

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 21

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

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

In the matter of the proposed ) NOTICE OF PUBLIC  
amendment of ARM 2.43.421 ) HEARING ON  
pertaining to USERRA and the ) PROPOSED AMENDMENT  
receipt of service when called )  
to perform duty in the uniformed )  
service )

TO: All Concerned Persons

1. On December 3, 2003, at 9:00 a.m. a public hearing will be held in the board room at 100 North Park, Suite 200 of the Montana Public Employee Retirement building at Helena, Montana, to consider the amendment of ARM 2.43.421 for members of the Public Employees', Judges', Highway Patrol, Sheriffs', Game Wardens' and Peace Officers', Municipal Police, and Firefighters' Unified retirement systems pertaining to a member receiving membership service and service credit for the time that the member was called to perform duty in the uniformed services.

2. The Public Employees' Retirement Board 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 Public Employees' Retirement Board no later than 5:00 p.m. on November 24, 2003, to advise us of the nature of the accommodation that you need. Please contact Carolyn Miller, Public Employees' Retirement Board, 100 North Park Avenue, Suite 200, P.O. Box 200131, Helena, Montana 59620-0131; telephone (406) 444-7939; TDD (406) 444-1421; FAX (406) 444-5428; e-mail cmiller@state.mt.us.

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

2.43.421 ABSENCE WHILE IN MILITARY SERVICE (1) If an actively employed member of the public employees', judges', highway patrol, sheriffs', game wardens' and peace officers', municipal police, or firefighters' unified retirement systems ~~enters the U.S. military during time of war involving the United States or during time of national emergency as specified by statute~~ is called to perform duty in the uniformed services, that the member may elect to qualify such time as receive service time credit and membership service within his the member's retirement system for that time, provided he the member:

(a) remains a member of the retirement system during the period of ~~active military~~ duty in the uniformed services by leaving his or her accumulated contributions on deposit, ~~and either;~~

~~(a) during the period of absence from covered employment, he continues to contribute to the retirement system amounts equal to the contributions he would have made if not absent; or~~

~~(b) within two years from time of return to service, he has entered into a signed agreement with the board to qualify the active military service time, which will include member's contributions and interest.~~

(b) complies with the requirements of the Uniformed Services Employment and Reemployment Rights Act of 1994, commonly known as USERRA; and

(c) is reemployed pursuant to USERRA.

(2) The member must make up the member's contributions for the uniformed services duty time within three times the period of the member's uniformed service starting upon return to employment, but not to exceed five years.

(3) The member may make up the employee contributions:

(a) on a pre-tax basis pursuant to 19-2-704, MCA;

(b) in a lump sum, including a direct transfer from an eligible retirement plan or individual retirement account; or

(c) through installments on a post-tax basis.

(4) If the member makes up the employee's contributions, the member's employer must make up the employer's contributions within the same time frame.

(5) The member's and the employer's contributions are determined based on the compensation the member would have received had the member not been called to uniformed services duty.

(6) Neither the member nor the employer is charged interest on their respective contributions.

(7) A member who is making additional contributions under a service purchase contract at the time he or she is called to duty in the uniformed services may suspend payments under the contract until return to employment as required under USERRA.

(8) For purposes of this rule, duty in the uniformed services is any service covered by USERRA, including:

(a) service in the army, navy, marine corps, air force, coast guard, or public health service commissioned corps;

(b) service in the reserve components of each of the services listed in (8)(a); and

(c) training or service in the army national guard or the air national guard.

(9) For purposes of this rule, service includes:

(a) active duty;

(b) active duty for training;

(c) inactive duty for training;

(d) initial active duty training; and

(e) any period of time during which a member is absent from employment for the purpose of an examination to determine fitness to perform any of the above-listed duties.

~~AUTH: 19-3-304, 19-5-201, 19-6-201, 19-7-201, 19-8-201, 19-9-201, and 19-13-202 19-2-403, MCA~~

~~IMP: 19-3-502, 19-5-304, 19-6-303, 19-7-303, 19-8-304, 19-9-402, 19-13-402 19-2-707, MCA~~

RATIONALE: The Montana legislature has repealed the statutes in the various retirement systems relating to the purchase of time during which the member was called to military service. Those statutes were replaced with section 19-2-707, MCA, recognizing the requirements of section 414(u) of the Internal Revenue Code and the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The proposed amendments are required to ensure the Montana Public Employee Retirement Administration administers all retirement systems in a manner consistent with USERRA in order to maintain the qualified status of each of the retirement plans.

4. ARM 2.43.421 is proposed to be amended to comply with the requirements of the Uniformed Services Employment and Reemployment Rights Act of 1994, commonly known as USERRA.

5. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Mike O'Connor, Executive Director, Public Employees' Retirement Board, 100 North Park Avenue, Suite 200, P.O. Box 200131, Helena, Montana 59620-0131; FAX (406) 444-5428; e-mail moconnor@state.mt.us and must be received no later than December 11, 2003.

6. Carolyn Miller, Montana Public Employee Retirement Administration, P.O. Box 200131, Helena, Montana 59620-0131 has been designated to preside over and conduct the hearing.

7. The Public Employees' Retirement Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding public retirement rulemaking actions. Such written request may be mailed or delivered to Carolyn Miller, Public Employees' Retirement Board, 100 North Park Avenue, Suite 200, P.O. Box 200131, Helena, Montana 59620-0131; faxed to the office at (406) 444-5428; or e-mailed to cmillerstate.mt.us, or may be made by completing a request form at any rules hearing held by the Public Employees' Retirement Board.

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

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

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

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

Certified to the Secretary of State on November 3, 2003.

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

In the matter of the proposed	)	NOTICE OF PUBLIC
amendment of ARM 2.43.437; and	)	HEARING ON PROPOSED
repeal of ARM 2.43.436	)	AMENDMENT AND REPEAL
pertaining to purchasing active	)	
and reserve military service	)	

TO: All Concerned Persons

1. On December 3, 2003, at 10:00 a.m. a public hearing will be held in the board room at 100 North Park, Suite 200 of the Montana Public Employee Retirement building at Helena, Montana, to consider the amendment of ARM 2.43.437 pertaining to purchasing active and reserve military service for members of the Public Employees', Judges', Highway Patrol, Sheriffs', Game Wardens' and Peace Officers', Municipal Police, and Firefighters' Unified retirement systems and the repeal of ARM 2.43.436.

2. The Public Employees' Retirement Board 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 Public Employees' Retirement Board no later than 5:00 p.m. on November 24, 2003, to advise us of the nature of the accommodation that you need. Please contact Carolyn Miller, Public Employees' Retirement Board, 100 North Park Avenue, Suite 200, P.O. Box 200131, Helena, Montana 59620-0131; telephone (406) 444-7939; TDD (406) 444-1421; FAX (406) 444-5428; e-mail cmiller@state.mt.us.

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

2.43.437 MILITARY SERVICE (1) Members who meet the requirements of their retirement systems may purchase active and reserve military service. The cost will equal the actuarial rate for the respective system times the member's compensation for the immediately preceding 12 months. Each full month of additional service will cost 1/12 the cost of a full year.

(2) Highway patrol officers who did not elect GABA will pay a different cost for military service, whether active or reserve. The cost will equal the contributions for the year of service the member must complete to purchase the year of military service. For example, a member purchasing the first year of military service would pay an amount equal to the contributions for the member's 16th year of service. To purchase the 2nd, 3rd, and 4th years, the member would pay an amount equal to the contributions for the 17th, 18th, and 19th years of service, respectively. The member must also pay interest forward from the date the member is eligible to purchase the service to when payment is complete. The interest

is the rate set by the board for member accounts.

~~(3) Members of PERS may purchase Korean or Vietnam military service at a different cost. The cost will equal the contributions for the year of service the member must complete to purchase the year of military. For example, a member purchasing the first year of military would pay an amount equal to the contributions for the member's 11th year of service. To purchase the 2nd, 3rd, and 4th years, the member would pay an amount equal to the contributions for the 12th, 13th, and 14th years of service, respectively. The member must also pay interest forward from the date the member is eligible to purchase the service to when payment is complete. The interest is the rate set by the board for member accounts.~~

(3) The following requirements pertain to the purchase of membership service and service credit for the member's reserve military service in the armed forces, including the national guard:

(a) The time spent in reserve military service must be confirmed on appropriate documentation from the proper branch of the armed forces.

(b) The member may not purchase any more reserve military service for a one year period than the amount of reserve military service that, when combined with all other earned or purchased service for that one year period, does not exceed one year of service credit. The reserve military service cannot be purchased if the member has received service credit for the same time period.

(c) The member may purchase reserve military service even if that period of service may be, or is, used to determine the member's right to, or amount of, military service retired pay under federal law, as provided by Title 10, chapter 1223 of the United States Code.

(d) The member may purchase reserve military time prior to separation from service in the reserves.

AUTH: 19-2-403, ~~19-3-304, 19-6-201, 19-7-201, 19-8-201, 19-9-201, 19-13-202~~, MCA

IMP: 19-3-503, 19-5-410, ~~19-6-304, 19-6-801, 19-7-310, 19-7-803, 19-8-304, 19-8-901, 19-9-403, 19-13-403~~, MCA

REASON: Effective July 1, 2003, members of any retirement system administered by the Montana Public Employees' Retirement Board (the Board) may purchase service credit and membership service for time spent in reserve military service. Federal law, specifically 10 United States Code section 12736, bars states which allow credit for reserve military service from denying credit to members who will receive a military pension based on that service. The proposed changes and additions to this rule are necessary to inform retirement system members of the requirements for purchase of reserve military time, and to clarify that reserve military service includes service in the national guard.

The existing section (3) is proposed to be deleted as the statute on which it was based sunset on June 30, 2001.

4. ARM 2.43.436 which can be found on page 2-3144 of the Administrative Rules of Montana, is proposed to be repealed because effective July 1, 2003, all members of the Firefighters' Unified Retirement System (FURS) and all members of the Sheriffs' Retirement System (SRS) who purchase military service, whether active or reserve, are eligible to receive both service credit and membership for that service. Furthermore, all members of FURS and SRS who purchase military service now purchase that service based on its actuarial cost. Therefore this rule no longer applies to any member of the FURS or the SRS.

AUTH: 19-2-403, MCA  
IMP: 19-7-803, 19-13-403, MCA

5. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Mike O'Connor, Executive Director, Public Employees' Retirement Board, 100 North Park Avenue, Suite 200, P.O. Box 200131, Helena, Montana 59620-0131; FAX (406) 444-5428; e-mail moconnor@state.mt.us and must be received no later than December 11, 2003.

6. Carolyn Miller, Montana Public Employee Retirement Administration, P.O. Box 200131, Helena, Montana 59620-0131 has been designated to preside over and conduct the hearing.

7. The Public Employees' Retirement Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding public retirement rulemaking actions. Such written request may be mailed or delivered to Carolyn Miller, Public Employees' Retirement Board, 100 North Park Avenue, Suite 200, P.O. Box 200131, Helena, Montana 59620-0131; faxed to the office at (406) 444-5428; or e-mailed to cmillerstate.mt.us, or may be made by completing a request form at any rules hearing held by the Public Employees' Retirement Board.

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

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

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

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

Certified to the Secretary of State on November 3, 2003.

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

In the matter of the proposed	)	NOTICE OF PUBLIC HEARING
amendment of ARM 6.6.1610	)	ON PROPOSED AMENDMENT AND
pertaining to collection	)	REPEAL
in advance of fees for a	)	
public adjuster's	)	
license and examination,	)	
ARM 6.6.4206 pertaining to	)	
certification requirements for	)	
licensees and limit on credit	)	
for courses repeated, and the	)	
proposed repeal of ARM	)	
6.6.4207 pertaining to	)	
extensions of time for course	)	
completions	)	

TO: All Concerned Persons

1. On December 3, 2003, at 10:00 a.m., a public hearing will be held in the 2nd floor conference room, State Auditor's Office, 840 Helena Avenue, Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules.

2. The State Auditor's Office 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 office no later than 5:00 p.m., November 26, 2003, to advise us of the nature of the accommodation needed. Please contact Darla Sautter, State Auditor's Office, 840 Helena Avenue, Helena, Montana 59601; telephone (406) 444-2726; facsimile (406) 444-3497 or e-mail to dsautter@state.mt.us.

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

6.6.1610 THE COMMISSIONER SHALL COLLECT IN ADVANCE THE FEES FOR A PUBLIC ADJUSTER'S LICENSE AND EXAMINATION

- (1) The commissioner shall collect in advance the fees as for an adjuster's license listed in ~~under~~ 33-2-708(j)(i), MCA., ~~and~~
- ~~(2) for each examination, a fee of ten dollars.~~

AUTH: 33-1-313 and ~~33-17-102~~ 33-17-301, MCA  
IMP: ~~33-17-102(1)(e)~~ 33-2-708, MCA

6.6.4206 CERTIFICATION REQUIREMENTS FOR LICENSEES AND LIMIT ON CREDIT FOR COURSES REPEATED

(1) Each licensee subject to these rules must file an appropriate certificate of completion and pay the required certification fee ~~each year in the first six months of the calendar year for courses~~

~~completed in the preceding year based on a schedule set by the commissioner.~~ Such certification must be submitted on a schedule established on forms supplied or approved by the commissioner, and completed in their entirety.

(2) remains the same.

AUTH: 33-1-313 and 33-17-1206, MCA  
IMP: 33-17-1203 and 33-17-1204, MCA

4. The rule proposed to be repealed provides as follows:

6.6.4207 EXTENSIONS OF TIME FOR COURSE COMPLETIONS on page 6-1066 of the Administrative Rules of Montana.

AUTH: 33-1-313 and 33-17-1206, MCA  
IMP: 2-4-631 and 33-17-1205, MCA

5. REASONABLE NECESSITY STATEMENT: It is necessary to amend ARM 6.6.1610, ARM 6.6.4206 and repeal ARM 6.6.4207 in order to bring them into compliance with legislative statute changes made during the 2003 session. The deletion of ARM 6.6.1610(2) eliminates an existing fee. No public adjuster license examinations have been taken during the past two fiscal years. The State Auditor's Office cannot estimate the number of persons who might take the public adjuster examination in the future. The elimination of this fee has no fee impact.

6. 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 Darla Sautter, State Auditor's Office, 840 Helena Avenue, Helena, Montana 59601, or by facsimile (406) 444-3497, or by e-mail, addressed to dsautter@state.mt.us, and must be received no later than December 11, 2003.

7. Christina L. Goe has been designated to preside over and conduct the hearing.

8. The State Auditor's Office maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies whether the person wishes to receive notices regarding insurance rules, securities rules, or both. Such written requests may be mailed or delivered to the State Auditor's Office, 840 Helena Avenue, Helena, Montana 59601, or by facsimile to (406) 444-3497, or e-mailed to dsautter@state.mt.us, or may be made by completing a request form at any rules hearing held by the State Auditor's Office.

9. The effective date will be January 1, 2004.

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

JOHN MORRISON, State Auditor  
and Commissioner of Insurance

By: /s/ Alicia Pichette  
Alicia Pichette  
Deputy Insurance Commissioner

By: /s/ Christina L. Goe  
Christina L. Goe  
Rules Reviewer

Certified to the Secretary of State on November 3, 2003.

BEFORE THE BOARD OF RADIOLOGIC TECHNOLOGISTS  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the proposed ) AMENDED NOTICE OF  
adoption of NEW RULES I, II, ) PUBLIC HEARING -  
III and IV pertaining to ) CANCELLATION OF PUBLIC  
radiologist assistants, scope ) HEARING AND WITHDRAWAL  
of practice, supervision, and ) OF PROPOSED RULES  
adoption of a code of ethics )

TO: All Concerned Persons

1. On October 30, 2003, the Board of Radiologic Technologists published MAR Notice No. 8-56-28 regarding the proposed adoption of the above-stated rules relating to radiologic assistants at page 2362 of the 2003 Montana Administrative Register, issue no. 20.

2. The Board has decided to withdraw the proposed rules from consideration at this time, and to cancel the public hearing regarding the proposed rules.

3. The Board intends to offer a revised set of proposed rules on the same topic in the near future. The Board will publish the revised version of the proposed rules in the Montana Administrative Register and mail a copy of the revised proposed rules to everyone on its interested persons list once the revisions are complete.

BOARD OF RADIOLOGIC TECHNOLOGISTS  
JOHN ROSENBAUM, CHAIRMAN

/s/ MARK CADWALLADER  
Mark Cadwallader,  
Alternate Rule Reviewer

/s/ WENDY J. KEATING  
Wendy J. Keating, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State November 3, 2003.

BEFORE THE BOARD OF RESPIRATORY CARE PRACTITIONERS  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the proposed ) NOTICE OF PUBLIC  
amendment of ARM 24.213.301 ) HEARING ON PROPOSED  
and ARM 24.213.401, and the ) AMENDMENT AND ADOPTION  
adoption of NEW RULES I, II and )  
III, pertaining to definitions, )  
the fee schedule, guidelines )  
for conscious sedation, the )  
abatement of fees, and )  
qualifications to perform )  
certain procedures )

TO: All Concerned Persons

1. On December 19, 2003, at 10:00 a.m., a public hearing will be held in room 438, Park Avenue Building, 301 South Park, Helena, Montana to consider the proposed amendment and adoption of the above stated rules.

2. The Department of Labor and Industry 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 Respiratory Care Practitioners no later than 5:00 p.m. on December 12, 2003, to advise us of the nature of the accommodation that you need. Please contact Helena Lee, Board of Respiratory Care Practitioners, 301 South Park, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2385; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdrpc@state.mt.us.

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

24.213.301 DEFINITIONS (1) through (3) remain the same.

(4) The board defines "pulse oximetry," "pulmonary function testing" and "spirometry" as diagnostic procedures that, pursuant to the orders of a physician, may be performed only by, or under clinical supervision of, a licensed respiratory care practitioner and/or other licensed health care provider who has met the minimum competency standards. ~~The individual performing pulmonary function testing and spirometry must meet minimum competency standards, as they currently exist, as established by the national institute for occupational safety and health (NIOSH) or the national board for respiratory care (NBRC) certification examination for entry level respiratory therapist, certification examination for entry level pulmonary function technologist (CPFT) credential or registry examination for advanced pulmonary~~

~~function technologists (RPFT) specific to pulmonary function testing.~~

AUTH: 37-1-131, 37-28-104, MCA  
IMP: 37-28-101, 37-28-102, MCA

REASON: The Board has determined there is reasonable necessity to amend the rule to clarify that an entry-level respiratory therapist (CRT) or an advanced level respiratory therapist (RRT) may perform pulse oximetry, pulmonary function testing and spirometry in response to questions from licensees. The Board believes that removing the practitioner qualifications from the "definitions" rule and placing those qualifications into a separate rule (see NEW RULE III) will make it easier for licensees, staff and the public to find the information. There is also reasonable necessity to amend the AUTH citations to include an additional applicable statute while otherwise amending the rule.

