MONTANA ADMINISTRATIVE REGISTER

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ISSUE NO. 21

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 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) 444-9000.

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PROPOSAL NOTICE SECTION

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

In the matter of the adoption of New Rules I through IV and the amendment of ARM 6.6.3101, 6.6.3102, 6.6.3103, 6.6.3104, 6.6.3109, 6.6.3109A, 6.6.3114, 6.6.3117, 6.6.3118, 6.6.3119, 6.6.3120, 6.6.3121, 6.6.3122, and 6.6.3129, pertaining to long-term care insurance	))))))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On December 11, 2018, at 10:00 a.m., the Commissioner of Securities and Insurance, Office of the Montana State Auditor (CSI), will hold a public hearing in the basement conference room, at the Office of the Montana State Auditor, Commissioner of Securities and Insurance, 840 Helena Avenue, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The CSI will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the CSI no later than 5:00 p.m. on November 27, 2018, to advise us of the nature of the accommodation that you need. Please contact Ramona Bidon, CSI, 840 Helena Avenue, Helena, Montana, 59601; telephone (406) 444-2726; TDD (406) 444-3246; fax (406) 444-3499; or e-mail rbidon@mt.gov.

3. The new rules as proposed to be adopted are as follows:

NEW RULE I RECOUPING PAST LOSSES (1) In reviewing loss ratio and premium rate schedule increases, the commissioner will ensure that any issuer does not recoup past losses.

(2) For premium rate increases, to ensure that issuers do not recoup past losses, premium deficiencies prior to a requested rate increase should not be included in the premium rate increase calculation. This is determined by comparing the originally filed lifetime loss ratio with the corrected lifetime loss ratio.

(a) The corrected lifetime loss ratio is found by recalculating the original premiums given the actual historical experience of that block of business combined with the company's revised projected assumptions.

(b) The originally filed lifetime loss ratio is found by:

(i) for blocks of business issued in Montana prior to January 1, 2009, following ARM 6.6.3112; or

(ii) for blocks of business issued in Montana on or after January 1, 2009, following ARM 6.6.3124.

(3) In order to review for past losses, insurers shall provide the following information in an actuarial memorandum accompanying any premium rate increase request:

(a) lifetime projections of earned premiums and incurred claims with the original pricing assumptions, including the originally filed discount rates;

(b) lifetime projections of earned premiums and incurred claims with actual experience;

(c) lifetime projections of earned premiums and incurred claims as required by (b), but with future premiums restated to reflect previously approved premium increases in Montana;

(d) lifetime projections of earned premiums and incurred claims as required by (c), but including persistency assumptions in the projected experience;

(e) lifetime projections of earned premiums and incurred claims as required by (d), but with revised claim assumptions (the lifetime loss ratio should reflect the expected lifetime loss ratio using best estimate assumptions besides the original discount rates);

(f) lifetime projections of earned premiums and incurred claims as required by (e), but including results both with and without the requested premium rate increase; and

(g) lifetime projections of earned premiums and incurred claims as required by (f), but including results with all past premium rate increases in Montana assumed to be implemented at policy issue.

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-18-206, 33-18-1003, 33-22-1102, 33-22-1121, MCA

REASON: The CSI is codifying its longstanding approach to review of premium rate increases for long-term care policies. While the CSI has been transparent and consistent in its application of this methodology, putting this methodology in rule will provide more notice to long-term care companies of this approach to calculating past losses, and also ensure consistency in application of this methodology in the future.

NEW RULE II APPEALING AN INSURER'S DETERMINATION THAT THE BENEFIT TRIGGER IS NOT MET (1) For purposes of this rule, "authorized representative" means a person authorized to act as the covered person's personal representative within the meaning of 45 CFR 164.502(g) promulgated by the Secretary under the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act and means the following:

(a) a person to whom a covered person has given express written consent to represent the covered person in an external review;

(b) a person authorized by law to provide substituted consent for a covered person; or

(c) a family member of the covered person or the covered person's treating health care professional only when the covered person is unable to provide consent.

(2) If an insurer determines that the benefit trigger of a long-term care insurance policy has not been met, it shall provide a clear, written notice to the

insured and the insured's authorized representative, if applicable, of all of the following:

(a) the reason that the insurer determined that the insured's benefit trigger has not been met;

(b) the insured's right to internal appeal in accordance with (3), and the right to submit new or additional information relating to the benefit trigger denial with the appeal request; and

(c) the insured's right, after exhaustion of the insurer's internal appeal process, to have the benefit trigger determination reviewed under the independent review process in accordance with (4).

(3) The insured or the insured's authorized representative may appeal the insurer's adverse benefit trigger determination by sending a written request to the insurer, along with any additional supporting information, within 120 calendar days after the insured and the insured's authorized representative, if applicable, receives the insurer's benefit determination notice. The internal appeal shall be considered by an individual or group of individuals designated by the insurer, provided that the individual or individuals making the internal appeal decision may not be the same individual or individuals who made the initial benefit determination. The internal appeal shall be completed and written notice of the internal appeal decision shall be sent to the insured and the insured's authorized representative, if applicable, within 30 calendar days of the insurer's receipt of all necessary information upon which a final determination can be made.

(a) If the insurer's original determination is upheld upon internal appeal, the notice of the internal appeal decision shall describe any additional internal appeal rights offered by the insurer. Nothing in this rule shall require the insurer to offer any internal appeal rights other than those described in this rule.

(b) If the insurer's original determination is upheld after the internal appeal process has been exhausted, and new or additional information has not been provided to the insurer, the insurer shall provide a written description of the insured's right to request an independent review of the benefit determination as described in (4) to the insured and the insured's authorized representative, if applicable.

(c) As part of the written description of the insured's right to request an independent review, an insurer shall include the following, or substantially equivalent, language: "We have determined that the benefit eligibility criteria ("benefit trigger") of your [policy][certificate] has not been met. You may have the right to an independent review of our decision conducted by long-term care professionals who are not associated with us. Please send a written request for independent review to us at [address]. You must inform us, in writing, of your election to have this decision reviewed within 120 days of receipt of this letter. Listed below are the names and contact information of the independent review organizations approved or certified by your state insurance commissioner's office to conduct long-term care insurance benefit eligibility reviews. If you wish to request an independent review, please choose one of the listed organizations and include its name with your request for independent review. If you elect independent review, but do not choose an independent review organization with your request, we will choose one of the independent review organizations for you and refer the request for independent review to it."

(d) If the insurer does not believe the benefit trigger decision is eligible for independent review, the insurer shall inform the insured and the insured's authorized representative, if applicable, in writing and include in the notice that reasons for its determination of independent review ineligibility.

(e) The appeal process described in this section is not deemed to be a "new service or provider" as referenced in ARM 6.6.3128 and therefore does not trigger the notice requirements of that rule.

(4) The insured or the insured's authorized representative may request an independent review of the insurer's benefit trigger determination after the internal appeal process outlined in (3) has been exhausted. A written request for independent review may be made by the insured or the insured's authorized representative to the insurer within 120 calendar days after the insurer's written notice of the final internal appeal decision is received by the insured or the insured's authorized representative, if applicable.

(a) The cost of the independent review shall be borne by the insurer.

(b) Within five business days of receiving a written request for independent review, the insurer shall refer the request to the independent review organization that the insured or the insured's authorized representative has chosen from the list of certified or approved organizations the insurer has provided to the insured. If the insured or the insured's authorized representative does not choose an approved independent review organization to perform the review, the insurer shall choose an independent review organization approved or certified by the commissioner. The insurer shall vary the selection of authorized independent review organizations on a rotating basis.

(c) The insurer shall refer the request for independent review of a benefit trigger determination to an independent review organization, subject to the following:

(i) the independent review organization shall be on a list of certified or approved independent review organizations that satisfy the requirements of a qualified long-term care insurance independent review organization contained in this rule;

(ii) the independent review organization shall not have any conflicts of interest with the insured, the insured's authorized representative, if applicable, or the insurer; and

(iii) such review shall be limited to the information or documentation provided to and considered by the insurer in making its determination, including any information or documentation considered as part of the internal appeal process.

(d) The insured or the insured's authorized representative may submit at any time new or additional information not previously provided to the insurer but pertinent to the benefit trigger denial. If the insured or the insured's authorized representative has new or additional information not previously provided to the insurer, whether submitted to the insurer or the independent review organization, such information shall first be considered in the internal review process, as set forth in (3).

(i) If new information is received by the independent review organization from the insured or the insured's authorized representative, the independent review organization shall provide copies of any documentation or information provided to the insurer for its review.

(ii) While this information is being reviewed by the insurer, the independent review organization shall suspend its review and the time period for review is suspended until the insurer completes its review.

(iii) The insurer shall complete its review of the information and provide written notice of the analysis and results of the review to the insured, the insured's authorized representative, if applicable, and the independent review organization within five business days of the insurer's receipt of such new or additional information.

(iv) If the insurer maintains its denial after such review, the independent review organization shall continue its review, and render its decision within the time period specified in (4)(g). If the insurer overturns its decision following its review, the independent review request shall be considered withdrawn.

(e) The insurer shall acknowledge in writing to the insured and the insured's authorized representative, if applicable, that the request for independent review has been received, accepted, and forwarded to an independent review organization for review. Such notice will include the name and address of the independent review organization.

(f) Within five business days of receipt of the request for independent review, the assigned independent review organization shall notify the insured, the insured's authorized representative, if applicable, and the insurer, that it has accepted the independent review request and identify the type of licensed health care professional assigned to the review. The assigned independent review organization shall include in the notice a statement that the insured or the insured's authorized representative may submit in writing to the independent review organization, within seven days following the date of receipt of the notice, additional information and supporting documentation that the independent review organization should consider when conducting its review.

(g) The independent review organization shall review all of the information received, and provide the insured, the insured's authorized representative, if applicable, and the insurer written notice of its decision within 30 calendar days from receipt of the referral referenced in (4)(c). If the independent review organization overturns the insurer's decision, it shall:

(i) establish the precise date within a specific period of time under review that the benefit trigger was deemed to have been met;

(ii) specify the specific period of time under review for which the insurer declined eligibility, but during which the independent review organization deemed the benefit trigger to have been met; and

(iii) for tax-qualified long-term care insurance contracts, provide a certification (made only by a licensed health care practitioner as defined in section 7702B(c)(4) of the Internal Revenue Code) that the insured is a chronically ill individual.

(h) The decision of the independent review organization with respect to whether the insured met the benefit trigger will be final and binding on the insurer.

(5) The independent review organization's determination shall be used solely to establish liability for benefit trigger decisions, and is intended to be admissible in any proceeding only to the extent it establishes the eligibility of benefits payable.

(6) Nothing in this rule shall restrict the insured's right to submit a new request for a benefit trigger determination after the independent review decision, should the independent review organization uphold the insurer's decision.

(7) Nothing contained in this rule limits the insurer's ability to assert any rights it may have under the policy related to:

(a) an insured's misrepresentation;

(b) changes in the insured's benefit eligibility; or

(c) terms, conditions, or exclusions of the policy, other than failure to meet the benefit trigger.

(8) The requirements of this rule apply to a benefit trigger request made on or after January 1, 2019, under a long-term care insurance policy.

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-18-201, 33-22-1102, 33-22-1121, 33-22-1124, 33-22-1125, MCA

REASON: These changes are to modernize Montana's long-term care regulations. The proposed language is part of model regulation 641 of the National Association of Insurance Commissioners (NAIC), most recently updated in 2017. With the aging population of long-term care insureds, claims to long-term care insurers are expected to rise. This rule will provide greater consistency and reliability in the claim review process for long-term care insurers, on par with other disability insurance products.

NEW RULE III LONG-TERM CARE INDEPENDENT REVIEW ORGANIZATIONS (1) The commissioner shall certify or approve a qualified long-term care insurance independent review organization, provided the organization demonstrates to the satisfaction of the commissioner that it is unbiased and that:

(a) the organization will have on staff, or contract with, a qualified and licensed health care professional in an appropriate field for determining an insured's functional or cognitive impairment (e.g., physical therapy, occupational therapy, neurology, physical medicine and rehabilitation) to conduct the review;

(b) neither the organization, nor any of its licensed health care professionals, may be related to or affiliated with, in any manner, an entity that previously provided medical care to the insured;

(c) the organization will utilize a licensed health care professional who is not an employee of the insurer or related in any manner to the insured;

(d) neither the organization, nor its licensed health care professionals who conduct the reviews, may receive compensation of any type that is dependent on the outcome of the review;

(e) the organization will be approved or certified by Montana before conducting such reviews;

(f) the organization provides a description of the fees to be charged by it for independent reviews of a long-term care insurance benefit trigger decision;

(g) the organization's fees shall be reasonable and customary for the type of long-term care insurance benefit trigger decision under review;

(h) the organization provides the name of the medical director or health care professional responsible for the supervision and oversight of the independent review procedure; and

(i) the organization will have on staff or contract with a licensed health care practitioner, as defined by Section 7702B(c)(4) of the Internal Revenue Code, who is qualified to certify that an individual is chronically ill for purposes of a qualified long-term care insurance contract.

(2) Each certified independent review organization shall:

(a) maintain written documentation, in an easily accessible and retrievable format for the year in which it received information plus two calendar years, establishing the date it received a request for independent review, the date each review was conducted, the resolution, the date such resolution was communicated to the insurer and the insured, and the name and professional status of the reviewer who conducted the review;

(b) be able to document measures taken to appropriately safeguard the confidentiality of its records and prevent unauthorized use and disclosures in accordance with applicable federal and state law;

(c) report annually to the commissioner, by June 1, in the aggregate and for each long-term care insurer all of the following:

(i) the total number of requests received for independent review of long-term care benefit trigger decisions;

(ii) the total number of reviews conducted and the resolution of such reviews (i.e., the number of reviews which upheld or overturned the long-term care insurer's determination that the benefit trigger was not met);

(iii) the number of reviews withdrawn prior to review; and

(iv) the percentage of reviews conducted within the prescribed timeframe set forth in [New Rule II];

(d) report immediately to the commissioner any change in its status which would cause it to cease meeting any of the qualifications required of an independent review organization performing independent reviews of long-term care benefit trigger decisions.

(3) The insurance department shall utilize the criteria set forth in ARM 6.6.3120(1)(h), in certifying or approving entities to review long-term care insurance benefit trigger decisions.

(4) The commissioner shall maintain and periodically update a list of approved independent review organizations.

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-18-201, 33-22-1102, 33-22-1121, 33-22-1124, 33-22-1125, MCA

REASON: With New Rule II requiring the use of independent review organizations, this rule is necessary to clarify how the CSI will review and approve independent review organizations for long-term care insurers to use. See also the reason for New Rule II.

NEW RULE IV PERMITTED COMPENSATION ARRANGEMENTS (1) An insurer or other person may provide commission or other compensation to an agent

or other representative for the sale of a long-term care insurance policy or certificate only if the first year commission or other first year compensation is no more than 200 percent of the commission or other compensation paid for selling or servicing the policy or certificate in the second year or period.

(2) The commission or other compensation provided in subsequent (renewal) years must be the same as that provided in the second year or period and must be provided for a reasonable number of renewal years.

(3) No person shall provide compensation to its agents or other producers and no agent or producer shall receive compensation greater than the renewal compensation payable by the replacing insurer on renewal policies.

(4) For purposes of this rule, "compensation" includes pecuniary or non-pecuniary remuneration of any kind relating to the sale or renewal of the policy or certificate including but not limited to bonuses, gifts, prizes, awards, or finders fees.

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-22-1102, 33-22-1117, 33-22-1121, 33-22-1128, MCA

REASON: The CSI includes this new language from NAIC model regulation 641. Because long-term care insurance is marketed primarily to senior citizens, additional protections are warranted to curb commission structures which may provide incentives to producers to push seniors into products they do not want.

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

6.6.3101 PURPOSE, SCOPE, AND AUTHORITY (1) remains the same.

(2) Except as otherwise specifically provided, these rules apply to:

(a) all long-term care insurance policies or certificates including qualified long-term care contracts and life insurance policies that accelerate benefits for long-term care delivered or issued for delivery in this state on or after January 1, 1991, by issuers, fraternal benefit societies, nonprofit health, hospital, medical service corporations, prepaid health plans, health maintenance organizations, and all similar organizations.; and

(b) policies having indemnity benefits that are triggered by activities of daily living and sold as disability income insurance, if:

(i) the benefits of the disability income policy are dependent upon or vary in amount based on the receipt of long-term care services;

(ii) the disability income policy is advertised, marketed, or offered as insurance for long-term care services; or

(iii) benefits under the policy may commence after the policyholder has reached social security's normal retirement age unless benefits are designed to replace lost income or pay for specific expenses other than long-term care services.

(3) Notwithstanding (2), Ccertain provisions of these rules apply only to qualified long-term care insurance contracts, as noted.

(3)(4) Group policies or certificates issued for delivery outside this state to Montana residents are subject to these rules and Title 33 of the Montana Code Annotated.

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-22-1101, 33-22-1102, 33-22-1103, 33-22-1107, 33-22-1108, 33-22-1111, 33-22-1112, 33-22-1113, 33-22-1114, 33-22-1115, 33-22-1116, 33-22-1117, 33-22-1119, 33-22-1120, 33-22-1121, MCA

REASON: These changes are to modernize the scope of Montana's long-term care regulations, consistent with the language from the latest version of NAIC model regulation 641.

6.6.3102 DEFINITIONS For purposes of these rules, in addition to the definitions in 33-22-1107, MCA, the following definitions apply:

(1) ~~"Applicant" is defined in 33-22-1107(2), MCA.~~ "Benefit trigger," for the purposes of independent review, means a contractual provision in the insured's policy of long-term care insurance conditioning the payment of benefits on a determination of the insured's ability to perform activities of daily living and on cognitive impairment. For purposes of a tax-qualified long-term care insurance contract, as defined in Section 770B of the Internal Revenue Code of 1986, as amended, "benefit trigger" shall include a determination by a licensed health care practitioner that an insured is a chronically ill individual.

~~(2) "Certificate" is defined in 33-22-1107(4), MCA.~~

~~(3)~~(2) "Commissioner" means the Montana State Auditor and Ex Officio Commissioner of Insurance.

~~(4)~~(3) "Exceptional increase" means a premium rate increase filed by an insurer as exceptional; and

(a) for which the commissioner determines the need for a rate increase to be justified~~;~~:

(i) due to a change in laws or rules applicable to long-term care coverage in this state; ~~and~~ or

(ii) and (b) remain the same.

(c) the commissioner may request a review of the basis for the exceptional increase by an independent actuary or a professional actuarial body~~professional actuarial review of the basis for an exceptional increase submitted for commissioner approval~~;

(d) the commissioner, in determining whether there is a necessary basis for an exceptional increase, shall also determine any potential offsets to higher claims costs.

~~(5) "Group long-term care insurance" is defined in 33-22-1107(5), MCA.~~

(6) remains the same but is renumbered (4).

~~(7) "Long-term care insurance" is defined in 33-22-107(6), MCA.~~

~~(8) "Policy" is defined in 33-22-1107(7), MCA.~~

(5) "Independent review organization" has the same meaning as in 33-32-402, MCA.

(6) "Insurer" or "issuer" means an insurance company, health service corporation, health maintenance organization, or other entity providing long-term care insurance or benefits in Montana.

(7) "Licensed health care professional" means an individual qualified by

education and experience in an appropriate field to determine, by record review, an insured's actual functional or cognitive impairment.

(9) remains the same but is renumbered (8).

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-22-1101, 33-22-1102, 33-22-1103, 33-22-1107, 33-22-1108, 33-22-1111, 33-22-1112, 33-22-1113, 33-22-1114, 33-22-1115, 33-22-1116, 33-22-1117, 33-22-1119, 33-22-1120, 33-22-1121, MCA

REASON: These changes are meant to reduce conflicting or redundant definitions, and to include modernized language from the latest version of NAIC model regulation 641.

6.6.3103 POLICY DEFINITIONS (1) through (13) remain the same.

(14) "Mental or nervous disorder" shall not be defined to include more than neurosis, psychoneurosis, psychopathy, psychosis, or mental or emotional disease or disorder.

(15) through (19) remain the same.

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-22-1101, 33-22-1102, 33-22-1103, 33-22-1107, 33-22-1108, 33-22-1111, 33-22-1112, 33-22-1113, 33-22-1114, 33-22-1115, 33-22-1116, 33-22-1117, 33-22-1119, 33-22-1120, 33-22-1121, MCA

REASON: This change is meant to correct an inadvertent drafting error in the original rule.

6.6.3104 POLICY PRACTICES AND PROVISIONS (1) through (9)(f)(i) remain the same.

(ii) the terminating coverage is replaced not later than 31 days after termination, by group coverage effective on the day following the termination of coverage.:

(A) through (11) remain the same.

(12) The purchase of additional coverage shall not be considered a premium rate increase, but for purposes of the calculation required under ARM 6.6.3128, the portion of the premium attributable to the additional coverage shall be added to and considered part of the initial annual premium. A reduction in benefits shall not be considered a premium change, but for purposes of the calculation required under ARM 6.6.3128, the initial annual premium shall be based on the reduced benefits.

(12) and (13) remain the same, but are renumbered (13) and (14).

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-22-1101, 33-22-1102, 33-22-1103, 33-22-1107, 33-22-1108, 33-22-1111, 33-22-1112, 33-22-1113, 33-22-1114, 33-22-1115, 33-22-1116, 33-22-1117, 33-22-1119, 33-22-1120, 33-22-1121, MCA

REASON: The change to (9)(f)(ii) is meant to correct an inadvertent drafting error in the original rule. The language in new (12) is to modernize the rule consistent with the language contained in the latest version of NAIC model regulation 641.

6.6.3109 REQUIREMENTS FOR APPLICATION FORMS AND REPLACEMENT COVERAGE (1) Application forms shall include the following questions designed to elicit information as to whether, as of the date of the application, the applicant has another long-term care insurance policy or certificate in force or whether a long-term care policy or certificate is intended to replace any other accident and sickness or long-term care insurance policy or certificate presently in force. A supplementary application or other form to be signed by the applicant and producer, except where the coverage is sold without a producer, containing the following questions shall be used.:

~~(a)~~ 1. Do you have another long-term care insurance policy or certificate in force (including health care service contract, health maintenance organization contract)?

~~(b)~~ 2. Did you have another long-term care insurance policy or certificate in force during the last 12 months?

~~(i)~~ a. If so, with which company?

~~(ii)~~ b. If that policy or certificate lapsed, when did it lapse?

~~(c)~~ 3. Are you covered by Medicaid?

~~(d)~~ 4. Do you intend to replace any of your medical or health insurance coverage with this policy [certificate].?

(2) Producers shall list any other health insurance policies they have sold to the applicant., including:

(a) ~~List~~ policies sold that are still in force.; and

(b) ~~List~~ policies sold in the past five years that are no longer in force.

(3) Upon determining that a sale will involve replacement, an issuer, other than an issuer using direct response solicitation methods, or its producer, shall furnish the applicant, prior to issuance or delivery of the individual long-term care insurance policy or certificate, a notice regarding replacement of accident and sickness or long-term care coverage. One copy of the notice shall be retained by the applicant and an additional copy signed by the applicant shall be retained by the issuer. The required notice shall be provided in the following manner:

NOTICE TO APPLICANT REGARDING REPLACEMENT OF INDIVIDUAL ACCIDENT AND SICKNESS OR LONG-TERM CARE INSURANCE

[Insurance Company's Name and Address]

SAVE THIS NOTICE! IT MAY BE IMPORTANT TO YOU IN THE FUTURE.

According to [your application] [information you have furnished], you intend to lapse or otherwise terminate existing accident and sickness or long-term insurance and replace it with an individual long-term care insurance policy to be issued by [company name] Insurance Company. Your new policy provides 30 days within which you may decide, without cost, whether you desire to keep the policy. For your own

information and protection, you should be aware of and seriously consider certain factors which may affect the insurance protection available to you under the new policy.

You should review this new coverage carefully, comparing it with all accident and sickness or long-term care insurance coverage you now have, and terminate your present policy only if, after due consideration, you find that purchase of this long-term care coverage is a wise decision.

STATEMENT TO APPLICANT BY PRODUCER [OR OTHER REPRESENTATIVE]:
(Use additional sheets, as necessary.)

I have reviewed your current medical or health insurance coverage. I believe the replacement of insurance involved in this transaction materially improves your position. My conclusion has taken into account the following considerations, which I call to your attention:

1. Health conditions which you may presently have (preexisting conditions), may not be immediately or fully covered under the new policy. This could result in denial or delay in payment of benefits under the new policy, whereas a similar claim might have been payable under your present policy.
2. If you are replacing existing long-term care insurance coverage, you may wish to secure the advice of your present issuer or its producer regarding the proposed replacement of your present policy. This is not only your right, but it is also in your best interest to make sure you understand all the relevant factors involved in replacing your present coverage.
3. If, after due consideration, you still wish to terminate your present policy and replace it with new coverage, be certain to truthfully and completely answer all questions on the application concerning your medical health history. Failure to include all material medical information on an application may provide a basis for the company to deny any future claims and to refund your premium as though your policy had never been in force. After the application has been completed and before you sign it, reread it carefully to be certain that all information has been properly recorded.

(Signature of Producer or Other Representative)

[Typed Name and Address of Producer]

The above "Notice to Applicant" was delivered to me on:

_____
(Date)

_____
(Applicant's Signature)

(4) Issuers using direct response solicitation methods shall deliver a notice regarding replacement of accident and sickness or long-term care coverage to the applicant upon issuance of the policy or certificate. The required notice shall be provided in the following manner:

NOTICE TO APPLICANT REGARDING REPLACEMENT OF ACCIDENT AND SICKNESS OR LONG-TERM CARE INSURANCE

[Insurance Company's Name and Address]

SAVE THIS NOTICE! IT MAY BE IMPORTANT TO YOU IN THE FUTURE.

According to [your application] [information you have furnished], you intend to lapse or otherwise terminate existing accident and sickness or long-term insurance and replace it with an individual long-term care insurance policy or certificate to be issued by [company name] Insurance Company. Your new policy or certificate provides 30 days within which you may decide, without cost, whether you desire to keep the policy or certificate. For your own information and protection, you should be aware of and seriously consider certain factors which may affect the insurance protection available to you under the new policy or certificate.

You should review this new coverage carefully, comparing it with all accident and sickness or long-term care insurance coverage you now have, and terminate your present policy or certificate only if, after due consideration, you find that purchase of this long-term care coverage is a wise decision.

1. Health conditions which you may presently have (preexisting conditions), may not be immediately or fully covered under the new policy or certificate. This could result in denial or delay in payment of benefits under the new policy or certificate, whereas a similar claim might have been payable under your present policy or certificate.

2. Montana law provides that your replacement policy or certificate may not contain new preexisting conditions or probationary periods. Your insurer will waive any time periods applicable to preexisting conditions or probationary periods in the new policy (or coverage) for similar benefits to the extent such time was spent (depleted) under the original policy.

~~2.~~3. If you are replacing existing long-term care insurance coverage, you may wish to secure the advice of your present issuer or its producer regarding the proposed replacement of your present policy or certificate. This is not only your right, but it is also in your best interest to make sure you understand all the relevant factors involved in replacing your present coverage.

~~3.~~4. [To be included only if the application is attached to the policy.] If, after due consideration, you still wish to terminate your present policy or certificate and replace it with new coverage, read the copy of the application attached to your new policy or certificate and be sure that all questions are answered fully and correctly. Omissions or misstatements in the application could cause an otherwise valid claim to be denied. Carefully check the application and write [company name and address] within 30 days if any information is not correct and complete, or if any past medical history has been left out of the application.

~~(Company Name)~~

(5) and (6) remain the same.

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-22-1101, 33-22-1102, 33-22-1103, 33-22-1107, 33-22-1108, 33-22-1111, 33-22-1112, 33-22-1113, 33-22-1114, 33-22-1115, 33-22-1116, 33-22-1117, 33-22-1119, 33-22-1120, 33-22-1121, MCA

REASON: The changes to (1) and (2) are meant to correct an inadvertent drafting error in the original rule. The changes to (3) and (4) are to modernize the rule consistent with the language contained in the latest version of NAIC model regulation 641.

6.6.3109A REPORTING REQUIREMENTS (1) through (8) remain the same
(9) The following annual submission requirements apply subsequent to initial rate filings for individual long-term care insurance policies issued in this state on or after January 1, 2009:
(a) An actuarial certification based on calendar year data, submitted annually no later than May 1st of each year, and prepared, dated, and signed by a member of the American Academy of Actuaries who provides the information. The actuarial certification shall provide at least the following information:
(i) for the rate schedules currently marketed, a description of the review performed and a statement of the sufficiency of the current premium rate schedule including:
(A) that the premium rate schedule continues to be sufficient to cover anticipated costs under moderately adverse experience and that the premium rate schedule is reasonably expected to be sustainable over the life of the form with no future premium increases anticipated; or
(B) if the statement in (A) cannot be made, a statement that margins for moderately adverse experience may no longer be sufficient. In this situation, the insurer shall provide to the commissioner, within 60 days of the date the actuarial certification is submitted to the commissioner, a plan of action, including a time frame, for the re-establishment of adequate margins for moderately adverse experience so that the ultimate premium rate schedule would be reasonably expected to be sustainable over the future life of the form with no future premium increases anticipated. Failure to submit a plan of action to the commissioner within

60 days or to comply with the time frame stated in the plan of action constitutes grounds for the commissioner to withdraw or modify approval of the form for future sales;

(ii) for the rate schedules that are no longer marketed, a description of the review performed and a statement:

(A) that the premium rate schedule continues to be sufficient to cover anticipated costs under best estimate assumptions; or

(B) that the premium rate schedule may no longer be sufficient. In this situation, the insurer shall provide to the commissioner, within 60 days of the date the actuarial certification is submitted to the commissioner, a plan of action, including a time frame, for the re-establishment of adequate margins for moderately adverse experience.

(b) An actuarial memorandum submitted at least once every three years with the certification required in (a), and dated and signed by a member of the American Academy of Actuaries who prepares the information. The actuarial memorandum shall provide at least the following information:

(i) a detailed explanation of the data sources and review performed by the actuary prior to making the statement required by (a);

(ii) a complete description of experience assumptions and their relationship to the initial pricing assumptions;

(iii) a description of the credibility of the experience data; and

(iv) an explanation of the analysis and testing performed in determining the current presence of margins.

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-22-1113, MCA

REASON: Section (9) includes language contained in the latest version of NAIC model regulation 641, which applies to long-term care policies issued under post-rate stabilization requirements, which in Montana apply on or after January 1, 2009.

6.6.3114 STANDARD FORMAT OUTLINE OF COVERAGE (1) through (5) remain the same.

(6) Format for outline of coverage:

[COMPANY NAME]

[ADDRESS-CITY & STATE]

[TELEPHONE NUMBER]

LONG-TERM CARE INSURANCE

OUTLINE OF COVERAGE

[Policy Number of Group Master Policy and Certificate Number]
[Except for policies or certificates which are guaranteed issue, the following caution

statement, or language substantially similar, must appear as follows in the outline of coverage.] Caution: The issuance of this long-term care insurance [policy] [certificate] is based upon your responses to the questions on your application. A copy of your [application][enrollment form] [is enclosed][was retained by you when you applied]. If your answers are incorrect or untrue, the company may have the right to deny benefits, or rescind your policy or certificate. The best time to clear up any questions is now, before a claim arises! If, for any reason, any of your answers are incorrect, contact the company at this address: [insert address]

1. This policy is [an individual policy of insurance] ([a group policy] which was issued in the [indicate jurisdiction in which group policy was issued]).
2. PURPOSE OF OUTLINE OF COVERAGE. This outline of coverage provides a very brief description of the important features of the policy. You should compare this outline of coverage to outlines of coverage for other policies available to you. This is not an insurance contract, but only a summary of coverage. Only the individual or group policy or certificate contains governing contractual provisions. This means that the policy or certificate or group policy sets forth in detail the rights and obligations of both you and the insurance company. Therefore, if you purchase this coverage, or any other coverage, it is important that you READ YOUR POLICY (OR CERTIFICATE) CAREFULLY!
3. FEDERAL TAX CONSEQUENCES.

   This [POLICY][CERTIFICATE] is intended to be a federally tax-qualified long-term care insurance contract under Section 7702B(b) of the Internal Revenue Code of 1986, as amended.

   OR

   This [POLICY][CERTIFICATE] is not intended to be a federally tax-qualified long-term care insurance contract under Section 7702B(b) of the Internal Revenue Code of 1986, as amended. Benefits received under the [POLICY][CERTIFICATE] may be taxable as income.
4. TERMS UNDER WHICH THE POLICY OR CERTIFICATE MAY BE CONTINUED IN FORCE OR DISCONTINUED.

   (a) [For long-term care health insurance policies or certificates, describe one of the following policy renewability provisions:]

   (1) [Policies and certificates that are guaranteed renewable shall contain the following statement:] RENEWABILITY: THIS POLICY [CERTIFICATE] IS GUARANTEED RENEWABLE. This means you have the right, subject to the terms of your policy [certificate], to continue this policy [certificate] as long as you pay your premiums on time. [Company Name] cannot change any of the terms of your policy [certificate] on its own, except that, in the future, IT MAY INCREASE THE PREMIUM YOU PAY.

   (2) [Policies and certificates that are noncancelable shall contain the following statement:] RENEWABILITY: THIS POLICY [CERTIFICATE] IS NONCANCELABLE. This means that you have the right, subject to the terms of your policy or certificate, to continue this policy as long as you pay your premiums on time. [Company Name] cannot change any of the terms of your policy on its own and cannot

change the premium you currently pay. However, if your policy or certificate contains an inflation protection feature where you choose to increase your benefits, [Company Name] may increase your premium at that time for those additional benefits.

(b) [For group coverage, specifically describe continuation conversion provisions applicable to the certificate and group policy.]

(c) [Describe waiver of premium provisions or state that there are not such provisions.]

5. TERMS UNDER WHICH THE COMPANY MAY CHANGE PREMIUMS. [In bold type larger than the maximum type required to be used for the other provisions of the outline of coverage, state whether or not the company has a right to change the premium, and if a right exists, describe clearly and concisely each circumstance under which the premium may change.]

