-32-303(5)(a) is to mandate basic training within one year of the "initial" appointment. This objective is defeated if an officer or appointing agency can effectively toll the deadlines through multiple appointments.

I realize that the one-year deadline may present a hardship, particularly for an officer whose return date is so late he or she may not have sufficient time remaining to successfully complete basic training. In that circumstance, however, the POST council may extend the one-year period for up to six months, presumably allowing sufficient time for completion of the course. Mont. Code Ann. § 7-32-303(6). I note that the circumstances listed in the statute are not exclusive, so that the POST council has substantial discretion when considering an extension request by the officer and the appointing agency.

II.

In the second scenario, a peace officer has a break in service that extends beyond the one-year time period described in Mont. Code Ann. § 7-32-303(5)(a). The following dates are representative:

January 1, 2012:	The officer is appointed by the agency.
May 1, 2012:	The officer leaves employment.
January 1, 2013:	The one-year period expires and the officer has not returned to service.

This scenario is distinct from the first because the officer, having failed to complete the education requirements within one year of initial appointment, forfeits his or her position, authority and arrest powers pursuant to the last sentence of Mont. Code Ann. § 7-32-303(5)(a). As a result, the officer may not resume employment under the terms of his or her initial appointment. Rather, the appointing agency is statutorily required to terminate the officer's employment "for failure to meet the minimum standards established by the council." Montana Code Annotated 44-4-404.

To avoid this result, some agencies propose to start the one-year time period anew by rehiring or reappointing the person as a peace officer. This proposition runs afoul of legislative intent and the plain language of 7-32-303(5)(a), which requires

completion of basic training within one year of the "initial" appointment, after which time the officer forfeits his or her position. By virtue of this requirement, the Legislature has provided a single, one-year grace period during which time the officer may serve as a peace officer without the necessary training. Once the grace period expires, the officer is no longer privileged to serve in a law enforcement capacity. There is nothing that would allow an appointing agency to extend multiple grace periods, or allow the officer to continually serve as a peace officer without training.

As the administrator of the Montana Law Enforcement Academy (MLEA), I have publicly declared the need for qualified and highly trained law enforcement personnel. (https://doj.mt.gov.mlea/basic-programs-3/). Section 7-32-303(5)(a) promotes that goal, while at the same time granting some flexibility to appointing agencies and the officers in the hiring and training process. While I recognize there are legitimate reasons why a peace officer may require a break in service extending beyond the one-year deadline due to circumstances beyond his or her control, e.g., military service or health issues, I cannot condone an interpretation of the statute that compromises public or officer safety. I conclude that agencies are not entitled to "rehire" or "reappoint" peace officers if they have not successfully completed basic training within the time periods provided by law.

Despite my conclusion, there is nothing preventing the agency from employing the individual in some other capacity until he or she completes basic training. I understand that MLEA will accept individuals for training even if they are not in a current appointed position as a peace officer. After training is successfully completed and the individual is certified by the POST council, he or she may resume the duties of a peace officer. In this respect, the one-year grace period is honored, the public safety objectives are fulfilled, and the individual's ability to work as a peace officer is inconvenienced but not totally compromised as a result of the break in service.

THEREFORE IT IS MY OPINION:

> A peace officer who has a break in service during the one-year time period provided in 7-32-303(5)(a) has the remainder of the one-year period, plus any additional time as granted by the public officer standards and training council, in which to attend and successfully complete a basic training course. If the break in service extends beyond one year from his or her initial appointment and the officer has not completed a basic training course within one year of the initial appointment as required by 7-32-303(5)(a), the officer forfeits his or her position as peace officer and cannot serve in that capacity until he or she attends and successfully completes a basic training course.