24.213.401 FEE SCHEDULE (1) The following fees are hereby adopted:

(a) Application fee	\$ <del>20</del> <u>50</u>
(b) License fee	<del>40</del> <u>50</u>
(c) Renewal fee	<del>50</del> <u>100</u>
(d) Temporary permit	<del>30</del> <u>50</u>
(e) Late renewal fee	<del>20</del> <u>40</u>
(f) Inactive license fee	<del>10</del> <u>30</u>

AUTH: 37-1-134, 37-28-104, MCA  
IMP: 37-28-104, 37-28-202, 37-28-203, MCA

REASON: The Board of Respiratory Care Practitioners has determined that there is reasonable necessity to amend ARM 24.213.401 in order to set the Board's fees at a level commensurate with program costs, as required by 37-1-134, MCA. The Board estimates that approximately 540 persons (500 active licensees, 20 inactive status licensees, and 20 new applicants) will be affected by the proposed fee changes. The Board's licenses are issued on a two-year renewal cycle, with renewals coming due in even-numbered years. The estimated biennial increase in revenue is approximately \$26,800. With the proposed fee increases, the Board's projected annual revenue is \$54,000 during the even-numbered years and \$3,200.00 during the odd-numbered years. The Board's appropriation for fiscal year 2004 is \$27,147.00 and for fiscal year 2005 is \$25,563. The Board's Departmental recharge has been increased by \$10,621 in fiscal year 2004 and by \$11,104 in fiscal year 2005. The increase is the result of the recharge now being calculated and based on the percentage of FTE needed to provide administrative support to the Board. The Board last raised its fees in fiscal year 2001.

4. The proposed new rules provide as follows:

NEW RULE I INSTITUTIONAL GUIDELINES CONCERNING EDUCATION AND CERTIFICATION -- WHEN REQUIRED

(1) Institutions that use or employ respiratory care practitioners who administer intravenous (IV) conscious sedation may do so only if the institution has adopted specific guidelines regarding the education and training of those respiratory care practitioners.

(2) The board recommends the following be incorporated as minimum standards into an institution's guidelines regarding moderate or deep sedation:

(a) at least one qualified individual trained in basic life support skills, such as CPR and bag-valve-mask ventilation, should be present in the procedure room; and

(b) there must be immediate availability (not more than five minutes away) of an individual with advanced life support skills training and equipment, such as tracheal intubation, defibrillation, and resuscitation medications.

(3) The board recommends regarding deep sedation that an individual with advanced life support skills training and equipment, such as tracheal intubation, defibrillation, and resuscitation medications, be present in the procedure room.

(4) The board recommends, but does not require, that all respiratory care practitioners performing IV conscious sedation have ACLS accreditation.

(5) The board recommends that individuals responsible for patients receiving sedation or analgesia should understand the pharmacology of the agents that are administered, as well as the role of pharmacologic antagonists for opioids and benzo-diazepines. Individuals monitoring patients receiving sedation or analgesia should be able to recognize the associated complications.

AUTH: 37-1-131, 37-28-104, MCA  
IMP: 37-28-101, 37-28-102, MCA

REASON: The Board believes it is reasonable and necessary to adopt NEW RULE I to clarify and establish the meaning of that certain Declaratory Ruling dated January 6, 2003, published at page 26 of the 2003 Montana Administrative Register, Issue Number 1, wherein it was stated that the Board would establish the prerequisites for proper administration and monitoring of conscious intravenous (IV) sedation and the scope of authority. This NEW RULE I will set the standard and require that an individual with advanced life support skills be immediately available (within five minutes) for moderate sedation. Based upon the concerns raised by the Montana Board of Nursing, the Board of Respiratory Care Practitioners believes NEW RULE I will serve to help protect the public health, safety and welfare.

NEW RULE II ABATEMENT OF RENEWAL FEES (1) This rule is intended to provide a process whereby the board may reduce its cash balance when the board's cash balance is excessive. This

rule provides for an abatement of certain fees when that cash balance is excessive.

(2) Except as provided by (3), when the board has an excessive cash balance, the department may abate the renewal fees for its licensees or registrants for one or more renewal cycles until the board's cash balance does not exceed allowable maximums.

(a) The abatement of renewal fees may be the total amount of the renewal fee or a specified portion of that fee.

(b) If the board has more than one category of renewals, the abatement must be made on a roughly proportional basis to fairly, equitably, reasonably and economically distribute the abatement among the program's licensees or registrants. The department may, for good cause, completely abate the renewal fee for certain classes of licensees or registrants and not for other classes, if the administrative cost of processing a reduced renewal for all classes is disproportionately high. In such case, the department must attempt in any future abatements to equitably treat those classes of renewals which have borne a relatively higher proportion of renewal fees.

(c) The fact that a renewal fee is abated for any given renewal cycle does not excuse the licensee or registrant from otherwise fulfilling renewal requirements, including submission of a renewal application and any continuing education documentation. The board, to the extent it provides by rule, may impose a late fee on untimely submissions of renewal applications or other required documentation.

(3) This rule will not apply when an exception to 17-2-302, MCA, exists and is applicable to the board's cash balance. (As an example, if the board adopts a three-year renewal cycle, the board will have an apparent excess cash balance during the first year of the renewal cycle, based upon a collection of three years worth of fees for operational expense.)

(4) This rule does not relieve the board from the duty of establishing fees at a level commensurate with costs.

AUTH: 37-1-101, 37-1-131, MCA

IMP: 17-2-302, 17-2-303, 37-1-101, 37-1-131, 37-1-134,  
MCA

REASON: The Board has determined that it is reasonably necessary to adopt NEW RULE II to ensure that the Board of Respiratory Care Practitioners and the Department have a methodology in place to promptly address any potential future excess cash accumulations that might be generated by the board's licensing programs. Excess cash accumulations are generally prohibited in 17-2-302, MCA, and a reduction in fees is required pursuant to 17-2-303, MCA. NEW RULE II is designed to be proactive in nature. The Board and the Department note that there needs to be a fee abatement rule in effect before the Board could decide on a waiver of fees, if such a decision becomes necessary in the future. The Department notes that at least one of the administratively

attached boards has an excessive cash balance, and has had to propose and adopt a similar rule in order to address the issue. The Department has prepared a model rule for fee abatements, which it is urging the various boards adopt in advance so that each board can promptly remedy any such excess cash accumulation that might arise. Accordingly, there is reasonable necessity to adopt NEW RULE II at this time, even though the Board does not currently have an accumulation of excess cash.

NEW RULE III AUTHORIZATION TO PERFORM PULMONARY FUNCTION TESTING AND SPIROMETRY (1) A licensee performing pulmonary function testing or spirometry must meet minimum competency standards as established by the national institute for occupational safety and health (NIOSH) or the national board for respiratory care (NBRC).

(2) A licensee is authorized to perform pulmonary function testing and spirometry if the individual has passed any one of the following certification or registry examinations:

- (a) entry level respiratory therapist (CRT);
- (b) advanced level respiratory therapist (RRT);
- (c) entry level pulmonary function technologist (CPFT);

or

- (d) advanced pulmonary function technologist (RPFT).

AUTH: 37-1-131, 37-28-104, MCA

IMP: 37-1-131, 37-28-102, 37-28-104, MCA

REASON: There is reasonable necessity to adopt NEW RULE III to clarify what credentials are required to perform pulmonary function testing and spirometry, based on recent questions posed by licensees. The new rule clarifies information currently found in ARM 24.213.301(4), above, and presents it in a more user-friendly format.

5. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Respiratory Care Practitioners, 301 South Park, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to [dlibsdrpc@state.mt.us](mailto:dlibsdrpc@state.mt.us) and must be received no later than 5:00 p.m., December 19, 2003.

6. An electronic copy of this Notice of Public Hearing is available through the department's site on the World Wide Web at <http://discoveringmontana.com/dli/bsd> under the Board of Respiratory Care Practitioner's rule notice section. The department strives to make the electronic copy of this notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version, only the official printed text will be considered.

In addition, although the department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the comment forum do not excuse late submission of comments.

7. The Board of Respiratory Care Practitioners maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the board. Persons who wish to have their name included on the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Respiratory Care Practitioners administrative rulemaking proceedings. Such written request may be mailed or delivered to the Board of Respiratory Care Practitioners, 301 S. Park, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2323, e-mailed to [dlibsdrpc@state.mt.us](mailto:dlibsdrpc@state.mt.us) or may be made by completing a request form at any rules hearing held by the agency.

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

9. Lon Mitchell, attorney, has been designated to preside over and conduct this hearing.

BOARD OF RESPIRATORY CARE PRACTITIONERS  
GREGORY PAULAUSKIS, PRESIDENT

/s/ WENDY J. KEATING  
Wendy J. Keating, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

/s/ MARK CADWALLADER  
Mark Cadwallader  
Alternate Rule Reviewer

Certified to the Secretary of State November 3, 2003.

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

In the matter of the adoption	)	NOTICE OF PROPOSED
of new rule I and the	)	ADOPTION AND AMENDMENT
amendment of ARM 37.86.2207	)	
and 37.86.2230 pertaining to	)	
early and periodic screening,	)	
diagnostic and treatment	)	NO PUBLIC HEARING
services (EPSDT), school based	)	CONTEMPLATED
transportation and health	)	
related services	)	

TO: All Interested Persons

1. On December 13, 2003, the Department of Public Health and Human Services proposes to adopt and amend the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you need to request an accommodation, contact the department no later than 5:00 p.m. on December 3, 2003, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

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

RULE I EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), SCHOOL BASED SPECIALIZED TRANSPORTATION SERVICES (1) Coverage of specialized transportation is limited to transportation of clients with disabilities for the purpose of obtaining nonemergency medical services covered by the medicaid program.

(a) The client must be in need of specialized transportation due to the client either being wheelchair-bound or subject to transport by stretcher.

(2) Coverage of specialized transportation is not available if another mode of transportation is appropriate for the transport of the client and is less costly.

(3) Specialized transportation services must be listed in the medicaid client's individualized education plan (IEP).

(4) Specialized transportation services may only be reimbursed by medicaid if the medicaid client receives a medicaid covered service listed in his or her IEP on the day transportation is provided.

AUTH: Sec. 53-6-113, MCA

IMP: Sec. 53-6-101 and 53-6-111, MCA

3. The rules as proposed to be amended provide as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.86.2207 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), REIMBURSEMENT (1) Reimbursement for an EPSDT service, except as otherwise provided in this rule, is the lowest of the following:

(a) through (c) remain the same.

(d) for public agencies, cost based reimbursement as determined in accordance with OMB Circular A-87, Cost Principles for State, Local and Indian Tribal Governments as established and approved by the department. The department ~~hereby~~ adopts and incorporates ~~herein~~ by reference the OMB Circular A-87, Cost Principles for State, Local and Indian Tribal Governments, as further amended August 29, 1997. A copy of OMB Circular A-87 may be obtained from the Department of Public Health and Human Services, ~~Health Policy and Services Division~~ Child and Adult Health Resources Division, Medicaid Services Bureau, P.O. Box 202951, Helena, MT 59620-2951.

(2) Reimbursement for outpatient chemical dependency treatment, nutrition, and private duty nursing services is specified in the department's EPSDT fee schedule. The department hereby adopts and incorporates by reference the department's EPSDT fee schedule dated July 2003. A copy of the fee schedule may be obtained from the Department of Public Health and Human Services, ~~Health Policy and Services Division~~ Child and Adult Health Resources Division, Medicaid Services Bureau, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(3) through (8) remain the same.

(9) ~~School~~ Reimbursements for school based health related services are specified in the school based health service fee schedule dated January 1, 2004. Rates are reimbursed at 90% of the fees as specified in (1)(a) through (1)(d), adjusted to reimburse these services at the federal matching assistance percentage (FMAP) rate.

(10) The department will not reimburse providers for two services that duplicate one another on the same day. The department ~~hereby~~ adopts and incorporates by reference the matrix of services excluded from simultaneous reimbursement dated January 1, 2003. A copy of the matrix is posted on the internet at the department's home page at ~~www.dphhs.state.mt.us/divisions/hcs/provider\_fee\_schedule.htm~~ www.dphhs.state.mt.us/about\_us/divisions/addictive\_mental\_disorders/services/mhap\_services\_excluded\_from\_simultaneous.pdf or may be obtained by writing the Department of Public Health and Human Services, Addictive and Mental Disorders Division, 555 Fuller, P.O. Box 202905, Helena, MT 59620-2905.

(11) Information regarding current reimbursement or copies of fee schedules for EPSDT services may be obtained from the Department of Public Health and Human Services, ~~Health Policy and Services Division~~ Child and Adult Health Resources Division,

Medicaid Services Bureau, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

AUTH: Sec. 53-2-201 and 53-6-113, MCA

IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

37.86.2230 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), SCHOOL BASED HEALTH RELATED SERVICES

(1) remains the same.

(2) School based health related services may include:

(a) through (h) remain the same.

(i) licensed professional counselor services; ~~and~~

(j) comprehensive school and community treatment; and

(k) specialized transportation.

(3) through (5) remain the same.

AUTH: Sec. 53-6-113, MCA

IMP: Sec. 53-6-101 and 53-6-111, MCA

4. The proposed rule changes to ARM 37.86.2207, 37.86.2230 and new rule I state the requirements that school based providers of specialized transportation must meet to qualify for Medicaid reimbursement. These rule amendments and changes are necessary to further define school based transportation services, which are provided pursuant to 53-6-101, MCA. The 2001 legislature issued a directive under HB 2 to allow DPHHS increased federal spending authority for school based medical services covered by Medicaid. It is now necessary to update the rules so school providers are aware of the new service they are able to bill and also to notify the public of this change. The rule update will benefit the Medicaid program as well as school providers as an additional service will be available to children at no cost to the state.

This program is a cooperative effort among the Office of Public Instruction (OPI), Department of Public Health and Human Services (DPHHS) and school districts. The rules are intended to coordinate with the existing state statutes and rules regarding client transportation generally and are targeted to address the needs of Medicaid eligible clients who are identified as eligible for special education, receiving school based medicaid services and that qualify for specialized transportation to school.

The new rule states the following criteria for coverage of specialized, school based transportation for medicaid eligible clients:

The client must need specialized transportation because he or she is wheelchair-bound or transported by stretcher.

The mode of transportation is appropriate and the least costly.

Specialized transportation services are listed in the client's individualized education plan (IEP).

The client receives a Medicaid covered service listed in his or her IEP on the day transportation is provided.

These criteria establish a method of delivering cost effective and efficient school based transportation services without unnecessary duplication of administrative effort by DPHHS and schools.

The Office of Public Instruction will certify the general fund match for Medicaid expenditures to schools. DPHHS will draw down and pay school based Medicaid providers the federal medical assistance percentage of the established fees for schools. Only the federal portion on the established fees are reimbursed to schools; therefore, there will be no additional monies expended by Medicaid. DPHHS estimates that school based providers may receive an additional \$1 million annually if school districts choose to participate in the program.

School based transportation services are added as a EPSDT service. The additional revenue to the schools is estimated to be \$1 million. Other school based medical services are currently being reimbursed. In state fiscal year 2002, Medicaid reimbursed \$1.2 million for school based services provided by 71 providers to 1,837 clients.

Finally, the Department is updating the website location of the matrix of services in ARM 37.86.2207. Recently the Department's Office of Technology Division reorganized and updated the entire Department website. As a result, the location of the matrix was changed. It is necessary to change the website address to the new location, otherwise members of the public and providers would not be able to locate the reimbursement matrix. This change will actually be reflected in the September quarter ARM update pages as both the Secretary of State and the Department thought it was imperative that the correct website address be published as soon as possible to allow the public and providers to access the matrix. If the Department were to wait until it was reflected through publication in the Montana Administrative Register, there would be a gap of 3 to 5 months before it appeared in the ARM since the updates are done on a quarterly basis.

5. The Department proposes these rule changes will be effective January 1, 2004. There is no adverse impact to this effective date. There is currently no Medicaid reimbursement for school based specialized transportation services.

6. Interested persons may submit their data, views or arguments concerning the proposed action in writing to Kathy

Munson, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than 5:00 p.m. on December 11, 2003. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

7. If a person who is directly affected by the proposed action wishes to express data, views and arguments orally or in writing at a public hearing, that person must make a written request for a public hearing and submit such request, along with any written comments to Kathy Munson, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us no later than 5:00 p.m. on December 11, 2003.

8. If the Department of Public Health and Human Services receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of those who are directly affected by the proposed action, from the Administrative Rule Review Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who are directly affected, a hearing will be held at a later date and a notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 4 based on the 45 schools affected by rules covering early and periodic screening, diagnostic and treatment services, school based health related services.

Russell Cater  
Rule Reviewer

Russell Cater for Gail Gray  
Director, Public Health and  
Human Services

Certified to the Secretary of State November 3, 2003.

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

In the matter of the adoption	)	NOTICE OF PUBLIC HEARING
of new rules I and II and the	)	ON PROPOSED ADOPTION AND
amendment of ARM 37.79.101,	)	AMENDMENT
37.79.102, 37.79.201,	)	
37.79.202, 37.79.206,	)	
37.79.207, 37.79.301,	)	
37.79.302, 37.79.303,	)	
37.79.308, 37.79.309,	)	
37.79.316, 37.79.317,	)	
37.79.321, 37.79.322,	)	
37.79.326, 37.79.501,	)	
37.79.503, 37.79.504,	)	
37.79.505, 37.79.601,	)	
37.79.602, 37.79.605,	)	
37.79.606, 37.79.607, and	)	
37.79.801 pertaining to	)	
children's health insurance	)	
plan (CHIP)	)	

TO: All Interested Persons

1. On December 3, 2003, at 1:30 p.m., a public hearing will be held in the auditorium of the Sanders Building, 111 Sanders, Helena, Montana to consider the proposed adoption and amendment of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on November 26, 2003, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

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

RULE I ELIGIBILITY VERIFICATION REVIEWS (1) To verify the eligibility determination process, a random sample of families will be required to participate in an eligibility verification review and provide documentation to verify the income information as stated on their applications.