~~3.~~6. TERMS UNDER WHICH THE POLICY OR CERTIFICATE MAY BE RETURNED AND PREMIUM REFUNDED.

(a) [Provide a brief description of the right to return--"free look" provision of the policy or certificate.]

(b) [include a statement that the policy or certificate either does or does not contain provisions providing for a refund or partial refund of premium upon the death of an insured or surrender of the policy or certificate. If the policy contains such provisions, include description of them.]

~~4.~~7. THIS IS NOT MEDICARE SUPPLEMENT COVERAGE. If you are eligible for Medicare, review the Medicare Supplement buyer's guide available from the insurance company.

(a) [For producers] Neither [insert company name] nor its producers represent Medicare, the federal government or any state government.

(b) [For direct response] [insert company name] is not representing Medicare, the federal government or any state government.

~~5.~~8. LONG-TERM CARE COVERAGE. Policies of this category are designed to provide coverage for one or more necessary or medically necessary diagnostic, preventive, therapeutic, rehabilitative, maintenance, or personal care services, provided in a setting other than an acute care unit of a hospital, such as in a nursing home, in the community or in the home. This policy or certificate provides coverage in the form of a fixed dollar indemnity benefit for covered long-term care expenses, subject to policy [limitations] [waiting periods] and [coinsurance] requirements. [Modify this paragraph if the policy is not an indemnity policy.]

~~6.~~9. BENEFITS PROVIDED BY THIS POLICY/CERTIFICATE.

(a) [Covered services, related deductible(s), waiting periods, elimination periods and benefit maximums.]

(b) [Institutional benefits, by skill level.]

(c) [Non-institutional benefits, by skill level.]

(d) [Activities of daily living and cognitive impairment shall be used to measure an insured's need for long-term care and must be defined and described as part of the outline of coverage.] [Any additional benefit triggers must also be explained. If these triggers differ for different benefits, explanation of the triggers

should accompany each benefit description. If an attending physician or other specified person must certify a certain level of functional dependency in order to be eligible for benefits, this too must be specified.]

~~7.~~10. LIMITATIONS AND EXCLUSIONS

[Describe:

(a) Preexisting conditions;

(b) Non-eligible facilities/provider;

(c) Non-eligible levels of care (e.g., unlicensed providers, care or treatment provided by a family member, etc.)

(d) Exclusions/exceptions;

(e) Limitations.]

[This section should provide a brief specific description of any policy provisions which limit, exclude, restrict, reduce, delay, or in any other manner operate to qualify payment of the benefits described in ~~(6)~~ (9) above.]

THIS POLICY MAY NOT COVER ALL THE EXPENSES ASSOCIATED WITH YOUR LONG-TERM CARE NEEDS.

~~8.~~11. RELATIONSHIP OF COST OF CARE AND BENEFITS. Because the costs of long-term care services will likely increase over time, you should consider whether and how the benefits of this plan may be adjusted. [As applicable, indicate the following:

(a) That the benefit level will not increase over time;

(b) Any automatic benefit adjustment provisions;

(c) Whether the insured will be guaranteed the option to buy additional benefits and the basis upon which benefits will be increased over time if not by a specified amount or percentage;

(d) If there is such a guarantee, include whether additional underwriting or health screening will be required, the frequency and amounts of the upgrade options, and any significant restrictions or limitations;

(e) And finally, describe whether there will be any additional premium charge imposed, and how that is to be calculated.]

~~9. TERMS UNDER WHICH THE POLICY (OR CERTIFICATE) MAY BE CONTINUED IN FORCE OR DISCONTINUED.~~

~~(a) [For long term care health insurance policies or certificates, describe one of the following policy renewability provisions:~~

~~(i) Policies and certificates that are guaranteed renewable shall contain the following statement:] RENEWABILITY: THIS POLICY [CERTIFICATE] IS GUARANTEED RENEWABLE. This means you have the right, subject to the terms of your policy [certificate], to continue this policy [certificate] as long as you pay your premiums on time. [Company Name] cannot change any of the terms of your policy [certificate] on its own, except that, in the future, it may increase the premium you pay.~~

~~(ii) [Policies and certificates that are noncancelable shall contain the following statement:] RENEWABILITY: THIS POLICY [CERTIFICATE] IS NONCANCELABLE. This means that you have the right, subject to the terms of your policy or certificate, to continue this policy as long as you pay your premiums on time. [Company Name]~~

~~cannot change any of the terms of your policy on its own and cannot change the premium you currently pay. However, if your policy or certificate contains an inflation protection feature where you choose to increase your benefits, [Company Name] may increase your premium at that time for those additional benefits.~~

~~(b) For group coverage, specifically describe continuation conversion provisions applicable to the certificate and group policy;~~

~~(c) Describe waiver of premium provisions or state that there are not such provisions;~~

~~(d) State whether or not the company has a right to change premium, and if such a right exists, describe clearly and concisely each circumstance under which premium may change.]~~

~~10.~~12. ALZHEIMER'S DISEASE, IRREVERSIBLE DEMENTIA, AND OTHER ORGANIC BRAIN DISORDERS.

[State that the policy or certificate provides coverage for insured clinically diagnosed as having Alzheimer's disease, irreversible dementia, or related degenerative and dementing illnesses. Specifically describe each benefit screen or other policy provision which provides preconditions to the availability of policy benefits for such an insured.]

~~11.~~13. PREMIUM.

[(a) State the total annual premium for the policy or certificate;

(b) If the premium varies with an applicant's choice among benefit options, indicate the portion of annual premium which corresponds to each benefit option.]

~~12.~~14. ADDITIONAL FEATURES.

~~(a) QUALIFIED LONG-TERM CARE INSURANCE. Indicate whether or not the policy or certificate is intended to be a federally tax-qualified long-term care insurance contract.~~

[(~~b~~a) Indicate if medical underwriting is used;

(~~c~~b) Describe other important features.]

15. CONTACT THE MONTANA STATE AUDITOR'S OFFICE, COMMISSIONER OF SECURITIES AND INSURANCE, IF YOU HAVE GENERAL QUESTIONS REGARDING LONG-TERM CARE INSURANCE. CONTACT THE INSURANCE COMPANY IF YOU HAVE SPECIFIC QUESTIONS REGARDING YOUR LONG-TERM CARE INSURANCE POLICY OR CERTIFICATE.

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-22-1101, 33-22-1102, 33-22-1103, 33-22-1107, 33-22-1108, 33-22-1111, 33-22-1112, 33-22-1113, 33-22-1114, 33-22-1115, 33-22-1116, 33-22-1117, 33-22-1119, 33-22-1120, 33-22-1121, MCA

REASON: These changes are meant to modernize the language of the outline of coverage, consistent with NAIC model regulation 641.

6.6.3117 STANDARDS FOR MARKETING (1) and (1)(a) remain the same.

(i) any marketing activities, including comparison of policies, by its producers

or other producers, will be fair and accurate; and

~~(b)~~(ii) ~~establish marketing procedures to assure~~ excessive insurance is not sold or issued;

(c) through (i) remain the same, but are renumbered (b) through (h).

(2) remains the same.

(3) With respect to the obligations set forth in this rule~~, the primary responsibility of an association, as defined in 33-22-1107, MCA, when endorsing long-term care insurance shall be~~:

(a) the primary responsibility of an association, as defined in 33-22-1107, MCA, when endorsing long-term care insurance shall be to educate its members concerning long-term care issues in general so that its members can make informed decisions. Associations shall provide objective information regarding long-term care insurance policies or certificates endorsed or sold by such associations to ensure that members of such associations receive a balanced and complete explanation of the features in the policies or certificates that are being endorsed or sold.

(b) through (i) remain the same.

AUTH: 33-1-313, 33-22-1121, MCA

IMP: 33-22-1101, 33-22-1102, 33-22-1103, 33-22-1107, 33-22-1108, 33-22-1111, 33-22-1112, 33-22-1113, 33-22-1114, 33-22-1115, 33-22-1116, 33-22-1117, 33-22-1119, 33-22-1120, 33-22-1121, MCA

REASON: The changes are meant to improve the organization and readability of the rule.

6.6.3118 SUITABILITY STANDARDS (1) remains the same.

~~(2) To determine whether the applicant meets the standards developed by the issuer, the issuer shall:~~

~~(a) develop procedures that take the following into consideration:~~

~~(i) the ability to pay for the proposed coverage and other pertinent financial information related to the purchase of the coverage;~~

~~(ii) the applicants' goals or needs with respect to long-term care and the advantages and disadvantages of insurance to meet these goals or needs; and~~

~~(iii) the values, benefits and costs of the applicant's existing insurance, if any, when compared to the values, benefits and costs of the recommended purchase or replacement.~~

~~(3)~~(2) To determine whether the applicant meets the standards developed by the issuer, the producer and issuer shall~~:~~

~~(a)~~ develop procedures that take the following into consideration:

(i) through (iii) remain the same, but are renumbered (a) through (c).

~~(4)~~(3) To determine whether the applicant meets the standards required by (2), ~~developed by~~ the issuer, and where a producer is involved, the producer shall make reasonable efforts to obtain the information set out in (2)~~(a)~~. The efforts shall include presentation to the applicant, at or prior to application, the "Long-Term Care Insurance Personal Worksheet." The personal worksheet used by the issuer shall contain, at a minimum, the information in the format contained in ARM 6.6.3120(1)(b) in not less than 12 point type. The issuer may request the applicant

to provide additional information to comply with its suitability standards. A copy of the issuer's personal worksheet shall be filed with the commissioner.

(a) and (b) remain the same.

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

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-22-1101, 33-22-1102, 33-22-1103, 33-22-1107, 33-22-1108, 33-22-1111, 33-22-1112, 33-22-1113, 33-22-1114, 33-22-1115, 33-22-1116, 33-22-1117, 33-22-1119, 33-22-1120, 33-22-1121, MCA

REASON: The changes are meant to correct a drafting error in the original rule, and improve the organization and readability of the rule.

6.6.3119 NONFORFEITURE BENEFIT REQUIREMENT (1) through (4)(b) remain the same.

(c) A contingent benefit on lapse shall also be triggered for policies with a fixed or limited premium paying period every time an issuer increases the premium rates to a level that results in a cumulative increase of the annual premium equal to or exceeding the percentage of the insured's initial annual premium set forth below based on the insured's issue age, the policy lapses within 120 days of the due date of the premium so increased, and the ratio in (4)(e)(ii), is 40% or more. Unless otherwise required, policyholders shall be notified at least 30 days prior to the due date of the premium reflecting the rate increase.

Triggers for a Substantial Premium Increase

Issue Age	Percent Increase Over Initial Premium
Under 65	50%
65-80	30%
Over 80	10%

This provision shall be in addition to the contingent benefit provided by (4)~~(c)~~(b), and where both are triggered, the benefit provided shall be at the option of the insured.

(d) remains the same.

(i) offer to reduce policy benefits provided by the current coverage consistent with the requirements of ARM 6.6.3129~~without the requirement of additional underwriting~~ so that required premium payments are not increased;

(ii) remains the same.

(iii) notify the policyholder or certificateholder that a default or lapse at any time during the 120-day period referenced in (4)(b) shall be deemed to be the election of the offer to convert in (4)(c)(ii), unless the automatic option in (4)(e)(iii) applies.

(e) remains the same.

(i) offer to reduce policy benefits provided by the current coverage consistent with the requirements of ARM 6.6.3129 ~~without the requirement of additional underwriting~~ so that required premium payments are not increased;

(ii) offer to convert the coverage to a paid-up status where the amount payable for each benefit is 90% of the amount payable, in effect immediately prior to lapse, times the ratio of the number of completed months of paid premiums, divided by the number of months in the premium paying period. This option may be elected at any time during the 120-day period referenced in (4)~~(d)~~(c); and

(iii) notify the policyholder or certificateholder that a default or lapse at any time during the 120-day period referenced in (4)(c) shall be deemed to be the election of the offer to convert in ~~(2)~~(4)(e)(ii), if the ratio is 40% or more.

(5) through (8) remain the same.

(9) Premiums charged for a policy or certificate containing nonforfeiture benefits or a contingent benefit on lapse shall be subject to the loss ratio requirements of ARM 6.6.3112 or ARM 6.6.3124, whichever is applicable, treating the policy or certificate as a whole.

(10) through (12) remain the same.

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-22-1101, 33-22-1102, 33-22-1103, 33-22-1107, 33-22-1108, 33-22-1111, 33-22-1112, 33-22-1113, 33-22-1114, 33-22-1115, 33-22-1116, 33-22-1117, 33-22-1119, 33-22-1120, 33-22-1121, MCA

REASON: The changes to (4)(d)(i), (4)(e)(i), and (9) are meant to modernize the rule, consistent with language contained in the latest version of NAIC model regulation 641. The other changes are meant to correct inadvertent drafting errors in the original rule.

6.6.3120 ADOPTION OF FORMS (1) and (1)(a) remain the same.

(b) LTC Form B Long-Term Care Insurance Personal Worksheet

LTC FORM B

Long-Term Care Insurance
Personal Worksheet

~~People buy long-term care insurance for many reasons. Some don't want to use their own assets to pay for long-term care. Some buy insurance to make sure they can choose the type of care they get. Others don't want their family to have to pay for care or don't want to go on Medicaid. But long-term care insurance may be expensive, and may not be right for everyone.~~

~~By state law, the insurance company must fill out part of the information on this worksheet and ask you to fill out the rest to help you and the company decide if you should buy this policy.~~

This worksheet will help you understand some important information about this type of insurance. Montana law requires companies issuing this [policy][certificate][rider] to **give** you some important facts about premiums and premium increases and to **ask** you some important questions to help you and the company decide if you

should buy this [policy][certificate][rider]. Long-term care insurance can be expensive and it may not be right for everyone.

Premium Information

Policy Form Numbers~~_____~~

~~The premium for the coverage you are considering will be [$____ per month, or $ _____ per year,] [a one-time single premium of $_____.]~~

The premium for the coverage you are considering will be $[ ] per [insert payment interval] **or a total of** [**$**[ ] per year][a one-time single premium of $[ ]].

The premium quoted in this worksheet is not guaranteed and may change during the underwriting process and in the future while this [policy][certificate][rider] is in force.

~~**Type of Policy** (noncancelable/guaranteed renewable):_____~~

~~**The Company's Right to Increase Premiums**:~~

~~[The company cannot raise your rates on this policy.] [The company has a right to increase premiums in the future provided it raises rates for all policies in the same class in this state.][Insurers shall use appropriate bracketed statement. Rate guarantees shall not be shown on this form.]~~

Type of Policy & The Company's Right to Increase Premiums on the Coverage You Choose:

[Noncancellable – The company cannot increase your premiums on this [policy][certificate][rider]].
[Guaranteed renewable – The company can increase your premiums on this [policy][certificate][rider] in the future if it increases the premiums for all [policies][certificates][riders] like yours in Montana.]
[Paid-up – This [policy][certificate][rider] will be paid-up after you have paid all of the premiums specified in your [policy][certificate][rider]].

~~**Rate Increase History**~~**Premium Increase History**

~~The~~ [Name of company] has sold long-term care insurance since [year] and has sold this [policy][certificate][rider] since [year]. ~~[The last rate increase for this policy in this state was in [year], when premiums went up by an average of ___%]. [The company has not raised its rates for this policy.]~~ [The company has never raised its ~~rates~~ premiums for any long-term care [policy][certificate][rider] it has sold in this state or any other state.]

[The company has not ~~raised its rates~~increased its premiums for this [policy][certificate][rider] ~~form~~ or similar ~~policy forms~~[policies][certificates][riders] in this state or any other state in the last 10 years.]
[The company has ~~raised~~increased its premiums ~~rates~~ on this [policy][certificate][rider] ~~form~~ or similar ~~policy forms~~[policies][certificates][riders] in the last 10 years. Following is a summary of the ~~rate~~ increases.]
[Over the past 10 years, the company has increased premiums on this [policy][certificate][rider] or similar [policies][certificates][riders] by ___%. A summary of the premium increases in the last 10 years is attached to this worksheet.]

Questions Related to Your Income

You do not have to answer the following questions. They are intended to make sure you have thought about how you'll pay premiums and the cost of care your insurance does not cover. If you do not want to answer these questions, you should understand that the company might refuse to insure you.

What resources will you use to pay your premium?
□ Current income from employment □ Current income from investments □ Other current income □ Savings □ Sell investments □ Sell other assets □ Money from my family
□ Other: _____

Could you afford to keep this [policy][certificate][rider] if your spouse or partner dies first?
□ Yes □ No □ Had not thought about it □ Do not know □ Does not apply

[**What would you do if the premiums went up, for example, by 50%?**
□ Pay the higher premium □ Call the company/producer □ Reduce benefits □ Drop the [policy][certificate][rider] □ Do not know]

~~[□ Have you considered whether you could afford to keep this policy if the premiums were raised, for example, by 20%?]~~

~~How will you pay each year's premiums?~~
~~□ From my Income □ From my Savings/Investments □ My Family Will Pay~~

~~**Income**~~

What is your household annual income from all sources? (check one) □ [Under $10,000] □ [$10,000-20,000] □ [$20,000-30,000] □ [$30,000-50,000] □ [Over $50,000]

~~How d~~**Do you expect your income to change over the next 10 years?** (check one)
□ No change——————□ Yes, expect i~~I~~ncrease——————□ Yes, expect d~~D~~ecrease

If you plan to pay premiums from your income, have you thought about how a change in your income would affect your ability to continue to pay the premium?
□ Yes □ No □ Do not know

~~If you will be paying premiums with money received only from your own income, a rule of thumb is that you may not be able to afford this policy if the premiums will be more than 7% of your income.~~

Will you buy inflation protection: (check one) □ Yes □ No

Inflation may increase the cost of long-term care in the future.
If you do not buy inflation protection, how will you pay for the difference between future costs and your daily benefit amount?
~~If not, have you considered how you will pay for the difference between future costs and your daily benefit amount?~~

□ From my Income □ ~~From my Savings/Investments □ My Family Will Pay~~
□ From my investments □ Sell other assets □ Money from my family □ Other: _____

The national average annual cost of care in [insert year] was [insert $ amount], but this figure varies across the country. In ten years the national average annual cost would be about [insert $ amount] if costs increase 5% annually.

What [elimination period][waiting period][cash deductible] are you considering? [Number of days _____ in [elimination period][waiting period] Approximate cost of care for this period: $_____ ~~for that period of care~~.
($xxx per day times the number of days in [elimination period][waiting period], where "xxx" represents the most recent estimate of the national daily average cost of long-term care)]

[Cash deductible $_____]

How are you planning to pay for your care during the [elimination period][waiting period][deductible period]? (check ~~one~~all that apply)
□ From my Income ~~□ From my Savings/Investments □ My Family Will Pay~~ □ From my savings/investments □ My family will pay

Questions Related to Your Savings and Investments

Not counting your home, about how much are all of your assets (your savings and investments) worth? (check one)
□ [Under $20,000] □ [$20,000-$30,000] □ [$30,000-$50,000] □ [Over $50,000]

How do you expect your assets to change over the next 10 years? (check one)
□ Stay about the same □ Increase □ Decrease

~~If you are buying this policy to protect your assets and your assets are less than $30,000, you may wish to consider other options for financing your long-term care.~~

If you are buying this [policy][certificate][rider] to protect your assets and your assets are less than $50,000, experts suggest you think about other ways to pay for your long-term care.

Disclosure Statement

□ The answers to the questions above describe my financial situation. **Or** □ I choose not to complete this information. (Check one.)
□ I acknowledge that the carrier and/or its producer (below) has reviewed this form with me including the premium, premium rate increase history and potential for premium increases in the future. [For direct mail situations, use the following : I acknowledge that I have reviewed this form including the premium, premium rate increase history and potential for premium increases in the future.] I understand the information contained in this worksheet~~above disclosures~~. **I understand that the rates for this policy may increase in the future.** (This box must be checked.)

Signed: _____ _____
(Applicant) (Date)

[□ I explained to the applicant the importance of completing this information.]

Signed: _____ _____
(Applicant) (Date)

Producer's Printed Name: _____]

[In order for us to process your application, please return this signed statement to [name of company], along with your application.]

[My ~~agent~~ producer has advised me that this [policy][certificate][rider] does not seem to be suitable for me. However, I still want the company to consider my application.~~]~~

Signed: _____ _____
(Applicant) (Date)]

~~The~~Someone from the company may contact you to ~~verify~~discuss your answers and the suitability of this [policy][certificate][rider] for you.

(c) and (d) remain the same.

(e) LTC Form E Claims Denial Reporting Form

LTC FORM E
Claims Denial Reporting Form
Long-Term Care Insurance

For the State of Montana
For the Reporting Year of _____

Company Name : _____ Due: June 30 annually
Company Address: _____
Company NAIC: _____ Number: _____
Contact Person: _____ Phone Number: _____
Line of Business: Individual Group

Instructions:

The purposes of this form is to report all long-term care claim denials under in-force long-term care insurance policies. Indicate the manner of reporting by checking one of the boxes below:
□ Per Claimant – counts each individual who makes one or a series of claim requests.
□ Per Transaction – counts each claim payment request.

"Denied" means a claim that is not paid for any reason other than for claims not paid for failure to meet the waiting period or because of an applicable preexisting condition.

Inforce Data

	State Data	Nationwide Data[1]
Total Number of Inforce Policies [Certificates] as of December 31st		

Claim & Denial Data

		State Data	Nationwide Data[1]
1	Total Number of Long-Term Care Claims Reported		
2	Total Number of Long-Term Care Claims Denied/Not Paid		
3	Number of Claims Not Paid due to Preexisting		

	Condition Exclusion		
4	Number of Claims Not Paid due to Waiting (Elimination) Period Not Met		
5	Net Number of Long-Term Care Claims Denied for Reporting Purposes (Line 2 Minus Line 3 Minus Line 4)		
6	Percentage of Long-Term Care Claims Denied of Those Reported (Line 5 Divided by Line 1)		
7	Number of Long-Term Care Claims Denied due to:		
8	▪ Long-Term Care Services[2]		
9	▪ Provider/Facility Not Qualified under the Policy[3]		
10	▪ Benefit Eligibility Criteria Not Met[4]		
11	▪ Other		

1. The nationwide data may be viewed as a more representative and credible indicator where the data for claims reported and denied for your state are small in number.
2. Example—home health care claim filed under a nursing home only policy.
3. Example—a facility that does not meet the minimum level of care requirements or the licensing requirements as outlined in the policy.
4. Examples—a benefit trigger not met, certification by a licensed health care practitioner not provided, no plan of care.

(f) LTC Form F Potential ~~Rate~~ Premium Increase Reporting Form

LTC Form F

Instructions: *Insurers shall provide all of the following information to the applicant regarding premium, premium adjustments, potential premium increases, and policyholder options in the event of a premium increase except as noted below. This form does not need to be provided in the event the policy does not reserve the right to increase rates.*

As used in this form:
"Policy" shall mean policy, certificate, or rider, as applicable.
"Premium" shall include premium schedules, as applicable.
Companies may substitute whichever term is appropriate to reflect the long-term care insurance for which the applicant is applying.
~~This form provides information to the applicant regarding premium rate schedules, rate schedule adjustments, potential rate revisions, and policy holder options in the event of a rate increase.~~

~~**Insurers shall provide all of the following information to the applicant:**~~

Long-Term Care Insurance
Potential ~~Rate~~Premium Increase Disclosure Form

Important Notice: Your long-term care insurance company **may** increase the premium for your policy **every year**. You have certain rights and it is important that you understand them before you buy a long-term care insurance policy. Please read this information and be sure you understand it before you buy a policy.

This policy is guaranteed renewable*. Companies can increase the premiums for guaranteed renewable policies in the future. The company cannot increase your premiums because you are older or your health declines. It can increase premiums based on the experience of all individuals with a policy like yours.*

1. What Is Your Premium?

The producer has quoted you a premium of $[ ] for this policy. This is **not** a final premium. The premium might change during the underwriting process or if you choose different benefits. The premium you will be required to pay for your policy will be [shown on the schedule page of][attached to] your policy.

2. How Will I Know If My Premium Is Changing?

The company will send you a notice. The notice will include the new premium and when you will start paying it. It also will give you ways you could avoid paying a higher premium. One likely choice will be to keep your insurance policy, but with fewer or lower benefits than you bought. Another choice may be to stop paying premiums and have a "paid-up" policy with fewer or lower benefits than the policy you bought. You may have other choices.

~~**[Premium Rate][Premium Rate Schedules]**: [Premium rate][Premium rate schedules] that [is][are] applicable to you and that will be in effect until a request is made and [filed][approved] for an increase [is][are][on the application][$_____]~~

~~1. The [premium] [premium rate schedule] for this policy [will be shown on the schedule page of] [will be attached to] your policy.~~

~~2. **Rate Schedule Adjustments:**~~

~~The company will provide a description of when premium rate or rate schedule adjustments will be effective (e.g., next anniversary date, next billing date, etc.) (fill in the blank): _____.~~

~~3. **Potential Rate Revisions:**~~

~~**This policy is Guaranteed Renewable**. This means that the rates for this product may be increased in the future. Your rates can NOT be increased due to your increasing age or declining health, but your rates may go up based on the experience of all policyholders with a policy similar to yours.~~

~~**If you receive a premium rate or premium rate schedule increase in the future, you will be notified of the new premium amount and you will be able to exercise at least one of the following options:**~~

~~$ Pay the increased premium and continue your policy in force as is.~~
~~$ Reduce your policy benefits to a level such that your premiums will not increase. (Subject to state law minimum standards.)~~
~~$ Exercise your nonforfeiture option if purchased. (This option is available for purchase for an additional premium.)~~
~~$ Exercise your contingent nonforfeiture rights.* (This option may be available if you do not purchase a separate nonforfeiture option.)~~
~~$~~

Contingent Nonforfeiture

If the premium rate for your policy goes up in the future and you didn't buy a nonforfeiture option, you may be eligible for contingent nonforfeiture. Here's how to tell if you are eligible:

You will keep some long-term care insurance coverage, if:

~~$~~● Your premium after the increase exceeds your original premium by the percentage shown (or more) in the following table; and

~~$~~● You lapse (do not pay more premiums) within 120 days of the increase.

The amount of coverage (i.e., new lifetime maximum benefit amount) you will keep will equal the total amount of premiums you've paid since your policy was first issued. If you have already received benefits under the policy, so that the remaining maximum benefit amount is less than the total amount of premiums you've paid, the amount of coverage will be that remaining amount.

Except for this reduced lifetime maximum benefit amount, all other policy benefits will remain at the levels attained at the time of the lapse and will not increase thereafter.

Should you choose this Contingent Nonforfeiture option, your policy, with this reduced maximum benefit amount, will be considered "paid-up" with no further premiums due.

Example:

~~$~~● You bought the policy at age 65 and paid the $1,000 annual premium for 10

years, so you have paid a total of $10,000 in premium.

~~$~~● In the eleventh year, you receive a rate increase of 50%, or $500 for a new annual premium of $1,500, and you decide to lapse the policy (not pay any more premiums.)

~~$~~● Your "paid-up" policy benefits are $10,000 (provided you have at least $10,000 of benefits remaining under your policy.)

Contingent Nonforfeiture
Cumulative Premium Increase over Initial Premium
That Qualifies for Contingent Nonforfeiture

(Percentage increase is cumulative from date of original issue. It does NOT represent a one-time increase.)

Issue Age	Percent Increase Over Initial Premium
29 and under	200%
30-34	190%
35-39	170%
40-44	150%
45-49	130%
50-54	110%
55-59	90%
60	70%
61	66%
62	62%
63	58%
64	54%
65	50%
66	48%
67	46%
68	44%
69	42%
70	40%
71	38%
72	36%
73	34%
74	32%
75	30%
76	28%
77	26%
78	24%
79	22%
80	20%
81	19%
82	18%

83	17%
84	16%
85	15%
86	14%
87	13%
88	12%
89	11%
90 and over	10%

[The following contingent nonforfeiture disclosure need only be included for those limited pay policies to which ARM 6.6.3119(4)(c) and (e) of the regulation are applicable].

In addition to the contingent nonforfeiture benefits described above, the following reduced "paid-up" contingent nonforfeiture benefit is an option in all policies that have a fixed or limited premium payment period, even if you selected a nonforfeiture benefit when you bought your policy. If both the reduced "paid-up" benefit AND the contingent benefit described above are triggered by the same rate increase, you can choose either of the two benefits.

You are eligible for the reduced "paid-up" contingent nonforfeiture benefit when all three conditions shown below are met:

1. The premium you are required to pay after the increase exceeds your original premium by the same percentage or more shown in the chart below:

Triggers for a Substantial Premium Increase

Issue Age	Percent Increase Over Initial Premium
Under 65	50%
65-80	30%
Over 80	10%

2. You stop paying your premiums within 120 days of when the premium increase took effect; and

3. The ratio of the number of months you already paid premiums is 40% or more than the number of months you originally agreed to pay.

If you exercise this option your coverage will be converted to reduced "paid-up" status. That means there will be no additional premiums required. Your benefits will change in the following ways:

a. The total lifetime amount of benefits your reduced paid up policy will provide can be determined by multiplying 90% of the lifetime benefit amount at the time the policy becomes paid up by the ratio of the number of months you already paid premiums to the number of months you agreed to pay them.

b. The daily benefit amounts you purchased will also be adjusted by the same ratio.

If you purchased lifetime benefits, only the daily benefit amounts you purchased will be adjusted by the applicable ratio.

Example:

- You bought the policy at age 65 with an annual premium payable for 10 years.
- In the sixth year, you receive a rate increase of 35% and you decide to stop paying premiums.
- Because you already paid 50% of your total premium payments and that is more than the 40% ratio, your "paid-up" policy benefits are .45 (.90 times .50) times the total benefit amount that was in effect when you stopped paying your premiums. If you purchased inflation protection, it will not continue to apply to the benefits in the reduced "paid-up" policy.

(g) remains the same.

(h) LTC Form H Guidelines for Long-Term Care Independent Review Entities

LTC FORM H

Guidelines for Long-Term Care Independent Review Entities

In order for an organization to qualify as an independent review organization for long-term care insurance benefit trigger decisions, it shall comply with all of the following:

a. The independent review organization shall ensure that all health care professionals on its staff and with whom it contracts to provide benefit trigger determination reviews hold a current unrestricted license or certification to practice a health care profession in the United States.

b. The independent review organization shall ensure that any health care professional on its staff and with whom it contracts to provide benefit trigger determination reviews who is a physician holds a current certification by a recognized American medical specialty board in a specialty appropriate for determining an insured's functional or cognitive impairment.

c. The independent review organization shall ensure that any health care professional on its staff and with whom it contracts to provide benefit trigger determination reviews who is not a physician holds the current certification in the specialty in which that person is licensed, by a recognized American specialty board in a specialty appropriate for determining an insured's functional or cognitive

impairment.

d. The independent review organization shall ensure that all health care professionals on its staff and with whom it contracts to provide benefit trigger determination reviews have no history of disciplinary actions or sanctions including, but not limited to, the loss of staff privileges or any participation restriction taken or pending by any hospital or state or federal government regulatory agency.

e. The independent review organization shall ensure that neither it, nor any of its employees, agents, or licensed health care professionals it utilizes for benefit trigger determination reviews receives compensation of any type that is dependent on the outcome of the review.

f. The independent review organization shall ensure that neither it, nor any of its employees, agents, or licensed healthcare professionals it utilizes for benefit trigger determination reviews are in any manner related to, employed by, or affiliated with the insurer, insured, or with a person who previously provided medical care or long-term care services to the insured.

g. The independent review organization shall provide a description of the qualifications of the reviewers retained to conduct independent review of long-term care insurance benefit trigger decisions, including the reviewer's current and past employment history, practice affiliations, and a description of past experience with decisions relating to long-term care, functional capacity, dependency in activities of daily living, or in assessing cognitive impairment. Specifically, with regard to reviews of tax qualified long-term care insurance contracts, it must demonstrate the ability to assess the severity of cognitive impairment requiring substantial supervision to protect the individual from harm, or with assessing deficits in the ability to perform without substantial assistance from another person at least two activities of daily living for a period of at least 90 days due to a loss of functional capacity.

h. The independent review organization shall provide a description of the procedures employed to ensure that reviewers conducting independent reviews are appropriately licensed, registered, or certified; trained in the principles, procedures, and standards of the independent review organization; and knowledgeable about the functional or cognitive impairments associated with the diagnosis and disease staging processes, including expected duration of such impairment, which is the subject of the independent review.

i. The independent review organization shall provide the number of reviewers retained by the independent review organization and a description of the areas of expertise available from such reviewers and the types of cases such reviewers are qualified to review (e.g., assessment of cognitive impairment or inability to perform activities of daily living due to a loss of functional capacity).

j. The independent review organization shall provide a description of the policies and procedures employed to protect confidentiality of protected health information, in accordance with federal and state law.

k. The independent review organization shall provide a description of its quality assurance program.

l. The independent review organization shall provide the names of all corporations and organizations owned or controlled by the independent review organization or which own or control the organization, and the nature and extent of any ownership or control. The independent review organization shall ensure that neither it, nor any of its employees, agents, or licensed health care professionals utilized are not a subsidiary of, or owned or controlled by, an insurer or by a trade association of insurers of which the insured is a member.

m. The independent review organization shall provide the names and resumes of all directors, officers, and executives of the independent review organization.

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-22-1101, 33-22-1102, 33-22-1103, 33-22-1107, 33-22-1108, 33-22-1111, 33-22-1112, 33-22-1113, 33-22-1114, 33-22-1115, 33-22-1116, 33-22-1117, 33-22-1119, 33-22-1120, 33-22-1121, MCA

REASON: The changes and additions are meant to modernize the rule consistent with the language contained in the latest version of NAIC model regulation 641.

6.6.3121 REQUIRED DISCLOSURE OF RATING PRACTICES TO CONSUMERS (1) through (5) remain the same.

(6) A premium increase notice required by (5) shall include:

(a) an offer to reduce policy benefits provided by the current coverage consistent with the requirements of ARM 6.6.3129;

(b) a disclosure stating that all options available to the policyholder may not be of equal value; and

(c) in the case of a partnership policy, a disclosure that some benefit reduction options may result in a loss in partnership status that may reduce policyholder protections.

