

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 15

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

In the matter of the amendment)	NOTICE OF PROPOSED
of ARM 2.5.502 concerning state)	AMENDMENT OF A RULE
procurement)	
)	NO PUBLIC HEARING
)	CONTEMPLATED

TO: All Concerned Persons

1. On September 11, 2000 the Department of Administration proposes to amend ARM 2.5.502 concerning state procurement.

2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Administration no later than 5:00 p.m. on September 1, 2000 to advise us of the nature of the accommodation that you need. Please contact Sheryl Motl, PO Box 200135, Helena, MT 59620-0135; (406) 444-3315; TDD 1-800-253-4091; or FAX (406) 444-2529.

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

2.5.502 BID, PROPOSAL, AND CONTRACT PERFORMANCE SECURITY

(1) and (2) remain the same.

(3) The preferred types of security are bonds as described in 18-4-312(3)(a) and cash as described in 18-4-312(3)(c) and (d), MCA. The security must be payable to the state of Montana and the contract performance security must remain in effect for the entire contract period.

(a) through (c) remain the same.

(d) Certificates of deposit or money market certificates will not be accepted as security for bid, proposal, or contract security unless the certificates are assigned only to the state. All interest income from these certificates would accrue only to the contractor and not the state.

AUTH: 18-4-221, MCA

IMP: 18-1-201 and 18-4-312, MCA

4. It is necessary to amend the rule for the following reason:

ARM 2.5.502 is amended to require that a certificate of deposit or money market certificate used as bid, proposal, or contract security be assigned to the state of Montana. Unless this assignment is made, these certificates could not be redeemed without obtaining the contractor's consent. In the event of nonperformance of a contractor, this could be a problem for the state.

5. Proposed rule notices are placed on the Procurement and Printing Division's Internet site at www.state.mt.us/doa/ppd.

6. Concerned persons may submit their data, views, or arguments concerning the proposed rule actions to Sheryl Motl, Bureau Chief, State Procurement Bureau, Department of Administration, PO Box 200135, Helena, MT, 59620-0135. Electronic responses may be sent to smotl@state.mt.us. Any comments must be received no later than September 9, 2000.

7. If persons who are directly affected by the proposed action wish to express their data, views, and arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written comments they have to Sheryl Motl at the address listed above. The comments must be received no later than September 9, 2000.

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

9. The Department of Administration maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to this list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notice regarding state procurement. Such written request may be mailed or delivered to Sheryl Motl, PO Box 200135, Helena, MT 59620-0135, faxed to the office at (406) 444-2529, or may be made by completing a request form at any rules hearing held by the Department of Administration.

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

By:

/s/ Dave Ashley
Dave Ashley, Deputy Director
Department of Administration

/s/ Dal Smilie
Dal Smilie, Rule Reviewer
Department of Administration

Certified to the Secretary of State July 31, 2000.

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

In the matter of the proposed) NOTICE OF PUBLIC HEARING
adoption of new rules I) ON PROPOSED ADOPTION
through IX pertaining to) OF VIATICAL RULES
viatical settlement)
agreements)

TO: All Concerned Persons

1. On August 31, 2000, at 10:00 a.m., a public hearing will be held in Room C209A&B, Cogswell Building, 1400 Broadway, Helena, Montana, to consider the proposed adoption of rules I through IX, pertaining to viatical settlement agreements.

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., August 24th, to advise us as to the nature of the accommodation needed. Please contact Pamela Weitz, State Auditor's Office, P.O. Box 4009, Helena, MT 59604-4009; telephone (406) 444-1744; Montana Relay 1-800-332-6145; TDD (406) 444-3246; facsimile (406) 444-3497 or e-mailed to pweitz@state.mt.us.