(a) A family will have 14 days from the date of the written request by the department to submit the required income documentation.

(b) If a family does not provide documentation, CHIP-eligible applicants will be taken off the CHIP waiting list or

disenrolled, as appropriate.

(c) A family who provides documentation after 14 days will have the application reprocessed as if it is a new application.

(2) If an enrollee's family income exceeds CHIP income guidelines, the enrollment will be terminated and if applicable, the applicant's name will be removed from the waiting list.

(3) For purposes of this rule, necessary income documentation may include one or more of the following:

- (a) pay stubs or other pay statements;
- (b) employee's W-2 forms;
- (c) state or federal income tax returns;
- (d) union records;
- (e) check copies;
- (f) self-employment bookkeeping records;
- (g) sales and expenditure records;
- (h) employer's wage or payroll records;
- (i) award notices or award letters;
- (j) correspondence from an employer specifying a benefit;
- (k) records of any government payor; or
- (l) other appropriate, persuasive documentation may be accepted at the discretion of the department.

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1004, MCA

RULE II PROVISIONAL BENEFITS, DETERMINATION OF ELIGIBILITY AND APPLICATIONS FOR CHIP

(1) Provisional CHIP benefits may be extended to enrollees who would otherwise lose health care coverage while awaiting a medicaid determination. Provisional coverage may be extended to enrollees who:

- (a) submit a completed CHIP renewal application before their CHIP benefits are scheduled to end;
- (b) have been determined potentially eligible for medicaid coverage; and
- (c) are awaiting a medicaid eligibility determination.

(2) A determination of CHIP eligibility will be completed within 20 working days after receipt of a complete application.

(3) Applications for applicants who appear to be medicaid eligible will be forwarded to the appropriate county office of public assistance for a medicaid eligibility determination within 20 working days after receipt of a complete application.

(a) Applicants who are denied medicaid coverage for failure to comply with medicaid eligibility requirements:

- (i) are not eligible for CHIP benefits; and
- (ii) will not have their application referred to other health care resources.

(b) CHIP applications will be processed for those applicants who subsequently provide information which would preclude them from medicaid eligibility.

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1004, MCA

3. The rules as proposed to be amended provide as

follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.79.101 CHILDREN'S HEALTH INSURANCE PROGRAM PLAN (CHIP)

(1) The rules in this subchapter implement the children's health insurance program, which is provided through the children's health insurance plan (CHIP). ~~This program CHIP~~ is jointly funded by the federal and state government. The purpose of ~~the program CHIP~~ is to provide health care benefits to ~~uninsured children of~~ individuals under the age of 19 years from low income families who are not eligible for the Montana medicaid program.

AUTH: Sec. 53-4-1004 and 53-4-1009, MCA

IMP: Sec. 53-4-1003, 53-4-1004 and 53-4-1009, MCA

37.79.102 DEFINITIONS As used in this subchapter, unless expressly provided otherwise, the following definitions apply:

(1) remains the same.

(2) "Applicant" means ~~a child~~ an individual under the age of 19 years who ~~has applied for CHIP benefits~~ or whose parent or guardian has applied for CHIP benefits on the ~~child's individual's~~ behalf, ~~for CHIP.~~

(3) "Benefits" means the services ~~the child~~ an enrollee is eligible for as outlined in this subchapter. All benefits with the exception of dental and eyeglasses services, are provided to ~~the child~~ an enrollee through the insurer.

~~(4) "Beneficiary" means a child who is eligible to receive CHIP benefits as determined by the department under this subchapter and is enrolled with an insurer. A child is not a beneficiary pending issuance of a hearing decision or during any period a hearing officer determines the child was not eligible for CHIP benefits.~~

~~(5)~~ (4) "Benefit year" means the period from October 1st through September 30th of a calendar year. If ~~a child~~ an individual is enrolled in CHIP after October 1st, the benefit year is the period from the date of enrollment through September 30th of the calendar year.

~~(6)~~ (5) "Children's health insurance ~~program plan~~ (CHIP)" means the children's health insurance program plan described in this subchapter and administered by the department under Title XXI of the Social Security Act.

(6) "Department" means the Montana department of public health and human services.

(7) "Earned income" means income ~~of any kind~~ received from employment, self-employment activity, profession, vocation or pastime and includes wages, salaries, tips, commissions, profits, farm or ranch income and honoraria.

(8) "Emergency medical condition" means a medical condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that a prudent layperson, with an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in any of the following:

(a) serious jeopardy to the health of the individual enrollee or, ~~in the case of a pregnant woman, the health of the woman or her~~ the enrollee's unborn child;

(b) and (c) remain the same.

(9) "Enrollee" means an individual who is eligible to receive CHIP benefits as determined by the department under this subchapter and is enrolled with an insurer. An individual is not an enrollee while on a waiting list or pending issuance of a hearing decision or during any period a hearing officer determines the individual was not eligible for CHIP benefits.

~~(9)~~ (10) "Eyeglasses" means corrective lenses and/or frames prescribed by an ophthalmologist or by an optometrist to aid and improve vision.

~~(10)~~ (11) "Family" means a group of two or more persons related by birth, marriage or adoption who live together. Family members must be children and parents individuals who are residing together as a single economic unit. Family members Members of the economic unit are considered to live together even though a family member may reside temporarily in a residential treatment setting. For purposes of this subchapter, a self-declared emancipated minor living alone shall be considered a family an economic unit.

(12) "Family span" means the 12 month period of eligibility beginning the first day of the month after an applicant qualifies for CHIP benefits and ending the last day of the 12th month. Although qualified for CHIP benefits, applicants placed on the waiting list may not be enrolled during the entire family span.

~~(11)~~ (13) "Federal poverty level (FPL)" means the poverty income guidelines for the contiguous 48 states and the District of Columbia most recently published in the federal register as of the end of the month immediately preceding the month in which an application is submitted 2003 published in the Federal Register by the U.S. department of health and human services.

(12) (14) "Guardian" means the custodial parent or other a person granted legal custody guardianship of a child by court order, judgment or decree.

(13) (15) "Incarcerated" or "inmate of a public institution" means a child living in a facility which would be termed a public institution under medicaid regulations at 42 CFR 435.1009.

(14) (16) "Income" or "family income" means the adjusted gross earned income of all family members as defined by federal tax law and regulations plus unearned income of the family as defined in this rule. Regular, continuing and intermittent sources of income will be annualized for purposes of determining the annual income level. Family income does not include:

~~(a) Income does not include:~~

~~(i)~~ (a) earned income of children individuals in the household who are under 19 years of age, unless they are of school age and are not attending school or are emancipated minors;

~~(ii)~~ (b) money received as from assets drawn down such as withdrawals from a bank savings account, an annuity or from the

sale of a house or a car;

~~(iii) (c) gifts, loans, one-time insurance payments, except as beneficiary of a life insurance policy, or compensation for an injury;~~

(14)(a)(iv) through (vi) remain the same but are renumbered (16)(d) through (f).

(15) and (16) remain the same but are renumbered (17) and (18).

~~(17) (19) "Medicaid screening" means a determination by the department of a child's an individual's potential eligibility to receive medicaid benefits applying the criteria set forth in ARM Title 46, chapter 12 Title 37, chapter 82 and certain medicaid rules which disregard income.~~

~~(18) (20) "Medically necessary" or "medically necessary covered services" means services and supplies which are necessary and appropriate for the diagnosis, prevention or treatment of physical or mental conditions as described in this subchapter and that are not provided only as a convenience. The medicaid program definition of medically necessary services in ARM 37.82.102 does not apply to this subchapter.~~

(19) remains the same but is renumbered (21).

~~(20) (22) "Montana resident" means a U.S. citizen or qualified alien who declares himself or herself to be living in the state of Montana, including a migrant and or other seasonal workers worker.~~

(21) remains the same but is renumbered (23).

~~(22) "Physician's assistant (PA)" or "physician assistant certified" means a member of a health care team, approved by the board of medical examiners, who provides medical services that may include examination, diagnosis, prescription of medications, and treatment, as approved by the board of medical examiners, under the supervision of a licensed physician.~~

~~(23) (24) "Premium" means the amount of money the department pays monthly to an insurer for the provision of benefits for each beneficiary enrollee. The premium is paid whether or not the enrollee received covered benefits during the month for which the premium is intended. All benefits outlined in this subchapter, except eyeglasses and dental benefits, are paid by the department covered through payment of this premium.~~

~~(24) (25) "Primary care provider" means a participating health care professional designated by the insurer to supervise, coordinate or provide initial care or continuing care to a CHIP beneficiary enrollee and who may be required by the insurer to initiate a referral for specialty care and to maintain supervision of health care services to the CHIP beneficiary enrollee.~~

~~(25) (26) "Qualified alien" means a person residing legally in the United States, as defined by federal immigration laws and regulations and in ARM 46.18.140 37.78.220.~~

~~(26) (27) "State employee" means a person, including the CHIP child applicant, employed on a permanent basis by the state of Montana.~~

~~(27) (28) "Unearned income" means income of any kind which~~

that is not defined as earned under this subchapter and includes interest, dividends, distributions from trusts or estates, social security benefits, veteran's benefits or payments, workers' compensation, and unemployment compensation benefits and. Unearned income does not include per capita income to enrolled members of Native American tribes, or income excluded under federal medicaid regulations.

(29) "Waiting list" means a list of applicants who have been determined eligible for CHIP but who are not enrolled because funds are not available to pay their health care premiums.

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1003, MCA

37.79.201 ELIGIBILITY (1) ~~Children who have not been determined by the department to be eligible for or potentially eligible for medicaid are~~ An applicant may be eligible for covered services under CHIP if:

(a) the child applicant is under 19 years of age;

(b) the applicant's social security number is provided.

Benefits will not be denied or delayed to an otherwise eligible applicant pending issuance of his or her social security number;

~~(b)~~ (c) the family of which the child applicant is a member has a total family annual family income, without regard to other family resources, at or below 150% of the most recently published 2003 federal poverty level (FPL);

~~(c)~~ (d) the child applicant is a Montana resident;

~~(d)~~ (e) the child applicant is a U.S. citizen or qualified alien as defined under federal statute;

(f) the applicant is not incarcerated;

(g) the applicant is not an inpatient in an institution for mental disease on the date of enrollment;

~~(e)~~ (h) the child applicant does not have or has not had creditable health insurance coverage as defined in 42 USC 300gg(c) during the 3 three months prior to application applying for CHIP. This 3 three month waiting period shall not apply if the parent or guardian providing the insurance:

(i) through (v) remain the same.

(i) the applicant or the applicant's parent is not eligible for health insurance coverage under the state of Montana employee's health insurance plan unless a less-than-nominal contribution as defined in 42 CFR 457.310 is available from the State of Montana;

(j) the applicant is not eligible or potentially eligible for medicaid coverage as determined by the department; and

(k) the family's adjusted gross income is within the CHIP income guidelines for the family size.

(2) For purposes of determining the total family income under this rule, family debts, medical expenses or other financial circumstances are not considered. Income information for all family members must be included on the signed and dated application.

(a) Income information will be used by the department to

project the family's income.

(b) The family's debts, medical expenses or other financial circumstances will not be taken into consideration when determining family income.

~~(3) The applicant's guardian must submit a statement of income with the completed and signed application form and the necessary documentation to verify the income reported.~~

~~(4) For purposes of this rule, necessary income verification may include one or more of the following or other appropriate and persuasive documentation:~~

~~(a) pay stubs or other pay statements;~~

~~(b) employee's W 2 forms;~~

~~(c) state or federal income tax returns and associated forms and schedules;~~

~~(d) union records;~~

~~(e) check copies;~~

~~(f) self employment bookkeeping records;~~

~~(g) sales and expenditure records;~~

~~(h) employer's wage or payroll records;~~

~~(i) award notices or award letters;~~

~~(j) correspondence from an employer specifying a benefit;~~

~~or~~

~~(k) records of any government payer.~~

(3) An applicant whose CHIP enrollment ended because his or her parent was activated into military service and who was insured through tri-care, which is the insurance available to active duty and retired military families during the parent's military activation period, is not subject to the three month waiting period for previous creditable health insurance and will bypass the waiting list if he or she continues to be eligible for CHIP. Upon notification that the parent was deactivated and the applicant loses tri-care coverage, the applicant may be re-enrolled:

(a) the month after CHIP is notified, if the family has an open family span; or

(b) the month after a completed application is received and the applicant re-qualifies for CHIP benefits, if the family does not have an open family span.

~~(5) (4) Children Applicants eligible to receive services from the Indian health services (IHS) program administered by the United States department of health and human services are eligible for CHIP if they meet the criteria specified in this subchapter.~~

(5) Applicants who are losing medicaid coverage or who were denied medicaid for a reason other than the family withdrew their application or failed to comply with medicaid requirements will be:

(a) referred to CHIP via an electronic report;

(b) mailed a form to authorize the use and disclosure of health information that will include questions about the family's health insurance and whether health insurance is available to the family.

(6) Upon receipt by the department of a signed and completed authorization form for the use and disclosure of

health insurance information, the applicant will be notified:

(a) whether the applicant qualifies for benefits based on CHIP-pertinent information obtained electronically from the family's most recent medicaid application; or

(b) if additional information is required to make a decision.

(7) If the signed and completed authorization for the use and disclosure of health information form is received by CHIP:

(a) during the same month it was mailed to the family and the applicant qualifies for CHIP benefits, the applicant will bypass the CHIP waiting list and be enrolled the first day of the following month;

(b) during the same month it was mailed to the family and it cannot be determined whether the applicant qualifies for CHIP benefits, the applicant may receive up to one month of CHIP benefits while required information is being provided;

(c) the month after it was mailed to the family, the CHIP qualified applicant will be placed at the top of the CHIP waiting list; or

(d) if later than (7)(c), the CHIP qualified applicant will be treated as a new applicant and placed on the CHIP waiting list.

~~(6)~~ (8) Children Applicants and their parents or guardians must comply with the procedures specified by the insurer or the department or both as necessary to obtain or access benefits.

~~(7)~~ (9) CHIP ~~coverage does~~ benefits do not start until the child applicant is enrolled with the insurer even though the child applicant may have been ~~found~~ determined eligible for CHIP prior to the date of enrollment.

~~(8)~~ (10) CHIP eligibility is redetermined within ~~±~~ one year after the initial eligibility period, and annually thereafter. A renewal application must be completed, signed, dated and returned Guardians must complete all necessary forms and verifications by a specified date for purposes of eligibility redetermination. Prior eligibility for CHIP does not guarantee continued eligibility nor enrollment with an insurer.

~~(9)~~ (11) CHIP eligibility and benefits are not an entitlement. If funding is insufficient, the department may reduce enrollment numbers or reduce eligibility to a lower percentage of the federal poverty level to ~~reduce~~ limit the number of individuals who are eligible to participate.

(12) A determination of CHIP eligibility will be completed within 20 working days after receipt of a complete application.

AUTH: Sec. 53-4-1004 and 53-4-1009, MCA

IMP: Sec. 53-4-1003 and 53-4-1004, MCA

37.79.202 CHILDREN NOT ELIGIBLE NON-QUALIFYING APPLICANTS

(1) Children Applicants determined by the department to be eligible for medicaid through a medicaid application and eligibility determination screening process are not eligible to receive covered CHIP benefits under CHIP.

(2) Children Applicants determined by the department to be

potentially eligible for medicaid during the CHIP eligibility determination ~~must process will be screened and found ineligible for medicaid through a medicaid application and eligibility determination process before they are eligible to receive covered benefits under CHIP referred to their local office of public assistance for a determination of medicaid eligibility.~~

(3) ~~Children Applicants~~ who are themselves eligible or who have a guardian parent who is eligible for state employee insurance benefits are not eligible for CHIP.

(4) ~~Children Applicants~~ who apply for the CHIP program benefits while they are patients in an institution for mental disease (IMD) shall not be eligible for enrolled in CHIP until they are discharged from the IMD. A CHIP beneficiary enrollee who becomes a patient in an IMD shall not lose CHIP eligibility benefits solely because they are the enrollee is a patient in an IMD.

(5) ~~Children Applicants~~ who are incarcerated ~~in a public institution are not eligible for~~ cannot be enrolled in CHIP.

(6) Applicants who are not eligible for CHIP benefits because their family income exceeds the CHIP income guideline for the family size will be referred to other health care programs for children, as appropriate.

AUTH: Sec. 53-4-1004 and 53-4-1009, MCA

IMP: Sec. 53-4-1003 and 53-4-1004, MCA

37.79.206 ELIGIBILITY REDETERMINATION, NOTICE OF CHANGES

(1) Eligibility determinations shall be effective for a period of ± one year unless one or more of the following changes occurs:

(a) ~~the federal poverty level decreases;~~

~~(b) the child enrollee moves from the state of Montana;~~

(b) the enrollee moves, does not notify CHIP of the new address and CHIP is unable to locate the enrollee;

(c) the child enrollee is found to have other creditable health coverage;

(d) the child enrollee becomes an inmate of a public institution;

(e) the child enrollee reaches his 19th birthday attains the age of 19 years;

(f) the child's guardian or the child himself enrollee or the enrollee's parent becomes eligible for state employee benefits before the expiration of the ± one year eligibility period except when a less-than-nominal contribution as defined in 42 CFR 457.310 is available from the state of Montana;

(g) the child enrollee dies; or

(h) the child enrollee becomes eligible for medicaid.

~~(2) Eligibility may be redetermined sooner than 1 year after the most recent determination upon a change in any of the conditions specified in (1). Guardians may be required to submit completed forms and verification by a specified date for purposes of eligibility redetermination.~~

~~(3) CHIP guardians must give notice of a change as specified in (1) within 30 days of the change. Failure to give~~

~~notice will be grounds for termination of eligibility until such time as complete and accurate information is provided.~~

(2) Parents or guardians must give notice within 30 days when the family moves or another change specified in (1) occurs. Termination of CHIP coverage will be effective:

(a) the day an enrollee enters a correctional facility;

(b) the day after an enrollee dies; or

(c) the last day of the month CHIP discovers a change occurred.