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-22-1101, 33-22-1102, 33-22-1103, 33-22-1107, 33-22-1108, 33-22-1111, 33-22-1112, 33-22-1113, 33-22-1114, 33-22-1115, 33-22-1116, 33-22-1117, 33-22-1119, 33-22-1120, 33-22-1121, MCA

REASON: The additional language is meant to modernize the rule consistent with the language contained in the latest version of NAIC model regulation 641.

6.6.3122 INITIAL FILING REQUIREMENTS (1) through (2)(b)(iv) remain the same.

(v) a statement that the premium rate schedule is not less than the premium rate schedule for existing similar policy forms also available from the insurer except for reasonable differences attributable to benefits; ~~or~~ and

(vi) through (3) remain the same.

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-22-1101, 33-22-1102, 33-22-1103, 33-22-1107, 33-22-1108, 33-22-1111, 33-22-1112, 33-22-1113, 33-22-1114, 33-22-1115, 33-22-1116, 33-22-1117, 33-22-1119, 33-22-1120, 33-22-1121, MCA

REASON: The change to (2)(b)(v) is meant to correct an inadvertent drafting error in the original rule.

6.6.3129 RIGHT TO REDUCE COVERAGE AND LOWER PREMIUMS

(1) Every long-term care insurance policy shall include~~:~~

~~(a)~~ a provision that allows the policyholder or certificateholder to reduce coverage and lower the policy premium in at least one of the following ways:

~~(i)~~(a) reducing the maximum benefit; or

~~(ii)~~(b) reducing the daily, weekly, or monthly benefit amount.

~~(b)~~(2) In addition to (1), the issuer may also offer other reduction options that are consistent with the policy design or the carrier's administrative processes.

(3) In the event the reduction in coverage involves the reduction or elimination of the inflation protection provision, the issuer shall allow the policyholder to continue the benefit amount in effect at the time of the reduction.

~~(2)~~(4) The provision required by (1) shall include a description of the ways in which coverage may be reduced and the process for requesting and implementing a reduction in coverage.

~~(3)~~(5) The age to determine the premium for the reduced coverage shall be based on the age used to determine the premiums for the coverage currently in force and shall be consistent with the approved rate table.

~~(4)~~(6) The issuer may limit any reduction in coverage to plans or options available for that policy form and to those for which benefits will be available after consideration of claims paid or payable.

~~(5)~~(7) If a policy is about to lapse, the issuer shall provide a written reminder to the policyholder or certificateholder of his or her right to reduce coverage and premiums in the notice required by ARM 6.6.3104A(1)(c).

~~(6)~~(8) This rule does not apply to life insurance policies or riders containing accelerated long-term care benefits.

~~(7)~~(9) This rule applies to any long-term care policy issued in Montana on or after January 1, 2009.

AUTH: 33-1-313, 33-22-1121, MCA
IMP: 33-22-1101, 33-22-1102, 33-22-1103, 33-22-1107, 33-22-1108, 33-22-1111, 33-22-1112, 33-22-1113, 33-22-1114, 33-22-1115, 33-22-1116, 33-22-1117, 33-22-1119, 33-22-1120, 33-22-1121, MCA

REASON: The additional language is to modernize the rule consistent with the language contained in the latest version of NAIC model regulation 641.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Mike Winsor, Attorney, Office of the Montana State Auditor, 840 Helena Avenue, Helena, Montana, 59601; telephone (406) 444-2004; fax (406) 444-3497; or e-mail mwinsor@mt.gov, and must be received no later than 5:00 p.m., December 19, 2018.

6. Mike Winsor, Attorney, will preside over and conduct this hearing.

7. The CSI 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 may sign up by clicking on the blue button on the CSI's website at: http://csimt.gov/laws-rules/ and may specify the subject matter they are interested in. Notices will be sent by e-mail unless a mailing preference is noted in the request. Requests may also be sent to the CSI in writing. Such written request may be mailed or delivered to the contact information in 2 above or may be made by completing a request form at any rules hearing held by the CSI.

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

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption and amendment of these rules will significantly and directly impact small businesses.

/s/ Michael A. Kakuk	/s/ Kristin Hansen
Michael A. Kakuk	Kristin Hansen
Rule Reviewer	Chief Legal Counsel

Certified to the Secretary of State October 23, 2018.

BEFORE THE MONTANA STATE LIBRARY
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through III pertaining to depository procedures for state publications	)))))	NOTICE OF PROPOSED ADOPTION NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On December 5, 2018, the Montana State Library proposes to adopt the above-stated rules.

2. The Montana State Library will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Montana State Library no later than 5:00 p.m. on November 23, 2018, to advise us of the nature of the accommodation that you need. Please contact Marlys Stark, Montana State Library, P.O. Box 201800, Helena, Montana, 59620-1800; telephone (406) 444-3384; fax (406) 444-0266; TTY (406) 444-4799; or e-mail mstark2@mt.gov.

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

NEW RULE I RULES FOR THE MONTANA STATE LIBRARY (1) The Montana State Library shall follow the State Publications management plan as adopted by the Montana State Library Commission.

(2) The Montana State Library shall review the State Publications management plan biannually and update it as appropriate.

AUTH: 22-1-212, MCA
IMP: 22-1-212, MCA

NEW RULE II RULES FOR DEPOSITORY LIBRARIES (1) Depository libraries from their website shall provide no charge access to state government information including digitized state publications and the archived collection of state agency websites provided by the Montana State Library.

(2) Depository libraries that are members of the Montana Shared Catalog shall include the State Government Information Center (SGIC) as part of the catalog search profile.

(3) Depository libraries not members of the Montana Shared Catalog shall load MARC catalog records provided by the Montana State Library for state publications into their local catalog.

(4) Depository library staff shall attend online training once every two years provided by the Montana State Library on providing access and reference service for state government information.

(5) Each depository library shall promote itself as a state government information center using promotional materials provided by the Montana State Library.

(6) Directors of depository libraries shall designate a staff person as a point of contact and provide the point of contact information to the state library.

(7) Depository libraries shall notify the state library should they wish to leave the depository library program.

AUTH: 22-1-212, MCA
IMP: 22-1-212, MCA

NEW RULE III RULES FOR STATE AGENCIES (1) State agencies shall post state publications to their websites. State publications should remain posted for a minimum of 90 days.

(2) State agencies shall notify the state library of new domain names that are outside of mt.gov and part of the state Domain Name System (DNS).

AUTH: 22-1-212, MCA
IMP: 22-1-212, MCA

REASON: Previous depository rules had been repealed. Statute requires depository rules for this library program.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: Marlys Stark, Montana State Library, P.O. Box 201800, Helena, Montana, 59620-1800; telephone (406) 444-3384; fax (406) 444-0266; or e-mail mstark2@mt.gov, and must be received no later than 5:00 p.m., November 30, 2018.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to Marlys Stark at the above address no later than 5:00 p.m., November 30, 2018.

6. If the agency receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be more than 25 persons based on the number of governmental subdivisions or agencies, as well as professional organizations and members of the public that use the many library services.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the department.

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

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

/s/ Jennie Stapp
Jennie Stapp
Rule Reviewer

/s/ Aaron LaFromboise
Aaron LaFromboise
Chairman
Montana State Library

Certified to the Secretary of State October 23, 2018.

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 12.11.3210 pertaining to recreating on the Helena Valley Regulating Reservoir	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On November 26, 2018, at 6:00 p.m., the Fish and Wildlife Commission (commission) will hold a public hearing at the Fish, Wildlife and Parks Headquarters Building, 1420 East 6th Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on November 16, 2018 to advise us of the nature of the accommodation that you need. Please contact Jessica Snyder, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana, 59620-0701; telephone (406) 444-4594; or e-mail jesssnyder@mt.gov.

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

12.11.3210 HELENA VALLEY ~~EQUALIZING~~ REGULATING RESERVOIR REGULATIONS ~~(1) The following rules have been devised in the interest of safety and the protection of property, for public health, and as a measure to achieve the fullest possible recreational use of the Helena Valley Equalizing Reservoir. These rules apply to the water surface of the reservoir and to those portions of the surrounding lands which have been specifically reserved for recreational use.~~

~~(2)~~ (1) The main purpose of the Helena Valley Regulating ~~equalizing~~ ~~r~~Reservoir is to impound the waters for irrigation and for domestic water supply for the city of Helena. ~~Accordingly, any person at any time going in or upon the lands or waters thereof, whether as a visitor, hunter, fisherman or windsurfer, shall assume all risks arising or resulting in injury or death to himself or damage to or destruction of property, resulting directly or indirectly, wholly or in part, and from use of said reservoir and lands or appurtenant structures or their construction, operation, and control by the United States or by the commission.~~

~~(3) The department may exclude public use or trespass of any kind within designated areas when such action is necessary to protect life, property, or public health, or it may designate any areas which are closed upon orders of the department of environmental quality because of the use of the reservoir for domestic water supply. Such areas shall be posted sufficiently to inform the public.~~

~~(4)~~ (2) No boathouse or landing float, pier, or other docking or mooring device shall be installed without a written permit issued by the department or the

U.S. ~~b~~Bureau of ~~r~~Reclamation.

~~(5)~~ (3) The reservoir is restricted to ~~M~~manually operated watercraft and watercraft powered by electric motors only ~~will be allowed on the reservoir~~.

(4) Boat regattas and racing are prohibited ~~on the reservoir~~.

~~(6)~~ (5) No swimming or wading is permitted ~~in the reservoir~~ except when launching or removing a vessel from the reservoir ~~those persons windsurfing and wearing a wet suit or dry suit in designated areas~~. ~~Designated areas as posted are closed to all windsurfing near the water outlets.~~

(6) Pets may not occupy the water but are allowed on ice covering the reservoir.

~~(7) Hunting and fishing are permitted upon compliance with the laws and regulations prescribed by the state of Montana, but are subject to such additional regulations as may be issued by the United States in order to protect the reservoir or other features. No hunting shall be allowed where it creates a safety hazard in regard to the lives or property of recreational area visitors nor shall hunting or fishing be allowed in an area close to the dam and spillway which shall be marked by buoys.~~

~~(8) Use of fireworks or explosives is prohibited.~~

~~(9) For regulations on firearms, fires, camping, picnicking, sanitation, vehicle use, disturbance of property, disorderly conduct, pets, and commercial activities, see ARM 12.8.201 et seq. (public use regulations). Other regulations on public use on the reservoir as adopted and posted by the department will apply.~~

~~(10) Any person violating any of the foregoing regulations may be ordered to remove his personal property from the reservoir and adjacent lands controlled by the commission or bureau of reclamation. In addition, he shall pay penalties as may be provided by law for such infraction of the rules.~~

(7) The following are prohibited upon ice covering the reservoir:

(a) fires; and

(b) all-terrain vehicles, off highway vehicles, snowmobiles, and any other vehicles.

AUTH: 87-1-303, MCA
IMP: ~~23-1-106,~~ 87-1-303, MCA

REASON: The commission is proposing amendments to ARM 12.11.3210 in cooperation with the Bureau of Reclamation and the Helena Valley Irrigation District. The Helena Valley Regulating Reservoir and lands surrounding the reservoir are owned by the Bureau of Reclamation. In 1969, the commission signed a memorandum of understanding with the Bureau of Reclamation permitting the commission to assume the responsibilities for the administration and development of the lands and facilities at the reservoir for wildlife and recreation purposes. The Helena Valley Irrigation District is responsible for the operation and management of the irrigation water supply works pursuant to a separate agreement. The amendments remove redundant language found in the public use regulations, ARM 12.8.201 et seq., and provide rule language regarding the surface water of the reservoir and not the lands surrounding the reservoir, as intended by the rule.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Justin Hawkaluk, Department of Fish, Wildlife and Parks, 930 West Custer, Helena, Montana, 59602; or e-mail jhawkaluk@mt.gov, and must be received no later than December 7, 2018.

5. Jessica Snyder or another person appointed by the department has been designated to preside over and conduct this hearing.

6. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department or commission. Persons who wish to have their name added to the list shall make written request that includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, or may be made by completing the request form at any rules hearing held by the department.

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

8. With regard to the requirements of 2-4-111, MCA, the commission has determined that the amendment of the above-referenced rule will not significantly and directly impact small businesses.

/s/ Aimee Hawkaluk
Aimee Hawkaluk
Rule Reviewer

/s/ Dan Vermillion
Dan Vermillion
Chair
Fish and Wildlife Commission

Certified to the Secretary of State October 23, 2018.

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I and the amendment of ARM 12.11.3201 and 12.11.3205 pertaining to No Wake Zones on Canyon Ferry Reservoir	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On November 29, 2018, at 6:00 p.m., the Fish and Wildlife Commission (commission) will hold a public hearing at the Fish, Wildlife and Parks Headquarters Building, 1420 East 6th Avenue, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The Department of Fish, Wildlife and Parks (department) will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on November 16, 2018 to advise us of the nature of the accommodation that you need. Please contact Kaedy Gangstad, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana, 59620-0701; telephone (406) 444-4594; or e-mail kgangstad@mt.gov.

3. The rule proposed to be adopted provides as follows:

<u>NEW RULE I CANYON FERRY RESERVOIR - BROADWATER COUNTY</u>

(1) In Broadwater County, Canyon Ferry Reservoir is limited to a controlled no wake speed, as defined in ARM 12.11.101(1), within 300 feet of docks or as buoyed in the following areas:

(a) White Earth.

(2) Silos Campground is limited to a controlled no wake speed, as defined in ARM 12.11.101(1), from shoreline to 300 feet from shoreline between Gass Bay and Seaman's Bay, or as marked by buoys.

(3) Refer to ARM 12.11.3201 for the portion of Canyon Ferry Reservoir located in Lewis and Clark County.

AUTH: 87-1-303, MCA
IMP: 87-1-303, MCA

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

<u>12.11.3201 CANYON FERRY RESERVOIR - LEWIS AND CLARK COUNTY</u>

(1) In Lewis and Clark County, Canyon Ferry Reservoir is limited to a controlled no wake speed, as defined in ARM 12.11.101(1), within 300 feet of docks or as buoyed or described otherwise below, in the following areas:

(a) Chinaman's Bay;

~~(a) Cave Bay;~~

(b) ~~Little~~ Hellgate Bay, 300 feet southwest from the boat ramp, and extending north to the opposite shore;

(c) Magpie Bay; and

(d) Shannon Boat Launch.

~~(d) Carp Bay; and~~

~~(e) Canyon Ferry Dam to Riverside boatramp.~~

(2) Court Sheriff Bay is limited to a controlled no wake speed, as defined in ARM 12.11.101(1), from the mouth of the bay or as buoyed. The mouth of Court Sheriff Bay is identified as the area from the tip of the narrow peninsula that extends southeast from Canyon Ferry Village to the shore directly east.

(3) Kayley Bay is limited to a controlled no wake speed, as defined in ARM 12.11.101(1), approximately 500 yards from the mouth of the stream entering the lake and extending southwest to the point of the bay that narrows at the peninsula at Tranquility Drive on the north side of the bay, to the opposite shore southeast, or as buoyed.

(2) remains the same but is renumbered (4).

(5) Refer to [NEW RULE I] for the portion of Canyon Ferry Reservoir located in Broadwater County.

AUTH: ~~23-1-106,~~ 87-1-303, MCA
IMP: ~~23-1-106,~~ 87-1-303, MCA

12.11.3205 HAUSER RESERVOIR (1) Hauser Reservoir is located in Lewis and Clark County.

(2) Hauser Reservoir is limited to a controlled no wake speed, as defined in ARM 12.11.101(1), in the following areas:

(a) through (e) remain the same.

(f) York Bridge fishing access site within 300 feet of the boat ramp and dock area or as buoyed; ~~and~~

(g) White Sandy Recreation Area within 300 feet of docks and swim area or as buoyed~~.~~; and

(h) Canyon Ferry Dam to Riverside boat ramp.

AUTH: ~~23-1-106,~~ 87-1-303, MCA
IMP: ~~23-1-106,~~ 87-1-303, MCA

REASON: Boating on Canyon Ferry has been steadily increasing over the years and shows no signs of slowing down. Canyon Ferry is a large body of water and boats are able to spread out and avoid each other. However, the public boat ramps and campgrounds are chokepoints where boaters converge creating potential safety issues. All commercial marinas around the lake have no-wake zones in place and several public boat ramps do as well.

This proposal seeks to proactively address safety issues near busy boat ramps and maintain consistent regulations at each major public boat launch by adding no wake zones to areas of heavy congestion. The department has taken complaints at many of the sites regarding high speed boating and has documented accidents at the Silos campground. The department believes that restricting these congested areas will increase safety for all users and decrease conflict. Additionally, several changes are proposed to the existing rules to clarify them and ensure that wake zones are organized under the correct rule for that body of water. The department does not expect the proposal will adversely affect wildlife, fishing, or recreation opportunities on Canyon Ferry Reservoir, and has received support of the recommended changes from the Bureau of Reclamation.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Department of Fish, Wildlife and Parks Enforcement Division, Attn: Phil Kilbreath, P.O. Box 200701, Helena, Montana, 59620-0701; or e-mail pkilbreath@mt.gov, and must be received no later than December 7, 2018.

6. Kaedy Gangstad or another person appointed by the department has been designated to preside over and conduct the hearing.

7. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department or commission. Persons who wish to have their name added to the list shall make written request that includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, or may be made by completing the request form at any rules hearing held by the department.

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

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

/s/ Aimee Hawkaluk
Aimee Hawkaluk
Rule Reviewer

/s/ Dan Vermillion
Dan Vermillion
Chair
Fish and Wildlife Commission

Certified to the Secretary of State October 23, 2018.

BEFORE THE BOARD OF REAL ESTATE APPRAISERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.207.401 fees, 24.207.404 appraisal review - USPAP exemption, 24.207.406 definitions, 24.207.501 examination, 24.207.502 application requirements, 24.207.504 approval of qualifying and continuing education courses, 24.207.508 ad valorem appraisal experience, 24.207.509 qualifying experience, 24.207.515 inactive license/certification, 24.207.516 inactive to active license, 24.207.517 trainee requirements, 24.207.518 mentor requirements, 24.207.1501 registration and renewal of appraisal management companies, 24.207.2101 continuing education - compliance and auditing, 24.207.2301 unprofessional conduct for appraisers, 24.207.2305 unprofessional conduct for appraisal management companies; the adoption of New Rule I incorporation by reference of the real property appraiser qualification criteria, New Rule II appraiser reporting obligations to the board, New Rule III appraisal management company reporting obligations to the board; and the repeal of ARM 24.207.403 regulatory reviews, 24.207.503 experience - number of hours required, 24.207.505 qualifying education requirements for licensed real estate appraisers, 24.207.506 qualifying education requirements for residential certification, 24.207.507 qualifying education requirements for general certification, 24.207.510 scope of practice, 24.207.2102 continuing education noncompliance	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT, ADOPTION, AND REPEAL

TO: All Concerned Persons

1. On November 26, 2018, at 9:00 a.m., a public hearing will be held in the Large Conference Room, 301 South Park Avenue, 4th Floor, Helena, Montana, to consider the proposed amendment, adoption, and repeal of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Real Estate Appraisers (board) no later than 5:00 p.m., on November 19, 2018, to advise us of the nature of the accommodation that you need. Please contact Sharon Peterson, Board of Real Estate Appraisers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2375; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; or dlibsdrea@mt.gov (board's e-mail).

3. GENERAL REASONABLE NECESSITY STATEMENT: As required by 37-54-105 and 37-54-303, MCA, the board must adopt rules pertaining to education, experience, and examination that are at least as stringent as those required by Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). FIRREA established the Appraisal Foundation and its Appraisal Qualifications Board (AQB) to establish education and experience criteria of appraisers. These criteria are known as the Real Property Appraiser Qualification Criteria and Interpretations of the Criteria – more commonly referred to as the "AQB criteria." The Appraisal Subcommittee (ASC) of the Federal Financial Institutions Examination Council is the organization that, along with the Appraisal Foundation, ensures that real estate appraisers who perform appraisals in federally related real estate transactions are sufficiently trained and tested to assure competency and independent judgment as dictated by uniform professional standards. The ASC is responsible for monitoring individual state licensing and certification of real property appraisers, and acts as an oversight mechanism for the activities of the Appraisal Foundation. Requirements of the ASC are expressed in policy statements which are based on Title XI of FIRREA.

The board concluded it is reasonably necessary to amend the rules to incorporate the AQB criteria by reference and repeal rules that unnecessarily repeat these criteria. The AQB criteria are well-organized, clearly worded, and accessible. Incorporation by reference of the AQB criteria will make it clear by contrast if or when the board exceeds the federal requirements and provide assurance that the current version is in effect. The board may adopt future versions by reference as well. Otherwise, the language is capable of inadvertent omission, variable word choice, and inconsistency with federal requirements. It is unduly cumbersome, expensive, and inexpedient to compare board rules line-by-line with federal requirements. Adoption by reference will eliminate such efforts by appraisers in the field, board members, staff, and other users of this information. Where additional specific bases for a proposed action exist, the board will identify those reasons immediately following that rule.

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

24.207.401 FEES (1) The following fees shall apply to all licensed and certified real estate appraisers, trainees, and applicants. Fees are not refundable or transferable. Fees are not prorated for portions of the year.

(a) original license application by examination $475

~~(b) address change or change of business 45~~

(c) through (e) remain the same but are renumbered (b) through (d).

~~(f)~~ (e) upgrade ~~or downgrade~~ fee 300

~~(g)~~ (f) ~~Applicants and renewing licensed or certified appraisers must pay a federal registry fee in the amount required by the Appraisal Subcommittee of the Federal Financial Institutions Examination Council in accordance with Title XI of the Federal Financial Institutions Reform, Recovery, and Enforcement Act. The current federal registry fee is specified in the application and renewal forms and can be found by a link from the board's web site.~~ Appraiser national registry fee 40

~~(h)~~ (g) inactive renewal license fee (50 percent of active renewal) 225

~~(i)~~ (h) reciprocal license application ~~by credentialing~~ 475

~~(j)~~ (i) license or certification renewal fee ~~475~~ 450

(k) through (m) remain the same but are renumbered (j) through (l).

~~(n)~~ (m) reactivation fee (inactive to active status) ~~250~~ 225

(2) The following fees apply to registered appraisal management companies and applicants for registration. Fees are not refundable or transferable. Fees are not prorated for portions of the year.

(a) remains the same.

~~(b) appraisal management company address change, (including web site, e-mail, telephone, fax, etc.) 45~~

~~(c) application for change in controlling person 500~~

~~(d)~~ (b) application for ~~redesignation~~ change of controlling person or contact person 250

~~(e) application for change in contact person under 37-54-504, MCA 100~~

~~(f)~~ (c) renewal fee for appraisal management company ~~with 200 or fewer engagements during previous renewal cycle~~ 1000

~~(g) renewal fee for appraisal management company with more than 200 engagements during previous renewal cycle 3000~~

(h) remains the same but is renumbered (d).

~~(i)~~ (e) application to change business structure with addition or substitution of ~~ten percent~~ an owner 250

~~(j)~~ (f) application to change business structure without addition or substitution of ~~ten percent~~ an owner 45

~~(k)~~ (g) ~~Applicants and renewing appraisal management companies must pay a federal registry fee in the amount required by the Appraisal Subcommittee of the Federal Financial Institutions Examination Council in accordance with Title XI of the Federal Financial Institutions Reform, Recovery, and Enforcement Act. The current federal registry fee is specified in the application and renewal forms and can be found by a link from the board's web site.~~ An appraisal management company shall, with each renewal of its registration, pay a fee for the AMC national registry of $25 multiplied by the number of appraisers performing an appraisal in a covered transaction for the AMC during the previous year. A year for this purpose is

September 1 through August 31.

~~(l) All audited registered appraisal management companies shall pay an audit fee in the amount of $450 within 30 days of receiving notification of selection for audit. If the board incurs costs in excess of $450, the board may assess the appraisal management company for such additional costs incurred, and the appraisal management company shall pay such assessments within 30 days of invoicing or as allowed by the board.~~

(3) remains the same.

AUTH: 37-1-131, 37-1-134, 37-54-105, MCA
IMP: 37-1-131, 37-1-134, 37-1-141, 37-54-105, 37-54-112, 37-54-212, 37-54-302, 37-54-310, MCA

REASON: The board is amending (1)(a) and (h) to differentiate between a license application by examination and a reciprocal license application. This change will further align with amendments in this notice to utilize ASC license terminology.

The board is striking (1)(b) and (2)(b) because the division's database now allows licensees to change their addresses online and a fee for an address change is no longer warranted. The board is amending (1)(e) as unnecessary since no appraisers have requested to downgrade their licenses in over six years and staff can find no downgrade fee code in the database. Additionally, if an appraiser's scope of practice and licensure level is downgraded as part of a disciplinary action, any applicable costs or fees would be addressed as part of a final order.

The board is amending (1)(f) because it unnecessarily repeats the federal requirement underlying the fee. Additionally, because the fee has remained unchanged since January 1, 2012, it is preferable and more convenient to include the actual fee amount in the rule.

Following the department's recommendation, the board is amending (1)(g) to align with standardized department procedures and for consistency in administration of board fees. Per ARM 24.101.403, the fee to reactivate an inactive license is limited to half of the active renewal fee.

In addition to distinguishing reciprocal license applications from examination applications, the board is amending (1)(h) to adopt the ASC's use of "reciprocal" for licensing out-of-state persons. The term "credential" refers to an appraiser's license.

The board is combining (2)(c) through (e) into (2)(b) after determining there is no difference between the word "change" and "redesignation," and the same background check and license verification applies regardless of whether a "controlling" or "contact" person is designated. The board proposes to charge $250 for the application to change controlling or contact person or persons. This fee will be consistent with changes in the business structure that adds new owners in (2)(e).

The board is amending (2)(c) and striking (g) after concluding that the renewal process should be the same regardless of the number of engagements an appraisal management company (AMC) had in the previous renewal year. The board further determined that a single renewal fee of $1000 should apply to all AMCs whether it had more than 200 engagements or 200 or fewer engagements during the previous renewal year. Tracking and auditing the number of engagements for this purpose is administratively burdensome and unnecessary.

The board is amending (2)(e) and (f) to remove the reference to ten percent and align with statute. In 2017, House Bill 106 removed this language from 37-54-503, MCA, to ensure that any owner who is a license holder, regardless of their share in the business, is subject to the professional good-standing requirement.

The board is amending (2)(g) to introduce and clarify a new federal requirement, and provide the underlying fee. The board determined it is reasonably necessary to strike (2)(l) because the board is standardizing the information requested in audits. The board determined that with this standardization, there is no reason that any audit will be broader in scope to incur or assess additional costs and the unlimited ability to charge additional costs is unacceptably vague in its scope.

The board estimates 374 renewing licensees will be affected by the $25 renewal fee reduction, resulting in a $9,350 decrease in revenue; 12 AMCs will be affected by the fee restructure for change of controlling/contact person, resulting in a $1,100 increase in revenue; and 12 AMCs will be affected by the $2,000 reduction in the renewal fee for companies with more than 200 engagements in the previous renewal cycle, resulting in a decrease of $24,000 in revenue. The remaining fee changes will have zero cumulative effect on board revenue. The board estimates the proposed rule changes will affect approximately 398 licensees/AMCs and result in a cumulative decrease in annual revenue of $32,250.

24.207.404 APPRAISAL REVIEW – USPAP EXEMPTION (1) ~~A licensed or certified appraiser who serves on the Board of Real Estate Appraisers is exempt from completing an appraisal review in accordance with USPAP as promulgated by the Appraisal Foundation in the performance of their board duties.~~ Board members and department staff are not required to comply with USPAP in performance of official board duties. However, the board may require contracted reviews to conform with USPAP.

~~(2) An appraisal review report shall be completed prior to any disciplinary proceedings for noncompliance with USPAP.~~

AUTH: ~~37-1-131,~~ 37-54-105, MCA
IMP: 37-54-105, MCA

REASON: The board is amending (1) to improve grammar, eliminate vagueness, and clarify that the exemption provided by the scope of practice covers board members and board agents. Review of appraisals related to licensing and disciplinary decisions by the board or its agents are not considered appraisal reviews or appraisals under USPAP. The board is striking (2) as it imposes an unnecessarily high standard on any reasonable cause finding the board may make that does not require expert testimony to decide. The board in conjunction with legal counsel must decide on a case-by-case basis whether such expert testimony is required.

Authority citations are being amended to provide the complete sources of the board's rulemaking authority.

24.207.406 DEFINITIONS (1) "AQB" means the Appraiser Qualifications Board of the Appraisal Foundation as provided for under Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).

(2) "AQB criteria" means minimum education, experience, and examination requirements to obtain and the continuing education requirements to maintain a license or certification as an appraiser, supervisory appraiser, or trainee appraiser. The AQB publishes these requirements in The Real Property Appraiser Qualification Criteria, which is adopted and incorporated by reference at [NEW RULE I].

(2) remains the same but is renumbered (3).

(a) The qualifications component will include a completed appraisal review prepared by an individual designated by the board, unless the applicant is qualified for a license by reciprocity or is applying for a mentor endorsement, temporary practice permit, or trainee license.

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

~~(4) "Nonroutine Reciprocal Applicant" means an applicant holding a license in another state in which the licensing requirements in the domicile state are not equal to or greater than the licensing requirements in Montana; the license is not in good standing; or there is a reason to deny the license under the laws of Montana governing the real estate appraisers profession or occupation.~~

(5) "USPAP" means the Uniform Standards of Professional Appraisal Practice, promulgated by the Appraisal Standards Board of the Appraisal Foundation.

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-1-304, 37-54-202, 37-54-302, 37-54-403, ~~37-54-501,~~ MCA

REASON: The board determined it is reasonably necessary to add (2) and define "AQB criteria" as that term is used repeatedly throughout the proposed new rules.

The board is amending (3)(a) to align with changes proposed in ARM 24.207.518(1) to no longer require review of mentor experience. Because the review is being eliminated, the board is adding it as exempt in this rule.

The board is striking "nonroutine reciprocal applicant" in favor of the AQB criteria per the general statement of reasonable necessity and New Rule I(3)(c). The new language in (5) is proposed to identify the publisher so persons unfamiliar with USPAP can more easily locate it.

Implementation citations are being amended to accurately reflect all statutes implemented through the rule.

24.207.501 EXAMINATION (1) Upon approval by the department of an original applicant's education and experience requirements, the department will issue a letter of exam eligibility to take the examination pending completion of fingerprint and background checks.

(2) Only an original applicant for licensure or certification as an appraiser must take an examination. Reciprocal applicants, temporary permit applicants, and trainees and trainee mentors are not generally subject to an examination. However, for nonroutine reciprocal applicants under ARM 24.207.502 or licensees reactivating

an inactive or administratively suspended license, the board may require the applicant to demonstrate competency by taking the licensing examination.

~~(1) A passing score on an examination shall be valid for two years from the examination date until December 31, 2014.~~

~~(2) An applicant must complete all qualifying education and experience prior to taking the examination.~~

~~(3) An applicant shall be required to successfully complete and pass the 2015 or later examination requirements of the AQB.~~

~~(4) The applicant must successfully complete and pass the examination required in (3) within 24 months of receiving the board's approval to take the examination.~~

~~(5)~~ (3) ~~The examination is~~ Examinations are administered by a testing agency under contractual agreement with the board.

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-105, 37-54-202, 37-54-302, MCA

REASON: The board is amending this rule by striking the requirements that are set forth in the AQB criteria and need not be repeated. The board is adding new provisions to address questions from staff and applicants by clearly setting forth the standardized department procedures utilized to process examination applications.

24.207.502 APPLICATION REQUIREMENTS (1) Applicants for licensure, a mentor endorsement, or a temporary practice permit must submit a complete application form provided by the department, electronically or by paper, including appropriate fees and all required documentation.

(2) An applicant for licensure by examination must additionally submit:

(a) a set of fingerprints to the Montana Department of Justice;

(b) qualifying education certificates or transcripts; and

(c) an experience log on a form provided by the department.

(3) Department staff will identify and direct an applicant by examination to submit three appraisal reports from the experience log for review. If the review indicates that the work is not compliant with USPAP, or staff have otherwise determined the applicant's background check indicates board review, staff will refer the application to the board as nonroutine. The board may request additional information or clarification of information provided in the application as it deems reasonably necessary.

~~(2) An applicant for licensure may qualify in one of two methods, either by examination or reciprocity.~~

~~(3) To qualify for licensure by examination, the applicant must complete the following requirements:~~

~~(a) An examination pursuant to ARM 24.207.501;~~

~~(b) Qualifying education for:~~

~~(i) a licensed real estate appraiser pursuant to ARM 24.207.505;~~

~~(ii) a certified residential appraiser pursuant to ARM 24.207.506; or~~

~~(iii) a certified general appraiser pursuant to ARM 24.207.507.~~

~~(c) Qualifying experience pursuant to ARM 24.207.503, 24.207.508, and 24.207.509;~~

~~(d) Applications will be reviewed for compliance with board law and rules and the applicant shall be notified in writing of any discrepancies or incompleteness in the application or required documentation. The board may request additional information or clarification of information provided in the application as it deems reasonably necessary;~~

~~(e) The board will select a representative sample of the applicant's work product from the experience log.~~

~~(f) The applicant shall correct any deficiencies and submit required material within 60 days of notice with no additional application fee. Failure to submit the required materials will be treated as a voluntary withdrawal. After voluntary withdrawal, an applicant will be required to submit an entirely new application to begin the process again;~~

~~(g) All examination applications are considered nonroutine and must be reviewed by the board; and~~

~~(h) Incomplete applications, whether missing information or documentation will not be scheduled for a board meeting. Applications including the appraisal review must be completed for board review at least 15 days prior to the scheduled board meeting or the application will be referred to the next scheduled board meeting.~~

(4) ~~To qualify~~ Applicants for licensure by reciprocity~~, the applicant~~ must additionally:

~~(a) have a current and unencumbered license in a jurisdiction where the appraisers are approved by the ASC as eligible to perform appraisals for federally related transactions or a jurisdiction that is in compliance with the ASC standards;~~

~~(b) have no current or pending disciplinary action against any other licenses the applicant holds; and~~

(a) submit a set of fingerprints to the Montana Department of Justice;

(b) have an active license in good standing, as shown on the ASC national appraiser registry, from a state that has:

(i) licensing requirements that meet or exceed those in Montana; and

(ii) a rating above a "poor" for compliance with Title XI of FIRREA as determined by the ASC; and

(c) be listed as AQB-compliant with continuing education on the ASC national appraiser registry.