Sincerely,

/s/ Steve Bullock
STEVE BULLOCK
Attorney General

sb/jma/jym

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 March 31, 2012. This table includes those rules adopted during the period April 1, 2012, through June 30, 2012, 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 March 31, 2012, 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 2012 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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BOARD APPOINTEES AND VACANCIES

Section 2-15-108, MCA, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees, and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of 2-15-108, MCA, is that the Secretary of State publish monthly in the ***Montana Administrative Register*** a list of appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments effective in July 2012 appear. Vacancies scheduled to appear from September 1, 2012, through November 30, 2012, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of August 1, 2012.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES FROM JULY, 2012

Appointee	Appointed by	Succeeds	Appointment/End Date
Board of Funeral Service (Labor and Industry)			
Mr. Ronald E. Brothers	Governor	reappointed	7/13/2012
Hamilton			7/1/2017
Qualifications (if required): mortician			
Mr. Bart Thompson	Governor	reappointed	7/13/2012
Helena			7/1/2017
Qualifications (if required): cemetarian			
Board of Nursing Home Administrators (Labor and Industry)			
Mr. Joshua Brown	Governor	reappointed	7/26/2012
Bozeman			5/28/2017
Qualifications (if required): nursing home administrator			
Ms. Carla Neiman	Governor	reappointed	7/26/2012
Plains			5/28/2017
Qualifications (if required): representative of an institution caring for chronically ill or aged			
Board of Water Well Contractors (Natural Resources and Conservation)			
Mr. Kevin Haggerty	Governor	reappointed	7/24/2012
Bozeman			7/1/2015
Qualifications (if required): water well contractor			
Board of Water Well Contractors (Natural Resources & Conservation)			
Mr. Laurence Siroky	Director	reappointed	7/1/2012
Helena			7/1/2015
Qualifications (if required): representative of the Board of Water Well Contractors			

BOARD AND COUNCIL APPOINTEES FROM JULY, 2012

Appointee	Appointed by	Succeeds	Appointment/End Date
Claims Data Analysis Council (State Auditor)			
Mr. Alan Hall	State Auditor	Lovshin	7/11/2012
Missoula			10/13/2013
Qualifications (if required): none specified			
Library Commission (Higher Education)			
Mr. Jim Gransbery	Governor	Allen	7/24/2012
Billings			5/22/2015
Qualifications (if required): public representative			
Ms. Anita Scheetz	Governor	reappointed	7/24/2012
Sidney			5/22/2015
Qualifications (if required): public representative			
Montana Historical Society Board of Trustees (Historical Society)			
Ms. B. Leslie Halligan	Governor	Carney	7/12/2012
Missoula			7/1/2017
Qualifications (if required): public member			
Mr. Kent Kleinkopf	Governor	reappointed	7/12/2012
Missoula			7/1/2017
Qualifications (if required): public member			
Mr. Steve Lozar	Governor	reappointed	7/12/2012
Polson			7/1/2017
Qualifications (if required): public member			

BOARD AND COUNCIL APPOINTEES FROM JULY, 2012

Appointee	Appointed by	Succeeds	Appointment/End Date
Petroleum Tank Release (Environmental Quality)			
Mr. Tim McDermott	Governor	Annala	7/12/2012
Bozeman			6/30/2015
Qualifications (if required): public member			
Mr. Roy Morris	Governor	reappointed	7/12/2012
Butte			6/30/2015
Qualifications (if required): service station dealer			
Postsecondary Scholarships Advisory Council (Higher Education)			
Mr. LeRoy Schramm	Governor	reappointed	7/24/2012
Helena			6/20/2015
Qualifications (if required): experience in postsecondary education			
Water Pollution Control Advisory Council (Environmental Quality)			
Mr. Keith Smith	Governor	Hoehne	7/12/2012
Hamilton			0/0/0
Qualifications (if required): public works director			

VACANCIES ON BOARDS AND COUNCILS -- September 1, 2012 through November 30, 2012

Board/current position holder	Appointed by	Term end
Alternative Health Care Board (Labor and Industry)		
Dr. Margaret Beeson, Billings	Governor	9/1/2012
Qualifications (if required): naturopathic physician		
Board of Barbers and Cosmetologists (Labor and Industry)		
Ms. Maggie Burton-Blize, Missoula	Governor	10/1/2012
Qualifications (if required): barber		
Ms. Angela Printz, Livingston	Governor	10/1/2012
Qualifications (if required): cosmetologist		
Mr. Thayne Orton, Florence	Governor	10/1/2012
Qualifications (if required): barber		
Board of Medical Examiners (Labor and Industry)		
Dr. Dean Center, Bozeman	Governor	9/1/2012
Qualifications (if required): doctor of medicine		
Board of Outfitters (Labor and Industry)		
Mr. Shawn McNeely, Bozeman	Governor	10/1/2012
Qualifications (if required): fishing outfitter		
Mr. Lee Kinsey, Livingston	Governor	10/1/2012
Qualifications (if required): fishing outfitter		
Board of Psychologists (Labor and Industry)		
Rep. Linda L. Holden, Valier	Governor	9/1/2012
Qualifications (if required): public representative		