(3) A CHIP renewal application must be completed and CHIP eligibility redetermined every 12 months. If the renewal application is not returned before CHIP enrollment is scheduled to end, benefits will terminate. A new application may be completed at a later date but the applicant may be placed on the waiting list until sufficient funds are available to enroll the applicant.

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1003, MCA

37.79.207 TERMINATION OF ELIGIBILITY AND GUARDIAN LIABILITY (1) CHIP eligibility terminates immediately upon:

~~(a) death of the CHIP beneficiary enrollee; or~~

~~(b) incarceration of the CHIP beneficiary; enrollee.~~

~~(c) a move out of the state of Montana by the CHIP beneficiary.~~

(2) CHIP eligibility terminates at the end of the month:

(a) the ~~beneficiary enrollee~~ attains the age of 19 years;

(b) the parent or guardian or child enrollee becomes eligible for state employee insurance benefits except when a less-than-nominal contribution as defined in 42 CFR 457.310 is available from the state of Montana;

(c) the ~~beneficiary becomes~~ department becomes aware that the enrollee is a beneficiary of other creditable health insurance;

(d) the ~~beneficiary enrollee~~ is determined eligible for medicaid; ~~or~~

(e) upon voluntary disenrollment of the CHIP ~~beneficiary enrollee;~~

(f) the enrollee moves out of Montana;

(g) the department becomes aware that the applicant has moved without providing a new address and CHIP is unable to locate the applicant; or

(h) when a completed renewal application has not been received by the department.

(3) Termination of eligibility, based ~~upon a decrease in the federal poverty level or on~~ insufficient funding at the department, may not be effective earlier than the end of the month ~~after~~ notice of ~~determination~~ termination ~~to the beneficiary~~ is given to the enrollee or the enrollee's parent or guardian.

(4) A parent or guardian is liable to the department and the department may collect from the parent or guardian the amount of actual premiums or payments or both to providers for

any benefits furnished to the ~~beneficiary~~ enrollee because of an intentional misrepresentation or a failure to give notice of changes as required by this subchapter.

AUTH: Sec. 53-4-1009, MCA  
IMP: Sec. 53-4-1003, MCA

37.79.301 COVERED BENEFITS (1) remains the same.

(2) Eyeglasses and dental benefits are ~~reimbursed~~ paid by the department as specified in ARM 37.79.322 and 37.79.326.

(3) Emergency services, including urgent care and emergency room screening to determine if a medical emergency exists, shall be available 24 hours per day, 7 seven days per week. In emergency situations, no pre-authorization is required to provide necessary medical care and ~~children~~ enrollees may seek care from nonparticipating providers. The insurer may, however, require prior authorization for any needed follow-up care.

AUTH: Sec. 53-4-1009, MCA  
IMP: Sec. 53-4-1003, MCA

37.79.302 COVERAGE LIMITATIONS (1) The lifetime maximum benefit coverage is one million dollars per ~~beneficiary~~ enrollee per insurer.

(2) Pre-existing conditions of each ~~beneficiary~~ enrollee are covered as of the effective date of enrollment if the condition would be otherwise covered except in the following conditions:

(a) ~~a beneficiary an enrollee~~, hospitalized prior to the date of enrollment, who remains in the hospital on the effective date of initial CHIP coverage shall not be covered for inpatient benefits for such hospitalization only. Upon discharge, the ~~beneficiary enrollee~~ shall become eligible for benefits for any subsequent inpatient hospitalizations. This exclusion shall not apply to ~~children~~ enrollees who are renewing their CHIP ~~enrollments~~ enrollment.

(3) The insurer shall provide covered benefits to a ~~beneficiary an enrollee~~ who is receiving inpatient hospital benefits up to and including the 11th day after the effective date of losing CHIP ~~eligibility~~ benefits.

(4) A newborn of a ~~mother covered by~~ CHIP enrollee shall have all medically necessary benefits covered by the insurer for 31 days after the newborn's date of live birth. Coverage for the newborn shall begin the day of live birth, without regard to whether the newborn is hospitalized on the date of coverage.

AUTH: Sec. 53-4-1009, MCA  
IMP: Sec. 53-4-1003, MCA

37.79.303 BENEFITS NOT COVERED (1) In addition to any exclusions noted elsewhere in these rules, the following services are not covered benefits:

(a) through (q) remain the same.

~~(r) benefits for a child who is incarcerated; and  
acupressure;~~

(s) contraceptives, for the purpose of birth control;

(t) temporomandibular joint (TMJ) treatment;

(u) hypnosis;

(v) durable medical equipment;

(w) mental health therapy when the enrollee is not  
present; and

(s) remains the same but is renumbered (x).

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1003, MCA

37.79.308 OUTPATIENT HOSPITAL BENEFITS (1) Outpatient hospital benefits provided include all benefits described in the inpatient hospital rule, ARM 37.79.307, which are provided on an outpatient basis in a hospital or ambulatory surgical center, and also include:

(a) remains the same.

(b) emergency room benefits for surgery, pain, accident or medical emergency; and

(c) remains the same.

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1003, MCA

37.79.309 PHYSICIAN AND ADVANCED PRACTICE REGISTERED NURSE BENEFITS, LIMITATIONS AND EXCLUSIONS (1) and (2) remain the same.

(3) Well-baby, well-child, and immunization services as recommended by the American academy of pediatrics and the advisory committee on immunizations practices are covered.

(4) and (5) remain the same.

(6) Hypnosis, local anesthesia, unless included in the procedure charge, and consultations prior to surgery are not covered.

(7) and (8) remain the same.

(9) Medically appropriate second opinions which may include major diagnoses or courses of treatment are a covered benefit.

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1003, MCA

37.79.316 MENTAL HEALTH BENEFITS (1) ~~Inpatient mental~~ Mental health benefits include:

(a) inpatient services furnished in a hospital, including a state-operated mental hospital, a residential service or a partial hospitalization program; and

(b) outpatient services furnished in a community based setting or in a mental hospital.

(2) Mental health benefits are limited to:

(a) 21 days of inpatient mental health care per benefit year; and

(b) partial hospitalization benefits which are exchanged for inpatient days at a rate of two partial treatment days for one inpatient day.

(3) Mental health benefits will not be limited for enrollees with the following disorders:

- (a) schizophrenia;
- (b) schizoaffective disorder;
- (c) bipolar disorder;
- (d) major depression;
- (e) panic disorder;
- (f) obsessive-compulsive disorder; and
- (g) autism.

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

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1003, MCA

37.79.317 CHEMICAL DEPENDENCY BENEFITS (1) remains the same.

(2) The combined benefit for inpatient and outpatient treatment for alcoholism and drug addiction, excluding costs for medical detoxification, is subject to a maximum benefit of \$6,000 in a 12-month period. Inpatient benefits are limited to a lifetime maximum benefit of \$12,000. After the inpatient lifetime maximum benefit has been met, the annual benefit may be reduced to \$2,000.

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

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1003, MCA

37.79.321 VISION BENEFITS (1) Vision benefits and medical eye care includes:

- (a) remains the same.
- (b) ~~annual~~ vision exams; and
- (c) a dispensing fee for eyeglasses which are ordered from the department's contractor and provided by a licensed physician, ophthalmologist, optometrist or ~~opticians~~ optician working within the scope of his/her license the profession.

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1003, MCA

37.79.322 EYEGLASSES BENEFITS (1) remains the same.

(2) ~~A beneficiary~~ An enrollee is limited to one pair of eyeglasses per 365 day period unless additional pairs are necessary due to any of the following circumstances:

- (a) through (h) remain the same.
- (i) the inability of the ~~recipient~~ enrollee to wear bifocals because of a diagnosed medical condition.

(3) When the ~~beneficiary~~ enrollee meets one or more of the conditions in (2)(a) through (2)(i), the ~~recipient~~ enrollee may be allowed two pairs of single vision eyeglasses ~~every~~ per 365 day period.

(4) remains the same.

AUTH: Sec. 53-4-1009, MCA  
IMP: Sec. 53-4-1003, MCA

37.79.326 DENTAL BENEFITS (1) ~~The maximum Dental dental~~ benefits paid will be ~~paid at~~ 85% of the billed ~~charges services~~ received up to a ~~maximum of~~ \$350 paid per benefit year for each beneficiary enrollee ~~by the department~~. For example, \$412 in services received would result in \$350 paid.

(a) Providers may not balance bill the beneficiary enrollee, parent or guardian for the remaining 15% of the billed charges.

(b) Providers may bill the beneficiary enrollee, parent or guardian for services received in excess of ~~the \$350~~ \$412 per benefit year ~~covered by the department~~.

(2) remains the same.

(3) The following procedures are not a benefit of the CHIP dental program:

(a) ~~procedure codes~~ D5900 - through D5999 maxillofacial prosthetics;

(b) D6000 - through D6199 implant services;

(c) D7610 - through D7780 treatment of fractures;

(d) D7940 - through D7999 other repair procedures; and

(e) D8000 - through D8999 orthodontics.

(4) Providers must comply with all applicable state and federal statutes, rules and regulations, including the United States Code governing ~~the children's health insurance program~~ CHIP and all applicable Montana statutes and rules governing licensure and certification.

(5) and (6) remain the same.

AUTH: Sec. 53-4-1009, MCA  
IMP: Sec. 53-4-1003, MCA

37.79.501 COST- SHARING PROVISIONS (1) Except as provided in (2) and (3), the parent or guardian of each CHIP ~~beneficiary enrollee~~ whose family income is greater than 100% of the federal poverty level must pay to the provider of service the following copayments not to exceed the cost of service:

(a) and (b) remain the same.

(c) \$5 per visit for outpatient hospital visits including outpatient treatment for physical, mental and substance abuse reasons;

~~(i) outpatient hospital visits for x ray or laboratory services are excluded from this copayment requirement;~~

(d) \$3 per visit for physician, APRN, PA, optometrist, audiologist, mental health professional, substance abuse counselor or other covered health care provider services;

~~(i) dental, pathology, radiology or anesthesiology services are not subject to this copayment.~~

(e) and (f) remain the same.

(2) No copayment shall apply to:

(a) well-baby or well-child care, including age-

appropriate immunizations;

(b) outpatient hospital visits for x-ray and laboratory services;

(c) dental, pathology, radiology or anesthesiology services; or

(d) families with at least one enrollee who is a Native American Indian or Native Alaskan.

(3) remains the same.

~~(4) No copayment shall apply to the family of an applicant who is a Native American Indian or Alaska native. A guardian must declare that the applicant is a Native American Indian or Alaskan native for this exemption to apply.~~

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1003, MCA

37.79.503 ENROLLMENT WITH AN INSURER (1) ~~Children Applicants~~ eligible for the CHIP program must enroll with an insurer under contract with the department.

(2) through (3) remain the same.

(4) An insurer must accept without restriction eligible ~~children applicants~~ in the order in which they are received for enrollment ~~by the state or its designee for CHIP~~ until the insurer's maximum enrollment, if any, under the contract is reached.

(5) ~~The effective date of enrollment for an eligible child must be no later than the first day of the 2nd month subsequent to the date on which the state or its designee determines a child is eligible for CHIP or the family picks an insurer, whichever is later. The enrollment date will always be the first day of the enrollment month. An applicant will be enrolled the later of:~~

(a) the month after the applicant is determined eligible;

(b) when there is more than one insurer, the month after the family chooses an insurer; or

(c) the month funding is sufficient to enroll the applicant from the waiting list.

(6) The insurer must:

(a) provide each enrollee with a handbook of information about CHIP including a summary of benefits; and

(b) issue an appropriate identification card to a beneficiary each enrollee.

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1003 and 53-4-1007, MCA

37.79.504 RIGHT TO CHOOSE PRIMARY CARE PROVIDER (1) ~~A child~~ An applicant, parent or guardian must have the opportunity to choose a primary care provider to the extent possible and medically appropriate from the providers available at the time of enrollment. The insurer may assign ~~a beneficiary an enrollee~~ to a primary care provider if ~~a child an enrollee, parent~~ or the guardian fails to choose one after being notified to do so. The assignment must be appropriate to the ~~child's enrollee's~~ enrollee's age,

~~sex gender~~ and residence. The ~~beneficiary enrollee~~ may change primary care providers once annually without good cause as defined in Montana insurance law and rules.

AUTH: Sec. 53-4-1009, MCA  
IMP: Sec. 53-4-1003, MCA

37.79.505 DISENROLLMENT WITH AN INSURER

(1) Participation in CHIP is voluntary and ~~a child or guardian~~ an enrollee may withdraw from the program at any time.

(2) ~~A beneficiary~~ An enrollee, parent or guardian ~~who wishes the child to remain on CHIP~~ may request, without good cause, disenrollment from one insurer and enrollment with another insurer annually.

(3) An insurer, based on good cause, may request that the department disenroll ~~a child~~ an enrollee. The request with the reason for the request must be in writing.

(a) CHIP benefits may be terminated for good cause if the ~~beneficiary enrollee, parent~~ or guardian has violated rules adopted by the Montana commissioner of insurance for enrollment with an insurer.

(b) Good cause shall be defined as provided in Montana insurance law and rules and does not include an adverse change in health status.

(4) Disenrollment takes effect, at the earliest, the first day of the month after the ~~month in which the state or its designee contractor~~ department receives the request for disenrollment, but no later than the first day of the second calendar month after ~~the month in which~~ the request for disenrollment is received. The ~~child~~ enrollee remains enrolled with the insurer and the insurer is responsible for benefits covered under the contract until the effective date of disenrollment, which is always the first day of a month.

(5) The department will disenroll ~~a beneficiary~~ an enrollee from a particular insurer if:

(a) the contract between the department and the insurer is terminated;

(b) the ~~beneficiary enrollee~~ permanently moves outside the geographic area served by the insurer and:

(i) no other insurer can provide care through participating providers; and

(ii) the ~~beneficiary enrollee, parent~~ or guardian does not agree to travel to the nearest participating provider for medical care except in the instances noted in ARM 37.79.605; or

(c) the ~~child~~ enrollee becomes ineligible for CHIP.

AUTH: Sec. 53-4-1009, MCA  
IMP: Sec. 53-4-1003, MCA

37.79.601 CONTRACTS FOR BENEFITS (1) through (3) remain the same.

(4) An insurer may not in any manner hold ~~a child~~ an enrollee, parent or guardian responsible for the debts of the insurer.

(5) through (7) remain the same.

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1003, MCA

37.79.602 PROVISION OF BENEFITS (1) An insurer may impose the following requirements in the provision of benefits:

(a) and (b) remain the same.

(c) ~~directing a beneficiary~~ an enrollee to the appropriate level of care for receipt of covered benefits; and

(d) denial of payment to a provider for benefits provided to ~~a beneficiary~~ an enrollee if the participation requirements in this rule are not met by the child enrollee or the child's enrollee's parent or guardian.

(2) ~~A beneficiary~~ An enrollee must use an insurer's participating providers unless:

(a) remains the same.

(b) the ~~beneficiary~~ enrollee receives emergency services or emergency room screen.

(3) An insurer and its participating providers must provide covered benefits as listed in this subchapter to ~~children~~ enrollees in the same manner as those benefits are provided to non-CHIP ~~beneficiaries~~ members in the insurance plan.

(4) An insurer may at its discretion offer benefits beyond the scope of CHIP benefits defined in this subchapter.

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1003, MCA

37.79.605 PARTICIPATING PROVIDERS (1) remains the same.

(2) An insurer must maintain an adequate network of participating providers to serve enrollees. The insurer must notify the department when providers are deleted from the network.

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

~~(4)~~ (5) Upon written notice by the department, the insurer must exclude from providing benefits to CHIP ~~beneficiaries~~ enrollees a provider who is currently suspended or terminated by the medicaid or the medicare program in any state.

(5) through (7) remain the same but are renumbered (6) through (8).

~~(8)~~ (9) A provider has no right to an administrative hearing with the department ~~for a denial of payment by~~ when the insurer to the provider has denied payment for a service provided to ~~a beneficiary~~ an enrollee.

(9) remains the same but is renumbered (10).

~~(10)~~ (11) An insurer may not prohibit a participating provider from:

(a) discussing a treatment option with a ~~child~~ an enrollee, parent or guardian; or

(b) ~~from~~ advocating on behalf of a ~~child~~ an enrollee within the utilization review or grievance processes established by the insurer.

AUTH: Sec. 53-4-1009, MCA  
IMP: Sec. 53-4-1003, MCA

37.79.606 REIMBURSEMENT OF INSURERS (1) In consideration for all services rendered by an insurer under a contract with the department, the insurer will receive a payment each month for each ~~beneficiary enrollee~~. This payment is the premium. Unless otherwise provided in this rule, the premium represents the total obligation of the department with respect to the costs of medical care and benefits provided to each ~~beneficiary enrollee~~ under the contract. Payment of the premium is considered to be payment in full and the insurer may not bill the ~~beneficiary enrollee, parent~~ or guardian, nor let its providers bill the ~~beneficiary enrollee, parent~~ or guardian, for any medical care provided beyond the cost-sharing provisions outlined in ARM 37.79.501.

(2) remains the same.

AUTH: Sec. 53-4-1009, MCA  
IMP: Sec. 53-4-1003, MCA

37.79.607 UTILIZATION REVIEW AND QUALITY ASSURANCE

(1) The insurer shall have adequate staff and procedures to assure that health care provided to ~~beneficiaries enrollees~~ is medically necessary and appropriate.

(2) remains the same.

AUTH: Sec. 53-4-1009, MCA  
IMP: Sec. 53-4-1003, MCA

37.79.801 GRIEVANCE PROCEDURES, AND APPEAL PROCEDURES

(1) An insurer must have a written procedure, approved in writing by the department before implementation, for resolution of ~~grievances or complaints~~ brought by ~~beneficiaries enrollees~~ or their ~~parents or~~ guardians either individually or as a class. In a situation requiring urgent care or emergency care, the department may require the insurer to expedite resolution of a grievance within a time line established by the department.

(2) Except when CHIP eligibility has been denied, a ~~beneficiary an enrollee, parent~~ or guardian must exhaust the insurer's grievance procedure before appeal of the matter may be made to the department.