(5) If the criteria in (4)(b) and (c) are not met or there is a criminal history revealed by the fingerprint background check, the reciprocal application will require review by the board as nonroutine for issuance of the license in the board's discretion.

~~(5)~~ (6) To qualify for a temporary practice permit to perform an appraisal assignment for a federally related transaction, the applicant must, as shown in the ASC national appraiser registry:

~~(a) complete the appropriate application and submit fees; and~~

~~(b)~~ (a) have an active ~~status with the ASC national registry~~ license in good standing as a credentialed appraiser; and

(b) be AQB-compliant.

~~(6) The applicant shall correct any deficiencies and submit required material within 60 days of notice with no additional application fee. Failure to submit materials will be treated as a voluntary withdrawal. After voluntary withdrawal, an applicant will be required to submit an entirely new application to begin the process again.~~

(7) Trainee appraisers from other states are not eligible for temporary practice permits.

(8) Staff may request additional information or clarification of information provided in the application. If the applicant fails to complete the application or comply with the request, the application will expire within one year. After expiration, an applicant will be required to submit an entirely new application to begin the process again.

(9) A fingerprint report is valid for six months from date of receipt of the report from the Federal Bureau of Investigation. If an application is still pending after this six-month period, the board may require the applicant to resubmit fingerprints.

~~(7) A nonroutine reciprocal applicant shall make application on forms provided by the board and pay any applicable fee.~~

~~(a) The board or its designee shall select appraisal reports from the experience log of all applicants. The appraisal reports requested shall be commensurate with the level of licensure sought:~~

~~(i) licensure level - single unit residential appraisal reports are required;~~

~~(ii) certified residential - two- to four-unit income-producing residential appraisal reports with all three approaches to value are required; and~~

~~(iii) general certification - nonresidential report with all three approaches to value are required.~~

~~(b) The applicant shall correct any deficiencies and submit required material within 60 days of notice with no additional application fee. Failure to submit materials will be treated as a voluntary withdrawal. After voluntary withdrawal, an applicant will be required to submit an entirely new application to begin the process again.~~

~~(8) A routine reciprocal applicant shall make application on forms provided by the board and pay any applicable fee.~~

~~(9) The board will not issue a license if an applicant has had a license or certification revoked in any jurisdiction within the five-year period preceding the date of application in this state.~~

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-105, 37-54-202, MCA

REASON: The board is striking (2) as unnecessary because these distinctions are present in the licensure qualifications and on the department application forms.

The board is striking (3) because it refers to rules being repealed in this notice. New (3) qualifies the term "representative sample" (formerly in (3)(e)) and explains when the board must review an application or work product associated with an application. The language is further intended to replace the language in stricken (7) that unnecessarily defines that type of experience that will be required for the

level of licensure sought. The experience qualifications are defined in the AQB and incorporated by reference; therefore it is redundant to repeat them in rule.

The board is striking (3)(g) as the board no longer treats all examination applications as nonroutine. Only applications determined by staff to be nonroutine will require board review. To license individuals who have met all the criteria for licensure, the board decided it is necessary to utilize staff to process routine license applications and reserve only those decisions requiring board expertise and discretion as nonroutine.

The board is striking (3)(h) in favor of a department policy that recognizes only the deadline for providing public notice items on a meeting agenda as the deadline to get appraisals before the board. The benefit of a shorter three-day deadline will not unnecessarily infringe upon a person's ability to work or have their rights adjudicated and outweighs the burden of additional paper or information distributed at board meetings.

The board is amending (4) to clarify a misstatement of law regarding "approval of appraisers by the ASC" as well as to clarify the grounds on which the reciprocal license will be issued, and incorporating the term "nonroutine" into this category of license applications. Two misconceptions refer to a reciprocity applicant holding a license in a jurisdiction where the appraisers are approved by the ASC as eligible to perform appraisals for federally related transactions, or if the jurisdiction complies with ASC standards. That language is incorrect. The ASC does not approve appraisers for eligibility to do federally related transactions. Neither does the ASC have "standards" in the strict sense of the term. Instead, the ASC uses Title XI of FIRREA, policy statements, and regulations.

The board is adding new (5) to make clear that the board may review nonroutine applications and therefore take more time to process. Further, new (5) provides the board with discretion to issue a license despite the state's rating with the ASC.

The board is amending (6) to clarify that staff will utilize the ASC national registry to verify the licensing status of temporary practice permit applicants.

The board is adding new (7) to clarify that trainees are not eligible for temporary practice permits because the board concluded that the burden involved in requiring a mentor would be too great. Further, only licensed or certified appraisers from another state have the autonomy that would allow a temporary practice permit to practice in this state as contemplated by the AQB. Under AQB qualifications, a temporary permit must be issued in a very short five-day window to allow a practitioner to come to the state to perform an appraisal assignment.

The board is removing (7)(a) and restating it more succinctly in new (3). Additionally, to the extent the rule suggests that all reciprocal applicants are nonroutine applications, the board rejects that idea and clarifies in new (5) when an application is considered nonroutine. The board is removing (7)(b) and addressing this requirement in new (8), as well as extending the timeline from 60 days to one year, with the caveat that fingerprint background checks older than six months will need to be resubmitted, as provided in new (9). The board is striking (8) as the process is adequately addressed in (1).

The board is striking (9) because the limitation on issuing licenses to reciprocal applicants conflicts with AQB guidance and has perhaps been

impermissibly expanded from the limitation against mentor (supervisor) appraisers from having had disciplinary action within the last five years. With respect to license holders from other professions who present a history of disciplinary action, the board must address each application on a case-by-case basis and make a decision on the individual facts. A board decision based solely on this section without accompanying facts, which may differ from case to case, would not be defensible.

Other changes are made to avoid passive voice, redundancy, and wordiness and make the rule easier to read and comprehend.

24.207.504 APPROVAL OF QUALIFYING AND CONTINUING EDUCATION ~~REQUIREMENTS~~ COURSES (1) through (15) remain the same.

AUTH: 37-1-131, 37-1-319, 37-54-105, MCA
IMP: 37-1-131, 37-1-306, 37-54-105, 37-54-202, MCA

REASON: The board is amending the rule title to clearly reflect the substance of the rule and avoid confusion.

24.207.508 AD VALOREM ~~TAX~~ APPRAISAL EXPERIENCE (1) ~~Experience credit may be awarded to a credentialed Montana Department of Revenue appraiser who can effectively demonstrate compliance with the USPAP.~~ An applicant for licensure may claim 80 percent of the required experience from conducting ad valorem or mass appraisal assignments. The remaining hours of experience must be gained as a licensed trainee under an approved mentor.

(2) The applicant shall provide ~~proper documentation as follows:~~

~~(a) The documentation shall include~~ an experience log ~~which is~~ prescribed by the board~~, completed by the applicant,~~ and ~~each page~~ attested to ~~with the signature of~~ by the applicant's ~~credentialed Montana Department of Revenue~~ supervisor and approved mentor.

~~(b)~~ (a) The ~~documentation shall be limited to appraisals which~~ hours must have been completed in compliance with the USPAP ~~within the last five years~~. For licensure as a licensed real estate appraiser and licensure as a certified residential real estate appraiser, the appraisals must be for residential properties. For licensure as a certified general real estate appraiser, the appraisals must be for nonresidential properties.

(3) Applicants for the following license or certification categories shall hold, at a minimum, the following certification(s) issued by the Montana Department of Revenue, or equivalent from another state, as verified on supervisor's affidavit, or by separate documentation issued to applicant:

(a) ~~Applicants for licensure as a~~ licensed real estate appraiser ~~or licensure as a~~ and certified residential real estate appraiser ~~shall hold a Montana Department of Revenue~~ require residential certification~~.~~; or

(b) ~~Applicants for licensure as a~~ certified general real estate appraiser ~~shall hold a Montana Department of Revenue~~ requires commercial, industrial, or agricultural certification.

~~(4) Experience credit accepted under other provisions of applicable statutes or rules such as ARM 24.207.503 is limited to include a maximum of 1,000 hours~~

~~from the ad valorem experience set forth above. All other experience credit must be obtained as a licensed trainee with an approved mentor.~~

~~(5) All ad valorem appraisal experience claimed for credit toward licensure or certification must have been completed as a Montana Department of Revenue certified real estate appraiser as described in (3) and must have been performed in accordance with the USPAP.~~

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-105, MCA

REASON: The board determined that ad valorem tax appraisals require current valuation, and therefore do not allow experience gained in using highest and best use valuation. Further, ad valorem experience does not provide a candidate experience writing individual property appraisal reports. For these reasons, the board determined it is reasonably necessary to require a portion of a candidate's experience to be performed under the supervision of a licensed or certified appraiser. The amendments will allow a greater portion of an ad valorem appraiser's experience to be counted toward licensure because the current rule expresses the experience in total hours which varies in percentage, depending on the type of licensure or certification sought.

The board is amending (2)(a) to eliminate the limitation on the experience taking place within the last five years to be consistent with the AQB which has no maximum period to gain the experience. Rather, the AQB focuses on minimum time periods. The board is further amending this rule to eliminate redundancy and improve clarity.

24.207.509 QUALIFYING EXPERIENCE ~~(1) Acceptable appraisal experience must be for an unrelated client or where the applicant has no financial interest in the property.~~

~~(2) All applicants claiming experience shall have made a substantial contribution in arriving at a value conclusion as evidenced by the applicant's signature on the experience log and the applicant's name identified within the signed certification as required by the USPAP. To claim qualifying experience, the applicant's contribution must be identified within the certification and scope of work. The experience log must demonstrate progressive participation in the appraisal process.~~

~~(3) All evidence of experience must be supported by a work file or written report and made available to the board for review.~~

~~(4) The experience log claimed by an applicant shall be on forms prescribed by the board which shall include:~~

~~(a) type of property;~~

~~(b) date of report;~~

~~(c) address of appraised property;~~

~~(d) description of work performed by the trainee/applicant and signature and license number of the trainee;~~

~~(e) number of actual work hours claimed by the trainee/applicant on the assignment in accordance with (8), (9), and (10); and~~

~~(f) scope of the review and the signature and certification number of the mentor.~~

~~(5) All experience submitted to the board must be done in conformance with the USPAP as promulgated by the Appraisal Foundation that is current at the time the appraisal experience is completed.~~

~~(6) Qualifying experience must be obtained within five years prior to application date, unless otherwise previously approved by the board.~~

(7) and (8) remain the same but are renumbered (1) and (2).

~~(9)~~ (3) Appraisal review reports that do not contain the reviewer's opinion of value will be allowed a maximum one-third of the allotted time found in ~~(8)~~ (2).

~~(10)~~ (4) The board may provide a variance from the hourly standards provided in ~~(8) and (9)~~ (2) and (3). To be considered for such a variance, an applicant must submit a written request for a variance supported by documentation, which demonstrates the need for additional credit hours.

AUTH: 37-1-131, 37-54-105, 37-54-303, MCA
IMP: 37-1-131, 37-54-105, 37-54-202, 37-54-303, MCA

REASON: The board is amending this rule by deleting (1) through (6) because applicants are required to submit experience hours in the format required on the experience log provided by the board.

24.207.515 INACTIVE LICENSE/CERTIFICATION (1) A licensed or certified appraiser can place their license or certification in an inactive status by notifying the board in writing.~~:~~

~~(a) paying the required fee in accordance with 37-54-105, 37-54-112, MCA, and ARM 24.207.401;~~

~~(b) indicating, in writing, "inactive at present"; and~~

~~(c) submitting proof of obtaining the required continuing education on the schedule currently adhered to by the board, in accordance with ARM 24.207.2101.~~

~~(2) A licensed or certified appraiser who has placed their license on an inactive status with the board has the sole responsibility to keep the board informed as to any change of residency or mailing address during the period of time the license or certification remains on inactive status.~~

~~(3)~~ (2) Inactive licensees must pay their inactive renewal fee annually to avoid license lapse and termination. ~~Failure to renew the inactive status or become active will result in the lapsing of their license or certification.~~

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

AUTH: 37-1-131, 37-1-319, 37-54-105, MCA
IMP: 37-1-131, 37-1-319, 37-54-105, 37-54-310, MCA

REASON: The board is proposing substantive changes to this rule in (1)(a) and (c). Following amendment, no fee will be charged for the simple act of requesting inactive status. Inactive licensees will pay an inactive license fee at renewal time, as directed in (3). Further, the board will no longer require licensees to submit proof of continuing education during inactive status. The board will only require proof of

continuing education and payment of a reactivation fee upon request to convert to active status as specified in the proposed amendments to ARM 24.207.516.

The board is striking (2) as the duty to keep the department informed of address changes is set forth in statute and is being relocated to New Rule II.

Other changes improve clarity and organization.

24.207.516 INACTIVE TO ACTIVE LICENSE (1) For a licensed or certified real estate appraiser to become active, the appraiser must:

(a) file an updated application form with the board office and pay the required reactivation fee in accordance with ARM 24.207.401; and

(b) complete all required continuing education hours that would have been required if the licensee was in an active status, including the most recent edition of a 7-hour National USPAP Update Course (or AQB-approved equivalent).

AUTH: 37-1-131, 37-1-319, 37-54-105, MCA
IMP: 37-1-131, 37-1-319, 37-54-105, 37-54-310, MCA

REASON: The board determined it is reasonably necessary to relocate the continuing education provisions for inactive status from ARM 24.207.515 to this rule. The board will no longer require licensees to submit proof of continuing education during inactive status, but only upon request to convert to active status.

24.207.517 TRAINEE REQUIREMENTS (1) A trainee shall apply to the board as required in ARM 24.207.502(1).

(2) A trainee who has completed 500 hours of training may exercise a one-time option to submit to the board for review an appraisal of the type of property for which the trainee seeks licensure to determine if the appraisal complies with USPAP.

(3) Applying the same criteria for reciprocal applicants in ARM 24.201.502, the board will accept hours earned in another jurisdiction as a licensed trainee in an AQB-compliant training program.

~~(1) A trainee shall:~~

~~(a) be 18 years of age or older;~~

~~(b) make application to the board on forms approved by the board; and~~

~~(c) have completed 100 percent of approved qualifying education prior to making application.~~

~~(2) A trainee shall be under the direct supervision of at least one board-approved mentor. A trainee may have more than one mentor.~~

~~(3) A trainee shall maintain an activity experience log as prescribed by the board for qualifying activity completed in accordance with USPAP.~~

~~(4) A trainee license must be renewed by the date set by ARM 24.101.413, following the trainee's original year of licensure. A trainee license may be renewed a total of four times, but may be extended by the board for cause.~~

~~(5) All qualifying appraisal assignments performed by a trainee must meet USPAP standards.~~

~~(6) Beginning with the trainee's original licensing year, a trainee shall meet continuing education requirements established by rule. Qualifying education may be~~

~~used to meet the continuing education requirements, with the additional requirement to take the seven-hour USPAP update course within each education cycle.~~

~~(7) A trainee may not perform qualifying experience without a board-approved mentor.~~

~~(8) A trainee shall perform qualifying experience within Montana.~~

~~(9) A trainee may not perform qualifying experience outside the scope of the mentor's licensure or certification.~~

~~(10) The core curriculum for trainee licensure is:~~

~~(a) basic appraisal principles~~	~~30 hours~~
~~(b) basic appraisal procedures~~	~~30 hours~~
~~(c) the 15-hour national USPAP course~~	~~15 hours~~
~~(d) total trainee education requirements~~	~~75 hours~~

~~(11) All qualifying education must be completed within the five-year period prior to the date of submission of an application for a trainee license.~~

~~(12) A trainee shall complete a course that, at a minimum, complies with the specifications for course content established by the AQB. The course will be oriented toward the requirements and responsibilities of mentors and trainees and must be completed by the trainee prior to obtaining a trainee license and completed by the trainee's mentor prior to the mentor's supervision of the trainee.~~

~~(13) A trainee shall notify the board within ten days of the occurrence of any change that affects the status of the trainee-mentor relationship.~~

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-105, ~~37-54-201,~~ 37-54-202, 37-54-303, ~~37-54-403,~~ MCA

REASON: The board is striking (1) through (7) from this rule because they mirror the requirements in the AQB criteria. See the REASON for New Rule I.

The board is adding (2) to afford license candidates an opportunity sooner than their final experience submission to have their work assessed for USPAP compliance. The requirement is not mandatory.

The board is reversing its position by amending (3) to accept a trainee's hours received in another state when the state is AQB-compliant. The board determined this is reasonably necessary to increase mobility and competition and to ensure a qualified pool of candidates for licensure as appraisers in this state.

Implementation citations are being amended to accurately reflect all statutes implemented through the rule.

24.207.518 MENTOR REQUIREMENTS (1) A licensed or certified appraiser who intends to supervise a trainee shall first obtain a license endorsement by applying to the board as required in ARM 24.207.502.

~~(1) A mentor for a licensed trainee must:~~

~~(a) be a certified residential or certified general appraiser for a minimum of three years;~~

~~(b) be approved by the board prior to beginning mentoring duties;~~

~~(i) a mentor shall make application on forms provided by the board, pay the required fee, and submit two appraisal reports prepared by the mentor in accordance with USPAP standards with all three approaches to value; and~~

~~(ii) failure to prepare appraisal reports in compliance with USPAP can result in denial of mentor status.~~

~~(c) be in good standing with the board, not currently hold a probationary license with the board, and may not have been subject to any disciplinary action within any jurisdiction within the past three years that affects the mentor's legal ability to engage in appraisal practice;~~

~~(d) certify the mentor's agreement to provide ongoing supervision of the licensed trainee;~~

~~(e) be responsible for and must provide direct supervision of all appraisal assignments performed by the trainee in accordance with the USPAP;~~

~~(f) review and sign each page of the activity experience log with their name and license number, certifying its accuracy;~~

~~(g) inspect the first 50 properties with each trainee under the mentor's supervision;~~

~~(h) prior to allowing the trainee to perform an appraisal assignment with limited supervision, the mentor shall evaluate the competency of the trainee after the first 50 properties. The mentor must determine that the trainee is competent to perform an appraisal assignment within the minimum criteria of USPAP, with limited supervision. Failure to provide adequate supervision is unprofessional conduct according to 37-1-316, MCA;~~

~~(i) be limited to mentoring a total of three trainees at any particular time; and~~

~~(j) be limited to mentoring trainees in areas where the mentor is competent to perform appraisal assignments.~~

~~(2) A mentor must notify the board within ten days when mentoring of a trainee has terminated.~~

~~(3) Any and all disciplinary actions against a mentor's appraiser license in any state where licensure is held must be disclosed in writing to the board within five days of receiving notification of the disciplinary action.~~

~~(4) The board may, in its discretion, allow a mentor to provide limited supervision to a trainee with whom the mentor has not inspected a minimum of 50 properties when:~~

~~(a) the mentor making this evaluation has personally inspected a minimum of ten properties with the trainee and supervised the trainee, with respect to all corresponding assignments;~~

~~(b) the trainee has completed a minimum of 50 appraisal assignments related to properties that were personally inspected by an approved mentor for the trainee at the time of the inspection;~~

~~(c) the mentor has evaluated all appraisal activity the trainee completed under the mentor's supervision, including the appraisal assignments involving properties which the mentor inspected with the trainee;~~

~~(d) on the basis of the mentor's evaluation of the appraisal assignments completed, while the trainee was under the mentor's supervision, the mentor has determined that the trainee is competent to perform appraisal assignments within the minimum criteria of USPAP, with limited supervision by the mentor; and~~

~~(e) the mentor and trainee request and receive approval from the board to allow the trainee to complete appraisal assignments with limited supervision.~~

~~(5) A mentor shall complete a course that, at a minimum, complies with the specifications for course content established by the AQB. The course will be oriented toward the requirements and responsibilities of mentors and trainees and must be completed by the mentor prior to the mentor's supervision of a trainee.~~

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-105, ~~37-54-201,~~ 37-54-202, ~~37-54-301, 37-54-403, 37-54-411,~~ MCA

REASON: The board is striking (1)(b) to no longer require review of mentor experience as the requirement exceeds that required by the AQB. There is a lack of evidence between the requirement and the quality of the work submitted by trainee candidates for licensure, as reviewed at the time of application. Rather, the board is proposing to offer trainee applicants an opportunity to have their work reviewed, as provided in ARM 24.207.517. Further, without the requirement to submit work to the board for review, more licensed or certified appraisers may become mentors.

The board is striking (1)(g), (h), and (4) in response to several comments from trainees that the requirement for 50 inspections by a mentor is somewhat arbitrary. The board is unable to determine what number would appropriately determine a trainee's competency to perform inspections on their own and believes each supervision situation is unique. Therefore, it is reasonably necessary to allow each mentor to determine when a trainee is competent to inspect a property with limited supervision.

The board is striking (1)(a), (c) through (f), (i) and (j), and (5) as these are covered by the AQB criteria.

The board is relocating the notification provisions of (2) to a single location at New Rule II.

Section (3) is unnecessary given this information is reported by the national registry. Nevertheless, the board concluded it is a good idea to require independent reporting by individuals, as is required by all boards, and this requirement is being moved to New Rule II.

Implementation citations are being amended to accurately reflect all statutes implemented through the rule.

24.207.1501 REGISTRATION AND RENEWAL OF APPRAISAL MANAGEMENT COMPANIES (1) An applicant for registration as an appraisal management company in Montana must:

(a) submit a complete application on forms prescribed by the department ~~and approved by the board~~;

(b) through (h) remain the same.

(i) provide specific information requested by the board regarding the business practices, any civil, criminal, or administrative actions, ethical practice of the appraisal management company's individual owners of ~~more than ten percent of~~ the company, and controlling and contact persons as part of the background examination pursuant to 37-54-503, MCA.

(2) remains the same.

~~(3) When the ownership or business structure of a currently registered appraisal management company changes, the appraisal management company is required to complete a new appraisal management company registration application and pay the appropriate fees within 30 days of the change. Failure to notify and submit the appropriate application and fees to the board within 30 days shall be cause for suspension or revocation of the appraisal management company's registration.~~

~~(4) When the individual designated as a controlling person by the registered appraisal management company is no longer employed, appointed, or contractually authorized by the appraisal management company to serve as the controlling person, the appraisal management company must submit an application to redesignate the controlling person. The application to redesignate the controlling person must be made on a form prescribed by the department, accompanied by the appropriate fees, and submitted to the board office within 30 days. Failure to notify and submit the appropriate application and fees to the board within 30 days shall be cause for suspension or revocation of the appraisal management company's registration.~~

~~(5) When the individual designated as the contact person by the registered appraisal management company is no longer the contact person and is not the designated owner or the controlling person of the appraisal management company, the appraisal management company must submit an application for change of contact person prescribed by the department and the appropriate fees to the board office within 30 days. Failure to notify and submit the appropriate application and fees to the board within 30 days shall be cause for suspension or revocation of the appraisal management company's registration.~~

~~(6) A registered appraisal management company must report all pending, current, or completed license disciplinary action or investigation against the company, controlling person, or other licensed individuals affiliated with the company to the board within 30 days of the proposed action or notice of such action or investigation. Failure to report such information shall be cause for suspension or revocation of the appraisal management company's registration.~~

~~(7) Annually, the registered appraisal management company must report to the board whether it had more than 200 engagements or 200 or fewer engagements during the previous renewal year. This requirement is subject to audit. The subsequent renewal fee will be based on the appraisal management company's reporting of engagements for the previous renewal year. If the AMC's report of 200 or fewer engagements is found to be inaccurate, the board will notify the AMC and the AMC shall pay an additional engagement fee of $2500 within 30 days of notification.~~

~~(8) When the registered appraisal management company adds or deletes a licensed or certified appraiser from the appraisal management company's appraiser panel, the appraisal management company must notify the board office within ten days by submitting an amended appraiser panel list with the appropriate fees. Failure to provide such information shall be cause for suspension or revocation of the appraisal management company's registration.~~

~~(9) If a registered appraisal management company is no longer providing appraisal management services in Montana, the appraisal management company must notify the board office within 30 days that they are no longer providing services. If an appraisal management company that is no longer providing services in Montana wishes to maintain its registration, it must comply with all applicable requirements, including renewal and reporting provisions. Prior to resuming services in this state, the appraisal management company must notify the board office that it intends to resume services in Montana and must provide updates regarding any changes in the information collected by the board, pursuant to this rule. Failure to provide such information shall be cause for suspension or revocation of the appraisal management company's registration.~~

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-501, MCA

REASON: The board is amending (1)(a) as the department provides standardized forms for all boards as part of its administrative services. The board is removing from (1)(i) a reference to an AMC applicant's provision of certain information relating to more than 10 percent of the appraisal management company's owners because HB 106 in the 2017 legislature removed this percentage requirement. The board has an obligation to investigate or at least to inquire about and consider the business practices and ethical practice of an appraisal management company applicant's individual owners regardless of how much of the company the individual owns.

The board is relocating (3) through (6) to New Rule III with changes described in that REASON.

The board is eliminating fees based on number of engagements from (7). See REASON for ARM 24.207.401.

The board is striking (8) as it unnecessarily repeats the provisions of ARM 24.207.1504(2). The board concluded that it is sufficient to require the maintenance of a list of appraisal panel members and their appointment or deletion dates, as required by ARM 24.207.1507(1)(d).

It is reasonably necessary to strike (9) as the board does not cancel an AMC license when notified they are no longer providing services in the state. Any non-renewed licenses will lapse, expire, and terminate according to 37-1-141, MCA.

24.207.2101 CONTINUING EDUCATION – COMPLIANCE AND AUDITING

~~(1) Continuing education courses shall be approved according to the criteria of ARM 24.207.504, including application for reapproval after three years.~~

~~(2) An examination may not be required.~~

~~(3) Courses must be a minimum of two hours in length to receive approval.~~

~~(4) Application may be made for continuing education credit for participation other than as a student in appraisal education processes and programs. Examples of activities for which credit may be granted are teaching, program development, authorship of textbooks, or similar activities, which are determined by the board to be equivalent to obtaining continuing education. These activities cannot be approved for more than 50 percent of continuing education requirements.~~

~~(5) Every other renewal year, licensees must complete at least 28 hours of instruction in courses or seminars approved by the board, at least seven hours of which must be the national USPAP update course or its AQB-approved equivalent.~~

~~(6) All continuing education courses must be taken and completed within the licensee's educational cycle.~~

~~(7)~~ (1) The board ~~may audit licensees~~ shall direct by motion a percentage of licensees to audit for compliance with continuing education requirements. Audited licensees ~~must~~ shall provide copies of completion certificates to the board office ~~as verification of compliance within 30 days after mailing of~~ as directed by the audit request.

(2) Failure to respond to the audit or to comply with continuing education requirements may result in the administrative suspension of the license and reporting to the appraiser national registry until the licensee cures the continuing education deficiency. Repeated failures by a licensee to respond to or comply with a continuing education audit may result in the filing of a complaint and referral for disciplinary action.

(3) If more than 10 percent of appraisers audited fail to meet continuing education requirements, the board shall conduct the next annual audit using a higher percentage of audited appraisers as set by board motion.

~~(8)~~ (4) Licensees shall retain ~~Education~~ completion certificates ~~must be retained and available for audit~~ for a period of five years~~, according to the record-keeping requirements of the USPAP~~.

~~(9) Appraisers must successfully complete the seven-hour national USPAP update course or its AQB-approved equivalent every two calendar years. Equivalency shall be determined through the AQB course approval program.~~

AUTH: 37-1-131, 37-1-319, 37-54-105, 37-54-303, MCA
IMP: 37-1-131, 37-1-306, 37-1-319, 37-1-321, 37-54-105, 37-54-303, 37-54-310, MCA

REASON: The board is striking (1) because continuing education (CE) provisions are adequately addressed in ARM 24.207.504. The board is striking (2) through (6) and (9) as these provisions are addressed by the AQB criteria and need not be repeated.

The board is amending (1) to allow flexibility in conducting random CE audits. This amendment will allow the board to respond to staffing and budget issues, and audit failure, as suggested by ASC policy statements, by adjusting the licensees audited, while remaining consistent with the statutory maximum of 50 percent in 37-1-306, MCA.

The board is adding (2) and (3) to clarify any ambiguity regarding whether the board "may" audit and to align with and further facilitate the department's standardized renewal, administrative suspension, and audit procedures. Because of the seriousness of the consequences, the amendment advises licensees of the potential results of failing to respond to or comply with a CE audit.

The board is amending (4) because the USPAP record-keeping rule addresses work-related opinion and conclusion documentation and has nothing to do with maintaining CE certificates.

Implementation citations are being amended to accurately reflect all statutes implemented through the rule.

24.207.2301 UNPROFESSIONAL CONDUCT FOR APPRAISERS (1) In addition to ~~other unprofessional conduct provisions contained in the statutes and rules administered by the board,~~ the provisions of 37-1-316, MCA, the following are also considered unprofessional conduct:

(a) ~~failing to comply with any request from the board or its designee~~ failing to comply with any law or rule governing the conduct of an appraiser;

(b) failing to provide information or documents requested by the board or its designee in relation to an audit, investigation, or complaint; ~~or~~

(c) failing to comply with ~~the~~ continuing education, reporting, or renewal requirements; or

(d) failing to provide adequate supervision of a trainee by a mentor.

~~(2) In addition to a complaint and possible disciplinary action, in the event of any failure to respond to a request from the board or failure to comply with the continuing education requirements, notification to the ASC's national registry of suspension to perform federally related transactions may occur until the licensee fully complies with the request.~~

AUTH: 37-1-131, 37-1-136, 37-1-319, 37-54-105, MCA
IMP: 37-1-131, 37-1-137, 37-1-141, 37-1-306, 37-1-307, 37-1-312, 37-1-316, 37-1-319, 37-54-105, MCA

REASON: The board determined it is reasonably necessary to cite to the unprofessional conduct statute than to vaguely refer to "other statutes and rules." The board is amending (1)(a) to clearly specify that the board views failure to comply with any law or rule governing the conduct of an appraiser as unprofessional conduct. Additionally, the board concluded the prohibition on failure to comply with any request could be found as overreaching the board's authority. This requirement is covered sufficiently by (1)(b), which accurately and specifically reflects the scenarios in which the board has authority to compel information. Subsection (1)(d) is being relocated here from ARM 24.207.518.

The board is eliminating (2) as it conflicts with due process procedures which require some degree of notice of a deficiency and an opportunity to cure before the department may report to the ASC national registry. The requirement to report is set forth in the ASC policy statements and applies both to appraisers and appraisal management companies.

24.207.2305 UNPROFESSIONAL CONDUCT FOR APPRAISAL MANAGEMENT COMPANIES (1) In addition to ~~other unprofessional conduct provisions contained in the statutes and rules administered by the board,~~ the provisions of 37-1-316 and 37-54-519, MCA, the following are also considered unprofessional conduct for appraisal management companies:

(a) ~~failing to comply with any request from the board or its designee~~ failing to comply with any law or rule governing the conduct of an appraisal management company;

(b) through (d) remain the same.

AUTH: 37-1-131, 37-1-136, 37-1-319, 37-54-105, MCA
IMP: 37-1-131, 37-1-137, 37-1-307, 37-1-312, 37-1-316, 37-1-319, 37-54-105, 37-54-512, 37-54-514, MCA

REASON: See REASON for ARM 24.207.2301 regarding changes in (1) and (1)(a).

5. The proposed new rules are as follows:

NEW RULE I INCORPORATION BY REFERENCE OF THE REAL PROPERTY APPRAISER QUALIFICATION CRITERIA (1) Except as stated in (3) and ARM 24.207.508 regarding ad valorem appraisal experience, the board adopts and incorporates by reference the Real Property Appraiser Qualification Criteria effective May 1, 2018, in its entirety, inclusive of the criteria, interpretations, guide notes, and Q&A, and Policy Statements, effective March 2018, published by the Appraiser Qualifications Board of the Appraisal Foundation. The Real Property Appraiser Qualification Criteria are commonly referred to as the "AQB criteria." A copy of the criteria and policy statements are available from the Appraisal Foundation at www.appraisalfoundation.org, or 1155 15th Street NW, Suite 1111, Washington, DC 20005.

(2) The AQB criteria covers the qualifying experience, education, examination, and background check requirements necessary to become a trainee, trainee supervisor, licensed appraiser, or certified appraiser; and the standards, scopes of practice, and continuing education requirements for each category of licensure.

(3) The board amends the following AQB Criteria:

(a) "Criteria Specific to Continuing Education," Part II F, paragraph 11 is amended with the addition of the following: "The board has a two-year continuing education cycle."

(b) "Criteria Specific to Continuing Education," Part III F, paragraph 13, delete the first sentence and replace with the following: "If after audit, a credential holder is determined to be deficient in continuing education, the state will offer a 60-day opportunity to cure and complete all required education hours for that continuing education cycle. If the credential holder fails to cure the continuing education deficiency, the state will place the credential holder in an "administrative suspension" status and report the credential holder to the national registry as AQB-noncompliant until the audited deficiency and any accrued deficiency is cured. A demonstrated pattern of deficiencies may result in referral to the board for traditional disciplinary action."

(c) "Background Checks," Part VI, paragraph C, is amended with the addition of the following: "As provided by Title 37, chapter 1, part 2, MCA, the board may not base a denial of a license solely on a previous criminal conviction unless it finds, after investigation, the applicant has not been sufficiently rehabilitated as to warrant the public trust."

AUTH: 37-1-131, 37-43-105, MCA

IMP: 37-1-131, 37-1-203, 37-1-321, 37-54-105, MCA

REASON: See GENERAL REASONABLE NECESSITY STATEMENT for (1) and (2). The board is adopting (3)(a) and (b) to recognize Montana statutes that are more stringent than the federal requirements, or that embody constitutionally based rights of Montana citizens.