VACANCIES ON BOARDS AND COUNCILS -- September 1, 2012 through November 30, 2012

Board/current position holder	Appointed by	Term end
Historical Preservation Review Board (Historical Society)		
Mr. Timothy Light, Kalispell	Governor	10/1/2012
Qualifications (if required): archaeologist		
Ms. Lesley M. Gilmore, Gallatin Gateway	Governor	10/1/2012
Qualifications (if required): historic architect		
Mr. Jon Axline, Helena	Governor	10/1/2012
Qualifications (if required): architectural historian		
Low Income Energy Programs Policy Advisory Council (Public Health and Human Services)		
Mr. Hank Hudson, Helena	Director	9/2/2012
Qualifications (if required): none specified		
Mr. Michael Vogel, Bozeman	Director	9/2/2012
Qualifications (if required): none specified		
Mr. Phil Cooke, Helena	Director	9/2/2012
Qualifications (if required): none specified		
Ms. Lesa Evers, Helena	Director	9/2/2012
Qualifications (if required): none specified		
Small Business Compliance Assistance Advisory Council (Environmental Quality)		
Mr. Charles Homer, Helena	Director	9/29/2012
Qualifications (if required): representative of the Department of Environmental Quality		

VACANCIES ON BOARDS AND COUNCILS -- September 1, 2012 through November 30, 2012

Board/current position holder	Appointed by	Term end
Trauma Care Committee (Public Health and Human Services)		
Dr. J. Bradley Pickhardt, Missoula	Governor	11/2/2012
Qualifications (if required): representative of the Western Region Trauma Advisory Council		
Dr. Freddy Bartoletti, Anaconda	Governor	11/2/2012
Qualifications (if required): representative of the Montana Medical Association		
Ms. Lauri Jackson, Great Falls	Governor	11/2/2012
Qualifications (if required): representative of the Central Region Trauma Care Advisory Committee		
Mr. Bradley Von Bergen, Billings	Governor	11/2/2012
Qualifications (if required): representative of the Eastern Region Trauma Advisory Council		
Mr. Jonathan Weisul, Missoula	Governor	11/2/2012
Qualifications (if required): representative of the Montana Hospital Association		
Vocational Rehabilitation Council (Public Health and Human Services)		
Mr. Dale Mahugh, Butte	Governor	10/1/2012
Qualifications (if required): business representative		
Ms. Char Harasymczuk, Billings	Governor	10/1/2012
Qualifications (if required): representative of the disabilities community		
Ms. Christina Mattlin, Clancy	Governor	10/1/2012
Qualifications (if required): representative of the disabilities community		
Ms. Andrea Falcon, Kalispell	Governor	10/1/2012
Qualifications (if required): business representative		

VACANCIES ON BOARDS AND COUNCILS -- September 1, 2012 through November 30, 2012

Board/current position holder	Appointed by	Term end
Vocational Rehabilitation Council (Public Health and Human Services) cont.		
Mr. Quentin Schroeter, Helena	Governor	10/1/2012
Qualifications (if required): representative of the disabilities community		
Ms. Mona Amundson, Glasgow	Governor	10/1/2012
Qualifications (if required): business representative		
Ms. Rosalie Hollimon, Great Falls	Governor	10/1/2012
Qualifications (if required): representative of the disabilities community		
Water and Waste Water Operators' Advisory Council (Environmental Quality)		
Mr. Tony Porrazzo, Polson	Governor	10/16/2012
Qualifications (if required): water treatment plant operator		
Mr. Andrew Loudermilk, Kalispell	Governor	10/16/2012
Qualifications (if required): water treatment plant operator		