(3) An applicant, ~~parent~~ or guardian aggrieved by a denial, suspension or termination of CHIP eligibility or a ~~beneficiary an enrollee, parent~~ or guardian aggrieved by a final grievance decision of an insurer, including but not limited to a reduction or denial of benefits, may request a fair hearing in accordance with ARM 37.5.304, 37.5.313, 37.5.322, 37.5.325, 37.5.328, 37.5.334 and 37.5.337. The provisions of ARM 37.5.305 do not apply to such hearings.

(4) If a written request for hearing is not received by the department within ~~30~~ 90 days after the date a notice of adverse action is mailed by the department or a final grievance

decision is mailed by an insurer, the hearing officer may deny a hearing as provided in ARM 37.5.313.

(5) remains the same.

AUTH: Sec. 53-4-1009, MCA

IMP: Sec. 53-4-1003, MCA

4. The Department of Public Health and Human Services (DPHHS) administers the Children's Health Insurance Plan (CHIP), and programs for dental care services and eyeglasses for low income individuals eighteen and younger who are not qualified for health care services under the Montana Medicaid program.

#### Rule I

This rule states the process DPHHS will use for CHIP eligibility verification review. An eligibility review process will improve the efficiency of the program and is required by Federal rule.

#### Rule II

This rule extends provisional CHIP coverage for current enrollees who are waiting for a Medicaid determination. This rule prevents a loss of health care coverage for current enrollees during the Medicaid determination process.

The language of Rule II(2) states that provisional CHIP eligibility must be determined within the 20 days. Twenty days is also the period allowed for processing new applications.

Rule II(3) through (3)(b) describe where current enrollee applications that are determined to be Medicaid eligible will be forwarded for Medicaid eligibility determination. Forwarding to the appropriate county office of public assistance is the process also followed for new applications.

#### ARM 37.79.101

Montana's children's health insurance program is provided primarily through contracts with insurance companies for health insurance plans. The acronym "CHIP" as used in these rules refers to the health insurance plan. Throughout these rules the reference to "child" or "children" was changed to "individual" or "individuals" to make it clear to the reader that enrollees may remain eligible until they reach the age of 19.

#### ARM 37.79.102

The definitions used in the CHIP rules are revised to be consistent with the language of the proposed rule changes. A substantive change to the definition of "family" is intended to allow the Department to consider a household a single economic unit and, if appropriate, consider the income of all individuals residing in a single economic unit when determining eligibility.

ARM 37.79.201

This rule states CHIP eligibility requirements. The rule change allows DPHHS to require social security numbers as a condition for CHIP eligibility. This is permitted by federal rule and will allow a method for cross checking Medicaid and CHIP eligibility. The rule is also amended to provide the reader with a list of all current eligibility requirements. Individuals residing in an institution for mental disease, incarcerated individuals and otherwise eligible State employees or their dependents are not eligible for CHIP benefits because health coverage is available from another source. The rule amendments also state the current time frame for processing CHIP applications and provide for provisional benefits for individuals awaiting Medicaid eligibility determinations.

ARM 37.79.202

This rule describes the process DPHHS follows to consider CHIP applications for individuals not currently enrolled. DPHHS will now refer applicants who are ineligible for the CHIP program because of potential medicaid eligibility to their local office of public assistance for a determination of medicaid eligibility. This change will improve access to services.

ARM 37.79.206

The Department is changing its current practice of redetermining eligibility if the parent or guardian moves. If the parent or guardian moves without notifying the Department or does not submit a renewal application, the one year eligibility determination will not apply. This amendment results in a more accurate determination of eligibility and reduces the payment of premiums for children who cannot be located.

ARM 37.79.207

This rule amendment allows termination of eligibility consistent with ARM 37.79.206 and amends the current practice of terminating eligibility at the end of the month that the Department discovers the individual has other creditable insurance coverage. This will avoid duplicate insurance coverage while maintaining CHIP's credibility with the provider community.

ARM 37.79.301 and 37.79.302

The amendments to these rules are non-substantive language edits. The word "reimbursed" is changed to "paid," "beneficiary" to "enrollee" and "eligibility" to "benefits."

ARM 37.79.303

This rule is being amended to compile an accurate list of the medical services not covered by CHIP. Federal regulations require a state CHIP program to meet bench mark health benefits coverage. The services excluded from CHIP coverage were determined based on an actuarial calculation of the cost of the required bench mark benefits. The exclusion of non-required benefits was based on costs and an estimation of services less likely to impact the health care of individuals under 19 years of age.

ARM 37.79.309, 37.79.316 and 37.79.317

These rule changes compile an accurate list of CHIP coverage and exclusion for: physicians and advanced practice registered nurses, mental health benefits, and chemical dependency benefits. The rules are not a substantive change in current practice. CHIP coverage is currently provided for medically appropriate second opinions. The outpatient mental health benefits are limited to 21 days of inpatient mental health care based on cost control and medical necessity. The listed disorders are excepted from the 21 day limit because these disorders frequently require longer treatment. The alcoholism and drug addiction limitations are based on costs and analysis of the efficacy of repeated treatments.

ARM 37.79.321

This rule has been amended to allow more than one eye examination per year. Managing the number of eye examinations has not been a cost issue and this change will allow for changes in an individual's vision during the year.

ARM 37.79.322

Amendments to this rule are non-substantive language edits.

ARM 37.79.326

This rule amendment states the current payment allowed for dental services. The benefit is 85% of services received up to an annual limit of \$350. This is a clarification of language, not a change in coverage. The language change is made to assist parents in understanding dental services.

ARM 37.79.501

This amendment states the benefits and individuals who are not subject to co-payments. This is a clarification of language, not a change in coverage.

ARM 37.79.503

This rule is being amended to provide insurers with an accurate statement of enrollment order, the enrollment process and

information that must be provided to the enrollee or his or her family. This is not a change in practice. The requirements for insurers are intended to establish an orderly process for enrolling qualified applicants and provide guidance on what information is required.

ARM 37.79.504, 37.79.601, 37.79.602, 37.79.606 and 37.79.607

The amendments to these rules are non-substantive language edits.

ARM 37.79.505

This rule change cross references the term "good cause" to the statutory definition of good cause in Montana statute. This is not a substantive change in how good cause is defined. The change is made to assist the reader in understanding the use of the term.

ARM 37.79.605

The amendment to this rule compiles an accurate list for insurers of CHIP requirements regarding provider networks. Any insurer who contracts to provide CHIP coverage must maintain an adequate network of participating providers.

ARM 37.79.801

This rule amendment increases the time limit for requesting a hearing after notification of an adverse action from 30 to 90 days. This amendment is consistent with other programs administered by the Department that allow 90 days to request a hearing.

Estimated Financial/Budget Impact

The proposed rule amendments will not have an adverse financial impact on the Department, the State of Montana or health care providers. The CHIP program currently has 9,550 enrollees served by 3,534 providers. DPHHS considered the alternative of not adopting these rule amendments and has determined that the language clarification and policy changes will improve service to eligible individuals and increase program efficiency.

5. Interested 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 Kathy Munson, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than 5:00 p.m. on December 11, 2003. Data, views or arguments may also be submitted by facsimile (406)444-9744 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled

according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

6. The Office of Legal Affairs, Department of Public Health and Human Services has been designated to preside over and conduct the hearing.

Russell Cater  
Rule Reviewer

Russell Cater for Gail Gray  
Director, Public Health and  
Human Services

Certified to the Secretary of State November 3, 2003.

BEFORE THE SECRETARY OF STATE  
OF THE STATE OF MONTANA

In the matter of the adoption )	NOTICE OF PUBLIC HEARING ON
of new rules I through XXXIX )	PROPOSED ADOPTION AND
pertaining to elections and )	REPEAL
repeal of ARM 44.3.1401 and )	
44.3.1501 through 44.3.1509 )	
pertaining to overseas and )	
military electors )	

TO: All Concerned Persons

1. On December 3, 2003, at 10:00 a.m. the Secretary of State will hold a public hearing in Room 261 of the Office of the Secretary of State, State Capitol Building, Helena, Montana, to consider the proposed adoption and repeal of the above-stated rules.

2. The 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 Secretary of State no later than 5:00 p.m., November 26, 2003, to advise us of the nature of the accommodation that you need. Please contact Janice Doggett, Secretary of State's Office, P.O. Box 202801, Helena, Montana 59620-2801; phone (406) 444-5375; fax (406) 444-3020; or email jdoggett@state.mt.us.

3. The proposed new rules provide as follows:

I VOTER REGISTRATION VERIFICATION (1) Consistent with 13-2-109, 13-2-110, 13-2-205, and 13-2-207, MCA, the rules in this subchapter shall be used to determine whether information provided is sufficient to be accepted and processed, for verifying accuracy, establishing procedures for provisional and legal registration and effect on ID requirements, and notifying electors of their status.

AUTH: 13-2-109, MCA  
IMP: 13-2-109, MCA

II DEFINITIONS As used in this subchapter, unless the context clearly indicates otherwise, the following definitions apply:

(1) "Current address" means Montana residence address or mailing address.

(2) "Driver's license number" means a number provided by the Montana motor vehicle division on either a Montana motor vehicle division driver's license or a Montana motor vehicle division identification card.

(3) "Election official" means an election administrator, election deputy, or election judge.

(4) "Election worker" means an individual designated to

perform election support duties.

(5) "Elector" means an individual qualified to vote under state law.

(6) "Identification" for the purposes of registration means any of the following:

(a) current and valid photo identification including, but not limited to, a valid driver's license, a school district or postsecondary education photo identification, or a tribal photo identification with the individual's name; or

(b) a current utility bill, bank statement, paycheck, government check, or other government document that shows the individual's name and current address.

(7) "Notice by the most expedient method available" means notification by any of the following, at the discretion of the election administrator:

(a) telephone;

(b) mail;

(c) facsimile machine;

(d) in person; or

(e) email or other electronic means.

AUTH: 13-2-109, MCA

IMP: 13-2-110, MCA

III APPLICATION FOR VOTER REGISTRATION (1) Applicants for voter registration may apply by the procedures specified in 13-2-110, MCA:

(a) in person;

(b) by mail; or

(c) as may otherwise be provided by law.

AUTH: 13-2-109, MCA

IMP: 13-2-110, MCA

IV VOTER REGISTRATION CARD (1) Election administrators shall use the voter registration card substantially in the most updated form prescribed by the secretary of state.

(2) Only registration cards substantially in the form prescribed by the secretary of state after June 1, 2003, shall be used by election administrators.

(3) Election administrators may print registration cards for their county use as long as the cards are substantially in the most updated form prescribed by the secretary of state.

(4) If an applicant submits an outdated registration card that does not contain all of the required information, the election administrator may obtain that information and process the registration according to [New Rule V].

AUTH: 13-2-109, MCA

IMP: 13-2-110, MCA

V VOTER REGISTRATION CARD INFORMATION REQUIREMENTS

(1) An applicant for voter registration must provide all required information on the voter registration card.

(2) An election official shall:

(a) enter the driver's license number, or the last four digits of the social security number provided by the applicant on the voter registration card into the voter registration database maintained by the election administrator in a field provided for the number;

(b) ensure that the number remains private and accessible only by authorized county election officials and, when applicable, by the authorized staff of the office of the secretary of state; and

(c) use the number as a unique identifier for voting purposes in addition to the voter registration number assigned to the elector.

(3) An applicant for voter registration who does not provide the applicant's driver's license number, the last four digits of the applicant's social security number, or a form of identification required in [New Rule II(4)], shall be registered as a provisionally registered elector pending receipt and verification of one of the required numbers or receipt of a form of identification required.

(4) If an applicant does not provide all required information and the election administrator is unable to obtain that information, except for the information in (2) on the form prescribed by the secretary of state, the applicant shall not be registered.

AUTH: 13-2-109, MCA

IMP: 13-2-110, MCA

VI APPLICANTS INELIGIBLE DUE TO AGE OR RESIDENCE REQUIREMENTS

(1) An applicant for voter registration who is not eligible to register because of residence or age requirements, but who will be eligible on or before election day, may apply for voter registration pursuant to 13-2-110, MCA. An election official shall register the applicant as a provisionally registered elector.

AUTH: 13-2-109, MCA

IMP: 13-2-110, 13-2-205, MCA

VII PROVISIONAL REGISTRATION PENDING VERIFICATION

(1) All applicants for voter registration who apply under this subchapter shall be registered provisionally pending verification of the applicant's driver's license number or, if the applicant does not have a driver's license number, the last four digits of the applicant's social security number. If the applicant does not have a driver's license number or social security number, the applicant shall provide a form of identification required under 13-2-110, MCA, which, if accepted, shall be sufficient for verification under these rules.

AUTH: 13-2-109, MCA

IMP: 13-2-110, MCA

VIII VERIFICATION OF VOTER REGISTRATION INFORMATION

(1) If the information provided by an applicant for voter registration in [New Rule VII] is verified and the applicant meets all other legal requirements for registration, an election official shall register the applicant as a legally registered elector.

(2) Throughout the election process, an election administrator shall, as necessary, work in conjunction with the office of the secretary of state, the motor vehicles division and the social security administration to ensure the verification of the accuracy of the information provided in [New Rule VII].

AUTH: 13-2-109, MCA

IMP: 13-2-110, MCA

IX NOTICE TO APPLICANT OF STATUS OF APPLICATION FOR VOTER REGISTRATION

(1) An election official shall confirm an elector's registration by a confirmation notice required under 13-2-207, MCA, which includes at minimum the elector's name, address, and precinct number.

(2) An election official shall provide notice by the most expedient method available to an applicant for voter registration whose voter registration is not confirmed.

AUTH: 13-2-109, MCA

IMP: 13-2-110, MCA

X BALLOT FORM AND UNIFORMITY (1) The following shall be prescribed by the secretary of state in the forms booklet that is provided to each election administrator:

(a) the manner in which each type of ballot may be corrected under 13-12-204, MCA;

(b) what provisions must be made on the ballot for write-in candidates;

(c) the size and content of stubs on paper ballots, except as provided in 13-19-106(1), MCA;

(d) how unvoted ballots must be handled;

(e) how the number of individuals voting and the number of ballots cast must be recorded; and

(f) the order and arrangement of voting system ballots.

(2) The names of all candidates to appear on the ballots must be in the same font size and style.

(3) Notwithstanding 13-19-106(1), MCA, when the stubs are detached, it must be impossible to distinguish any one of the ballots from another ballot for the same office or issue.

(4) The ballots must contain the name of each candidate whose nomination is certified under law for an office and no other names, except that the names of candidates for president and vice president of the United States must appear on the ballot as provided in 13-25-101(2), MCA.

(5) Consistent with 13-14-212, MCA, provision must be made for a voter to indicate a "yes" or "no" vote in regard to retaining unopposed incumbent judicial officers.

AUTH: 13-12-202, MCA  
IMP: 13-12-202, MCA

XI VOTER IDENTIFICATION AND PROVISIONAL VOTING PROCEDURES AT THE POLLING PLACE - GENERAL (1) An election administrator shall follow 13-13-114, 13-13-301, 13-13-601, 13-15-107, MCA, and these rules in regard to voter identification and provisional voting at the polling place.

AUTH: 13-13-603, MCA  
IMP: 13-13-603, MCA

XII DEFINITIONS As used in this subchapter, unless the context clearly indicates otherwise, the following definitions apply:

(1) "Current address" means Montana residence address or mailing address.

(2) "Driver's license number" means a number provided by the Montana motor vehicle division on either a Montana motor vehicle division driver's license or a Montana motor vehicle division identification card.

(3) "Election official" means an election administrator, election deputy, or election judge.

(4) "Election worker" means an individual designated to perform election support duties.

(5) "Elector" means an individual qualified to vote under state law.

(6) "Identification" for the purposes of voting at the polling place, means any of the following:

(a) a current photo identification showing an elector's name including, but not limited to, a valid driver's license, a school district or postsecondary education photo identification, or a tribal photo identification; or

(b) a current utility bill, bank statement, paycheck, notice of confirmation of voter registration issued pursuant to 13-2-207, MCA, government check, or other government document that shows the elector's name and current address.

(7) "Notice by the most expedient method available" means notification by any of the following, at the discretion of the election administrator:

(a) telephone;

(b) mail;

(c) facsimile machine;

(d) in person; or

(e) email or other electronic means.

(8) "Polling place elector identification form" means a form prescribed by the secretary of state and printed by the election administrator that:

(a) requires an elector to provide the elector's current Montana residential address, current mailing address, signature and date;

(b) requires an elector to provide the elector's Montana driver's license number or Montana state identification number

or, if verification is available, the last four digits of the elector's social security number; and

(c) is permitted to be used by an elector at the polling place as a government document meeting the requirements of identification under (6), if the number provided under (8)(b) is verified.

(9) "Polling place greeter" means an election official or election worker who assists electors with voting procedures as they enter the polling place.

(a) "Polling place manager" means an election official who assists electors with voting procedures while they are inside the polling place.

AUTH: 13-13-603, MCA

IMP: 13-13-114, 13-13-601, 13-15-107, MCA

XIII PRINTING OF IDENTIFICATION AND PROVISIONAL VOTING MATERIALS

(1) Election administrators shall provide materials for provisional voting in sufficient numbers for each election. These materials shall include at least the following, in forms prescribed by the secretary of state:

- (a) provisional ballot instructions;
- (b) provisional ballot outer envelopes;
- (c) provisional ballot secrecy envelopes (colored and/or hole-punched for ease of identification);
- (d) verified and unverified provisional ballot containers;
- (e) displays of instructions for electors under 13-13-112, MCA;

(f) polling place elector identification forms as defined in [New Rule XII(8)]; and

(g) at the option of the election administrator, educational postings for outside of the polling place in the form suggested by the secretary of state.

(2) Election administrators shall use regular ballots for provisional voting.

AUTH: 13-13-603, MCA

IMP: 13-13-112, 13-13-603, MCA

XIV ARRANGEMENTS FOR IDENTIFICATION AND PROVISIONAL VOTING PROCEDURES - BEFORE THE ELECTION

(1) Election administrators shall arrange for a secure location for ballots cast provisionally, in the same or similar location as for voted regular ballots.