NEW RULE II APPRAISER REPORTING OBLIGATIONS TO THE BOARD

(1) All licensees shall report in writing to the board, within ten days of the occurrence of:

(a) change in the licensee's physical, postal, or e-mail address, or phone numbers;

(b) constructive notice to the licensee of a final order of disciplinary action, an order of summary suspension, or legal action related to the practice of real estate appraisal against the licensee; and

(c) personal knowledge of the licensee of the unprofessional conduct of another licensee.

(2) To ensure that a mentor adheres to the limitation on the number of trainees the mentor supervises at a time, all mentors shall report in writing to the board, within ten days of the ending or beginning of a training relationship.

(3) "In writing" includes by postal mail or e-mail, or if available, by updating the licensee's online account with the division (e.g., address changes and supervisory relationships).

(4) Failure to report under this rule shall be cause for disciplinary action up to and including suspension or revocation of the license.

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-105, 37-1-131, 37-1-309, 37-54-105, MCA

REASON: Currently, the department enforces 37-1-105, MCA, by questions posed on the licensure application and renewal forms. While the department will continue to question applicants about past legal or disciplinary action, in lieu of asking the question at renewal time, the department will instead remind the licensee of the obligation to report and ask the licensee to certify compliance with this rule. The rule will enable the department to learn about the action closer to its occurrence when the events are recent rather than waiting until annual renewal time. Although appraisers and AMCs renew annually, some license types in the division renew every two years. The new reporting obligation will allow faster processing of renewals and spread workload throughout the year rather than focusing it at renewal time. The board is also relocating reporting requirements from other rules to this single new rule.

NEW RULE III APPRAISAL MANAGEMENT COMPANY REPORTING OBLIGATIONS TO THE BOARD (1) The designated contact person for a registered AMC shall report in writing to the board, and submit any necessary application forms within ten days of occurrence, the following information pertaining to the AMC:

(a) change in controlling person, with application;
(b) change in contact person, with application;
(c) change in owners, with application;
(d) change in physical, postal, or e-mail address, or phone numbers;
(e) institution of legal or disciplinary action against the AMC, the controlling person, or contact person that is related to the conduct of the AMC;
(f) pending, current, or completed license disciplinary action or investigation against the company, controlling person, contact person, or other licensed individuals affiliated with the company to the board within ten days of the proposed action or notice of such action or investigation; or
(g) the personal knowledge of agents of the AMC of unprofessional conduct of an appraiser or other AMC.
(2) "In writing" includes by postal mail or e-mail, or if available, by updating the licensee's online account with the division (e.g., address changes and relationships).
(3) Failure to report or make application under this rule shall be cause for disciplinary action up to and including suspension or revocation of the registration.

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-105, 37-1-131, 37-1-309, 37-54-105, MCA

REASON: The board is relocating ARM 24.207.1501(3) through (6) to this new rule to avoid redundancy and wordiness and increase readability and comprehension. For all types of information, the reporting period is shortened from 30 to 10 days in the interest of ensuring consistency in reporting obligations and to convey the urgency of updating the department regarding the information. The board notes that "days" mean calendar days unless otherwise stated as business days. The board is also providing guidance regarding various methods to communicate to the board to encourage licensee use of online services.

6. The rules proposed to be repealed are as follows:

24.207.403 REGULATORY REVIEWS

AUTH: 37-54-105, MCA
IMP: 37-1-136, 37-54-416, MCA

REASON: The board is repealing this rule because it unnecessarily repeats statute. Section 37-54-105, MCA, expresses the board's authority to require licensees to submit reports, information, and documents to the board, as does the authority of the department to investigate under 37-1-101, MCA. Without an articulated peer review program, which the board does not have, nor is interested in expanding its regulation to include, 37-54-105, MCA, should only be construed to require submission of documents connected to an application or complaint investigation. In practice, board members and board staff have no recollection of a random "regulatory review" of an appraiser's work ever taking place without relation to the investigation of a complaint or an application for licensure. Further, the references to unprofessional conduct in

37-1-316, MCA, unnecessarily repeat ARM 24.207.2301, which adequately sets forth unprofessional conduct.

24.207.503 EXPERIENCE - NUMBER OF HOURS REQUIRED

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-105, 37-54-202, 37-54-303, MCA

REASON: The board is repealing ARM 24.207.503, 24.207.505, 24.207.506, 24.207.507, and 24.207.510 because the provisions are set forth in the AQB criteria. See GENERAL REASONABLE NECESSITY STATEMENT.

24.207.505 QUALIFYING EDUCATION REQUIREMENTS FOR LICENSED REAL ESTATE APPRAISERS

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-105, 37-54-202, MCA

24.207.506 QUALIFYING EDUCATION REQUIREMENTS FOR RESIDENTIAL CERTIFICATION

AUTH: 37-1-131, 37-54-105, 37-54-303, MCA
IMP: 37-1-131, 37-54-105, 37-54-303, MCA

24.207.507 QUALIFYING EDUCATION REQUIREMENTS FOR GENERAL CERTIFICATION

AUTH: 37-1-131, 37-54-105, 37-54-303, MCA
IMP: 37-1-131, 37-54-105, 37-54-303, MCA

24.207.510 SCOPE OF PRACTICE

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-105, 37-54-201, MCA

24.207.2102 CONTINUING EDUCATION NONCOMPLIANCE

AUTH: 37-1-136, 37-1-319, 37-54-105, MCA
IMP: 37-1-131, 37-1-136, MCA

REASON: It is reasonably necessary to repeal this rule because it no longer states the correct process for addressing CE noncompliance since the enactment of 37-1-321, MCA, and the board's ratification of the department's standardized administrative suspension process which provides for opportunity to cure CE deficiencies. This process has specifically been acknowledged as more stringent than Title XI of FIRREA and is concurred in by the appraisal subcommittee. The process and deviation from the AQB criteria are called out in New Rule I(3)(b).

7. 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 Real Estate Appraisers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or e-mail to dlibsdrea@mt.gov, and must be received no later than 5:00 p.m., November 30, 2018.

8. An electronic copy of this notice of public hearing is available at realestateappraiser.mt.gov (department and board's web site). Although the department strives to keep its web sites accessible at all times, concerned persons should be aware that web sites may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing a web site do not excuse late submission of comments.

9. 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 that 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 Real Estate Appraisers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2305; e-mailed to dlibsdrea@mt.gov; or made by completing a request form at any rules hearing held by the agency.

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on August 16, 2017, by telephone.

11. Regarding the requirements of 2-4-111, MCA, the board has determined that the amendment of ARM 24.207.404, 24.207.406, 24.207.501, 24.207.502, 24.207.504, 24.207.508, 24.207.509, 24.207.515, 24.207.516, 24.207.517, 24.207.518, 24.207.1501, 24.207.2101, 24.207.2301, and 24.207.2305 will not significantly and directly impact small businesses.

Regarding the requirements of 2-4-111, MCA, the board has determined that the adoption of New Rules I through III will not significantly and directly impact small businesses.

Regarding the requirements of 2-4-111, MCA, the board has determined that the repeal of ARM 24.207.403, 24.207.503, 24.207.505, 24.207.506, 24.207.507, 24.207.510, and 24.207.2102 will not significantly and directly impact small businesses.

Regarding the requirements of 2-4-111, MCA, the board has determined that the amendment of ARM 24.207.401 will significantly and directly impact small businesses. The group of small businesses affected are appraisal management companies (AMCs) registered in Montana who reported more than 200

engagements during the previous renewal cycle. The significant and direct effect on the AMCs in question is a $2,000 decrease in their annual renewal fee. The board has determined that the proposed rule amendment would be a positive change to the AMCs affected. Therefore, it is not necessary to minimize or eliminate any potential adverse effects of the proposed rule.

Documentation of the board's above-stated determinations is available upon request to the Board of Real Estate Appraisers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2375; facsimile (406) 841-2305; or to dlibsdrea@mt.gov.

12. Sharon Peterson, Executive Officer, has been designated to preside over and conduct this hearing.

BOARD OF REAL ESTATE APPRAISERS
THOMAS STEVENS, CERTIFIED
GENERAL APPRAISER
PRESIDING OFFICER

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

/s/ GALEN HOLLENBAUGH
Galen Hollenbaugh, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State October 23, 2018.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.19.1401, 42.19.1403, 42.19.1404, 42.19.1407, and 42.19.1412, and the repeal of ARM 42.19.1402, 42.19.1408, 42.19.1409, 42.19.1410, and 42.19.1411 pertaining to tax increment financing districts	))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On November 26, 2018, at 2:30 p.m., the Department of Revenue will hold a public hearing in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, located at 125 North Roberts, Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules. The conference room is most readily accessed by entering through the east doors of the building.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, please advise the department of the nature of the accommodation needed, no later than 5 p.m. on November 9, 2018. Please contact Todd Olson, Department of Revenue, Director's Office, PO Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or email at todd.olson@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY. The department proposes amending and repealing rules in ARM Title 42, chapter 19, subchapter 14 to reorganize the subchapter, eliminate redundancies and unnecessary language, combine relevant and similar language for efficiency, and provide additional procedural guidance for local governments. The proposed actions in this notice incorporate recommendations received from the Legislative Audit Division following a recent performance audit regarding tax increment financing administration and impact. The department agreed to improve its current rules to make them more clear and concise and to make updates to ensure the rules provide better and necessary guidance to prospective and current districts. In all, the department proposes amending and repealing a total of ten rules.

While this general statement of reasonable necessity covers the basis for the following proposed rulemaking actions, it is supplemented where necessary to explain specific changes or to cover any new provisions being included in a rule that were not previously located elsewhere in an existing rule.

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

42.19.1401 DEFINITIONS The following definitions apply to this subchapter: (1) through (6) remain the same.

AUTH: 15-1-201, MCA
IMP: 7-15-4202, 7-15-4203, 7-15-4204, 7-15-4205, 7-15-4206, 7-15-4207, 7-15-4208, 7-15-4209, 7-15-4210, 7-15-4211, 7-15-4212, 7-15-4213, 7-15-4214, 7-15-4215, 7-15-4216, 7-15-4217, 7-15-4218, 7-15-4278, 7-15-4279, 7-15-4280, 7-15-4281, 7-15-4282, 7-15-4283, 7-15-4284, 7-15-4285, MCA

REASONABLE NECESSITY: The department proposes amending ARM 42.19.1401 to add 7-15-4285, MCA, as an implementing citation for the rule.

42.19.1403 ~~NEW~~ NOTIFICATION REQUIREMENTS FOR THE CREATION OR AMENDMENT OF AN URBAN RENEWAL ~~DISTRICTS~~ DISTRICT (URD) – ~~INFORMATION REQUIRED TO ENABLE THE DEPARTMENT TO CERTIFY BASE TAXABLE VALUE~~ (1) A local government may create or amend a URD containing a tax increment financing provision pursuant to Title 7, chapter 15, parts 42 and 43, MCA.

(2) ~~The~~ Before the department ~~will~~ can certify the base taxable value of property located within a newly created ~~URD if the department determines that the following information exists and has been provided to the department~~ or amended district, the local government must notify the department of the intent to create or amend a URD. The notification must include:

(a) the contact information for the person designated to interact with the department;

(b) the name of the district;

(c) the desired base year;

(d) a legal description accompanied by a map illustrating the district's proposed boundary;

(e) geospatial vector data files, if available; and

(f) confirmation that the property within the proposed district is contiguous and not included within an existing URD or TEDD district.

(3) If the local government wants the department to provide a list of the affected real, separately assessed improvements, personal and centrally assessed properties within the district, the local government must provide the notification information required in (2) to the department no later than August 1 of the desired base year. Within 60 days after receiving the notification, the department will provide the following to the designated contact:

(a) confirmation that no issues were identified with the district boundary; and

(b) a list of the affected properties.

(4) If the local government does not need the department to provide a list of the affected real, separately assessed improvements, personal and centrally assessed properties within the district, the local government must provide the notification information required in (2) to the department no later than December 1 of the desired base year.

(5) By no later than February 1 of the calendar year following the creation of the district, the local government must provide the department with the following:

~~(a) a copy of the statement of blight required under 7-15-4202, MCA, including any documentation upon which the statement of blight is based;~~

~~(b)~~ (a) a copy of the executed resolution of necessity required by 7-15-4210, MCA~~, adopting the statement of blight~~. The executed resolution must ~~have an effective date prior to the date on which the URD is created;~~ contain:

(i) an effective date prior to the date on which the URD is created; and

(ii) a statement of necessity regarding the interest of public health, morals, or welfare of the residents;

(b) the documentation (statement of blight) upon which the resolution of the necessity is based;

~~(c) a map representing the URD's boundary including a legal description of the URD;~~

~~(d) a copy of the local government's growth policy;~~

~~(e) a copy of the local government's urban renewal plan pursuant to 7-15-4212 and 7-15-4284, MCA, containing the tax increment provision;~~

~~(f)~~ (c) a copy of the local government's planning board's finding that the urban renewal plan conforms with the local government's growth policy~~;~~ that includes:

(i) documentation of the adoption of the growth policy;

(ii) documentation upon which the conformance is based; and

(iii) documentation upon which the accordance with zoning is based;

~~(g)~~ (d) a copy of the published notice of public hearing required under 7-15-4215, MCA;

(e) a copy of the letter that was sent to all property owners in the district;

(f) a list of all addresses with proof of certified mailing;

(g) a list of all the geocodes, assessor codes, and centrally assessed property within the district;

(h) a ~~certified~~ copy of ~~the ordinance approving~~ the local government's urban renewal plan pursuant to 7-15-212 and 7-15-4216, MCA, containing the tax increment provision under 7-15-4216, MCA; and

(i) a ~~certified~~ copy of the ordinance ~~creating~~ adopting the urban renewal ~~district including~~ plan with the tax increment provision~~;~~ pursuant to 7-15-4216 or 7-15-4284, MCA.

~~(j) the name of the URD; and~~

~~(k) a list of the geocodes for all real property, the assessor codes for all personal property, and a description of all centrally assessed property located within the URD at the time of its creation.~~

~~(2) The local government that has created the URD will provide the information described in (1) to the department when it notifies the department that the URD has been created.~~

(6) Within 20 calendar days after the department receives the documentation required in (2) and (5), the department will send notification to the local government whether the documentation is complete and correct for the desired base year.

(a) If supporting documentation submitted with the application is deficient, the department will notify the local government and request additional information.

(b) By March 1, the department must receive the local government's complete and corrected documentation to establish a base year effective January 1

of the previous year.

(c) If supporting documentation submitted with the application is complete and correct, the department will notify the local government and will report the base, actual, and incremental taxable values to the taxing jurisdictions by the first Monday in August of the calendar year following receipt of the notification in (2).

(d) If supporting documentation submitted for creation or amendment of a URD is not complete and correct, the department will report the base, actual, and incremental taxable values to the taxing jurisdictions by the first Monday in August of the calendar year following the year which the complete and correct supporting documentation is submitted to the department.

(7) All correspondence and documentation must be mailed to the Department of Revenue, Property Assessment Division at P.O. Box 8018, Helena, MT 59604-8018, or e-mailed to DORTIFinfo@mt.gov.

AUTH: 15-1-201, MCA
IMP: 7-15-4202, 7-15-4210, 7-15-4215, 7-15-4216, 7-15-4282, 7-15-4283, 7-15-4284, 7-15-4285, 15-10-202, 15-10-420, MCA

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity provided at the beginning of this notice, the department proposes amending ARM 42.19.1403 to incorporate the relevant information from rules being repealed in this same notice, such as the notification and documentation requirements for local governments creating or amending urban renewal districts, to provide this information in one location.

The language proposed for (2) through (6) is new and necessary to provide clear and concise deadlines and additional documentation requirements for local governments. Specifically, the legislative auditors recommended that the department update its rules to require that local governments submit documentation demonstrating that they meet statutory requirements.

The department also proposes changing the reporting address in (7) to ensure that all communication and documentation is directed to a single location to enable the department to efficiently track the information.

The department further proposes updating the implementing citations for the rule to correspond with amendments to the rule language and proposes updating the rule catchphrase to capture the changes in the rule content.

42.19.1404 ~~NEW~~ NOTIFICATION REQUIREMENTS FOR THE CREATION OR AMENDMENT OF A TARGETED ECONOMIC DEVELOPMENT ~~DISTRICTS~~ DISTRICT (TEDD) ~~– INFORMATION REQUIRED TO ENABLE THE DEPARTMENT TO CERTIFY BASE TAXABLE VALUE~~ (1) A local government may create or amend a TEDD containing a tax increment financing provision pursuant to Title 7, chapter 15, parts 42 and 43, MCA.

(2) ~~The~~ Before the department ~~will~~ can certify the base taxable value of property located within a newly created ~~TEDD if the department determines that the following information exists and has been provided to the department~~ or amended district, the local government must notify the department of the intent to create or amend a TEDD. The notification must include:

(a) the contact information for the person designated to interact with the department;

(b) the name of the district;

(c) the desired base year;

(d) a legal description accompanied by a map illustrating the district's proposed boundary;

(e) geospatial vector data files, if available; and

(f) confirmation the property within the proposed district is contiguous and not included within an existing URD or TEDD district.

~~(a) a copy of the local government's finding that the property within the TEDD consists of a continuous area with an accurately described boundary;~~

~~(b) a copy of the local government's finding that the area within the TEDD is large enough to host a diversified base of multiple independent tenants;~~

~~(c) a copy of the local government's finding that the zoning within the TEDD is in accordance with the local government's growth policy as defined in 76-1-103, MCA;~~

~~(d) a copy of the local government's growth policy;~~

~~(e) a copy of the local government's finding that the property within the TEDD is not included within an existing tax increment financing district;~~

~~(f) a copy of the local government's finding, adopted prior to the creation of the TEDD, that the area within the TEDD is deficient in infrastructure necessary to encourage and retain value-adding industry;~~

~~(g) copies of all documentation upon which the local government's finding of deficiency was based;~~

~~(h) a copy of the local government's comprehensive development plan that:~~

~~(i) was adopted prior to the creation of the TEDD;~~

~~(ii) identifies the use and purpose for which the TEDD was created;~~

~~(iii) ensures that the area within the TEDD is large enough to host a diversified base of multiple tenants and was not designed to serve the need of a single tenant; and~~

~~(iv) is in conformance with the local government's growth policy;~~

~~(i) a copy of the notice of public hearing published in accordance with 7-1-2121, MCA, for counties or with 7-1-4127, MCA, for municipalities;~~

~~(j) a certified copy of the ordinance approving the TEDD and the tax increment financing provision pursuant to 7-15-4284, MCA;~~

~~(k) a map representing the TEDD's boundary including a legal description of the TEDD;~~

~~(l) the name of the TEDD; and~~

~~(m) a list of the geocodes for all real property, the assessor codes for all personal property, and a description of all centrally assessed property located within the TEDD at the time of its creation.~~

~~(2) The local government that has created the TEDD will provide the information described in (1) to the department when it notifies the department that the TEDD has been created.~~

(3) If the local government wants the department to provide a list of the affected real, separately assessed improvements, personal and centrally assessed properties within the district, the local government must provide the notification

information required in (2) to the department no later than August 1. Within 60 days of receiving the notification, the department will provide the following to the designated contact:

(a) confirmation that no issues were identified with the district boundary; and

(b) a list of the affected properties.

(4) If the local government does not need the department to provide a list of the affected real, separately assessed improvement, personal and centrally assessed properties within the district, the local government must provide the notification information required in (2) to the department no later than December 1.

(5) By no later than February 1 of the calendar year following the creation of the district, the local government must provide the department with the following:

(a) a copy of the executed resolution of necessity required by 7-15-4279, MCA. The executed resolution must contain:

(i) an effective date prior to the date on which the TEDD was created; and

(ii) a statement of necessity regarding the interest of public health, morals, or welfare of the residents;

(b) the documentation (statement of infrastructure deficiency) upon which the resolution of necessity is based;

(c) a copy of the local government planning board's findings that the comprehensive development plan conforms with the local government's growth policy as defined in 76-1-103, MCA, that includes:

(i) documentation of the adoption of the growth policy;

(ii) documentation upon which the conformance is based;

(iii) documentation upon which the accordance with zoning is based; and

(iv) if a county is proposing to create a TEDD and does not have a growth policy, it must show that it has zoning in the proposed TEDD that is in accordance with the development pattern and the zoning regulations in the district;

(d) a copy of the published notice of public hearing required under 7-15-4215, MCA;

(e) a copy of the letter that was sent to all property taxpayers in the district;

(f) a list of all addresses with proof of certified mailing;

(g) a list of all the geocodes, assessor codes, and centrally assessed property within the district;

(h) a copy of the local government's comprehensive development plan for the district pursuant to 7-15-4279 and 7-15-4284, MCA, containing the tax increment provision; and

(i) a copy of the executed ordinance adopting the comprehensive development plan for the district with the tax increment financing provision pursuant to 7-15-4216 or 7-15-4284, MCA, that:

(i) ensures that the purpose of the district is the development of infrastructure to encourage and retain value-adding industry;

(ii) identifies the use and purpose for which the TEDD was created;

(iii) ensures that the area within the TEDD is large enough to host a diversified base of multiple tenants and was not designed to serve the need of a single tenant; and

(iv) is in conformance with the local government's growth policy.

(6) Within 20 calendar days after the department receives the required

documentation in (2) and (5), the department will send notification to the local government whether the documentation is complete and correct for the desired base year.

(a) If supporting documentation submitted with the application is deficient, the department will notify the local government and request additional information.

(b) By March 1, the department must receive the local government's complete and corrected documentation to establish a base year effective January 1 of the previous year.

(c) If supporting documentation submitted with the application is complete and correct, the department will notify the local government and will report the base, actual, and incremental taxable values to the taxing jurisdictions by the first Monday in August of the calendar year following receipt of the notification in (2).

(d) If supporting documentation submitted for creation or amendment of a TEDD is not complete and correct, the department will report the base, actual, and incremental taxable values to the taxing jurisdictions by the first Monday in August of the calendar year following the year which the complete and correct supporting documentation is submitted to the department.

(7) All correspondence and documentation must be mailed to the Department of Revenue, Property Assessment Division at P.O. Box 8018, Helena, MT 59604-8018, or e-mailed to DORTIFinfo@mt.gov.

AUTH: 15-1-201, MCA
IMP: 7-15-4279, 7-15-4282, 7-15-4283, 7-15-4284, 7-15-4285, 15-10-202, 15-10-420, 76-1-103, MCA

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity provided at the beginning of this notice, the department specifically proposes amending ARM 42.19.1404 to incorporate the relevant information from rules being repealed in this same notice, such as the notification and documentation requirements for local governments creating or renewing urban renewal districts, to provide this information in one location.

The language proposed for (2) through (6) is new and necessary to provide clear and concise deadlines and additional documentation requirements for local governments. Specifically, the legislative auditors recommended that the department update its rules to require that local governments submit documentation demonstrating that they meet statutory requirements.

The department also proposes changing the reporting address in (7) to ensure that all communication and documentation is directed to a single location to enable the department to efficiently track the information.

The department further proposes updating the implementing citations for the rule to correspond with amendments to the rule language and proposes updating the rule catchphrase to capture the changes in the rule content.

42.19.1407 DETERMINATION OF BASE ~~YEAR~~ AND INCREMENTAL TAXABLE VALUES OF ~~TAX INCREMENT FINANCING~~ URBAN RENEWAL DISTRICTS (URD) ~~(TIFD)~~ OR TARGETED ECONOMIC DEVELOPMENT DISTRICTS (TEDD) (1) The department will determine the:

(a) base ~~year~~ taxable value for ~~the TIFD will be determined as follows:~~ a URD or TEDD as the taxable value of all property located within the district, exclusive of any Title 15, chapter 24, MCA, locally approved abatement reductions, as of January 1 of the base year established in accordance with ARM 42.19.1403(6) and 42.19.1404(6); and

~~(a) If the notice or supporting documentation, or both, required by ARM 42.19.1403 and 42.19.1404 is received by the department on or before February 1 of the calendar year following the creation of a valid TIFD, the department will determine the base year taxable value of the district as of January 1 of the calendar year in which the valid TIFD was created.~~

~~(b) If the notice or supporting documentation, or both, required by ARM 42.19.1403 and 42.19.1404 is received after February 1 of the calendar year following the creation of a valid TIFD, the department will calculate the base year taxable value of the district as of January 1 of the year in which the documentation was received. In these instances, the base year will be reported to the affected taxing jurisdictions by the first Monday in August of the calendar year following receipt of the notification.~~

~~(c) The department will calculate base taxable values using the total taxable value of all property within a TIFD prior to the application of any local abatement identified in Title 15, chapter 24, MCA.~~

~~(d)~~ (b) ~~The department will calculate~~ incremental taxable ~~values~~ value by subtracting the base taxable value identified in ~~(1)(c)~~ (1)(a) from the total taxable value of all property within the ~~TIFD after the application of any local abatements identified in Title 15, chapter 24, MCA~~ district.

(2) The incremental value of a ~~TIFD~~ district cannot be less than zero.

(3) The department will report the base, actual, and incremental taxable values to all affected taxing jurisdictions by the first Monday of August each year when the department certifies values pursuant to 15-10-202, MCA.

(4) A URD or TEDD may include one or more levy districts. If a URD or TEDD includes more than one levy district, the department will apportion the base taxable value and the incremental taxable value between the levy districts by apportioning the base taxable value and the incremental taxable value to each levy district according to its contribution to the total taxable value of the URD or TEDD.

(5) A local government that amends the boundaries or makes changes within a valid URD or TEDD, pursuant to the provisions of Title 7, chapter 15, parts 42 and 43, MCA, shall follow the process described in ARM 42.19.1403 or 42.19.1404.

(a) In cases where a boundary amendment removes property from an existing URD or TEDD:

(i) property shall be considered newly taxable pursuant to 15-10-420, MCA;

(ii) the base year and the base taxable value of the original URD or TEDD will not change; and

(iii) the total actual taxable value of the URD or TEDD will be reduced by the value of the property that has been removed from the boundary. The value of the property being removed out of the URD or TEDD will be the actual taxable value determined by the department for ad valorem tax purposes as of January 1 of the year in which the department approves the amendment. An amendment that removes property from a URD or TEDD will cause a reduction in the incremental

taxable value of the URD or TEDD.

(b) In cases where a URD or TEDD boundary amendment adds new property to an existing URD or TEDD:

(i) the base year and base taxable value of the properties located within the original URD or TEDD will not change;

(ii) the base taxable value of the property being added to the URD or TEDD by the boundary amendment will be the actual taxable value determined by the department for ad valorem tax purposes as of January 1 of the year in which the department approves the amendment;

(iii) the base taxable value calculated pursuant to (ii) of the property being added to the URD or TEDD will be added to the existing base taxable value of the URD or TEDD to create the new base taxable value that shall be used to calculate the incremental taxable value of the URD or TEDD; and

(iv) the incremental value of the URD or TEDD after the boundary amendment will be calculated using the new base taxable value determined in (iii).

AUTH: 15-1-201, MCA
IMP: 15-10-202, 7-15-4284, 7-15-4285, 15-10-420, MCA

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity provided at the beginning of this notice, the department proposes amending ARM 42.19.1407 to incorporate the relevant information from rules being repealed in this same notice, such as the determination of base and incremental values for urban renewal or targeted economic development districts, to provide this information in one location.

The department further proposes adding an implementing citation to correspond with amendments to the rule language and proposes updating the rule catchphrase to capture the changes in the rule content.

42.19.1412 LOCAL GOVERNMENT REPORTING REQUIREMENTS ~~OF ISSUANCE OF BONDS OR RETIREMENT OF BONDS~~ (1) ~~To allow the department to determine the value of the newly taxable property as required under 15-10-420, MCA, a local governing body that authorizes URD bonds, TEDD bonds, or refunding bonds shall, no later than February 1 of each year,~~ No later than October 1 of each year, the local government must provide the department with a copy of each bond resolution or ordinance required under 7-15-4301, MCA, and on a form provided by the department, must report the following information:

(a) contact for the district;

(b) year the district expires;

(c) details on any bonds secured by the tax increment, if applicable, including the:

(i) dollar amount of the bond(s) issued;

(ii) term of year on the bond(s) issued; and

(iii) retirement of any bond(s);

(d) details on remittance agreements including:

(i) whether the district has a remittance agreement;

(ii) the names of the agreements; and

(iii) the dollar amount remitted; and

(e) a description of changes or amendments, if any, made to the district in the previous fiscal year.

~~(2) A local governing body that retires any bonds secured by tax increment shall, no later than February 1 of each year, notify the department of the retirement.~~

(3) (2) ~~The~~ All correspondence and documentation ~~required by this rule shall~~ must be mailed to the Department of Revenue, ~~Legal Services Office at PO Box 7701, Helena, MT 59604-7701, with a copy to the~~ Property Assessment Division at ~~PO~~ P.O. Box 8018, Helena, MT 59604-8018 or e-mailed to DORTIFinfo@mt.gov.

AUTH: 15-1-201, MCA
IMP: 7-15-4282, 7-15-4284, 7-15-4286, 7-15-4290, 7-15-4301, 15-10-420, MCA

REASONABLE NECESSITY: In addition to the reason provided in the general statement of reasonable necessity at the beginning of this notice, the department specifically proposes reorganizing ARM 42.19.1412 and combining the reporting requirements previously located in ARM 42.19.1409, which is proposed to be repealed in this same notice, into this rule to provide the information in one location.

The new language proposed in (1) is necessary and defines the new form to be used by local governments to meet statutory reporting requirements, as recommended by the legislative auditors.

The department proposes striking language in (2) as the content is covered in the annual reporting requirement in (1).

The department also proposes changing the reporting address in newly numbered (2) to ensure that all communication and documentation is directed to a single location to enable the department to efficiently track the information.

The department further proposes updating the rule catchphrase to capture the changes in the rule content.

5. The department proposes to repeal the following rules:

42.19.1402 NOTIFICATION OF THE CREATION OR AMENDMENT OF A TAX INCREMENT FINANCING DISTRICT - TIMING

AUTH: 15-1-201, MCA
IMP: 7-15-4283, 7-15-4284, 15-10-202, 15-10-420, MCA

REASONABLE NECESSITY: As explained in the general statement of reasonable necessity at the beginning of this notice, the department proposes repealing ARM 42.19.1402 as part of reorganizing and combining the relevant content of the rules in ARM Title 42, chapter 19, subchapter 14 for efficiency and ease of locating. The content of this rule has been incorporated into ARM 42.19.1403 and 42.19.1404 except for the language in (2) stating the department is required to annually certify the taxable value of all property located within each taxing jurisdiction. This language is not needed in ARM 42.19.1403 and 42.19.1404 because it is stated in 15-10-202, MCA.

42.19.1408 DETERMINATION AND REPORT OF BASE YEAR, ACTUAL, AND INCREMENTAL TAXABLE VALUES – TIMING

AUTH: 15-1-201, MCA
IMP: 7-15-4284, 7-15-4285, 15-10-202, 15-10-420, MCA

REASONABLE NECESSITY: As explained in the general statement of reasonable necessity at the beginning of this notice, the department proposes repealing ARM 42.19.1408 as part of reorganizing and combining the relevant content of the rules in ARM Title 42, chapter 19, subchapter 14 for efficiency and ease of locating. The content of this rule has been incorporated into ARM 42.19.1407.

42.19.1409 NOTIFICATION OF AMENDMENT OF BOUNDARIES OR CHANGES WITHIN AN EXISTING TAX INCREMENT FINANCE DISTRICT - NEWLY TAXABLE PROPERTY

AUTH: 15-1-201, MCA
IMP: 7-15-4282, 7-15-4284, 15-10-420, MCA

REASONABLE NECESSITY: As explained in the general statement of reasonable necessity at the beginning of this notice, the department proposes repealing ARM 42.19.1409 as part of reorganizing and combining the relevant content of the rules in ARM Title 42, chapter 19, subchapter 14 for efficiency and ease of locating. The content of this rule has been incorporated into ARM 42.19.1407 and 42.19.1412.

42.19.1410 INFORMATION REQUIRED BY THE DEPARTMENT TO CERTIFY BASE YEAR TAXABLE VALUES OF AN AMENDED OR CHANGED TAX INCREMENT FINANCING DISTRICT (TIFD)

AUTH: 15-1-201, MCA
IMP: 7-15-4282, 7-15-4284, 7-15-4285, 15-10-420, MCA

REASONABLE NECESSITY: As explained in the general statement of reasonable necessity at the beginning of this notice, the department proposes repealing ARM 42.19.1410 as part of reorganizing and combining the relevant content of the rules in ARM Title 42, chapter 19, subchapter 14 for efficiency and ease of locating. The content of this rule has been incorporated into ARM 42.19.1403, 42.19.1404, and 42.19.1407.

42.19.1411 DETERMINATION OF BASE YEAR TAXABLE VALUES OF AN AMENDED TIFD – REPORTING OF BASE YEAR, ACTUAL, AND INCREMENTAL TAXABLE VALUES

AUTH: 15-1-201, MCA

IMP: 7-15-4282, 7-15-4284, 7-15-4285, 15-10-420, MCA

REASONABLE NECESSITY: As explained in the general statement of reasonable necessity at the beginning of this notice, the department proposes repealing ARM 42.19.1411 as part of reorganizing and combining the relevant content of the rules in ARM Title 42, chapter 19, subchapter 14 for efficiency and ease of locating. The content of this rule has been incorporated into ARM 42.19.1407.

6. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Todd Olson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or e-mail todd.olson@mt.gov and must be received no later than November 30, 2018.

7. Todd Olson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

8. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notice regarding particular subject matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. A written request may be mailed or delivered to the person in number 6 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

9. An electronic copy of this notice is available on the department's web site at revenue.mt.gov or through the Secretary of State's web site at sosmt.gov/ARM/register.

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

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

/s/ Todd Olson	/s/ Gene Walborn
Todd Olson	Gene Walborn
Rule Reviewer	Director of Revenue

Certified to the Secretary of State October 23, 2018.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.20.681 pertaining to agricultural land valuation	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On November 26, 2018, at 1:30 p.m., the Department of Revenue will hold a public hearing in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, located at 125 North Roberts, Helena, Montana, to consider the proposed amendment of the above-stated rule. The conference room is most readily accessed by entering through the east doors of the building.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, please advise the department of the nature of the accommodation needed, no later than 5 p.m. on November 9, 2018. Please contact Todd Olson, Department of Revenue, Director's Office, PO Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or todd.olson@mt.gov.

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

42.20.681 AGRICULTURAL COMMODITY PRICES AND VALUES

(1) Commodity prices for the ~~2017~~ 2019-2020 appraisal cycle used for the determination of income are calculated using a 10-year Olympic average of prices from Montana Agricultural Statistics for the years ~~2006-2015~~ 2008-2017. ~~An~~ The department's Olympic average ~~throws out the high and low years~~ removes the highest price and the lowest price and averages the remaining eight ~~years~~ prices. The commodity prices used for valuing agricultural land for the ~~2017~~ 2019-2020 appraisal cycle are as follows:

(a) Spring wheat price used in the valuation of nonirrigated summer fallow and nonirrigated continuous cropped farm lands ~~= $6.67~~ is $6.50 per bushel.

(b) Alfalfa hay price, reduced by 20 percent as required by 15-7-201, MCA, used in the valuation of irrigated and nonirrigated hay lands ~~= $86.20~~ is $98.20 per ton.

(c) Private grazing fees used in the valuation of grazing lands ~~= $19.53~~ is $20.93 per Animal Unit Month (AUM).

(2) The minimum value of irrigated land as determined by the methodology detailed in ARM 42.20.675 ~~= $599.26~~ is $583.98 per acre.

(3) The statewide ~~average~~ grazing productivity average = is .21 AUMs per acre, and is used in calculating the values of:

(a) and (b) remain the same.

(4) For the ~~2017~~ 2019-2020 appraisal cycle the capitalization rate for Class 3 agricultural land, which is used to convert an ongoing income stream into an estimate of value ~~=~~ is 6.4 percent.

(5) For the ~~2017~~ 2019-2020 appraisal cycle the highest productivity of nonirrigated continuously cropped farmland is 60 bushels per acre, and is used in calculating the values of specialty crop land.

(6) For the ~~2017~~ 2019-2020 appraisal cycle, the value of the one acre beneath a residence on agricultural land is ~~$2,302~~ $2,144.

(7) For the ~~2017~~ 2019-2020 appraisal cycle, the minimum carrying capacity for grazing land to be eligible for agricultural classification is 31 AUMs as determined by the Montana State University ~~-~~ Bozeman, College of Agriculture, Department of Agricultural Economics and Economics, in accordance with ARM 42.20.620.

AUTH: 15-1-201, MCA
IMP: 15-6-133, 15-7-201, 15-7-202, ~~15-7-203,~~ 15-7-206, ~~15-7-207, 15-7-208, 15-7-209,~~ 15-7-210, ~~15-7-212,~~ MCA

REASONABLE NECESSITY: The department proposes amending ARM 42.20.681 to update year, price, and valuation references from the adopted 2017 appraisal cycle data to the data determined for the 2019-2020 appraisal cycle. The proposed year, price, and valuation amendments are necessary for the department to comply with its appraisal duties provided in 15-7-201, MCA, where the department is required to obtain current commodity price and production data for the base period described in 15-7-201(5)(d), MCA, for its use in the valuation of Montana taxpayers' agricultural land. The department obtains this data, as directed by 15-7-201(5)(b)(i), MCA, from the Montana Agricultural Statistics Bulletin, as published by the USDA National Agricultural Statistics Service (NASS).

Specifically, the department finds it necessary to propose: replacing 2017 appraisal cycle references in (1), (4), (5), (6), and (7) with 2019-2020; amending the commodity prices referenced in (1)(a) through (c); amending (2) to update the minimum value of irrigated land; and updating (6) with the value of one acre beneath a residence on agricultural land to more accurately reflect the appraisal cycle.

Further, as a result of the department's periodic review of its rules, the department finds it necessary to revise the Olympic average language in (1) to verbiage more accurate and appropriate for department rules, and add the Department of Agricultural Economics and Economics name in (7) to specify the department within the Montana State University College of Agriculture required by 15-7-202, MCA, to determine animal unit months (AUMs).

Finally, it is necessary for the department to propose striking implementing citations for 15-7-203, 15-7-207, 15-7-208, 15-7-209, and 15-7-212, MCA, because they are obsolete or are unrelated references to this rule.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Todd Olson, Department of Revenue, Director's Office, PO Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or e-

mail todd.olson@mt.gov and must be received no later than 5:00 p.m., December 4, 2018.

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

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

7. An electronic copy of this notice is available on the department's web site at revenue.mt.gov, or through the Secretary of State's web site at sosmt.gov/ARM/register.

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

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

/s/ Todd Olson
Todd Olson
Rule Reviewer

/s/ Gene Walborn
Gene Walborn
Director of Revenue

Certified to the Secretary of State October 23, 2018.

BEFORE THE CLASSIFICATION REVIEW COMMITTEE

In the matter of the amendment of ARM 6.6.8301 pertaining to establishment, deletion, or revision of classifications for various industries for supplementing the NCCI Basic Manual for Workers' Compensation and Employers Liability	)))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On September 7, 2018, the Classification Review Committee published MAR Notice No. 6-246 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1762 of the 2018 Montana Administrative Register, Issue Number 17.

2. The committee has amended the above-stated rule as proposed.

3. No comments or testimony were received.

/s/ Brett W. Olin
Brett W. Olin
Rule Reviewer

/s/ Greg Roadifer
Greg Roadifer
Committee Chair

Certified to the Secretary of State October 23, 2018.

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

In the matter of the amendment of ARM 36.22.307, 36.22.608, 36.22.1015, and 36.22.1016 pertaining to fracturing of oil and gas wells, and the repeal of ARM 36.22.1244 pertaining to the producer's certificate of compliance	)))))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On August 24, 2018, the Department of Natural Resources and Conservation and the Board of Oil and Gas Conservation published MAR Notice No. 36-22-197 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 1711 of the 2018 Montana Administrative Register, Issue Number 16.

2. The department has amended ARM 36.22.307, 36.22.608, 36.22.1015, and 36.22.1016 as proposed. The department has repealed ARM 36.22.1244 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 commenter supported the amendment and repeal.

RESPONSE TO COMMENT 1: The board thanks the commenter for the comment.

COMMENT 2: Commenters requested that a minimum of 45-day disclosure of chemicals be used in hydraulic fracturing to provide the land or water well owner the opportunity to perform baseline testing.

RESPONSE TO COMMENT 2: The board thanks the commenters for the comment. During public listening sessions and meetings held by the board and its hydraulic fracturing subcommittee, experts in groundwater characterization and groundwater testing stated that changes in basic water chemistry would establish whether a water well had been impacted by oil and gas operations. The experts stated that a simple, inexpensive, basic baseline water test would establish whether there was an impact on water wells.

Testing for specific chemicals that might be used in hydraulic fracturing a nearby well would significantly increase testing costs. If a water well were impacted by any stage of oil and gas production, or by another activity not connected to oil and gas

production, the advance tested chemicals may or may not be present in subsequent tests, depending on the source of the chemicals. However, if a change in basic water chemistry is detected after hydraulic fracturing or another activity, additional directed testing can be performed to determine the specific source of the chemicals.

The board is concerned that the elevated cost of specific advance testing would deter the use of simple baseline testing. According to the experts, a basic water test can be done at any point prior to drilling or completion. Because the board's current disclosure requirements already require disclosure of chemicals used for hydraulic fracturing, the chemicals actually used in the stimulation would be available, should an adverse change in basic water chemistry be identified. Moreover, the experts also stated that significant background water chemistry data are available through numerous publicly available projects and studies. Any impact to water sources from drilling or completion activities could be identified through changes from the basic chemical analysis.

Some studies have documented impacts to ground water from oil and gas production, but these impacts were attributed either to practices that are no longer used or to activities other than hydraulic fracturing. The board knows of no cases of contaminated water wells related to hydraulic fracturing under Montana's regulations. In reviewing materials provided to the board during this rulemaking, and through the board's own research, the board found no documented case in which chemicals uniquely related to the hydraulic fracturing process were found in water wells. One event identified in the submitted literature (Beak et. al., 2015) involved a casing failure during hydraulic fracturing of a well located in North Dakota; chemicals related to hydraulic fracturing were found in monitor wells drilled after the failure. This incident occurred prior to the board's adoption in 2011 of hydraulic fracturing rules, which included engineering, operational, and environmental requirements to prevent a similar failure.

Two other technical papers alleged water well contamination from hydraulic fracturing operations. DiGiulio and Jackson, 2016, discussed sampling in Pavillion, Wyoming, performed by the United States Environmental Protection Agency. The Wyoming Department of Environmental Quality completed a subsequent study that concluded evidence was lacking for hydraulic fracturing being the cause of an impact to water-supply wells in the Pavillion area. See http://deq.wyoming.gov/wqd/pavillion-investigation/resources/investigation-final-report/.

Llewellyn et al., 2015, reported possible well contamination related to hydraulic fracturing in Pennsylvania. A later statement by the authors identified possible leakage of drilling fluids from offsetting wells or from other sources as the likely source of the contamination. See https://www.energyindepth.org/major-research-gaps-in-new-groundwater-study/?154.

In the absence of any evidence that a chemical unique to hydraulic fracturing has been found in a Montana water well, the advance disclosure of specific hydraulic

fracturing chemicals is unnecessary. The board believes that its current engineering, operational, and environmental requirements for drilling and hydraulic fracturing safeguard against water well contamination. The board also believes that current notice requirements provide ample time for water wells to undergo water chemistry testing prior to drilling or hydraulic fracturing activities. The chemical disclosure requirements already required by statute and rule protect a water well owner's ability to properly investigate any possible contamination.

COMMENT 3: Commenters noted that companies are only required to disclose chemicals 48 hours prior to hydraulic fracturing in the case of a wildcat or exploratory well.

RESPONSE TO COMMENT 3: The board thanks the commenters for the comment. Hydraulic fracturing with 48-hour notice to the board under ARM 36.22.608 occurs after required notice to nearby landowners, after approval of the application for permit to drill, and after the well was drilled. The purpose of the 48-hour notice is to confirm that well construction followed the approved construction plan, to apply additional stipulations or requirements that may be necessary, and to schedule an inspection during the time the hydraulic fracturing is to occur.

The decision to hydraulically fracture an exploratory well can only be made after the potential producing formation has been evaluated by drilling or testing. The characteristics of the targeted formation may be found to be different than expected, or the target geologic zone may be different from that originally targeted. The decision to hydraulically fracture is part of the ongoing process of evaluating and completing a well. It would not be practical to require a 45-day notice for each possible fracture stimulation when the work is being performed as a continuous well completion activity.

COMMENT 4: Commenters stated that baseline water well testing prior to hydraulic fracturing is necessary to protect water well owners and the oil and gas operator.

RESPONSE TO COMMENT 4: The board thanks the commenters for the comment. The board notes that many owners of domestic water wells test the water quality of their wells. The board also notes that various state and federal agencies have authority to investigate contamination of water. The board does not believe that additional, mandatory baseline testing would provide additional, meaningful protections to water owners or to oil and gas operators.

By statute, the board requires measures to prevent contamination from oil and gas activities, including requiring all pertinent engineering, operational, and environmental information to be available at the time an application for permit to drill is under review. The involvement of the land or water well owners can play an important role in the prevention of contamination. Notice requirements have been established to inform landowners of planned activity so they can communicate their concerns to the operator or to the board's staff. Should these concerns not be

adequately addressed during the permit review process, the application for permit to drill can be referred to the board for notice and hearing.

The identification of water wells within one-half mile of a proposed location must be provided by the operator as part of the application for permit to drill. Water well locations and depths to aquifers are independently confirmed by the board's staff during permit and environmental review. Potential contamination pathways are dependent upon the geologic setting of the well. Drilling permits and hydraulic fracturing proposals are evaluated to assure protection for existing water wells and other aquifers at the proposed well location. Additional construction requirements or operational stipulations are applied as necessary.

COMMENT 5: Commenters asked that the drilling of all oil and gas wells, not just wells subject to hydraulic fracturing, require mandatory water well testing prior to drilling, as in neighboring states, if the 45-day chemical disclosure prior to hydraulic fracturing is not adopted.

RESPONSE TO COMMENT 5: The board thanks the commenters for the comment. The request in this comment exceeds the scope of the current rulemaking, which is limited to hydraulic fracturing. The board knows of no state that requires testing for specific chemicals proposed for use in hydraulic fracturing prior to drilling.

COMMENT 6: Commenters requested that the rules include notice to adjacent landowners so they can sample their water in advance of hydraulic fracturing activities.

RESPONSE TO COMMENT 6: The board thanks the commenters for the comment. Existing rules and statutes require notice to the surface owner of the proposed well, published notice in a Helena newspaper and a newspaper of general circulation in the county where drilling is to occur if the well is not located in a previously delineated oil or gas field, and direct notice to the owners of occupied structures within one-quarter mile of the well. The board believes that individuals directly impacted by drilling activities will receive notice through one or more of the existing notice requirements. This notice protects the ability of those individuals to sample and test water in advance of hydraulic fracturing activities.

COMMENT 7: Commenters supported the proposed rules and stated that current drilling notice requirements and surface activities taking place before a well is hydraulically fractured provided sufficient opportunity for water well testing.

RESPONSE TO COMMENT 7: The board thanks the commenters for the comment.

COMMENT 8: Commenters requested that the methodology of trade secret verification be made public.

RESPONSE TO COMMENT 8: The board thanks the commenters for the comment. The requirements for evaluating confidentiality requests for the chemical

composition of components of a fracturing fluid are established in 82-10-604, MCA, and are summarized as guidelines, which are available on the board's website.

COMMENT 9: Some commenters requested that the administrator be required to release a chemical list to medical professionals in response to an emergency. Other commenters requested full chemical disclosure in the event of a transportation or occupational accident.

RESPONSE TO COMMENT 9: The board thanks the commenters for the comment. Timely release of chemical information in an emergency is addressed in ARM 36.22.1016. That rule requires compliance with state and federal laws for chemical disclosure, including for emergency purposes. Unless required by a state or federal law, the administrator may not disclose trade secret information.

COMMENT 10: Commenters requested that full chemical disclosure to the public be required with no allowance for consideration of a trade secret.

RESPONSE TO COMMENT 10: The board thanks the commenters for the comment. Trade secret protections are established in both federal and state law and are required under 82-10-601, MCA, et seq.

/s/ Robert Stutz
ROBERT STUTZ
Rule Reviewer

/s/ Ronald S. Efta
RONALD S. EFTA
Chair
Board of Oil and Gas Conservation

Certified to the Secretary of State October 23, 2018.

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 XVIII and the amendment of ARM 37.106.322 pertaining to eating disorder centers	))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On September 21, 2018, the Department of Public Health and Human Services published MAR Notice No. 37-829 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1857 of the 2018 Montana Administrative Register, Issue Number 18.

2. The department has adopted the following rules as proposed: New Rules I (37.106.3001), II (37.106.3002), III (37.106.3005), IV (37.106.3006), V (37.106.3011), VI (37.106.3013), VII (37.106.3015), VIII (37.106.3017), IX (37.106.3019), X (37.106.3020), XI (37.106.3022), XII (37.106.3025), XIII (37.106.3009), XIV (37.106.3036), XV (37.106.3030), and XVI (37.106.3033) as proposed.

3. The department has amended ARM 37.106.322 as proposed.

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

NEW RULE XVII (37.106.3037) EATING DISORDER CENTERS (EDC): INTENSIVE OUTPATIENT PROGRAM (1) through (3) remain as proposed.

(4) Group therapy sessions must include at least two staff members, one of which must be a mental health professional, registered nurse, or registered ~~dietician~~ dietitian.

(5) remains as proposed.

AUTH: 50-5-247, MCA
IMP: 50-5-247, MCA

NEW RULE XVIII (37.106.3038) EATING DISORDER CENTERS (EDC): PARTIAL HOSPITALIZATION PROGRAM (1) through (4) remain as proposed.

(5) Group therapy sessions must include at least two staff members, one of which must be a mental health professional, registered nurse, or registered ~~dietician~~ dietitian.

(6) remains as proposed.

AUTH: 50-5-247, MCA

IMP: 50-5-247, MCA

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

COMMENT #1: A commenter requested confirmation that the definition of "partial hospitalization program" was left out of New Rule II [37.106.3002] intentionally as it is already in statute.

RESPONSE #1: The department confirms that the definition is in statute and therefore, not required in rule.

COMMENT #2: A commenter stated the word "dietician" which is the lesser used variation may also be spelled "dietitian."

RESPONSE #2: The department agrees with the commenter that the proposed new rule will use the spelling "dietitian" throughout the rule. The spelling has been changed in New Rule XVII (37.106.3037) and in New Rule XVIII (37.106.3038).

6. These rule amendments are effective November 3, 2018.

/s/ Flint Murfitt
Flint Murfitt
Rule Reviewer

/s/ Laura Smith, Deputy Director for
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State October 23, 2018.

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 III, the amendment of ARM 37.95.127, 37.95.227, 37.106.2506, 37.111.523, and the repeal of 37.115.101, 37.115.104, 37.115.105, 37.115.201, 37.115.301, 37.115.302, 37.115.303, 37.115.305, 37.115.306, 37.115.307, 37.115.308, 37.115.309, 37.115.311, 37.115.312, 37.115.313, 37.115.316, 37.115.317, 37.115.319, 37.115.321, 37.115.323, 37.115.502, 37.115.503, 37.115.504, 37.115.505, 37.115.506, 37.115.507, 37.115.508, 37.115.509, 37.115.510, 37.115.511, 37.115.513, 37.115.515, 37.115.517, 37.115.518, 37.115.519, 37.115.521, 37.115.522, 37.115.523, 37.115.601, 37.115.602, 37.115.604, 37.115.605, 37.115.701, 37.115.702, 37.115.703, 37.115.705, 37.115.706, 37.115.707, 37.115.801, 37.115.802, 37.115.804, 37.115.805, 37.115.807, 37.115.902, 37.115.903, 37.115.905, 37.115.1001, 37.115.1002, 37.115.1003, 37.115.1005, 37.115.1006, 37.115.1007, 37.115.1008, 37.115.1009, 37.115.1010, 37.115.1011, 37.115.1012, 37.115.1015, 37.115.1016, 37.115.1017, 37.115.1019, 37.115.1020, 37.115.1022, 37.115.1101, 37.115.1103, 37.115.1201, 37.115.1202, 37.115.1203, 37.115.1301, 37.115.1302, 37.115.1304, 37.115.1305, 37.115.1307, 37.115.1308, 37.115.1309, 37.115.1310, 37.115.1311, 37.115.1313, 37.115.1314, 37.115.1315, 37.115.1401, 37.115.1402, 37.115.1403, 37.115.1404, 37.115.1405, 37.115.1406,	)	NOTICE OF ADOPTION, AMENDMENT, AND REPEAL

37.115.1501, 37.115.1503,	)
37.115.1505, 37.115.1507,	)
37.115.1601, 37.115.1602,	)
37.115.1603, 37.115.1604,	)
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37.115.1837, 37.115.1838,	)
37.115.1839, 37.115.1840,	)
37.115.1845, 37.115.1846,	)
37.115.1847, 37.115.1901,	)
37.115.1902, 37.115.1903,	)
37.115.1905, 37.115.1907,	)
37.115.1909, 37.115.1910,	)
37.115.1911, 37.115.1912,	)
37.115.2001, 37.115.2002,	)
37.115.2003, 37.115.2101,	)
37.115.2103, 37.115.2104,	)
37.115.2105, 37.115.2201,	)
37.115.2203, 37.115.2205,	)
37.115.2207, 37.115.2209, and	)
37.115.2211 pertaining to pools,	)
spas, and other water features	)

TO: All Concerned Persons

1. On July 20, 2018, the Department of Public Health and Human Services published MAR Notice No. 37-850 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 1387 of the 2018 Montana Administrative Register, Issue Number 14.

2. A statutory citation of an authority and implementation section was incorrectly shown for New Rules I through III. The department has adopted the following rules as proposed, but has corrected the authority and implementation citations, and has made the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (37.115.102) PURPOSE (1) and (2) remain as proposed.

AUTH: ~~50-52-102~~ 50-53-103, MCA
IMP: ~~50-52-102~~ 50-53-103, MCA

NEW RULE II (37.115.103) APPLICABILITY (1) New and existing public swimming pools must conform to the provisions of this code, and any other standard and code referenced herein, except as specified in FCS 3-2018, ~~O.~~ Chapter 14, Grandfather Clause, or elsewhere in this chapter.

AUTH: ~~50-52-102~~ 50-53-103, MCA
IMP: ~~50-52-102~~ 50-53-103, MCA

NEW RULE III (37.115.106) INCORPORATION BY REFERENCE (1) through (3) remain as proposed.

AUTH: ~~50-52-102~~ 50-53-103, MCA
IMP: ~~50-52-102~~ 50-53-103, MCA

3. The department has amended the following rules as proposed: ARM 37.95.127, 37.95.227, 37.106.2506, and 37.111.523.

4. The department has repealed the following rules as proposed: ARM 37.115.101, 37.115.104, 37.115.105, 37.115.201, 37.115.301, 37.115.302, 37.115.303, 37.115.305, 37.115.306, 37.115.307, 37.115.308, 37.115.309, 37.115.311, 37.115.312, 37.115.313, 37.115.316, 37.115.317, 37.115.319, 37.115.321, 37.115.323, 37.115.502, 37.115.503, 37.115.504, 37.115.505, 37.115.506, 37.115.507, 37.115.508, 37.115.509, 37.115.510, 37.115.511, 37.115.513, 37.115.515, 37.115.517, 37.115.518, 37.115.519, 37.115.521, 37.115.522, 37.115.523, 37.115.601, 37.115.602, 37.115.604, 37.115.605, 37.115.701, 37.115.702, 37.115.703, 37.115.705, 37.115.706, 37.115.707, 37.115.801, 37.115.802, 37.115.804, 37.115.805, 37.115.807, 37.115.902, 37.115.903, 37.115.905, 37.115.1001, 37.115.1002, 37.115.1003, 37.115.1005, 37.115.1006, 37.115.1007, 37.115.1008, 37.115.1009, 37.115.1010, 37.115.1011, 37.115.1012, 37.115.1015, 37.115.1016, 37.115.1017, 37.115.1019, 37.115.1020, 37.115.1022, 37.115.1101, 37.115.1103, 37.115.1201, 37.115.1202, 37.115.1203, 37.115.1301, 37.115.1302, 37.115.1304, 37.115.1305, 37.115.1307, 37.115.1308, 37.115.1309, 37.115.1310, 37.115.1311, 37.115.1313, 37.115.1314, 37.115.1315, 37.115.1401, 37.115.1402, 37.115.1403, 37.115.1404, 37.115.1405, 37.115.1406, 37.115.1501, 37.115.1503, 37.115.1505, 37.115.1507, 37.115.1601, 37.115.1602, 37.115.1603, 37.115.1604, 37.115.1701. 37.115.1702, 37.115.1703, 37.115.1704, 37.115.1801, 37.115.1803, 37.115.1804, 37.115.1805, 37.115.1806, 37.115.1807, 37.115.1808, 37.115.1809, 37.115.1810, 37.115.1811, 37.115.1812, 37.115.1813, 37.115.1815, 37.115.1817, 37.115.1819, 37.115.1821, 37.115.1823, 37.115.1824, 37.115.1825, 37.115.1826, 37.115.1827, 37.115.1828, 37.115.1835, 37.115.1836, 37.115.1837, 37.115.1838, 37.115.1839, 37.115.1840, 37.115.1845, 37.115.1846,

37.115.1847, 37.115.1901, 37.115.1902, 37.115.1903, 37.115.1905, 37.115.1907, 37.115.1909, 37.115.1910, 37.115.1911, 37.115.1912, 37.115.2001, 37.115.2002, 37.115.2003, 37.115.2101, 37.115.2103, 37.115.2104, 37.115.2105, 37.115.2201, 37.115.2203, 37.115.2205, 37.115.2207, 37.115.2209, and 37.115.2211.

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

COMMENT #1: A commenter stated that alkalinity should not be regulated as a shut-down offense in Circular FCS 3-2018, Chapter 2(B)(1)(a).

RESPONSE #1: The department disagrees. Facilities may be closed due to alkalinity at the discretion of the regulatory authority. It is not a mandatory immediate closure item.

COMMENT #2: A few commenters commented that alkalinity parameters in Circular FCS 3-2018, Chapter 2(B)(1)(a) conflicts with Circular FCS 3-2018, Chapter 7(G)(1).

RESPONSE #2: The department agrees and has changed the language in Chapter 2(B)(1)(a) [renumbered 2.2.1(a)] to match Chapter 7(G)(1) [renumbered 7.7.1].

COMMENT #3: A commenter asked if existing spray decks with recirculating water supplies would be required to have UV treatment or if they would be protected under the grandfather clause.

RESPONSE #3: The department believes there has been no change to this requirement. Splash decks with recirculating water supplies that were approved under the previous rule were also required to have a secondary disinfection system such as UV treatment. Any splash deck approved and built prior to these requirements would be grandfathered in until they lost their grandfather clause status.

COMMENT #4: A commenter stated that the free chlorine parameters in Circular FCS 3-2018, Chapter 7(G)(1) should be reworded to clarify the use of stabilizer.

RESPONSE #4: The department disagrees and believes the existing proposed language makes it clear when stabilizer should be used.

COMMENT #5: A commenter stated that minimum free chlorine concentrations listed in Circular FCS 3-2018, Chapter 7(G)(1) should be amended to read 2 ppm in outdoor pools and 1 ppm in indoor pools because the free chlorine concentration in unstabilized outdoor pools would quickly drop below recommended levels.

RESPONSE #5: The department disagrees. The proposed language is consistent with what is recommended in the Model Aquatic Health Code (MAHC).

COMMENT #6: A commenter is in support of Circular FCS 3-2018, Chapter 4(I)(4), Dog Swim Days.

RESPONSE #6: The department thanks the commenter for the support.

COMMENT #7: A commenter asked what category spray decks fall under with regard to required turnover rate in Circular FCS 3-2018, Chapter 5(A).

RESPONSE #7: The department refers to the International Swimming Pool and Spa Code (ISPSC), Chapter 6, Table 604.2 in addition to the circular. All existing public swimming pools would be required to meet the historical turnover rates in effect at the time of their original approval. Circular FCS 3-2018, Chapter 5(A) [renumbered 5.1] gives some historical turnover rates. Additional turnover rates can be found in the rule that was in effect at the time of the pool plan approval. If they are newly built, or existing and lose their grandfather status, then they would need to meet the current turnover rate in ISPSC, Table 604.2. A splash deck is regulated as a class D-6 Interactive Play Attraction in the ISPSC.

COMMENT #8: A commenter is in support of Chapter 5(B)(2), flow turndown system.

RESPONSE #8: The department thanks the commenter for the support.

COMMENT #9: A few commenters are confused over the term "DPD" in Circular FCS 3-2018, Chapter 7(A)(1) and (A)(3).

RESPONSE #9: The department agrees that "DPD" is not a term that is appropriately used to reference most specific tests. However, this section is referring to an entire test kit. The department has changed the language in Circular FCS 3-2018, Chapter 7(A)(3) [renumbered 7.1.3] from "DPD test kit" to "FAS-DPD test kit."

COMMENT #10: A commenter references Circular FCS 3-2018, Chapter 7(B)(5), Total Alkalinity must be tested weekly, and asked why we would back off daily alk testing if we are newly making low alk a shut down offense.

RESPONSE #10: The department's current rule on testing, ARM 37.115.1302, requires alkalinity testing once per week. Circular FCS 3-2018, Chapter 7(B)(5) [renumbered 7.2.5], maintains a weekly requirement for alkalinity testing.

COMMENT #11: A commenter reported that operators may need to add sodium bicarbonate as frequently as 3 or 4 times per day to maintain alkalinity when using muriatic acid.

RESPONSE #11: The department does not see a question or proposed change in this comment. Alkalinity should stay fairly stable if the pool water is balanced through the proper process and make-up water is not having to be added constantly.

COMMENT #12: A commenter suggests that weekly alkalinity testing be allowed for certain pools.

RESPONSE #12: The department thanks the commenter for the suggestion, but the department is not proposing any changes to alkalinity testing frequency and is maintaining it at once per week.

COMMENT #13: A commenter agrees with the change to calcium hardness testing frequency in Circular FCS 3-2018, Chapter 7(B)(6).

RESPONSE #13: The department thanks the commenter for the support.

COMMENT #14: A commenter stated that Circular FCS 3-2018, Chapter 8(B)(2) should be modified to allow for glare off the water.

RESPONSE #14: The department disagrees. If glare is a factor, the observation point should be moved. The sign does not say that an observer must be able to see the main drains from "all" points around the pool.

COMMENT #15: A commenter said the signage requirement of Circular FCS 3-2018, Chapter 8(B)(3)(d) should be modified to require a responsible adult or lifeguard to be in attendance with nonswimmers and children under 14.

RESPONSE #15: The department disagrees. On-duty lifeguards are required to be attentive to their jobs and not be distracted. Making a lifeguard responsible for supervising nonswimmer children is a serious distraction from their professional job. Any off-duty lifeguard, attendant, or other employee could fill the role of a responsible adult if the facility wants to take on that responsibility, but not an on-duty lifeguard.

COMMENT #16: A commenter reported that a Montana code recognizes a 12-year old as being able to be home alone and responsible for other younger children. The commenter further states that the signage requirement of Circular FCS 3-2018, Chapter 8(B)(3)(d) should be modified to reduce the age to at least 11 years, but preferably to 7.

RESPONSE #16: The department disagrees. The department is unaware of any state code that establishes a minimum age for babysitting or being left home alone. The MAHC requires that children be supervised by a responsible adult (parent or caregiver). The supporting language of the MAHC Annex states that many standards recognize that a person who is under the age of 14 years of age is considered to be a child, and that their ability to make decisions, especially when complying with rules, requires adult supervision.

COMMENT #17: A commenter supports Circular FCS 3-2018, Chapter 9, Zone of Patron Surveillance.

RESPONSE #17: The department thanks the commenter for the support.

COMMENT #18: A commenter requests a modification to ARM 37.115.1602(1), WHEN LIFEGUARDS ARE NOT REQUIRED, that would allow for equivalent CPR training courses to be accepted and to restrict training to hands-on classes.

RESPONSE #18: The department agrees, but notes ARM 37.115.1602 is being repealed. The language from the repealed rule is incorporated in modified form to allow for equivalent courses in Circular FCS 3-2018, Chapter 9(C) [renumbered 9.3] for lifeguard training requirements and Circular FCS 3-2018, Chapter 9(E) [renumbered 9.5] for attendant training requirements. The department has added language to prohibit Lifeguard, CPR, and CPO classes that do not include a hands-on training curriculum.

COMMENT #19: A commenter suggested adopting MAHC language regulating the color of pool finishes.

RESPONSE #19: This topic is already regulated in the 2015 ISPSC Section 307.7. The department is unable to amend the ISPSC or adopt construction-related rules that have not already been adopted by the Department of Labor and Industry.

COMMENT #20: A commenter supports Circular FCS 3-2018, Chapter 2(A).

RESPONSE #20: The department thanks the commenter for the support.

COMMENT #21: A commenter supports Circular FCS 3-2018, Chapter 2(A)(1)(b).

RESPONSE #21: The department thanks the commenter for the support.

COMMENT #22: A commenter is concerned that the term "reference point" used in the circular is not defined and suggests adopting language from the MAHC related to marker tiles and clarity observations.

RESPONSE #22: The department is unable to adopt construction-related rules that have not already been adopted by the Department of Labor and Industry. The department is reluctant to try to specifically define "reference point," because a reference point could be virtually anything that has been approved by the regulatory authority. Circular FCS 3-2018, Chapter 7(I)(2) [renumbered 7.9.2] addresses water clarity directly and states that an observer must be able to see the main drain, or other approved device placed in the deepest part of the bottom of the public swimming pool. Chapter (I)(3) [renumbered 7.9.3] further states that this reference point must be visible from any point on the deck up to thirty feet away in a direct line of sight.

COMMENT #23: A commenter suggests that the turbidity standard found in the current rule be retained as a quantitative measure of clarity.

RESPONSE #23: The department disagrees. Turbidity does not have a direct quantifiable relationship to clarity and there are no recognized national standards for turbidity levels in relation to clarity and personal safety concerns in the MAHC.

COMMENT #24: A commenter has requested modification of Circular FCS 3-2018, Chapter 2(A)(1)(p) which states, "the public swimming pool does not comply with the requirements of ANSI/APSP/ICC-7-2013 Suction Entrapment Avoidance in Swimming Pools, Wading Pools, Spas, Hot Tubs, and Catch Basins based on a visual inspection and review of drain cover documentation." The commenter would prefer to use the word "or" in place of "and."

RESPONSE #24: The department agrees that this section could be interpreted in multiple ways. Our intent is for the inspector to conduct both visual inspections of the drain covers as well as a review of the drain cover documentation. The question of closure of a pool is independent and could be based on either of those criteria individually. The department has made a change in the language.

COMMENT #25: A commenter has requested a change to Circular FCS 3-2018, Chapter 3(A)(1) to allow for submittal of plan review documents to the local health authority for review.

RESPONSE #25: The department wants to keep the final plan reviews limited to one central office to promote integrity and consistency of the program across the state. Local health authorities are welcome to provide input on any plan review of facilities in their respective jurisdictions. Chapter B(1) [renumbered 3.2.1] of Chapter 3 requires duplicate plans and specifications to be submitted to the department for review. The department has added language to modify this section to require only a single set of plans and specifications be sent to the department and a set be sent to the local regulatory authority. This allows a copy of the files to be conveniently maintained for future use as well as provide local authorities with the materials necessary for a review so they are able to provide comments to the department if they desire.