(2) Election administrators may at their option arrange for:

(a) polling place greeters who will inform electors of voting procedures;

(b) polling place managers to ensure ease of identification and provisional voting processes; and

(c) delivery and setup of educational materials to polling places for education of electors on voting procedures.

AUTH: 13-13-603, MCA

IMP: 13-13-603, MCA

XV PROCEDURES AT THE POLLING PLACE FOR DETERMINING THE SUFFICIENCY OF IDENTIFICATION - PRIOR TO CASTING A BALLOT

(1) Consistent with 13-13-114, MCA, before an elector is permitted to receive a ballot or vote, the elector shall present to an election judge one of the forms of required identification defined in [New Rule XII(6)].

(2) An election official shall allow an elector whose name appears on the precinct register, but who does not provide a required form of identification, to do the following:

(a) return to the polling place with a required form of identification; or

(b) complete a polling place elector identification form, as defined in [New Rule XII(8)].

(3) An elector who is otherwise eligible to vote and who provides a required form of identification shall be permitted to vote as follows:

(a) if the information on the form of identification provided is determined to be sufficient by an election official while the elector is at the polling place, the elector shall be provided a regular ballot to vote;

(b) if the information on the form of identification provided is determined to be insufficient by an election official while the elector is at the polling place, the elector shall be provided a provisional ballot to vote; and

(c) consistent with 13-13-114(1)(c) and (d), MCA, if the identification provided differs from information in the precinct register, but an election judge determines that the information provided is sufficient to verify the voter's identity to vote pursuant to 13-2-512, MCA, the elector may sign the precinct register, complete a transfer form or new registration form to correct the elector's voter registration information, and vote. An election judge shall write "transfer form" or "registration form" beside the name of any elector submitting a form.

AUTH: 13-13-603, MCA

IMP: 13-13-114, MCA

XVI PROCEDURES AT THE POLLING PLACE FOR DETERMINING ELIGIBILITY TO VOTE - PRIOR TO CASTING A BALLOT

(1) An individual who provides identification specified in [New Rule XV], but whose name does not appear on the precinct register, shall be permitted to:

(a) provide information to an election official at the polling place to verify the individual's registration; and

(b) sign the precinct register and cast a provisional ballot if the election official is unable to verify the individual's eligibility while the elector is at the polling place.

(2) Consistent with 13-13-114(1)(c) and (d), MCA, if the information provided by the elector differs from information in the precinct register, but an election judge determines that the information provided is sufficient to verify the voter's

eligibility to vote pursuant to 13-2-512, MCA, the elector may sign the precinct register, complete a transfer form or new registration form to correct the elector's voter registration information, and vote. An election judge shall write "transfer form" or "registration form" beside the name of any elector submitting a form.

(3) Consistent with 13-13-114(3) and (4), MCA, if the elector is not able to sign the elector's name to the precinct register, a fingerprint or other identifying mark may be used. If the elector fails or refuses to sign the elector's name or, if unable to write, fails to provide a fingerprint or other identifying mark, the elector may cast a provisional ballot as provided in 13-13-601, MCA, and these rules.

AUTH: 13-13-603, MCA  
IMP: 13-13-114, MCA

XVII PROCEDURES AT THE POLLING PLACE FOR CHALLENGES - PRIOR TO CASTING A BALLOT

(1) Consistent with 13-13-301, MCA, an elector's right to vote may be challenged on election day by any registered elector by orally stating to the election judges the grounds of the challenge. An individual offering to vote may be orally challenged by any elector of the county upon the following grounds, stating that the individual:

- (a) is not registered as required by law;
- (b) is not 18 years of age or older;
- (c) has not been a resident of the state of Montana and of the county in which the individual offers to vote for at least 30 days;
- (d) is not a citizen of the United States;
- (e) is registered in another county or state;
- (f) is subject to a court order requiring the individual's voter registration to be cancelled;
- (g) is not the registered elector who the individual presenting to vote claims to be;
- (h) is a provisionally registered elector whose status has not been changed to status as a legally registered elector;
- (i) is of unsound mind, as determined by a court;
- (j) has voted before in that election;
- (k) has been convicted of a felony and is serving a sentence in a penal institution; or
- (l) does not have the right to vote due to failing to meet other requirements in the Montana constitution, statutes, or the administrative rules.

(2) An elector challenged under these rules may cast a provisional ballot, which must be handled as a provisional ballot under 13-15-107, MCA, and these rules.

AUTH: 13-13-603, MCA  
IMP: 13-13-301, MCA

XVIII PROVISIONAL VOTING PROCEDURES AT THE POLLING PLACE - CASTING A BALLOT

(1) The election administrator shall direct election officials in each precinct to mark, in a location

specified by the election administrator in the records maintained by election officials, a notation for each elector who has chosen to cast a provisional ballot.

(2) Consistent with 13-13-601, MCA, an election official shall give to an elector who has been permitted the option of casting a provisional ballot the following, in the forms prescribed by the secretary of state:

(a) instructions for casting a provisional ballot, which must be filled out by an election official in the areas specified;

(b) a provisional ballot outer envelope, which must be filled out by an election official in the areas specified;

(c) a provisional ballot secrecy envelope; and

(d) a regular ballot.

(3) The elector shall, upon receipt of the forms in (1):

(a) read the instructions for casting a provisional ballot;

(b) fill out the specified areas of the provisional ballot outer envelope; and

(c) allow an election official to review the provisional ballot outer envelope that has been filled out by the elector.

(4) An election official, upon receiving the provisional ballot outer envelope from the elector, shall:

(a) ensure that the elector completed all required information on the provisional ballot outer envelope; and

(b) inform the elector that the elector may provide additional information at the elector's option.

(5) After the elector and the election official complete the requirements in this rule, the election official shall allow the elector to:

(a) sign the precinct register;

(b) cast the ballot;

(c) place the ballot in the provisional ballot secrecy envelope;

(d) place the provisional ballot secrecy envelope in the provisional ballot outer envelope; and

(e) return the provisional ballot outer envelope to an election official, who shall place the provisional ballot outer envelope into an unverified provisional ballot container.

(6) Consistent with 13-15-107, MCA, an election official shall handle a provisional ballot outer envelope which holds a ballot cast provisionally by an elector whose voter information is verified by the close of the polls on election day as follows:

(a) remove the provisional ballot outer envelope from the unverified provisional ballot container;

(b) mark it to indicate the reason(s) why it was verified and removed;

(c) remove the provisional ballot secrecy envelope, which must be opened by the elector to remove the provisional ballot, which must then be deposited with other ballots in a manner that allows for the secrecy of the ballot to the greatest extent possible, and counted as any other ballot;

(d) place the provisional ballot outer envelope in the

verified provisional ballot container; and

(e) mark in the location specified by the election administrator that the ballot has been counted as any other ballot.

AUTH: 13-13-603, MCA

IMP: 13-13-114, 13-13-601, 13-15-107, MCA

XIX PROVISIONAL VOTING PROCEDURES ON ELECTION DAY AFTER THE CLOSE OF POLLS - THE SIXTH DAY AFTER ELECTION DAY

(1) The election administrator shall direct election officials in each precinct, after the close of polls on election day, to tally the number of electors who have chosen to cast provisional ballots, but whose voter information is not verified by the close of the polls on election day, in a location specified by the election administrator in the records maintained by election officials.

(2) All information regarding electors who have chosen to cast provisional ballots shall remain private at all times prior to and during the counting of provisional ballots and shall not be released prior to and during the counting period without a court order.

(3) Election officials shall seal the unverified and verified provisional ballot containers and ensure delivery according to the election administrator's instructions.

(4) The election administrator shall, until 5:00 p.m. on the day after election day, allow electors who cast provisional ballots to verify eligibility to vote, in person, or by sending by facsimile or electronic mail a copy or scanned document.

(5) The election administrator shall allow electors who cast provisional ballots to verify eligibility to vote, by mail postmarked on election day or the day after election day.

(6) Consistent with 13-15-107, MCA, an election official shall handle a provisional ballot outer envelope which holds a ballot cast provisionally by an elector whose voter information is verified after the close of polls on election day as follows:

(a) remove the provisional ballot outer envelope from the unverified provisional ballot container;

(b) mark it to indicate the reason(s) why it was verified and removed;

(c) remove the provisional ballot secrecy envelope, which must be opened to remove the provisional ballot secrecy envelope, which must not be opened until the ballot is counted, and which must then be grouped with other ballots in a manner that allows for the secrecy of the ballot to the greatest extent possible, and counted as any other ballot under (7); and

(d) place the provisional ballot outer envelope in the verified provisional ballot container.

(7) Election officials must not begin the count of provisional ballots, cast by electors whose voter information is received and verified after the close of polls on election day, until 3:00 p.m. on the sixth day following the election.

(8) Election officials must not count any provisional ballots cast by electors whose voter information is not verified

by 3:00 p.m. on the sixth day following the election.

(9) After the completion of the count of provisional ballots, election officials must ensure that the reasons for counting or not counting provisional ballots are not released without a court order and that the names of electors who cast provisional ballots are not released without a court order if there are 10 or less electors who cast provisional ballots which were counted in a precinct.

AUTH: 13-13-603, MCA  
IMP: 13-15-107, MCA

XX PROVISIONAL VOTING PROCEDURES - AFTER FINAL DETERMINATION WHETHER OR NOT TO COUNT PROVISIONAL BALLOTS

(1) Election officials, after making the final determination whether or not to count the ballot of each elector who cast a provisional ballot, shall:

(a) open the verified provisional ballot container, record on the provisional ballot outer envelope the reason(s) for counting the verified provisional ballots, and seal the verified provisional ballot container, which shall not be opened without a court order;

(b) open the unverified provisional ballot container, and mark on each provisional ballot outer envelope that the elector's vote was not counted, and the reason why not, and all other applicable information;

(c) election officials or election workers shall notify each elector who cast a provisional ballot, by the most expedient means possible, whether or not the elector's vote was counted, and the reason(s) why or why not; and

(d) seal the unverified provisional ballot container, which shall not be opened without a court order.

AUTH: 13-13-603, MCA  
IMP: 13-15-107, MCA

XXI FORM OF ABSENTEE BALLOT APPLICATION AND ABSENTEE BALLOT TRANSMISSION TO ELECTION ADMINISTRATOR - GENERAL

(1) Election officials and election workers shall follow Title 13, chapter 13, part 2, MCA, and these rules in regard to absentee applications.

AUTH: 13-13-212, MCA  
IMP: 13-13-212, MCA

XXII DEFINITIONS As used in this subchapter, unless the context clearly indicates otherwise, the following definitions apply:

(1) "Election official" means an election administrator, election deputy, or election judge.

(2) "Election worker" means an individual designated to perform election support duties.

(3) "Elector" means an individual qualified to vote under state law.

AUTH: 13-13-212, MCA  
IMP: 13-13-212, MCA

XXIII FORM OF ABSENTEE BALLOT APPLICATION AND ABSENTEE BALLOT TRANSMISSION TO ELECTION ADMINISTRATOR (1) Consistent with 13-13-212, MCA, an elector may apply for an absentee ballot, using only a standardized form provided for in these rules, by making a written request, which must include the applicant's birth date and must be signed by the applicant. The request must be submitted to the election administrator of the applicant's county of residence within the time period specified in 13-13-211, MCA.

(2) The minimum acceptable prescribed form for an application for an absentee ballot must include a written request for the absentee ballot, the elector's birth date, and the elector's signature. Additional recommended statements include the election for which the elector is requesting an absentee ballot and the address to which the elector wants the ballot mailed. Electors are strongly encouraged to use the form used by election administrators, which appears in the forms booklet that is provided by the secretary of state to each election administrator.

(3) Consistent with 13-13-213(1), MCA, and except as provided in 13-13-213(3), MCA, the elector shall mail the application directly to the election administrator or deliver the application in person to the election administrator. With the exception of an immediate family member, as defined in 15-30-602, MCA, or a guardian, a third party may not collect applications for absentee ballots from electors and forward the applications to the election administrator.

AUTH: 13-13-212, MCA  
IMP: 13-13-211, 13-13-212, 13-13-213, MCA

XXIV VOTER IDENTIFICATION AND PROVISIONAL VOTING BY ABSENTEE AND MAIL BALLOT - GENERAL (1) Election officials and election workers shall follow 13-13-201, 13-13-204, 13-13-241, 13-13-602, and 13-15-107, MCA, and these rules in regard to voter identification and provisional voting by absentee and mail ballot.

AUTH: 13-13-603, MCA  
IMP: 13-13-603, MCA

XXV DEFINITIONS As used in this subchapter, unless the context clearly indicates otherwise, the following definitions apply:

(1) "Absentee or mail ballot elector identification form" means a form prescribed by the secretary of state and printed by the election administrator that:

(a) requires an elector to provide the elector's Montana driver's license number or Montana state identification number or the last four digits of the elector's social security number,

and states that if the elector does not have any of the above, the elector may enclose in the outer return envelope a copy of the elector's photo identification showing the elector's name, including but not limited to a valid driver's license, a school district or postsecondary education photo identification, or a tribal photo identification, and that if the elector does not enclose a photo identification, the elector may enclose a copy of a current utility bill, bank statement, paycheck, notice of confirmation of voter registration, government check, or other government document that shows your name and current address;

(b) if sufficient, is permitted to be used by an absentee or mail ballot elector as a government document meeting the requirements of identification under (6); and

(c) may be the same as the voter registration confirmation notice specified under 13-2-207, MCA, with the addition of the requirement under (1)(a).

(2) "Current address" means Montana residence address or mailing address.

(3) "Election official" means an election administrator, election deputy, or election judge.

(4) "Election worker" means an individual designated to perform election support duties.

(5) "Elector" means an individual qualified to vote under state law.

(6) "Identification" for the purposes of voting by absentee and mail ballot means any of the following:

(a) a current photo identification showing the elector's name, including, but not limited to, a valid driver's license, a school district or postsecondary education photo identification, or a tribal photo identification; or

(b) a current utility bill, bank statement, paycheck, notice of confirmation of voter registration issued pursuant to 13-2-207, MCA, government check, or other government document that shows the elector's name and current address.

(7) "Notice by the most expedient method available" means notification by any of the following, at the discretion of the election administrator:

- (a) telephone;
- (b) mail;
- (c) facsimile machine;
- (d) in person; or
- (e) email or other electronic means.

AUTH: 13-13-603, MCA

IMP: 13-13-201, 13-13-214, 13-13-241, 13-13-602, 13-15-107, MCA

XXVI ABSENTEE OR MAIL BALLOT ELECTOR IDENTIFICATION FORM

(1) An election official or election worker shall enclose with the materials sent to each elector an absentee or mail ballot elector identification form defined under [New Rule XXV(1)] and prescribed by the secretary of state.

AUTH: 13-13-603, MCA

IMP: 13-13-603, MCA

XXVII PROCEDURES FOR ABSENTEE AND MAIL BALLOT VOTING - DETERMINING THE SUFFICIENCY OF IDENTIFICATION (1)

After completion of the signature verification procedures in 13-13-241, or 13-19-309, MCA, as applicable, the election administrator shall determine prior to an election whether an absentee or mail ballot elector has provided sufficient identification defined in [New Rule XXV(6)] to allow a ballot to be counted:

(a) if the identification is insufficient, an election official or election worker shall follow procedures described in 13-13-241, MCA, and these rules to allow an absentee or mail ballot elector who failed to provide proper identifying information in the outer return envelope to verify eligibility to vote:

(i) a ballot cast by an elector whose voter information is insufficient or whose name does not appear on the precinct register must be handled as a provisional ballot under 13-15-107, MCA;

(ii) an absentee or mail ballot elector whose ballot is determined to be provisional has until 5:00 p.m. on the day after the election to provide sufficient identification information either in person, by facsimile, by electronic mail, or by mail postmarked on the day of the election or the day after the election;

(iii) an election official or election worker shall notify the absentee or mail ballot elector by mail or by the most expedient method available that the elector's identification information was insufficient and that the elector's ballot will be treated as a provisional ballot until the elector provides sufficient information under 13-13-114, MCA;

(iv) if the elector is notified by mail, an election official or election worker shall provide a self-addressed return envelope along with a description in the form prescribed by the secretary of state of the information necessary for the absentee or mail ballot elector to reclassify the provisional ballot as a regular ballot; and

(v) to the extent applicable, an election official or election worker shall handle absentee and mail ballot elector provisional ballots in the same manner as specified under the procedures for provisional ballots cast at the polling place in [New Rule XVIII], [New Rule XIX] and [New Rule XX].

(b) Upon receipt of the absentee or mail ballot elector identification form, the election administrator shall accept as sufficient this properly completed form as one of the forms of required identification defined in [New Rule XXV(6)].

(c) If the absentee or mail ballot elector identification form or other form of identification provided in [New Rule XXV(6)] is sufficient, an election official or election worker shall mark on the absentee or mail ballot outer return envelope that sufficient identification was provided by the elector.

(d) An election official or election worker shall retain in a sealed package the copy of identification provided by the

absentee or mail ballot elector. The sealed package containing the copy of identification may not be opened without a court order.

AUTH: 13-13-603, MCA

IMP: 13-13-114, 13-13-241, 13-19-309, MCA

XXVIII PROCEDURES FOR ABSENTEE AND MAIL BALLOT VOTING - PRINTING ERROR OR BALLOT DESTROYED - FAILURE TO RECEIVE BALLOT

(1) Consistent with 13-13-204(2), MCA, if an elector does not receive an absentee ballot or if the absentee ballot was destroyed, the elector may appear at the appropriate polling place on election day and vote in person after signing an affidavit, in the form prescribed by the secretary of state, swearing that the elector's ballot has not been received or was destroyed, and must provide a form of identification defined in [New Rule XXV(6)]. The ballot must be handled as a provisional ballot under 13-15-107, MCA, and these rules, subject to determination whether the ballot was voted wrongfully or illegally.

(2) An election administrator who determines that the identification provided by an elector under (1) is insufficient shall follow [New Rule XXVII] to allow the elector to provide sufficient identification.

(3) An election administrator shall follow 13-19-305 and 13-19-313, MCA, in regard to replacement ballots, signature verification, and procedural mistakes for mail ballot voting, and shall require that the elector provide a form of identification defined in [New Rule XXV(6)]. The ballot must be handled as a provisional ballot under 13-15-107, MCA, and these rules, subject to determination whether the elector attempted to vote more than once.