COMMENT #26: A commenter comments that Circular FCS 3-2018, Chapter 3(O)(1)(d) requires a facility to upgrade to new standards upon the cancellation of a license before a new license is issued to a new owner. The commenter suggests that this may require extensive work and that it may be more reasonable to wait until the pool is renovated.

RESPONSE #26: The department agrees that it may not want to force upgrades for every construction issue during a change of ownership. The department disagrees with the commenter's interpretation of this section. The rule referenced by the commenter is addressing the loss of grandfather status after the specific administrative enforcement action of cancelling a license. That would cause the loss of grandfather status and require a plan review and upgrade to current standards before re-licensure. However, the specific scenario given by the commenter is

referring to the fact that licenses are nontransferable under 50-53-204, MCA. When a facility is sold the license is unable to be transferred to a new owner so that license is closed and the new owner must apply for a new license. We do not consider this to be a cancellation. For clarification, the department is adding the following language to Chapter 3(O)(4) [renumbered 14.4]: "the regulatory authority may require a plan review and upgrade to new construction standards, due to health or safety risks, during a change of ownership." The department notes there is nothing prohibiting the regulatory authority from accepting a long-term plan of correction for upgrades that are not immediate health threats that are also financially prohibitive in the short term.

COMMENT #27: A commenter requests that Circular FCS 3-2018, Chapter 4(F) be modified to include "decks must be free of any trip, injury, or slip hazards."

RESPONSE #27: The department agrees that unsafe situations should be corrected and has modified the language of (F)(2) [renumbered 4.6.2] to read, "All deck surfaces must be clear of tripping or other injury hazards." Slip resistance and cleaning is addressed in other sections of the rule. Care must be taken not to conflict with building tolerances and other building codes.

COMMENT #28: A commenter requests the addition of a section to Circular FCS 3-2018, Chapter 4 that requires facilities to be kept clean and in good repair. This would include slip resistant floors, easily cleanable surfaces, and adequate lighting.

RESPONSE #28: The department directs the commenter to Circular FCS 3-2018, Chapter 4(E)(1) [renumbered 4.5.1]. All public swimming pools and related facilities must be maintained in a safe, clean, and sanitary condition at all times. Flooring materials and lighting are all regulated by the ISPSC and other applicable building codes.

COMMENT #29: A commenter comments that the current rule has many sections of safety measures for CO2 storage that have not been added to the circular and has requested the retention of the requirements to protect public safety, especially the requirement to store CO2 above grade.

RESPONSE #29: The department disagrees. Storage of hazardous chemicals is regulated through applicable building and fire codes and much of that is related to construction standards.

COMMENT #30: A commenter supports Circular FCS 3-2018, Chapter 4(A)(3), lockable safety covers for spas and hot tubs and powered safety covers for pools are not sufficient to meet barrier or alternate methods required in this section.

RESPONSE #30: The department thanks the commenter for the support.

COMMENT #31: A commenter suggests that a rule be added to Circular FCS 3-2018, Chapter 5(F) to require that automated controllers be maintained and operated as per manufacturer specifications.

RESPONSE #31: The department disagrees that a new rule is necessary. Automated controllers are part of the circulation equipment. Please refer to Chapter 5(B)(4) [renumbered 5.2.4]. All circulation equipment must be maintained according to manufacturer's instructions. In the absence of manufacturer's instructions, all components must be maintained as needed to ensure system performance is not impeded.

COMMENT #32: A commenter requested that a section be added to Circular FCS 3-2018, Chapter 5, (F) to give the regulatory authority the ability to require an automatic controller on facilities with repeat or two consecutive closure situations because of inadequate free chlorine, inadequate ORP or pH out of parameter.

RESPONSE #32: The department agrees and has added language to Circular FCS 3-2018, Chapter 5(F) [renumbered 5.6].

COMMENT #33: A commenter reported that Circular FCS 3-2018, Chapter 6(B)(2) records must be maintained on forms approved by the department, would put an undue burden on the department and the rule should be changed to "regulatory authority" instead of "department" to give operators and inspectors the continued ability to review and approve records.

RESPONSE #33: The department disagrees. This requirement has not changed from previous rules so there is no change to burden on the department. The department hopes to maintain better statewide consistency by continuing to require department-approved forms that are provided electronically on our website.

COMMENT #34: A commenter suggests that Circular FCS 3-2018, Chapter 7(E)(3) might be better if changed to say 0.4 ppm above source water, due to high levels of chloramines in the source water.

RESPONSE #34: The department disagrees. The national standard (MAHC) is no greater than 0.4 ppm combined chlorine. The MAHC reports that health symptoms can begin to show between 0.3 and 0.5 ppm.

COMMENT #35: A commenter supports Circular FCS 3-2018, Chapter 7(E)(6).

RESPONSE #35: The department thanks the commenter for the support.

COMMENT #36: A commenter stated that Circular FCS 3-2018, Chapter 9 is a difficult regulation to interpret and enforce and if the standards for placement of lifeguards are adopted as written, training for standards of review and inspection must be provided to local health authorities.

RESPONSE #36: The department is happy to provide training and answer questions. Circular FCS 3-2018, Chapter 9(E) [renumbered 9.5] is new to sanitarians, but is part of the national standard (MAHC), and is taught in lifeguard certification courses. The intent is for managers to develop a staffing plan that also identifies zones of patron surveillance as described in the rules. The regulatory authority will need to verify that a plan has been designed and implemented, but we do not necessarily expect them to test some of the specifics such as lifeguard swim time or zone scan time. These particulars are beyond our scope and more applicable to facility management and trained lifeguard supervisors. However, the criteria for establishing a zone are fairly simple. The department encourages the regulatory authority to become knowledgeable so they are able to recognize when a facility may not be providing sufficient numbers of lifeguards.

COMMENT #37: A commenter stated that a description of who is to review and approve the lifeguard plan (Circular FCS 3-2018, Chapter 9(D)) needs to be included. Sanitarian training does not include best practices for lifeguard placement. As written, the regulatory authority is in the position of determining whether a zone designation is sufficient for public safety.

RESPONSE #37: The department's position is that the licensee is ultimately responsible for developing and implementing the staffing plan as required by law, Circular FCS 3-2018, Chapter 9(D)(1) [renumbered 9.4.1]. As noted in the above comment, the regulatory authority will be responsible for verifying that a sufficient plan exists and that it meets the intent of the law during their routine inspections. All specifics are included in the rule and should not require any specialized training to evaluate.

COMMENT #38: A commenter stated that the current standard of square footage per lifeguard requirement and/or the standards for number of lifeguards provided per number of bathers as set forth by the ARC and other official lifeguard training courses would provide a clear and easily enforceable standard.

RESPONSE #38: The department disagrees. The department does not believe the previous lifeguard density standard was sufficient for all circumstances because it did not adequately account for bather density and zone size. The proposed approach allows the lifeguard manager to tailor the system to their particular needs at any particular time while providing a sufficient number of lifeguards to meet public safety needs. This approach is required in national standards (MAHC) and as part of lifeguard certification programs such as StarGuard.

COMMENT #39: A commenter requested clarification of the term ″operated for individual use″ in Circular FCS 3-2018, Chapter 1(22), ″Float tank.″ Also would ″float tank″ apparatus be considered in the definition of ″hydrotherapy pool″ or ″therapeutic pool″?

RESPONSE #39: Float tanks are, by their very purpose, designed to be used by only one person at a time. They are an individual treatment so we do not consider

them to be public in the same sense as a municipal pool or hot tub. They are also unique in that the body of water is extremely saline and very small. The water is treated, generally by UV and ozone, filtered, and recycled into the float tank. Treatment systems will treat at least 99.9% of all water between users. This is better than the efficiency provided by a standard pool or even a spa. To the best of the department's knowledge, there have been no outbreaks or injuries associated with float tanks. Because of these reasons, the department believes that float tanks are not strictly public, and they do not provide a significant public health risk that would require licensing and regulation.

COMMENT #40: A commenter asked what is the importance of having the definition Circular FCS 3-2018, Chapter 1(22) "full facility inspection." Where and how is this term used in the proposed rule?

RESPONSE #40: Full Facility Inspection is used in statute, but not defined in statute. The department believes it is useful to provide a definition within the rule.

COMMENT #41: A commenter asked the department to provide clarifying terms to the definition Circular FCS 3-2018, Chapter 1(42) "person in charge (PIC)."

RESPONSE #41: The department disagrees the definition is unclear. Every pool will have somebody that is in charge. That person may or may not be trained in swimming pool operation. In some cases, the PIC may be the attendant or the CPO. It might be a general facility manager or a housekeeper. It is whoever assumes responsibility for the facility at the time of inspection or incident.

COMMENT #42: A commenter requested that the department modify the definition Circular FCS 3-2018, Chapter 1(50), "residential swimming pool."

RESPONSE #42: The department agrees and has modified the definition to read "invited guests" instead of "guests."

COMMENT #43: A commenter requested modifying Circular FCS 3-2018, Chapter 2(A)(1) to account for potential ORP malfunctions.

RESPONSE #43: The department disagrees. A minimum limit for oxidation reduction potential (ORP) is set in the Circular. The department encourages regulatory authorities to close facilities based on actual residual sanitizer concentrations. If the regulatory authority chooses to inspect based on ORP then it should use its own ORP meter for enforcement purposes and keep good calibration check logs before and after each field outing. Facilities are required to maintain functional automated controls. If their ORP meter is not operating properly then it would be in violation of other rules, but would not necessarily result in closure so long as the actual water chemistry is within safe parameters.

COMMENT #44: A commenter requests a quantitative light meter value be added to Circular FCS 3-2018, Chapter 2(A)(1)(k).

RESPONSE #44: The department disagrees. There are related lighting requirements with minimum values in the ISPSC, but those are to be taken at the water surface and would not necessarily ensure sight of the main drain during all circumstances. The department recommends evaluating this as part of a clarity evaluation with the same standards.

COMMENT #45: A commenter points out the spelling of “lightening” in Circular FCS 3-2018, Chapter 2(A)(1)(m).

RESPONSE #45: The department agrees and has made the change.

COMMENT #46: A couple of commenters requested modification of Circular FCS 3-2018, Chapter 2(A)(4) to require notification of local health departments of pool-related deaths, or serious accident or injury.

RESPONSE #46: The department disagrees. The department does not believe this needs to be in rule, as it has the discretion to forward information to the local regulatory authority.

COMMENT #47: A commenter requested modification of Circular FCS 3-2018, Chapter 2(A)(4) to add the FCS email address for communication of death or serious injury events.

RESPONSE #47: The department disagrees. Email is not a secured form of communication. Reports could include individually identifiable health information subject to protections under the Health Insurance Portability and Accountability Act (HIPAA) for which email would not be an appropriate form of communication.

COMMENT #48: A commenter asks if there is a possible rule conflict or misinterpretation between Circular FCS 3-2018, Chapter 2(B)(1) and Chapter 12(A)(6).

RESPONSE #48: The language from these rules comes from the department's current rules. The department is unaware of any past conflicts or misinterpretation, but can see how the language could be confusing. For clarity, the department has removed the language in Chapter 12(A)(6).

COMMENT #49: A commenter comments that use of the term "repeated and documented violations" in Circular FCS 3-2018, Chapter 2(C)(4) is vague and open-ended.

RESPONSE #49: The department agrees and has modified the language.

COMMENT #50: A commenter suggests to modify Circular FCS 3-2018, Chapter 2(D)(1)(b) to remove "2016 edition" and replace with "current edition published by the CDC."

RESPONSE #50: The department disagrees and believes it must reference the edition in existence at the time of the proposed rulemaking.

COMMENT #51: A commenter asked if the term "approved" in Circular FCS 3-2018, Chapter 2(D)(1)(d) refers to the department or to the local health department.

RESPONSE #51: The department intends to do approvals to keep the forms consistent across the state. The department has modified the language to read: "document the incident using a department-approved fecal incident log."

COMMENT #52: A commenter asks what is the purpose and intent for the applicant to submit duplicate plans and specifications to the department as requested in FCS 3-2018, Chapter 3(B)(1).

RESPONSE #52: This came from prior rule language. The department believes the language is no longer necessary. The department has removed the language.

COMMENT #53: A commenter asked if the local health department is able to or required to perform the site visit or is it solely the responsibility of the department as regulated by Circular FCS 3-2018, Chapter 3(D)(5).

RESPONSE #53: The department is able to require an interim site visit as part of the plan review process. This may be conducted by the department or the department may request the assistance of the local regulatory authority.

COMMENT #54: A commenter suggests changing the term "department" in Circular FCS 3-2018, Chapter 3(D)(5) to "regulatory authority."

RESPONSE #54: The department disagrees. The site visits may be conducted by the department or the department may request the assistance of the local regulatory authority.

COMMENT #55: A commenter asked if the intent of Circular FCS 3-2018, Chapter 4(G)(3) is that a handwashing sink be required in the swimming pool area. The commenter also commented that the rule seems vague, possibly with respect to the distance from a handwashing sink and waste receptacle.

RESPONSE #55: This regulation is in the section titled dressing rooms, toilets, and shower areas so this rule is intended to require a diaper changing area in a dressing room, toilet, or shower area that is conveniently located near a handwashing sink and waste receptacle. The department believes the regulatory authority can use some discretion to determine if a diaper changing area is located in the proper area that is convenient for use by a diaper changing parent.

COMMENT #56: A commenter suggested the term "Glass" in Circular FCS 3-2018, Chapter 4(H)(4) be changed to a term such as "breakable containers" or some other phrase that better fits the intent of this rule.

RESPONSE #56: The department disagrees and believes that the term "glass" fits the intent of the rule.

COMMENT #57: A commenter requested the addition of "or notified by some other effective means" to Circular FCS 3-2018, Chapter 6(A)(3).

RESPONSE #57: The department agrees and has amended the language.

COMMENT #58: A commenter requested clarification of Circular FCS 3-2018, Chapter 9(E)(2) and asks if an attendant could be a desk attendant, housekeeper, maintenance employee, or some other employee working at a public accommodation establishment.

RESPONSE #58: An attendant can hold any position of employment that allows them to be on the premises with reasonable access to the pool for supervision.

COMMENT #59: A commenter asked if the phrase "has staff present or" should be omitted from Circular FCS 3-2018, Chapter 12(A)(1). What is the purpose and intent of including this phrase into rule?

RESPONSE #59: The department believes the language is necessary and should not be omitted. The language allows for an inspection not only while a facility is operating for the public, but also if there is staff present conducting cleaning or maintenance.

COMMENT #60: A commenter asks if there is any specific rule that addresses when pools/spas should be licensed in tourist home operations.

RESPONSE #60: There is not. The department believes that a tub which is drained, filled, and sanitized between users could be considered a single-use medicinal tub and would be exempt from licensure. Otherwise, pools or spas in a tourist home would need to be licensed as a public swimming pool.

COMMENT #61: A commenter asked if there is a specific rule that addresses a license, CPO, PIC, or attendant that fails in the duties of providing active managerial control in supervising operations at a facility.

RESPONSE #61: The department is not aware of any specific rule.

COMMENT #62: A commenter asked if the reason behind more stringent water chemistry parameters and frequency of water testing is based on peer-reviewed scientific evidence that is available in published materials.

RESPONSE #62: These parameters were mostly taken from the MAHC. The department refers the commenter to the MAHC, and the MAHC Annex.

COMMENT #63: A commenter requests that the department also update ARM 37.111.339, which required bed and breakfast facilities to follow the current regulations.

RESPONSE #63: The department intends to amend this rule at a future time.

COMMENT #64: A commenter commented that NEW RULE III (ARM 37.115.106) needs changes to make the adoption language more consistent and clear.

RESPONSE #64: The department agrees and has amended the language.

COMMENT #65: A commenter commented that the AUTH and IMP references for NEW RULES I, II, and III incorrectly reference 50-52-102, MCA and recommends 50-53-103, MCA.

RESPONSE #65: The department agrees and has changed the references to 50-53-103, MCA.

COMMENT #66: A commenter is in support of the adoption of the ISPSC.

RESPONSE #66: The department thanks the commenter for the support.

COMMENT #67: A few commenters reported that it seems the intention is for the ISPSC to only be applicable for new pool construction or remodel/renovation of existing pools and are confused on the application of the grandfather clause so it would be helpful to state that intent in rule.

RESPONSE #67: The department intends for the ISPSC to be an integral part of the rule. Most of the ISPSC is construction related and would be applicable mostly to new pool construction, but also to any pool that loses their grandfather status and certain specific items such as barriers and Virginia Graham Baker rules that are not protected by grandfather clauses. The department believes that the grandfather clause is clear on what is grandfathered in and what is not.

COMMENT #68: A commenter stated that the partial adoption of the ISPSC strikes signage requirements in Sections 509.2 and 611, but retains section 412 and they feel that the rule will be most user friendly if all signage requirements were in one location.

RESPONSE #68: The department agrees that it would be better if we could put all of the signage requirements in one place; however, the department wishes to retain the language in section 412. The department has added language to Circular FCS 3-2018, Chapter 8, requiring compliance with ISPSC Section 412 for all public swimming pools instead of only pool type facilities.

COMMENT #69: A few commenters stated that ISPSC Section 412 lists emergency phone and shutoff signage requirements; however, there is no language requiring an emergency phone and no language in the circular showing that a shutoff switch is a requirement for both new and existing facilities. The commenter recommends ISPSC Section 412 be deleted and the language be moved to Circular FCS 3-2018, Chapter 8.

RESPONSE #69: The department disagrees and believes the signage requirements are sufficient.

COMMENT #70: A commenter stated that the Circular FCS 3-2018 needs a table of contents and the numbering/letter in the circular makes it difficult to follow. The commenter recommends using a numerical system, i e., 4.2.1 instead of Chapter 4, Section B, Subsection 1.

RESPONSE #70: The department agrees and has changed the numbering in the circular to reflect this, and has added a table of contents.

COMMENT #71: A commenter requests that Circular FCS 3-2018, Chapter 13 include an allowance for enforcement proceedings to follow a local administrative process, when one is in place.

RESPONSE #71: The department disagrees. By statute, when the department denies, suspends, cancels, or implements corrective action, the license applicant or licensee has the right to request a hearing before the department to be conducted in accordance with the Montana Administrative Procedure Act. Section 50-53-212, MCA. The health officer does have the right to refuse to validate a license and the administrative process for that specific procedure allows the licensee to request a hearing before the local board of health.

COMMENT #72: A commenter stated that rule chapter or section headings are legally significant and notes that Chapter 3, "Plan Review" contains the variance and grandfather clause sections. The commenter suggests separating out these sections so they are not mistakenly applied only to plan review.

RESPONSE #72: The department partially agrees. To make the Circular more user friendly, the department is putting the "Variance" and "Grandfather Clause" sections into separate chapters.

COMMENT #73: A commenter comments on Circular CS 3-2018, Chapter 3(E)(1) that the term "chapter" restricts the variance process to only those regulations in Chapter 3.

RESPONSE #73: The department agrees and has amended the language.

COMMENT #74: A commenter requests the addition of variance limiting criteria to Circular FCS 3-2018, Chapter 3(E) and gives examples.

RESPONSE #74: The department disagrees and believes the criteria proposed by the commenter are too restrictive.

COMMENT #75: A commenter recommends the addition of language to Circular FCS 3-2018, Chapter 3(E) that makes it clear the department can place enforceable conditions on any variance they grant.

RESPONSE #75: The department agrees and has added a new section to make it clear.

COMMENT #76: A commenter comments that Circular FCS 3-2018, Chapter 3(E)(4) limits the department's ability to revoke a variance, makes it a reactive response to an ambiguous term "significant" and recommends modifying it to read "The department may revoke a variance at any time to prevent or abate a public health risk, or if there is documented non-adherence to the variance conditions."

RESPONSE #76: The department agrees, in part, and has amended the sentence by removing the term "significant" from Circular FCS 3-2018, Chapter 3(E)(4) [renumbered 15.4].

COMMENT #77: A commenter requests the addition of language to circular FCS 3-2018, Chapter 3(E)(5) to allow the regulatory authority to locally review variances or to add language to prohibit the state's approval if opposed by the local regulatory authority.

RESPONSE #77: The department disagrees. The department desires to keep the variance process consistent across the state and as streamlined as possible. Some of the variance requests could be quite technical and require research or further investigation. The department is happy to provide information concerning the variance requests to local departments and receive comments on the variance requests.

COMMENT #78: A commenter reports that Circular FCS 3-2018, Chapter 3(O)(1) limits itself to Chapter 3.

RESPONSE #78: The department agrees and has modified the language.

COMMENT #79: A commenter asked if the purpose of Circular FCS 3-2018, Chapter 4(A) is to require installation of barriers, regardless of grandfather status and requests that it be directly stated in the circular.

RESPONSE #79: The department is requiring installation of barriers in all public swimming pools. The department believes this is made clear in Circular FCS 3-

2018, Chapter 4(A)(1) and (2) [renumbered 4.1.1 and 4.1.2] as well as Circular FCS 3-2018, Chapter 3(O)(3) [renumbered 14.3], Grandfather Clause.

COMMENT #80: A commenter comments that they do not believe that public swimming pools with no standing water should have to install barriers.

RESPONSE #80: The department agrees and has amended language in Circular FCS 3-2018, Chapter 4(A) [renumbered 4.1].

COMMENT #81: A commenter makes a number of suggestions for minor language changes to remove unnecessary language or fix references.

RESPONSE #81: The department agrees and has made the changes suggested by the commenter.

COMMENT #82: A commenter requested the change of "department" to "regulatory authority" in a number of places.

RESPONSE #82: The department disagrees, with the exception of Circular FCS 3-2018, Chapter 11(A)(3) [renumbered 11.1.3] and has changed "department" to "regulatory authority."

COMMENT #83: A commenter asks for clarification on the intent of Circular FCS 3-2018, Chapter 2(C)(3).

RESPONSE #83: The intent of the rule is to require the use of a secondary disinfection system for splash decks with recirculating water supplies. Anything that was built under the previous rule would already have UV treatment. Anything built under the new rule will be required to use a secondary disinfection system. Any splash deck with recirculating water built before this was a requirement is grandfathered in until such time as it loses its grandfather status.

COMMENT #84: A commenter asks if a spray pool has standing water, while a splash deck does not, and recommends the terms be defined.

RESPONSE #84: Yes, that would be the correct distinction to make; however, a splash deck is a special subtype of spray pool which is the defined term in the ISPSC. The department has added a definition of "splash deck" to mean a spray pool that does not have standing water.

COMMENT #85: A commenter stated that the proposed rule does not include a basic requirement that every public swimming pool have an available toilet facility and suggests including a requirement for a toilet facility with a handwashing station.

RESPONSE #85: The department disagrees. Class C semipublic pools are the only facilities that are not discussed in the ISPSC, but generally have restrooms available for guests. Class A and B must meet applicable building code

requirements. Class D aquatic recreation facilities have their own requirements in the ISPSC.

COMMENT #86: A commenter is unclear on the intent of Circular FCS 3-2018, Chapter 4(G)(3).

RESPONSE #86: The department's intent is to require a diaper changing area in the dressing room, toilet, or shower area of any public pool that allows diaper-aged children. The department has amended the language by adding diaper changing areas to the list in Chapter 3(O)(3) [renumbered 14.3].

COMMENT #87: A commenter requests that Circular FCS 3-2018, Chapter 4(N)(1) be modified to be more specific.

RESPONSE #87: The department agrees with the recommendation and has amended the language in Chapter 4(N)(1) [renumbered 4.14.1], to read "The equipment room must be locked at all times, unless occupied by authorized persons or staff."

COMMENT #88: A commenter recommended language be added to Circular FCS 3-2018, Chapter 4(B)(1) to require adequate ventilation in equipment rooms.

RESPONSE #88: The department agrees; however, be mindful that any specific design details must come from applicable mechanical codes. The department has amended language to add equipment rooms to Circular FCS 3-2018, Chapter 4(B)(1) [renumbered 4.2.1].

COMMENT #89: A commenter recommends adding language to Circular FCS 3-2018, Chapter 4(O)(2) to prohibit the storage of chemicals in proximity to a heat source.

RESPONSE #89: Chemicals are required to be stored in accordance with the Material Safety Data Sheet (MSDS) which generally requires chemicals to be stored in a cool, dry, well-ventilated place.

COMMENT #90: A commenter gives multiple recommendations for Circular FCS 3-2018, Chapter 5(A) to be changed to eliminate contradicting or confusing requirements in turnover rates.

RESPONSE #90: The department agrees, in part, and has made changes to the language in Circular FCS 3-2018, Chapter 5(A) [renumbered 5.1].

COMMENT #91: A commenter stated that Circular FCS 3-2018, Chapter 5(F)(1) be modified to contain the actual adoption date of the original circular.

RESPONSE #91: The department agrees and has amended the circular to reflect this change.

COMMENT #92: A commenter stated that there is an incorrect circular reference in Circular FCS 3-2018, Chapter 6(B)(3) which should read "Chapter 7(B)."

RESPONSE #92: The department agrees and has made the change.

COMMENT #93: A commenter stated that there is an incorrect circular reference in Circular FCS 3-2018, Chapter 7(A)(4) which should read, Chapter 6(B)(3)(a) through (g).

RESPONSE #93: The department agrees and has inserted the correct reference.

COMMENT #94: A commenter comments that there is an incorrect circular reference in Circular FCS 3-2018, Chapter 9(B)(1) which should read Chapter 9(A).

RESPONSE #94: The department agrees and has inserted the correct reference.

COMMENT #95: A commenter recommends the addition of language requiring the elimination of glare.

RESPONSE #95: The department disagrees and is unable to adopt construction related requirements from the MAHC. However, under Circular FCS 3-2018, Chapter 7, the facility is required to take remedial action if they are unable to see the bottom of the pool for any reason including glare. This could include adding blinds that would be closed at certain times of the day to reduce glare.

COMMENT #96: A commenter recommends that Circular FCS 3-2018, Chapter 2(A)(1)(b) be modified to include an additional statement such as "regardless of chlorine residual measurement."

RESPONSE #96: The department disagrees. The department believes the language it has proposed makes it clear that the pool is to be closed if ORP is less than 650 mV.

COMMENT #97: A commenter requests that the pH closure range be changed to match the pH acceptable range listed in Circular FCS 3-2018, Chapter 7(G)(1).

RESPONSE #97: The department disagrees. The language is consistent with the MAHC.

COMMENT #98: A commenter recommends a change to Circular FCS 3-2018, Chapter 7(G)(1) to clarify the water parameters for calcium hardness and cyanuric acid.

RESPONSE #98: The department agrees that this could be clearer and has amended the language to show reversing the order of these parameters to the maximum limit is first, and putting the "ideal" limit second and in small italics.

COMMENT #99: A commenter comments on Circular FCS 3-2018, Chapter 7(G)(1) and 7(I)(4) that a sanitarian cannot require a facility to make changes to moderate water clarity if moderate is within the acceptable parameter.

RESPONSE #99: The department disagrees. The department's intent is to set an acceptable operational range in Circular FCS 3-2018, Chapter 7(G)(1) [renumbered 7.7.1] for clarity from Excellent to Moderate. The pool may remain in operation in those ranges without direct enforcement action. However, in order to head off imminent pool closure, the department wishes to give the operator separate instructions to begin corrective actions when the water clarity is at Moderate. The department believes that if the operator does not begin corrective actions and record those corrective actions then this would constitute a separate violation that is unrelated to the accepted operational parameters.

COMMENT #100: A commenter comments on Circular FCS 3-2018, Chapter 9(E) that attendant requirements are broken up and confusing.

RESPONSE #100: The department agrees and has amended the requirements.

COMMENT #101: A commenter recommends changes to Circular FCS 3-2018, Chapter 7(B)(1) to allow regulatory discretion on testing frequency for pools with non-automated chemical feeders.

RESPONSE #101: The department disagrees and believes that statewide consistency needs to be maintained for testing frequency.

COMMENT #102: A commenter stated that it is unusual to capture the operation requirements in a circular, rather than adopt regulations and asks if this is due to the cost of publishing ARMs.

RESPONSE #102: The department has proposed to adopt the Circular in accordance with 2-4-307, MCA, which provides that an agency may adopt by reference any model code or other similar publication if publication would be unduly cumbersome, expensive, or otherwise inexpedient.

COMMENT #103: A commenter requests that the effective date for the new pool rules not occur during the height of swimming season.

RESPONSE #103: The department agrees and is proposing an effective date of January 1, 2019.

COMMENT #104: A commenter provided a list of typographical errors in Circular FCS 3-2018.

RESPONSE #104: The department agrees and has addressed all of the noted typographical errors.

COMMENT #105: A commenter comments that the Statement of Reasonable Necessity for New Rule III refers to a "manual created by food and consumer safety section."

RESPONSE #105: The "manual" referenced in the Statement of Reasonable Necessity is Circular FCS 3-2018.

COMMENT #106: A commenter recommends changes to Circular FCS 3-2018, Chapter 6(B)(5) and (6) to require records to be kept onsite.

RESPONSE #106: The department agrees and has made the change.

COMMENT #107: A commenter comments that Circular FCS 3-2018, Chapter 7(B)(7) would be better worded "combined chlorine must be determined prior to opening to the public."

RESPONSE #107: The department agrees and has made the change.

COMMENT #108: A commenter comments that Circular FCS 3-2018, Chapter 7(B)(7) would be better worded "Chemical balance, as determined by the saturation index, must be calculated at least monthly."

RESPONSE #108: The department agrees and has made the change.

COMMENT #109: A commenter comments that Circular FCS 3-2018, Chapter 7(B)(8) would be better worded "CYA must be tested at least monthly at all public swimming pools utilizing CYA."

RESPONSE #109: The department agrees and has made the change.

COMMENT #110: A commenter comments that Circular FCS 3-2018, Chapter 7(C)(1) and (2) are in conflict.

RESPONSE #110: The department agrees that there may be confusion and has made changes to the language in Chapter 7(C)(1) and (2) [renumbered 7.3.1 and 7.3.2].

COMMENT #111: A commenter suggests modifications to Circular FCS 3-2018, Chapter 8(B)(2) to allow for substantially similar wording to the sign requirement.

RESPONSE #111: The department disagrees and believes best practice is to maintain statewide consistency for signage.

COMMENT #112: A commenter recommends changes to Circular FCS 3-2018, Chapter 9(D) to require plans to be kept onsite.

RESPONSE #112: The department agrees and has added language to Chapter 6(B) [renumbered 6.2], staffing plans and zones of patron surveillance must be kept onsite and readily available.

COMMENT #113: A commenter comments that Circular FCS 3-2018, Chapter 10(A)(1)(a) uses, but does not define, the term "proper signage".

RESPONSE #113: The term "proper signage" is addressed in Chapter 10(A)(6) [renumbered 10.1.6]. The department has amended Chapter 10(A)(1)(a) [renumbered 10.1.1(a)] to remove the language "with proper signage".

COMMENT #114: A commenter comments that temperature requirements in Circular FCS 3-2018, Chapter 10(A)(1)(b) are inconsistent with other temperature requirements in this circular.

RESPONSE #114: The department agrees and has modified the language in Chapter 10(A)(1)(b) [renumbered 10.1.1(b)].

COMMENT #115: A commenter made a series of statements concerning the minimum number of lifeguards and implied duty of lifeguards in Chapter 8 and Chapter 9, and requests a state-defined minimum requirement to assure proper coverage and appropriate staffing.

RESPONSE #115: Minimum requirements are provided for under Chapter 9(A) [renumbered 9.1] and Chapter 9(D) [renumbered 9.4]. These rules are consistent with MAHC as well as lifeguard training programs.

6. These rule adoptions, amendments, and repeals are effective January 1, 2019.

/s/ Robert Lishman	/s/ Laura Smith, Deputy Director for
Robert Lishman	Sheila Hogan, Director
Rule Reviewer	Public Health and Human Services

Certified to the Secretary of State October 23, 2018.

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

In the matter of the amendment of ARM 37.82.701 pertaining to breast and cervical cancer treatment program	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On September 21, 2018, the Department of Public Health and Human Services published MAR Notice No. 37-857 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1874 of the 2018 Montana Administrative Register, Issue Number 18.

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

3. No comments or testimony were received.

4. This rule amendment is effective November 3, 2018.

/s/ Nicholas Domitrovich
Nicholas Domitrovich
Rule Reviewer

/s/ Laura Smith, Deputy Director for
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State October 23, 2018.

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 pertaining to nursing facilities reimbursement	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On September 21, 2018, the Department of Public Health and Human Services published MAR Notice No. 37-866 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1880 of the 2018 Montana Administrative Register, Issue Number 18.

2. The department has amended the above-stated rule 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 commenter asked why the department does not publish proposed rate schedules when it publishes proposed rule changes impacting rates.

RESPONSE #1: The department adopts rates through rulemaking, and nursing facility rates are readily available to the public and to the industry. The proposed nursing facility rates were posted to the department's website on September 18, 2018.

COMMENT #2: A commenter asked the department to consider the social security increase of 2.8% which will be effective January 1, 2019, in calculating the funding available from patient contribution. The commenter states that taking this into account should increase the available funding and the average rate.

RESPONSE #2: The rule change proposed in this notice will take effect retroactive to July 1, 2018, and therefore a future change in social security is outside the scope of the rule.

COMMENT #3: The department received a comment in support of the proposal to increase rates to an average of $202.46 per day.

RESPONSE #3: The department thanks the commenter and concurs with the comment.

COMMENT #4: A commenter felt they did not receive sufficient information from the department regarding the proposed rate calculations.

RESPONSE #4: The department provided sufficient information in the rule notice to enable public comment on the proposed rule change. A public information request is separate from this proposed rulemaking process, which follows the requirements of the Montana Administrative Procedure Act.

COMMENT #5: A commenter suggested the department post certain information as part of future rulemaking.

RESPONSE #5: The information provided in this rule notice is sufficient to enable comment on the proposed rule. The department will consider for future rule changes the commenter's suggestion.

4. The department intends to apply this rule amendment retroactively to July 1, 2018. A retroactive application of the rule amendment does not result in a negative impact to any affected party.

/s/ Robert Lishman
Robert Lishman
Rule Reviewer

/s/ Laura Smith, Deputy Director for
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State October 23, 2018.