(4) An election administrator who determines that the identification provided by an elector under (3) is insufficient shall follow [New Rule XXVII] to allow the elector to provide sufficient identification.

AUTH: 13-13-603, MCA

IMP: 13-13-204, 13-13-603, 13-15-107, 13-19-313, MCA

XXIX DETERMINING A VALID VOTE IN MANUALLY COUNTING AND RECOUNTING PAPER AND OPTI-SCAN BALLOTS

(1) The following general rules shall apply in a count or recount of paper and opti-scan ballots:

(a) two (or more) designated voting areas have been marked and one (or more) mark has been erased, but residue is left. The election official shall clarify the ballot and cause a vote to be counted for the designated voting area that has been marked;

(b) one designated voting area is marked and a second designated voting area is marked with a heavy mark and no erasure has been attempted. The election official shall cause this to be counted as an overvote;

(c) the designated voting area has been marked for one response and a partially completed mark is made in a designated

voting area. The mark may or may not have some erasure although for the purpose of this rule erasure is not required. The election official shall cause this to be counted as an overvote;

(d) the designated voting area has been marked for one response and a hesitation mark is present within other designated voting area. The election official shall clarify the ballot and cause a vote to be counted for the designated voting area that has been marked;

(e) the designated voting area has not been marked according to instructions but the response is circled. The election official shall clarify the ballot by marking the designated voting area beside the circled vote if the marking of the designated voting area is consistent throughout the individual's ballot, and cause a vote to be counted for the marked designated voting area;

(f) the designated voting area has not been marked according to instructions but there is a connective line or arrow between the response and the designated voting area to indicate the vote. The election official shall clarify the ballot if the connective line or arrow beside the designated voting area is consistent throughout the individual's ballot, and cause a vote to be counted for the marked designated voting area;

(g) more than one designated voting area has been marked, but no clear mark is used to indicate the correct vote. The election official shall cause this to be counted as an overvote;

(h) more than one designated voting area has been marked, but a clear word, mark or statement is used to indicate the correct vote. The election official shall clarify the ballot and cause a vote to be counted for the designated voting area indicated as the correct vote;

(i) a word or statement has been used to indicate the correct vote instead of marking the designated voting area. The election official shall clarify the ballot and cause a vote to be counted for the designated voting area indicated as the correct vote;

(j) all of the designated voting areas are crossed out. The election official shall clarify the ballot and cause this to be counted as an undervote.

AUTH: 13-15-206, MCA

IMP: 13-15-206, MCA

XXX DETERMINING A VALID WRITE-IN VOTE IN MANUALLY COUNTING AND RECOUNTING PAPER AND OPTI-SCAN BALLOTS (1) Only votes for declared write-in candidates shall be counted. Except as provided in [New Rule XXXII], a write-in vote may be counted only if the write-in vote identifies an individual by any of the designations filed pursuant to 13-10-211(1)(a), MCA. The following rules shall apply to determining a valid write-in vote in a count or recount of paper and opti-scan ballots:

(a) no candidate name or office written in, but the designated write-in voting area is marked and no other candidate is selected. The election official shall count this as an

undervote;

(b) a printed candidate is selected by marking of the designated voting area, and no name is written in, but the designated write-in voting area is marked. The election official shall count this as an overvote;

(c) a printed candidate is selected by marking of the designated voting area, and any name, including, but not limited to, that candidate, is written in and the designated write-in voting area is marked. The election official shall count this as an overvote;

(d) the designated voting area for a printed candidate is marked and the same name is written in but the designated write-in voting area is not marked. The election official shall count this as a vote for the marked designated voting area;

(e) comments are written in which do not indicate a clear vote, and no candidate is marked. The election official shall count this as an undervote;

(f) the designated voting area for a printed candidate is marked, a comment is written in, and the corresponding designated write-in voting area is marked. The election official shall count this as an overvote;

(g) the designated voting area for a printed candidate is marked, a comment is written in, and the corresponding designated write-in voting area is not marked. The election official shall count this as a vote for the marked designated voting area unless the comment creates uncertainty about who the choice is or directs the election official not to count the vote for the printed candidate. In the latter case, the election official shall count this as an undervote.

AUTH: 13-15-206, MCA  
IMP: 13-15-206, MCA

XXXI DETERMINING A VALID VOTE ON A DIRECT RECORDING ELECTRONIC (DRE) BALLOT (1) A vote on a touch-screen direct recording electronic voting system or other electronic voting system consists of a voter's selection of a candidate or answer to a ballot question appearing on the voting surface of the device, followed by the voter activating the cast vote indicator.

(a) All DRE equipment shall provide for the use of a device for the voter to enter the name of a write-in candidate where applicable. Except as provided in [New Rule XXXII], a write-in vote may be counted only if the write-in vote identifies an individual by any of the designations filed pursuant to 13-10-211(1)(a), MCA.

(b) If a voter does not mark a candidate, judicial retention choice, or issue choice, the valid votes for other candidates or issues on the same ballot shall be counted.

AUTH: 13-15-206, MCA  
IMP: 13-15-206, MCA

XXXII DETERMINING A VALID VOTE ON A FEDERAL WRITE-IN

ABSENTEE BALLOT (1) A United States elector voting a federal write-in absentee ballot for a federal general election may designate a candidate by writing in the name of the candidate or by writing in the name of the political party. A written designation of the political party must be counted as a vote for the candidate of that party. A vote may not be voided for reasons of misspellings, abbreviations, or other minor variations of the candidate's name.

AUTH: 13-15-206, MCA  
IMP: 13-21-205, MCA

XXXIII APPLICABILITY TO ELECTIONS ALLOWING VOTES FOR MORE THAN ONE CANDIDATE FOR A POSITION (1) The rules in this subchapter shall be applied consistently with necessary adjustments for elections in which electors may cast votes for more than one candidate for a position.

AUTH: 13-15-206, MCA  
IMP: 13-15-206, MCA

XXXIV UNITED STATES ELECTORS (1) The following rules shall be followed, consistent with the Montana Absent Uniformed Services and Overseas Elector Voting Act, Title 13, chapter 21, MCA, in regard to United States electors:

(a) an individual must notify the county election official that the individual is a United States elector in order to come under the provisions of the Montana Absent Uniformed Services and Overseas Elector Voting Act;

(b) pursuant to 13-21-201, MCA, there is no limit on the earliest date that a United States elector may request an absentee ballot;

(c) in receiving absentee ballots, United States electors must be given priority to receive ballots as soon as they are available, if possible before the 30-day deadline for making them available;

(d) in even-year general elections, election administrators must notify United States electors that the voter information pamphlet is available online, which can be accomplished through either:

(i) the absentee elector instructions; or

(ii) a special insert in materials provided to the absentee elector.

AUTH: 13-21-104, MCA  
IMP: 13-21-201, MCA

XXXV FACSIMILE MACHINE ACCESS (1) A county election administrator desiring to offer this service, must use a facsimile machine that is secure from unauthorized access. Access to the facsimile machine must be limited by the following means:

(a) it is physically located in the office of the election administrator; or

(b) it has the technological ability to store the ballots that are faxed and that ballots stored in such manner can only be accessed by the election administrator or specially appointed deputies.

AUTH: 13-21-104, MCA  
IMP: 13-21-207, MCA

XXXVI HANDLING OF FACSIMILE BALLOTS (1) Facsimile ballots for United States electors shall be handled in the same manner as absentee ballots when the facsimile balloting rules do not specify procedure.

AUTH: 13-21-104, MCA  
IMP: 13-21-207, MCA

XXXVII BALLOT TRANSMISSION (1) Upon request for a facsimile ballot, an election administrator who has received a valid application from a United States elector shall send by facsimile transmission a ballot and a transmission slip containing instructions to the elector and a notice that the elector's ballot will not be secret in that it will be received by the election administrator and the elector's votes will be transcribed to the original ballot by a panel of no less than two election judges.

(2) The original transmission slip and original ballot shall be retained in a secure absentee envelope.

AUTH: 13-21-104, MCA  
IMP: 13-21-207, MCA

XXXVIII RECEIVING BALLOTS (1) The election administrator shall receive all facsimile ballots. As the ballots are printed out by the machine, they shall be checked by the election administrator to ensure that they are:

(a) readable in that the transmission has not made it impossible for the election judges to determine the elector's intentions; and

(b) the elector has signed an affirmation.

AUTH: 13-21-104, MCA  
IMP: 13-21-207, MCA

XXXIX ADMINISTRATIVE COMPLAINT PROCEDURES (1) The procedures in this rule shall be uniform and nondiscriminatory.

(2) Under this rule, any individual who believes that there is a violation of any provision of Title III of the Help America Vote Act of 2002 (hereinafter referred to as Title III), including a violation which has occurred, is occurring, or is about to occur, may file a complaint.

(3) Any complaint filed under this rule shall be in writing and notarized, and signed and sworn by the individual filing the complaint, and include the full name, telephone number, and mailing address of the complainant.

(4) The secretary of state may consolidate complaints filed under this rule.

(5) The secretary of state shall designate a presiding officer for any complaint under this rule. The secretary of state may, upon agreement of all the parties, resolve the complaint informally, and issue a final determination without a formal proceeding.

(6) At the request of the complainant, there shall be a hearing on the record. If a hearing on the record is requested, the complainant must so state. Any such hearing shall be held at a date and time and place determined by the secretary of state and at the discretion of the secretary of state the hearing may be conducted by telephone or upon written documentation. If the hearing is on consolidated complaints, then the complainants shall designate a single representative party to advocate for the consolidated complaint. If the presiding officer permits witnesses to testify, then they must be sworn in prior to their testimony being given. If a complainant fails to pursue a complaint, then the complaint shall be dismissed with prejudice.

(7) If, under this rule, the secretary of state determines that there is a violation of any provision of Title III, the secretary of state shall provide an informal opinion.

(8) If, under this rule, the secretary of state determines that there is no violation or that the complainant did not follow the above procedures in filing the complaint or the complaint does not on its face allege a violation of Title III with regard to a federal election, the secretary of state shall dismiss the complaint and publish the results of the procedures.

(9) The secretary of state shall make a final determination with respect to a complaint prior to the expiration of the 90-day period that begins on the date the complaint is filed, unless the complainant consents to a longer period for making such a determination.

(10) If the secretary of state fails to meet the deadline applicable under this rule, the complaint shall be resolved within 60 days under alternative dispute resolution procedures established for purposes of this rule. The record and other materials from any proceedings conducted under the complaint procedures established under this rule shall be made available for use under the alternative dispute resolution procedures.

(11) If a final determination of a complaint was not made within 90 days of the filing of the complaint and the complainant did not agree in writing to an extension, then the complaint shall be referred to a review panel comprised of three staff members of the office of the secretary of state. The three-member review panel shall issue a final determination on the complaint within 60 days of the referral. The review panel shall make its determination on the record of the hearing and shall not conduct any further proceedings, if the hearing was held and completed. If the hearing was not held or completed, then the review board shall conduct the hearing as prescribed above.

(12) At any time before, during or prior to this process

the complainant retains the right to file an action in any court of appropriate jurisdiction or to withdraw the complaint. No exhaustion of this administrative remedy is required.

AUTH: 13-1-202, MCA, Public Law 107-252  
IMP: 13-1-202, MCA, Public Law 107-252

REASON: These rules are being proposed pursuant to legislation enacted during the 2003 Legislative Session. The purpose of the rules is to ensure that Montanans have confidence in their government by ensuring they have confidence in the way their government is elected. The rules attempt to ensure that every eligible Montanan is able to exercise his or her right to vote, while at the same time protecting the integrity of the election process.

4. The rules proposed to be repealed provide as follows:

44.3.1401 REQUIRED MARKINGS found on page 44-77 of the Administrative Rules of Montana.

AUTH: Sec. 13-13-214, MCA  
IMP: Sec. 13-13-214, MCA

44.3.1501 FACSIMILE MACHINE ACCESS found on page 44-83 of the Administrative Rules of Montana.

AUTH: Sec. 13-13-278, MCA  
IMP: Sec. 13-13-277, MCA

44.3.1502 HANDLING OF FACSIMILE BALLOTS found on page 44-83 of the Administrative Rules of Montana.

AUTH: Sec. 13-13-278, MCA  
IMP: Sec. 13-13-277, MCA

44.3.1503 BALLOT TRANSMISSION found on page 44-83 of the Administrative Rules of Montana.

AUTH: Sec. 13-13-278, MCA  
IMP: Sec. 13-13-277, MCA

44.3.1504 RECEIVING BALLOTS found on page 44-83 of the Administrative Rules of Montana.

AUTH: Sec. 13-13-278, MCA  
IMP: Sec. 13-13-277, MCA

44.3.1505 BALLOT LOG found on page 44-84 of the Administrative Rules of Montana.

AUTH: Sec. 13-13-278, MCA  
IMP: Sec. 13-13-277, MCA

44.3.1506 ELECTOR AFFIRMATION found on page 44-84 of the Administrative Rules of Montana.

AUTH: Sec. 13-13-278, MCA  
IMP: Sec. 13-13-277, MCA

44.3.1507 BALLOT ACCEPTANCE found on page 44-84 of the Administrative Rules of Montana.

AUTH: Sec. 13-13-278, MCA  
IMP: Sec. 13-13-277, MCA

44.3.1508 TRANSCRIPTION OF BALLOTS found on page 44-84 of the Administrative Rules of Montana.

AUTH: Sec. 13-13-278, MCA  
IMP: Sec. 13-13-277, MCA

44.3.1509 ELECTION JUDGES AND BALLOT SECRECY found on page 44-84 of the Administrative Rules of Montana.

AUTH: Sec. 13-13-278, MCA  
IMP: Sec. 13-13-277, MCA

REASON: These rules are being proposed to be repealed because they have been included in separate proposed rules regarding United States electors. The purpose is to make these rules more easily accessible to the public and election officials.

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 Janice Doggett, Secretary of State's Office, P.O. Box 202801, Helena, MT 59620-2801, or by emailing [jdoggett@state.mt.us](mailto:jdoggett@state.mt.us), and must be received no later than December 11, 2003.

6. Janice Doggett, at the address above, has been designated to preside over and conduct the hearing.

7. The Secretary of State maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices, and specifies that the person wishes to receive notices regarding administrative rules, corporations, elections, notaries, records, Uniform Commercial Code or a combination thereof. Such written request may be mailed or delivered to the Secretary of State's Office, Administrative Rules Bureau, 1236 Sixth Avenue, P.O. Box 202801, Helena, MT 59620-2801, faxed to the office at (406) 444-5833, emailed to [klubke@state.mt.us](mailto:klubke@state.mt.us), or may be made by completing a request form at any rules hearing held by the Secretary of State's Office.

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

SECRETARY OF STATE

/s/ Bob Brown  
BOB BROWN  
Secretary of State

/s/ Janice Doggett  
JANICE DOGGETT  
Rule Reviewer

Certified to the Secretary of State, November 3, 2003.

BEFORE THE BOARD OF PHYSICAL THERAPY EXAMINERS  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the )  
amendment of ARM 8.42.409, )  
pertaining to exemptions from )  
licensure )

CORRECTED NOTICE OF  
AMENDMENT

TO: All Concerned Persons

1. On May 22, 2003, the Board of Physical Therapy Examiners published MAR Notice No. 8-42-24 regarding the proposed amendment of the above-stated rules relating to temporary, out-of-state and renewal licenses, foreign-trained applicants and continuing education at page 1027, 2003 Montana Administrative Register, issue no. 10.

2. On October 16, 2003, the Board of Physical Therapy Examiners published a Notice of Amendment for ARM 8.42.409 and other rules at page 2292, 2003 Montana Administrative Register, issue no. 19.

3. During preparation of replacement pages, the Board noticed errors in the AUTH and IMP citations for ARM 8.42.409. ARM 8.42.409 is amended as proposed, but with the following changes to correct the errors in the citations, stricken matter interlined, new matter underlined:

8.42.409 EXEMPTIONS (1) and (2) remain as proposed.

AUTH: 37-1-131, ~~37-11-101~~ and 37-11-201, MCA  
IMP: ~~37-11-101~~, 37-11-105, MCA

BOARD OF PHYSICAL THERAPY  
EXAMINERS  
Brenda Mahlum, President

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

/s/ MARK CADWALLADER  
Mark Cadwallader  
Alternate Rule Reviewer

Certified to the Secretary of State November 3, 2003.

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

In the matter of the	)	NOTICE OF AMENDMENT
amendment of ARM 24.35.111,	)	AND REPEAL
24.35.121, 24.35.201,	)	
24.35.205, 24.35.206,	)	
24.35.207, 24.35.301 and	)	
24.35.303, and the	)	
repeal of ARM 24.35.210,	)	
24.35.212 and 24.35.213, all	)	
relating to independent	)	
contractor exemptions and	)	
status determinations	)	

TO: All Concerned Persons

1. On September 25, 2003, the Department of Labor and Industry published MAR Notice No. 24-35-174, regarding the proposed amendment and repeal of the above stated rules at page 2028, 2003 Montana Administrative Register, issue number 18.

2. A public hearing was held in Helena on October 16, 2003. No members of the public attended the hearing. One written comment was received prior to the closing of the comment period on October 24, 2003.

3. After consideration of the comment, the Department has amended ARM 24.35.111, 24.35.121, 24.35.201, 24.35.205, 24.35.206, 24.35.207, 24.35.301 and 24.35.303 exactly as proposed.

4. After consideration of the comment, the Department has repealed ARM 24.35.210, 24.35.212 and 24.35.213 exactly as proposed.

5. The Department has thoroughly considered the comment made. The comment received, and the Department's response, is as follows:

Comment 1: The State Fund commented that the proposed changes were necessary and appropriate.

Response 1: The Department thanks the State Fund for their support.

/s/ MARK CADWALLADER  
Mark Cadwallader  
Alternate Rule Reviewer

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

Certified to the Secretary of State: November 3, 2003.

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

In the matter of the amendment ) NOTICE OF AMENDMENT  
of ARM 37.12.401 pertaining to )  
laboratory fees for the public )  
health laboratory and )  
environmental laboratory )

TO: All Interested Persons

1. On September 25, 2003, the Department of Public Health and Human Services published MAR Notice No. 37-302 pertaining to the proposed amendment of the above-stated rule relating to laboratory fees for the public health laboratory and environmental laboratory, at page 2045 of the 2003 Montana Administrative Register, issue number 18.