VOLUME NO. 57 OPINION NO. 4

FISH, WILDLIFE, AND PARKS, DEPARTMENT OF – Statutory requirement of Board of Land Commissioners' approval of easements involving more than 100 acres or $100,000 in value;
LAND COMMISSIONERS, BOARD OF - Authority of Board of Land Commissioners to approve or disapprove Fish, Wildlife, and Parks conservation easement acquisitions;
LAND USE – Applicability of Mont. Code Ann. § 87-1-209(1) to conservation easements purchased by Department of Fish, Wildlife, and Parks;
PROPERTY, REAL – Inclusion of conservation easements within the meaning of "land acquisition" as the term is used in Mont. Code Ann. § 87-1-209(1);
STATUTORY CONSTRUCTION – When the Legislature has not defined a statutory term, courts consider the term to have its plain and ordinary meaning;
MONTANA CODE ANNOTATED – Sections 70-17-102(1), 70-17-111(2), 76-6-104(2), 76-6-201(1), 76-6-203, 76-6-206, 76-6-208, 87-1-209, 87-1-209(1), 87-1-218(3)(c), 87-1-301(1)(e), 87-1-603.

HELD: Montana law requires that the Department of Fish, Wildlife, and Parks obtain prior approval of the Board of Land Commissioners for acquisitions of easements, including conservation easements, if they involve more than 100 acres or $100,000 in value.

October 15, 2018

President Scott Sales
P.O. Box 200500
Helena, MT 59620-0500

Dear President Sales:

You have requested my opinion on a question I have restated as follows:

> Does Montana law require that the Montana Department of Fish, Wildlife, and Parks (FWP) obtain the approval of the Montana Board of Land Commissioners (Land Board) for FWP's acquisition of easements, including conservations easements, if they involve more than 100 acres or $100,000 in value?

In preparing this Opinion, I have considered the analysis you provided; two memoranda supplied by FWP dated March 23 and July 31, 2018; written comments from the Office of the Governor dated September 10, 2018; and written comments from the Springhill Ranch, Wibaux, dated September 11, 2018.

Section 87-1-209(1) addresses the circumstances in which FWP is required to obtain Land Board approval:

> Subject to 87-1-218 and subsection (8) of this section, the department [of fish, wildlife, and parks], with the consent of the [fish and wildlife] commission or the [the state parks and recreation] board and, ***in the case of land acquisition involving more than 100 acres or $100,000 in value***, the approval of the board of land commissioners, may acquire by purchase, lease, agreement, gift, or devise and may acquire easements upon lands or waters for the purposes listed in this subsection.

(Emphasis added.) The statute requires Land Board approval of "land acquisition[s] involving more than 100 acres or $100,000 in value." The dispositive issue is whether FWP's acquisition of an easement is a "land acquisition" within the meaning of Mont. Code Ann. § 87-1-209(1).

1. The Law of Easements in Montana

a. Easements Generally

Under Montana law, "[a]n easement is a nonpossessory interest in land—a right which one person has to use the land of another for a specific purpose or a servitude imposed as a burden upon the land." *Walker v. Phillips*, 2018 MT 237, ¶ 12, ___ Mont. ___, ___ P.3d ___ (Sept. 25, 2018) (quoting *Blazer v. Wall*, 2008 MT 145, ¶ 24, 343 Mont. 173, 183 P.3d 84), *see also Ganoung v. Stiles*, 2017 MT 176, ¶¶ 14-15, 388 Mont. 152, 398 P.3d 282. The former is referred to as a positive easement; whereas, the latter is a negative easement.

> [T]he grant of an easement, unlike a leasehold, permanently conveys a property interest to another person. The grantor retains no supervisory regulatory control over the property interest conveyed by the easement.

Williamson v. Commissioner, 974 F.2d 1525, 1535 (9th Cir. 1992) (citing R. Cunningham, W. Stoebuck, D. Whitman, The Law of Property § 8.1 (1984)).

b. Conservation Easements

In *Scott v. Lee & Donna Metcalf Charitable Trust*, the Montana Supreme Court recognized two types of easements that preserve conservation values: 1) those created under Montana's Open-Space Land and Voluntary Conservation Easement Act, which the Court referred to as "a Title 76, Chapter 6, MCA conservation easement"; and 2) servitudes created for conservation purposes under Mont. Code Ann. § 70-17-102(7) ("the right of conserving open space to preserve park, recreational, historic, aesthetic, cultural, and natural values on or related to land"). 215 MT 265, ¶ 10, 381 Mont. 64, 358 P.3d 879.

A conservation easement under Title 76 is

> an easement or restriction, running with the land and assignable, whereby an owner of land voluntarily relinquishes to the holder of such easement or restriction any or all rights to construct improvements upon the land or to substantially alter the natural character of the land or to permit the construction of improvements upon the land or the substantial alteration of the natural character of the land, except as this right is expressly reserved in the instruments evidencing the easement or restriction.

Mont. Code Ann. § 76-6-104(2). A conservation easement is properly characterized as a negative easement; *i.e.*, "one the effect of which is . . . to preclude the owner of the land subject to the easement from doing that which, if no easement existed, he would be entitled to do." *Conway v. Miller*, 2010 MT 103, ¶ 17, 356 Mont. 231, 235, 232 P.3d 390, 395 (quoting *Northwestern Improvement Co. v. Lowry*, 104 Mont. 289, 301, 66 P.2d 792, 794 (1937)).

The primary purpose of a conservation easement is to preserve the natural character of the land by precluding and\or restricting the owner from engaging in certain specified activities. *See* Mont. Code Ann. § 76-6-203 (listing the types of prohibitions a conservation easement may impose, including acts detrimental to conservation, and acts or uses detrimental to such retention of land or water areas in their existing conditions).

The grant of a conservation easement may, and often does, include affirmative easements or servitudes in support of the negative easement. In the case of FWP Conservation Easements, these typically include the right of public recreational access for activities such as hunting, trapping, and wildlife viewing. *See, e.g.*, Mont. Code. Ann. § 70-17-102(1) ("[L]and burdens or servitudes upon land may be granted and held though not attached to land" and may include "the right of . . . fishing and taking game.").

c. Applicability of General Easement Law to Conservation Easements

FWP and the governor's office have commented and assert, with no citation, that easements and conservation easements are fundamentally different types of property interests, thereby suggesting that general laws pertaining to easement would not apply in conservation easement analysis. On the contrary, as should be obvious from its name, the conservation easement is a specific type, or sub-set of easements, and not a different, unique type of property interest altogether. As discussed below general easement law readily applies to conservation easements to the extent general law has not been pre-empted by the Open-Space Land and Voluntary Conservation Easement Act.

As noted above, conservation easements are a type of negative easement, which is neither new nor novel in Montana. *See, e.g., Conway* at ¶ 27 (developer's "building restriction line" on plat sufficient to create a negative easement restricting building location); *Haggerty v. Gallatin County*, 221 Mont. 109, 119-20, 717 P.2d 550, 556-57

(1986); (concluding that commercial-use restriction covenant, or "negative easement," on conveyed ski-area property was enforceable); *Reichert v. Weeden*, 190 Mont. 95, 100-102, 618 P.2d 1216, 1219-20 (1980) (agreement between property owners restricting operation of tavern construed as an enforceable "negative easement" that ran with the land); and *Northwestern Improvement Co.,* 104 Mont. at 302, 66 P.2d at 795 (recognizing enforceable "restrictive covenants" contained in a deed that prohibited subsequent purchasers of conveyed lot from using premises for the sale of "vinous, spirituous or fermented liquors as a beverage, nor for gambling, nor for any immoral purpose" under negative easement analysis).

Thus, the fact that conservation easements, in substantial part, prohibit rather than authorize uses of real property is not remarkable; and does not transmogrify the conservation easement into a new, unique species of property interest. Hence, unless a specific provision of conservation easement law provides otherwise,[1] the laws and legal principles pertaining to easements generally apply with equal force to conservation easements and are therefore instructive with respect to the issue at hand.

As the Montana Supreme Court explained in *Colarchik v. Watkins*, an easement is not only an interest in property, "an easement *is property* in the sense that it cannot be taken for public use without just compensation." 144 Mont. 17, 22, 393 P.2d 786, 789 (1964) (emphasis added); *see also Searight v. Cimino*, 230 Mont. 96, 100, 748 P.2d 948, 950 (1988) ("[a]n easement is a property right protected by the constitutional guarantee against the taking of private property without just compensation."). Accordingly, under the property law of Montana, an “easement acquisition” is a real property acquisition, which in turn reflects that an easement acquisition is a “land acquisition” under principles of many decades of Montana property law. No provision of Montana's Open-Space Land and Voluntary Conservation Easement Act precludes or preempts application of this principle to the sub-set of easements referred to as conservation easements.

2. Plain Meaning of "Land Acquisition"

a. Montana Legislative Intent Concerning the Meaning of "Land Acquisition"

In Montana, a public body's acquisition of "an interest in land less than fee . . . shall be by conservation easement." Mont. Code Ann. § 76-6-201(1). It necessarily follows that acquisition of a conservation easement is an "acquisition of an interest in land. " Mont. Code Ann. § 76-6-201(1). The issue thus becomes whether "acquisition of an interest in land" is synonymous with "land acquisition" as the term is used in Mont. Code Ann. § 87-1-209(1).

[1] For example, Title 76, Chapter 6, Part 2 of the Montana Code Annotated imposes requirements on conservation easements that do not apply to other types of easements (*e.g.*, Mont. Code Ann. § 76-6-206 (requiring submission to local planning authority for comment)).

"Land acquisition" is not defined in Title 87, or elsewhere in the Montana Code. Nor has the Montana Supreme Court defined or addressed the meaning of the term. Consequently, we turn to well established rules of statutory construction to ascertain the legislature's intent for its meaning.

In construing a statute, courts look first to the plain meaning of the words it contains. *Clarke v. Massey*, 271 Mont. 412, 416, 897 P.2d 1085, 1088 (1995). Where the language is clear and unambiguous, the statute speaks for itself and courts will not resort to other means of interpretation. *Id*. "In the search for plain meaning, 'the language used must be reasonably and logically interpreted, giving words their usual and ordinary meaning.'" *Gaub v. Milbank Ins. Co.*, 220 Mont. 424, 427, 715 P.2d 443, 445 (1986); s*ee also Westmoreland Res. Inc. v. Department of Revenue*, 2014 MT 212, ¶ 11, 376 Mont. 180, 330 P.3d 1188 ("We ascertain legislative intent from the plain meaning of the words used in a statute."). In summary, if the language is unambiguous, courts look no further than the plain language of the statute to determine legislative intent. *Bassett v. Lamantia*, 2018 MT 119, ¶ 24, 391 Mont. 309, 417 P.3d 299.

In applying the foregoing principles to determine the meaning of "land acquisition," it is significant that legally cognizable interests in land take various forms with varying degrees of associated rights, and are categorized by highly specific terms; *e.g.*, fee simple, life estate, leasehold interest, easement in gross, easement appurtenant, and numerous others. One may refer to "fee simple acquisition," or "life estate acquisition," or "acquisition of leasehold interest" and thereby indicate the specific nature of the interest acquired.

"Land acquisition," in material contrast, is quite ***non***-specific and it is logical to infer the legislature intended it to be so. Unlike those terms referenced above, "land acquisition" is not a specialized term of art in real property law; and does not describe any particular property interest, but instead reflects a general concept: acquisition of a legally cognizable interest in land. The significance of this point cannot be overstated, as it reflects a legislative intent to encompass the spectrum of various types of real property legal interests subject to acquisition. Indeed, later in the same sentence, Mont. Code Ann. § 87-1-209(1) describes the scope of "land acquisitions;" *i.e.*, land "acquire[d] by purchase, lease, agreement, gift, or devise" and "easements upon lands or waters." The term encompasses easements generally and conservation easements specifically.

While one may speak of "acquiring land," from a property law perspective, it would be more accurate to use the phrase, "acquiring an interest in land." To be precise with property law terminology and concepts, one does not acquire land; one acquires one or more specifically defined interests in land. Property law students and practitioners are familiar with the "bundle of sticks" analogy: the view that "property" is a bundle of discrete rights associated with a thing, such as the rights of usage, exclusion, alienation, access, and alteration. *Kafka v. Montana Dep't of Fish, Wildlife & Parks*, 2008 MT 460, ¶ 147, 348 Mont. 80, 201 P.3d 8 (Nelson, J.,

dissenting). Because one acquires an interest in land, under well-established property law principles, the term "land acquisition" should properly be viewed as a shorthand way of indicating "acquisition of an interest in land."

In its memoranda, FWP asserts that "land acquisition" should be read narrowly to mean only "fee title acquisition." If that were the legislature's intent, it is reasonable to assume that the legislature would have used the term "fee title acquisition," rather than "land acquisition" in Mont. Code Ann. § 87-1-209(1) and the statute would provide that Land Board approval is required "in the case of *fee title acquisition* involving more than 100 acres or $100,000 in value." The legislature did not do so. In short, if the legislature meant "fee title acquisition" it would have said "fee title acquisition."

Indeed, when the legislature intends to convey the concept of fee title, it uses the terms "fee title" or "fee title acquisition." *See, e.g.*, Mont Code Ann. § 70-17-111(2) (“fee title”); and Section 2, Ch. 319, L. 1991 (Study Required — Report to 1993 Legislature):

> (1) The department of fish, wildlife, and parks shall commission an independent comprehensive study of wildlife habitat acquisition, improvement, and development, to be funded in an amount up to $150,000 from money allocated under 87-1-242(3).
>
> (2) The study must analyze the department's current wildlife habitat acquisition, improvement, operations, maintenance, and development program and develop a comprehensive plan for a permanent wildlife habitat acquisition, improvement, operations, maintenance, development, and land management program, including the use of conservation easements, leases, and *fee title acquisition*.

(Emphasis added.) The fact that the legislature uses the term "fee title" elsewhere in the code and uses a different term, land acquisition, in Mont. Code Ann. § 87-1-209(1) creates a presumption the legislature intended a meaning different from "fee title" in § 209(1). *See, e.g., Zinvest, Ltd. Liab. Co. v. Gunnersfield Enters.*, 2017 MT 284, ¶ 26, 389 Mont. 334, 405 P.3d 1270 (Where different language is used in the same connection in different parts of a statute, it is presumed the legislature intended a different meaning and effect.).

FWP also asserts that acquisition of a conservation easement and acquisition of land are different, because a conservation easement is a non-possessory interest that "does not allow the holder the use of the land" and therefore should not be considered a land acquisition. FWP Memo at 2 (July 31, 2018). As applied to the conservation easements purchased by FWP, this is simply not true. For example, a primary purpose of the recently acquired Horse Creek Conservation Easement is "to provide to the Department pursuant to its authority to acquire interests in land at § 87-1-209, MCA, on behalf of the public, the right of reasonable access to the Land for recreational uses." Horse Creek Complex 2 (FWP) Deed of Conservation

Easement at 3 (Mar. 30, 2018). Such recreational uses of the Land include extensive recreational hunting, trapping, and wildlife viewing. FWP's assertion that a conservation easement does not allow the use of the land, and therefore should not be considered a land acquisition, is not accurate.

Moreover, while a non-possessory negative easement does not, in itself, convey an affirmative right to the grantee to use the land, such easements convey to the grantee the significant right *to control the use* of the entire property, and to enforce prohibitions on use as set forth in the easement in perpetuity. In certain circumstances, the right to control the use of the entire parcel of land in perpetuity can be viewed as a right superior, and of greater value, to the remaining possessory rights of the fee title holder. This is evidenced by the fact that the appraised value of the conservation easement itself can be significantly greater than the appraised value of the fee title holder's remaining interest after the easement is conveyed.[2]

b. The County Commissioner Notice Provisions of Mont. Code Ann. § 87-1-218(3)(c) Do Not Support an Argument that Land Board Approval Is Unnecessary.

Additionally, in support of its contention that Mont. Code Ann. § 87-1-209 does not require Land Board approval of conservation easement acquisitions, FWP relies on Mont. Code Ann. § 87-1-218(3)(c), which requires FWP to provide notice to county commissioners in the county of the proposed land acquisition of:

> (a) a description of the proposed acquisition, including acreage and the use proposed by the department;
>
> (b) an estimate of the measures and costs the department plans to undertake in furtherance of the proposed use, including operating, staffing, and maintenance costs;
>
> (c) an estimate of the property taxes payable on the proposed acquisition and a statement that if the department acquires the land pursuant to 87-1-603, the department would pay a sum equal to the amount of taxes that would be payable on the county assessment of the property if it was taxable to a private citizen; and
>
> (d) a draft agenda of the meeting at which the proposed acquisition will be presented to the commission or the board and information on how the board of county commissioners may provide comment.

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[2] For example, the land subject to the Horse Creek Complex Easement had a "Before Easement Value" of $10,148,000; and an "After Easement Value" of $3,998,000. This established the value of the Easement at $6,150,000, an amount $2.15 million greater than the fee title holder's remaining interest in the land.

FWP does not pay property tax on conservation easements it holds. *See* Mont. Code Ann. § 76-6-208. For property it owns, FWP does generally pay the county a sum equal to the amount of taxes that would be payable on county assessment of the property if it was taxable to a private citizen. Mont. Code Ann. § 87-1-603. Because FWP is required to provide county commissioners with a property tax estimate for "land acquisitions," and FWP pays no property tax on conservation easement acquisitions, FWP reasons that a conservation easement is not a "land acquisition."

I respectfully disagree. A notice provision is intended to give relevant information, including that there is no impact from the proposal. If the estimate of property taxes payable is zero, that is relevant information, just like it is relevant information when agencies give notice that the fiscal impact of proposed legislation is zero. Simply because the impact on property taxes for a conservation easement is zero does not indicate that the legislature did not intend conservation easements to be within the meaning of land acquisition.

c. <u>The Distinction Between "Land Acquisition" in Mont. Code Ann. § 87-1-209(1) and "Acquisitions . . . of Interests in Land" in Mont. Code Ann. § 87-1-301(1)(e)</u>.

In both memoranda, FWP argues a distinction between "land acquisition" in Mont. Code Ann. § 87-1-209(1) and "acquisitions . . . of interests in land" in Mont. Code Ann. § 87-1-301(1)(e). It appears that FWP is referring to the rule of statutory construction that the legislature's use of different language in different parts of a statute creates a presumption that the legislature intended a different meaning and effect. *See, e.g., Zinvest* at ¶ 26.

FWP argues that the legislature's use of different terms in these statutes requires us to construe them as having different meanings. Specifically, § 301 clearly includes easements, and uses the phrase "interests in land;" and in § 209, the legislature uses a different term, "land acquisition." FWP argues that if the legislature intended to include easement in the scope of § 209, it would have used the phrase "acquisition of interests in land."

The foregoing rule does not apply, however, because the legislature was in fact addressing <u>*two different concepts*</u>. The statutes must be read in full. Section 87-1-301(1)(e) sets forth the Fish and Wildlife Commission's broad authority to "approve <u>*all*</u> acquisitions <u>*or transfers*</u> by [FWP] of interests in land <u>*or water*</u>." (Emphasis added.) The significantly narrower language of § 87-1-209(1), in contrast, sets forth the authority of the Land Board to approve only a much smaller sub-set: only those "land acquisition <u>*involving more than 100 acres or $100,000 in value*</u>." "[A]ll acquisitions or transfers of interests in land or water" in § 301 is a substantively different and broader concept than "land acquisitions" in § 209. So, of course, the legislature used different terms to reflect those different concepts.

Moreover, even FWP seems to acknowledge that "interests in land" encompasses land acquisitions it is entitled to make pursuant to Mont. Code Ann. § 87-1-209. *See, e.g.,* Horse Creek Complex 2 (FWP) Deed of Conservation Easement, at 3 (March 30, 2018) (recognizing that authority to purchase Horse Creek Easement was "pursuant to its authority to acquire *interests in land* at § 87-1-209, MCA").

d. Plain Meaning of "Land Acquisition" in Other Jurisdictions

As noted above, "land acquisition" is not defined by Montana statute or case law. However, numerous other jurisdictions, in a variety of legal contexts, have universally recognized the term "land acquisition" to encompass acquisition of easements. *See, e.g., United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 597-98 (1973) (recognizing that "land acquisitions might include reservations, easements, and rights of way" under Migratory Bird Conservation Act); *Columbia v. Costle*, 710 F.2d 1009, 1013 (4th Cir. 1983) (acquisition of easements comes within "the land acquisition policies" of federal Uniform Relocation and Real Property Acquisitions Policies Act); *McLennan v. United States*, 24 Cl. Ct. 102, 104 (U.S. Cl. Ct. 1991) (recognizing conservation easement as a "land acquisition" project); *Otay Mesa Prop., L.P. v. United States*, 110 Fed. Cl. 732, 738 (2013) (recognizing that valuation of permanent easement by government is determined under government-published Uniform Appraisal Standards for Federal *Land Acquisition*) (emphasis added); *United States v. Am. Elec. Power Serv. Corp.*, 2007 U.S. Dist. LEXIS 104330, at *133-34 (S.D. Ohio Oct. 9, 2007) ("land acquisition means purchase of interests in land, including fee ownership, easements, or other restrictions that run with the land that provide for perpetual protection of the acquired land"); and *Hire v. Bd. of Cty. Comm'rs*, 175 N.E.2d 326 (Ohio 1960) (cost of easement constitutes "cost of land acquisition").

Similarly, scholars routinely recognize the acquisition of a conservation easement as a "land acquisition." *See, e.g.*, Symposium of Waterbanks, Piggybanks, and Bankruptcy, 83 Tex. L. Rev. 1941, 1943 (recognizing two types of "land acquisitions:" (1) "full-fee" based, and (2) "conservation-easement-based"); Local Land Trusts: A Comparative Analysis in Search of an Improved Template for Land Trusts, 38 Wm. & Mary Envtl. L. & Pol'y Rev. 767, 786 (discussing organizations that rely on "conservation easements as a main mechanism for *land acquisition*") (emphasis added); 1 Environmental Law Practice Guide CHAPTER 3.syn (2018) (recognizing that "the conservation easement plays a central role in *land acquisition* programs") (emphasis added); The Beach Zone: Using Local Land Use Authority to Preserve Barrier Islands, 20 Pace Envtl. L. Rev. 299, 314 ("Conservation easements are another *land acquisition measure* that restrict development in scenic and environmentally sensitive areas.").

These authorities, though not controlling, support the conclusion that the plain meaning of "land acquisition" includes acquisition of easements.

In summary, I conclude that the plain meaning of "land acquisition" includes acquisition of easements generally, and conservation easements specifically.

Section 87-1-209(1) of the Montana Code requires that FWP obtain the approval of the Land Board for FWP's acquisition of easements of the requisite size and/or cost.

3. Legislative History

The Montana Supreme Court has held that reliance on legislative history is unnecessary when the language of the statute is clear and unambiguous on its face. *See, e.g., Richland Aviation, Inc. v. State*, 2017 MT 122, ¶ 12, 387 Mont. 409, 394 P.3d 1198 (quoting *State v. Goebel*, 2001 MT 73, ¶ 21, 305 Mont. 53, 31 P.3d 335. Nonetheless, the Court does, at times, find legislative history instructive in cases where the statute is unambiguous. *See, e.g., Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, ¶ 13, 362 Mont. 1, 261 P.3d 570. This is such a case. Additionally, I acknowledge the possibility that a court could determine the term "land acquisition" as used in Mont. Code Ann. § 87-1-209(1) to be ambiguous. Relevant legislative history is set forth below.

a. 1981: HB 251 and HB 766.

Two bills pertaining to oversight of FWP land acquisitions were introduced in the 1981 Legislative Session. First, Representative Aubyn Curtiss introduced HB 251, which would have required legislative approval of FWP land acquisitions of 100 acres or $10,000. HB 251 did not pass out of committee. Immediately thereafter, HB 766 was introduced. As originally drafted, HB766 would have required the governor's approval of the FWP land acquisitions. HB 766 was amended to provide, as it does today, for Land Board approval of FWP acquisitions involving more than 100 acres or $100,000 in value and was thereafter signed into law.

FWP has asserted that the legislative history of the relevant language reflects the legislature's intent to address concerns regarding erosion of the tax base which resulted from FWP's acquisition of fee title to land. Because acquisitions of conservation easements generally have no effect on the tax base, FWP reasons that the legislature could not have intended "land acquisition" to include easements. FWP overlooks additional important aspects of the relevant legislative history.

Loss of tax revenues was, indeed, one concern of the legislature. It was not, however, the only one. For example, Representative Curtiss, the primary sponsor of HB 251, testified she was "concerned with the amount of money the F.W. & P. can spend on land acquisition." *See* Minutes of the Meeting of the Fish and Game Committee, at 3 (Jan. 24, 1981).

Perhaps most significantly, then-FWP Director Jim Flynn testified in opposition and offered written testimony which included the following points describing FWP's concerns regarding the practical effect of the "land acquisition" language of HB 251:

> *Passage of this bill will affect all acquisitions by the department regardless of the purpose for acquisition.*

> *The department's acceptance of conservation easements would be curtailed also, if not shut down entirely, in the same manner as donations or other receipts of gifts.*

House Minutes of the Meeting of the Fish and Game Committee, Exh. 2 at 2, 4 (Jan. 24, 1981) (emphasis added). The Director of the agency responsible for implementing and complying with the statute thereby acknowledged that the statutory language "land acquisition" encompasses "all acquisitions" by FWP. More to the point, Director Flynn thereby expressly acknowledged that the statute applies to – and potentially restricts FWP's power to acquire – conservation easements.[3]

Flynn was Director of FWP at the time the statute was enacted. Significantly, FWP would follow Director Flynn's construction of the statute and seek consent of the Land Board for conservation easement acquisitions in compliance with the statute for the next 37 years.

b. 1987: HB 526 (Habitat Montana)

The 1987 Montana Legislature passed HB 526, establishing the "Habitat Montana" program for FWP acquisition and maintenance of wildlife habitat. Once again, then-Director Flynn's testimony sheds considerable light on FWP's land acquisition process under Mont. Code Ann. § 87-1-209(1). Specifically, in testifying before the House Fish and Game Committee, FWP Director Flynn explained that some land acquisitions are in fee title, while others utilize conservation easements. In emphasizing the extensive independent review of all FWP acquisitions, Director Flynn describes the final step in the completed land acquisition processes as follows:

> *The final step was review by the State Land Board consisting of the Governor, Secretary of State, Attorney General, Auditor and Superintendent of Public Instruction.*

House Minutes of the Fish and Game Committee at 4 (Feb. 17, 1987) (emphasis added). The context clearly indicates that the "acquisitions" include both fee title and conservation easement acquisitions.

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[3]Although HB 251 died in committee, HB 766 was introduced immediately thereafter, containing the same "land acquisition" language. Consequently, FWP Director Flynn testified in opposition to HB 766 and offered written testimony which incorporated by reference the above-quoted testimony, as follows:

> *HB 251 was designed to do essentially the same thing as HB 766 . . . For purposes of this testimony, please consider the information presented on HB 251, particularly the amount of lands purchased and leased by the department.*

House Minutes of the Meeting of the Fish and Game Committee, Exh. 7 at 1 (Feb. 19, 1981) (emphasis added).

4. FWP's Long and Continued Course of Applying Mont. Code Ann. § 87-1-209(1)

FWP has historically sought the approval of the Land Board of its acquisitions of all conservation easements involving more than 100 acres or $100,000 in value. From the 1981 enactment of the "land acquisition" provision of Mont. Code Ann. § 87-1-209(1) to 2018, FWP recognized its obligation to submit conservation easement acquisitions to the Land Board for approval. In fact, our research has revealed no instance of FWP acquiring a conservation easement of the requisite size and cost without first seeking Land Board approval since the 1981 Legislature amended Mont. Code Ann. § 87-1-209(1), with the exception of the recently acquired Horse Creek Easement in eastern Montana.

Moreover, FWP's own internal guidance documents reflect it recognizes the necessity of Land Board approval. For example, the "FWP Process for Wildlife Land Acquisitions" (ver. 8 12 2015), places requirements for "land acquisitions" into three categories: 1) fee projects; 3) conservation easement projects; and 3) all land projects (fee and easement projects combined). While the document recognizes the distinction between fee projects and easement projects, it clearly places them both under the umbrella of "Land Acquisitions." Most significantly, this FWP policy at # 21 expressly recognizes the necessity of Land Board approval of "*all* acquisitions of greater than 100 acres or $100,000 in value" for "All Land Projects" – both fee and easement acquisitions.

Similarly, FWP has prepared Environmental Assessments expressly recognizing that "[a]s with other FWP property acquisition proposals, the Fish Wildlife and Parks Commission and *the State Land Board* (for easements greater than 100 acres or $100,000) *must approve any easement proposal* by the agency." Olsen Ranch Conservation Easement Draft EA at 1 (prepared by FWP) (emphasis added). Indeed, the Horse Creek Conservation Easement EA itself recognizes the necessity of submission of the Horse Creek Easement to the Land Board, including in its Timeline of Events, "Project Submitted to Montana State Board of Land Commissioners: February 2018." *Id*. at 16.

The January 2017 Draft EA for the Horse Creek Conservation Easement, at page 5, also discusses the decision whether FWP should move forward with purchase of the Horse Creek Conservation Easement, and states:

> *As with other FWP conservation projects that involve land interests, the Fish and Wildlife Commission and the State Board of Land Commissioners would make the final decision.*

In the final Decision Notice for the Horse Creek Easements, Brad Schmitz, FWP Region 7 Regional Supervisor stated:

> After review of this proposal, it is my decision to accept the draft EA as supplemented by this Decision Notice and changes herein as final, and to recommend proceeding with the proposed Horse Creek Complex Conservation Easement, *contingent on approvals by the Fish & Wildlife Commission and the Montana Board of Land Commissioners.*

Decision Notice – Horse Creek Complex Conservation Easement at 11 (Jan. 25, 2018).

Similarly, the January 2018 Draft EA for the Birdtail Conservation Easement, at page 8, discusses the decision whether FWP should move forward with purchase of the Birdtail Conservation Easement, and likewise states:

> *As with other FWP conservation projects that involve land interests, the Fish and Wildlife Commission and the State Board of Land Commissioners would make the final decision.*

The FWP Public Scoping Notice (dated February 7, 2018) for the North Sunday Creek Conservation Easement states, at page 2, that the land project requires the "*approval from . . . the Montana State Board of Land Commissioners.*"

Additionally, the FWP Public Scoping Notice (dated February 16, 2018) for the Antelope Coulee Conservation Easement also states, at page 2, that the land project requires the "*approval from . . . the Montana State Board of Land Commissioners*."

The above quoted public documents, and many others, constitute FWP's repeated assurances to the public that FWP's expenditures of funds for the easement acquisitions would be subject to the independent scrutiny and approval of the governor, superintendent of public instruction, auditor, secretary of state, and attorney general.

Indeed, FWP continues to view conservation easements as "land acquisitions" up to the present. *See, e.g.*, FWP's 2017 Habitat Montana Legislative Report, p. 12 (describing the two types of "land acquisition projects": conservation easements and fee title).

When a statute's interpretation is placed in doubt, courts generally defer to an agency's "long and continued course of consistent interpretation, resulting in an identifiable reliance." *Montana Power Co. v. Montana. PSC*, 2001 MT 102, ¶¶ 25, 305 Mont. 260, 265-66, 26 P.3d 91, 94. Here, as noted above, the language of the statute should not be in doubt. But even if it were, a court would generally defer to FWP's longstanding and consistent practice of declaring that Land Board approval of conservation easements over 100 acres or $100,000 is necessary under Mont. Code Ann. § 87-1-209(1). Governmental agencies and the public have reasonably relied on that decades-long application of § 87-1-209. Consequently, FWP's recent reversal of its long-held practice and position is entitled to no deference.

I am aware of no instance or document reflecting an intent on the part of FWP of submitting easement proposals to the Land Board "out of courtesy." Nonetheless, FWP claims that its historical submission of conservation easements to the Land Board for a vote was, in fact, a mere "courtesy." More specifically, FWP refers to its own "unsupported practice of seeking Land Board approval as a courtesy." FWP Memo at 2 (July 31, 2018). Seeking "approval" as a "courtesy" is contradictory on its face. One may give notice as a courtesy. Seeking approval in this context, in contrast, connotes a request for permission or authorization, without which the proposed action cannot be taken.

The necessity of Land Board approval is further evidenced by the Land Board's rejection of the Keogh Ranch Conservation Easement Amendment by a 3-2 vote on September 18, 2017. According to an article in the Montana Standard (Dec. 27, 2017), "[b]ecause the amendment failed at the Land Board Commission, FWP officials say they now hope to find another way to protect the Keogh Ranch from getting carved up." FWP thereby recognized that the Land Board's approval was required for amendment of the conservation easement, and the amendment was certainly not submitted to the Land Board as a mere "courtesy."

The remarkable suggestion that FWP has sought Land Board approval for every conservation easement since 1981 as a mere courtesy is simply unsupportable.

* * *

In summary, Mont. Code Ann. § 87-1-209(1) precludes FWP from acquiring interests in land – both fee ownership and conservation easements – involving more than 100 acres or $100,000 in value without Land Board approval.

THEREFORE, IT IS MY OPINION:

> Montana law requires that the Department of Fish, Wildlife, and Parks obtain prior approval of the Board of Land Commissioners for acquisitions of easements, including conservation easements, if they involve more than 100 acres or $100,000 in value.

Sincerely,

/s/ Timothy C. Fox
TIMOTHY C. FOX
Attorney General

tcf/rc

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.

Water Policy Interim Committee (where the primary concern is the quality or quantity of water):

- 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 an online 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 recent rulemaking 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.

RECENT RULEMAKING BY AGENCY

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through June 30, 2018. This table includes notices in which those rules adopted during the period April 27, 2018, through October 19, 2018, occurred and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through June 30, 2018, this table, and the table of contents of this issue of the Register.

This table indicates the department name, title number, notice numbers in ascending order, the subject matter of the notice, and the page number(s) at which the notice is published in the 2018 Montana Administrative Registers.

To aid the user, this table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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