2. The Department has amended the rule as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

37.12.401 LABORATORY FEES FOR ANALYSES (1) remains as proposed.

(2) Effective December 1, 2003, fees for environmental analyses performed by the laboratory of the department of public health and human services are as follows, with the exceptions noted in (3) and (4):

(a) through (c)(ii)(H) remain as proposed.

(d) Fees for fuel analyses are as follows:

(i) Blue dye in fuel 8.63

(ii) Red dye in fuel 8.63

(iii) Dyed fuel combo

(excludes blue dye in fuel) ~~69.00~~ 55.00

(iv) through (4) remain as proposed.

AUTH: Sec. 50-1-202 and 50-19-104, MCA

IMP: Sec. 50-1-202 and 50-19-104, MCA

3. The Department has thoroughly considered all commentary received. The comments received and the Department's response to each follow:

COMMENT #1: The laboratory analysis for blue dye in fuel should be eliminated from the dyed fuel combo testing. Blue dye in fuel is no longer used at gas pumps. The price for the dyed fuel combo testing should be adjusted accordingly with the elimination of the blue dye analysis.

RESPONSE: The Department agrees. Testing for blue dye in fuel will be offered as a single test and will be removed from the dyed fuel combo. The proposed price of the dyed fuel combo will be reduced to \$55.00. This price represents a substantial

discount from the combination of the individual tests' prices. The Department has modified ARM 37.12.401(2)(d)(iii) to reflect the change.

COMMENT #2: Since the Department's Public Health Laboratory is setting fees for prenatal testing for syphilis, hepatitis B surface antigen, and rubella immunity pursuant to 50-19-104, MCA, that statute should be cited as rulemaking implementation authority for the rule.

RESPONSE: The Department agrees and has added 50-19-104, MCA, as rulemaking implementation authority.

Russell Cater  
Rule Reviewer

Russell Cater for Gail Gray  
Director, Public Health and  
Human Services

Certified to the Secretary of State November 3, 2003.

VOLUME NO. 50

OPINION NO. 3

COUNTY WATER DISTRICTS - local government entities subject to Montana Single Audit Act;  
LOCAL GOVERNMENT - entities subject to Montana Single Audit Act;  
WATER DISTRICTS - local government entities subject to Montana Single Audit Act;  
MONTANA CODE ANNOTATED - Title 2, chapter 7, part 5; sections 2-7-501, -501(7)(a), (7)(b), (7)(b)(vii), -502, (2)(b), (d), -503, -503(3)(a), -503(2);  
OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 5 (1991).

HELD: A county water district, as a defined local government entity, is subject to the requirements of the State of Montana Single Audit Act, whether or not it has accepted local, state or federal funds during the year.

November 5, 2003

Mr. Scott Darkenwald  
Director  
Department of Administration  
PO Box 200101  
Helena, MT 59620-0101

Dear Mr. Darkenwald:

You have requested my opinion on the following question:

Is a county water district subject to the State of Montana Single Audit Act whether or not it has accepted local, state or federal funds?

Based on the following analysis, it is my opinion that a county water district is subject to all requirements imposed on local government entities by the provisions of the State of Montana Single Audit Act under Mont. Code Ann. Title 2, chapter 7 (hereinafter referred to as the Act).

The Act specifies that the governing body of each local government entity shall ensure that a financial report is made each year and submitted to the Department of Administration. Montana Code Annotated § 2-7-501(7)(b)(vii) explicitly states that local government entities include county water districts. As a local government entity, the district is subject to the provisions of the Act.

The Act was adopted for the following specific goals:

(2) The purposes of this part are to:

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- (a) improve the financial management of local government entities with respect to federal, state, and local financial assistance;
- (b) establish uniform requirements for financial reports and audits of local government entities;
- (c) ensure constituent interests by determining that compliance with all appropriate statutes and regulations is accomplished;
- (d) ensure that the financial condition and operations of the local government entities are reasonably conducted and reported;
- (e) ensure that the stewardship of local government entities is conducted in a manner to preserve and protect the public trust;
- (f) ensure that local government entities accomplish, with economy and efficiency, the duties and responsibilities of the entities in accordance with the legal requirements imposed and the desires of the public; and
- (g) promote the efficient and effective use of audit resources.

Mont. Code Ann. § 2-7-502(2).

I note that the legislative intent as stated in Mont. Code Ann. § 2-7-502(2)(b) and (d) is "to establish uniform requirements for financial reports and audits of local government entities," and further "to ensure that the financial condition and operations of the local government entities are reasonably conducted and reported." Clearly, the legislature took it upon itself to identify as many local governmental entities as possible to satisfy these purposes. See Mont. Code Ann. § 2-7-501(7)(b).

The Act requires that each local government entity shall make a financial report every year. Mont. Code Ann. § 2-7-503 states:

The governing body or managing or executive officer of a local government entity, other than a school district or associated cooperative, shall ensure that a financial report is made every year.

The statute also provides that the department shall prescribe a uniform reporting system for all local government entities subject to the reporting requirements and identifies criteria to determine when local government entities are subject to audit. Mont. Code Ann. § 2-7-503(3)(a) provides that:

The governing body or managing or executive officer of each local government entity receiving revenue or financial assistance in the period covered by the

financial report in excess of \$200,000 shall cause an audit to be made at least every 2 years.

Entities not meeting the requirements of part (3)(a) above may be subject to a financial review at the request of the Department of Administration.

In addition to the reporting and audit provisions required, the statute further provides that the "department may at any time conduct or contract for a special audit or review of the affairs of any local government entity referred to in this part." Mont. Code Ann. § 2-7-503(5).

In order to determine whether the county water district is subject to the State of Montana Single Audit Act your question requires interpretation of the Act itself. Mont. Code Ann. § 2-7-501(7)(a) and (b) provide the following definition of local governmental entity:

(a) "Local government entity" means a county, city, district, or public corporation that:

(i) has the power to raise revenue or receive, disburse, or expend local, state, or federal government revenue for the purpose of serving the general public;

(ii) is governed by a board, commission, or individual elected or appointed by the public or representatives of the public; and

(iii) receives local, state, or federal financial assistance.

(b) Local government entities include but are not limited to:

. . . .

(vii) county water districts;

In addressing your question, I must follow the well-established principle of statutory construction that "statutory language must be construed according to its plain meaning and, if the language is clear and unambiguous, no further interpretation is required." Dahl v. Uninsured Employers' Fund, 1999 MT 168, ¶ 16, 295 Mont. 173, 983 P.2d 363.

The meaning of this statute is quite clear: "county water districts" are enumerated and expressly included within the definition of a "local government entity." The definition also provides criteria by which a non-enumerated entity may be evaluated for inclusion as the express list is not limited solely to those on the list.

As the language is clear and unambiguous, no further interpretation is required; the county water districts, as expressly defined local governmental entities, must comply with the requirements under the Act.

A prior Montana case addressed this statute, Reep v. Board of County Commissioners of Missoula County, State of Montana, 191 Mont. 162, 622 P.2d 685 (1981) but did not address the specific issue presented by your question. In addition a prior opinion of this office has addressed this statute without addressing the specific issue presented by your question, see 44 Op. Att'y Gen. No. 5 (1991).

It is my opinion that county water districts, whether or not they receive local, state or federal assistance, are subject to the requirements for reporting and audits under the State of Montana Single Audit Act, Mont. Code Ann. § 2-7-501, et seq.

THEREFORE, IT IS MY OPINION:

A county water district, as a defined local government entity, is subject to the requirements of the State of Montana Single Audit Act, whether or not it has accepted local, state or federal funds during the year.

Very truly yours,

/s/ Mike McGrath

MIKE MCGRATH  
Attorney General

mm/cfw/jym

BEFORE THE BOARD OF REALTY REGULATION  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the petition )  
for declaratory ruling on the )  
issue of whether a real )  
estate broker or )  
salesperson, who is engaged )  
in property management, )  
shall provide relationship )  
disclosures as are provided by )  
§37-51-314, MCA, or as are provided) )  
by ARM 8.58.714(3)(n) )

TO: All Concerned Persons

1. On December 12, 2003, at 1:00 p.m., in room B07, Park Avenue Building, 301 South Park Avenue, Helena, Montana, the Board of Realty Regulation will consider a petition for declaratory ruling on the following question:

"Shall a real estate broker or salesperson, who is engaged in property management, provide the relationship disclosures as are provided by MCA §37-51-314 or the disclosures as are provided by ARM §8.58.714(3)(n)?"

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or who need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Realty Regulation no later than 5:00 p.m., December 5, 2003, to advise us of the nature of the accommodation that you need. Please contact Grace Berger, Board of Realty Regulation, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 444-2961; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2323; e-mail dlibsdrre@state.mt.us.

3. This petition for declaratory ruling is submitted at the request of Merilynn J. Foss, Chair of the Property Managers Working Group of the Montana Association of REALTORS®, and the Montana Association of REALTORS®, Inc. (MAR) (Collectively the Petitioners).

4. Petitioners allege that licensed brokers and salespersons are subject to rigorous disclosure requirements pursuant to 37-51-314, MCA. On the other hand, licensed property managers are only required to disclose their contractual relationships pursuant to ARM 8.58.714(3)(n). Petitioners question which disclosure requirements are applicable to licensed brokers or salespersons who are engaged in property management.

5. The statutes and rules upon which the declaratory ruling is requested are 37-51-102(7), (8), (16), (20), (21), (22), (23), and (24), MCA, 37-51-314, MCA, ARM 8.58.419(3)(q), and ARM 8.58.714(3)(n), as set forth herein:

37-51-102 DEFINITIONS Unless the context requires otherwise, in this chapter, the following definitions apply:

...  
(7) "Buyer broker agreement" means a written agreement in which a prospective buyer employs a broker to locate real estate of the type and with terms and conditions as designated in the written agreement.

(8) "Buyer subagent" means a broker or salesperson who, pursuant to an offer of a subagency, acts as the agent of a buyer.

...  
(16) "Person" includes individuals, partnerships, associations, and corporations, foreign and domestic, except that when referring to a person licensed under this chapter, it means an individual.

...  
(20) "Salesperson" includes an individual who for a salary, commission, or compensation of any kind is associated, either directly, indirectly, regularly, or occasionally, with a real estate broker to sell, purchase, or negotiate for the sale, purchase, exchange, or renting of real estate.

(21) "Seller" means a person who has entered into a listing agreement to sell real estate and includes landlords who have an interest in or are a party to a lease or rental agreement.

(22) "Seller agent" means a broker or salesperson who, pursuant to a written listing agreement, acts as the agent of a seller and includes a seller subagent and an in-house seller agent designate.

(23) "Seller subagent" means a broker or salesperson who, pursuant to an offer of a subagency, acts as the agent of a seller.

(24)(a) "Statutory broker" means a broker or salesperson who assists one or more parties to a real estate transaction without acting as an agent or representative of any party to the real estate transaction.

(b) A broker or salesperson is presumed to be acting as a statutory broker unless the broker or salesperson has entered into a listing agreement with a seller or a buyer broker agreement with a buyer or has disclosed, as required in this chapter, a relationship other than that of a statutory broker.

37-51-314 RELATIONSHIP DISCLOSURE REQUIREMENTS (1) A broker or salesperson shall disclose the existence and nature of relevant agency or other relationships to the parties to a real estate transaction as provided in this section.

(2) A seller agent shall make the required relationship disclosures as follows:

(a) The initial disclosure, as provided in subsection (6), must be made to the seller at the time the listing agreement is executed.

(b) If a broker or salesperson is acting as a seller subagent, a subsequent disclosure, as provided in subsection (7), must be made to the seller at the time negotiations commence.

(c) The subsequent disclosure established in subsection (7) must be made to the buyer or buyer agent at the time negotiations commence.

(3) A buyer agent shall make the required relationship disclosures as follows:

(a) The initial disclosure, as provided in subsection (6), must be made to the buyer at the time the buyer broker agreement is executed.

(b) If a broker or a salesperson is acting as a buyer subagent, a subsequent disclosure, as provided in subsection (7), must be made to the buyer at the time negotiations commence.

(c) The subsequent disclosure established in subsection (7) must be made to the seller or seller agent at the time negotiations commence.

(4) A statutory broker shall make the required relationship disclosures as follows:

(a) The initial disclosure, as provided in subsection (6), must be made to the buyer at the time the statutory broker first endeavors to locate property for the buyer.

(b) The subsequent disclosure, as provided in subsection (7), must be made to the seller or seller agent at the time negotiations commence.

(5) A buyer agent or seller agent who contemplates becoming or subsequently becomes a dual agent shall disclose the potential or actual relationship to the buyer and seller and receive their consent prior to the time or at the time that the dual agency arises. If the buyer agent or seller agent who contemplates becoming a dual agent has not previously given the buyer or seller the initial disclosure, as provided in subsection (6), the initial disclosure must be used, but if the initial disclosure has been given, any subsequent disclosures must take the form of the disclosure provided in subsection (7).

(6) The initial disclosure as required by subsections (2)(a), (3)(a), (4)(a), and (5) must be written and contain substantially the following information:

(a) a description of the duties owed by the broker and the salesperson as set forth in 37-51-313;

(b) a statement that reads as follows: "IF A SELLER AGENT IS ALSO REPRESENTING A BUYER OR A BUYER AGENT IS ALSO REPRESENTING A SELLER WITH REGARD TO A PROPERTY, THEN A DUAL AGENCY RELATIONSHIP MAY BE ESTABLISHED. IN A DUAL AGENCY RELATIONSHIP, THE DUAL AGENT IS EQUALLY OBLIGATED TO BOTH THE SELLER AND THE BUYER. THESE OBLIGATIONS MAY PROHIBIT THE DUAL AGENT FROM ADVOCATING EXCLUSIVELY ON BEHALF OF THE SELLER OR BUYER AND MAY LIMIT THE DEPTH AND DEGREE OF REPRESENTATION

THAT YOU RECEIVE. A BROKER OR A SALESPERSON MAY NOT ACT AS A DUAL AGENT WITHOUT THE SIGNED, WRITTEN CONSENT OF BOTH THE SELLER AND THE BUYER".

(c) a definition of "adverse material fact";

(d) identification of the type of relationship disclosed;

(e) the signature of the seller or the buyer to whom the disclosure is given;

(f) the signature of the broker or the salesperson making the disclosure; and

(g) the date of the disclosure.

(7) The subsequent disclosure required by subsections (2)(b), (2)(c), (3)(b), (3)(c), (4)(b), and (5) or otherwise necessitated by a change or prospective change in a relationship described in a previous disclosure must be written, must contain the information required in subsections (6)(d), (6)(e), and (6)(g), and may be included in other documents involved in the real estate transaction. If a seller or buyer has not previously consented to the entry of the broker or the salesperson into a dual agency relationship, a subsequent disclosure must include all the information required in subsection (6), including the seller's or buyer's written consent to the dual agency relationship.

(8) Any disclosure required by this section may contain the following information:

(a) a description of the other relationships and corresponding duties available under this part, as long as the disclosure clearly indicates the relationship being disclosed;

(b) a consent to the creation of a dual agency relationship;

(c) other definitions in or provisions of this chapter; and

(d) other information not inconsistent with the information required in the disclosure.

(9) A written disclosure that complies with the provisions of this section must be construed as a sufficient disclosure of the relationship between a broker or salesperson and a buyer or seller and must be construed as conclusively establishing the obligations owed by a broker or salesperson to a buyer or seller in a real estate transaction.

8.58.419 GROUND FOR LICENSE DISCIPLINE - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT

...

(3) In addition to all other provisions contained in the statutes and rules administered by the board, failure to comply with any of the following shall constitute an act against the interest of the public:

...

(q) Licensees, while managing properties for owners, shall abide by the requirements of 37-51-607, MCA, and the requirements of the board of realty regulation's rules for property management as set forth in ARM 8.58.712 and 8.58.714;

...

8.58.714 GROUND FOR DISCIPLINE OF PROPERTY MANAGEMENT  
LICENSEES - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT

...  
(3) In addition to all other provisions contained in the statutes and rules administered by the board, particularly 37-51-606, MCA, failure to comply with any of the following will constitute an act against the interest of the public:

...  
(n) Licensees shall disclose to all customers and clients their contractual relationship.  
...

6. Petitioner Foss requests that the Board of Realty Regulation declare that a licensed real estate broker or salesperson, who is engaged in property management, does not need to provide relationship disclosures as provided in Montana Code Annotated Section 37-51-314 but rather, must provide disclosure as provided by ARM 8.58.714(3)(n).

Petitioner Montana Association of REALTORS®, Inc. does not advance a position but merely requests that the Board of Realty Regulation determine an answer to the question.

7. M. Gene Allison, attorney, has been designated to preside over and conduct this hearing.

8. The Board of Realty Regulation and Petitioners have identified the following as interested persons: The Montana Association of Realtors and all Montana licensed sales persons, brokers and property management agents.

9. 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 by mail to Grace Berger, Board of Realty Regulation, Department of Labor and Industry, P.O. Box 200513, Helena, MT 59620-0513; by facsimile to (406) 841-2323; or by e-mail to dlibsdrre@state.mt.us and must be received no later than 5:00 p.m., December 11, 2003.

BOARD OF REALTY REGULATION  
LAURA ODEGAARD, CHAIRPERSON

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

Certified to the Secretary of State November 3, 2003.

**NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE**

**Interim Committees and the Environmental Quality Council**

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

**Economic Affairs Interim Committee:**

- ▶ Department of Agriculture;
- ▶ Department of Commerce;
- ▶ Department of Labor and Industry;
- ▶ Department of Livestock;
- ▶ Office of the State Auditor and Insurance Commissioner;

and

- ▶ Office of Economic Development.

**Education and Local Government Interim Committee:**

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

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

- ▶ Department of Public Health and Human Services.

**Law and Justice Interim Committee:**

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

**Energy and Telecommunications Interim Committee:**

- ▶ Department of Public Service Regulation.

**Revenue and Transportation Interim Committee:**

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

**State Administration, and Veterans' Affairs Interim Committee:**

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

**Environmental Quality Council:**

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

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

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

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

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

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

Use of the Administrative Rules of Montana (ARM):

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

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To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through June 30, 2003, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 2002 and 2003 Montana Administrative Registers.

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