3. The proposed new rules provide as follows:

RULE I DEFINITIONS In addition to the definitions in 33-20-1302, MCA, the following definitions apply to these rules:

- (1) "Filed" means the date that the commissioner receives a form.
- (2) "Identifying information" means a name, address, telephone number, facsimile number, electronic mail address, photograph or likeness, employer, employment status, social security number, or any other information that is likely to lead to identification.
- (3) "Individual" means a natural person.
- (4) "Insured" means the terminally ill individual covered under a policy.
- (5) "Insured's family" means the insured, spouse, children, and anyone that lives in the house with the insured.
- (6) "Financing entity" means individual or institutional entities who may or will purchase a viatical settlement contract from a viatical settlement provider.
- (7) "Policy" means an individual life insurance policy, a rider to an individual life insurance policy, a certificate or a rider to a certificate evidencing coverage under a group life insurance policy.

(8) "Terminal illness" means having an illness where death is reasonably expected in 24 months or less.

(9) "Viator" means an individual who:

(a) is the holder of a group or individual life insurance policy, or a certificate holder of a life insurance policy, insuring the life of an individual with a terminal illness; and

(b) negotiates with, provides information to, or enters into a viatical settlement with a provider or broker. The term does not include a viatical settlement provider that sells, transfers, or pledges a policy that it has purchased from a viator.

AUTH: Sec. 33-1-313, 33-20-1315, MCA

IMP: Sec. 33-20-1302, MCA

RULE II LICENSE REQUIREMENTS (1) To obtain a license as a viatical settlement provider, a person shall apply to the department by filling out an application for a license as a viatical settlement provider on a form prescribed by the commissioner and by supplying requested information. The application form must be accompanied by:

(a) a registration fee in the amount of \$1900;

(b) a copy of an executed bond as surety; and

(c) a copy of an errors and omissions policy in an amount commensurate with a provider's exposure.

(2) To obtain a license as a viatical settlement broker, an individual shall apply to the department by filling out an application for a license as a viatical settlement broker on a form prescribed by the commissioner and by supplying requested information. The application form must be accompanied by:

(a) a registration fee in the amount of \$50;

(b) a copy of an executed bond as a surety; and

(c) a copy of an errors and omissions policy in an amount commensurate with a broker's exposure.

(3) A viatical settlement provider or a viatical settlement broker shall acquire and maintain a surety bond for violations of the insurance code. The bond must be in the amount of \$50,000 payable to the State of Montana. An applicant shall file a copy of the executed bond with the commissioner at the time of application.

(4) The commissioner may ask and an applicant shall provide for such additional information as is necessary to determine whether an applicant complies with the requirements of 33-20-1303, MCA.

AUTH: Sec. 33-20-1315, MCA

IMP: Sec. 33-20-1303, 33-20-1315, MCA

RULE III ANNUAL FEE AND REPORTING FORMS (1) On or before March 1 of each year, viatical settlement providers shall submit to the department an annual fee in the amount of \$1900.

(2) Forms for annual reporting required in 33-20-1309, MCA, are available at the commissioner's office.

AUTH: 33-20-1315, MCA
IMP: 33-2-708, 33-20-1309, MCA

RULE IV FORMS AND MATERIALS FILINGS, APPROVALS AND REVISIONS (1) A viatical settlement provider shall file and have approved by the commissioner application forms, contracts and other forms as required by 33-1-501 and 33-20-1308, MCA.

(2) A viatical settlement provider or broker shall file with the commissioner information brochures, advertising, and other solicitation materials that a provider or broker uses to market viatical settlements to viators or prospective viators in this state before using such materials.

(3) If a viator, prior to effectuating a viatical settlement, requests any changes to a contract form previously approved by the commissioner, the provider shall file a letter with the commissioner requesting a deviation from the standard contract form. The letter must provide:

- (a) the name of a viatical settlement provider;
- (b) that the viator requested substantive revision;
- (c) the form number of the viatical settlement contract that was originally proposed;
- (d) the deviations from a standard viatical settlement contract;
- (e) the date a settlement occurred; and
- (f) that the payment was reasonable under [Rule VII].

AUTH: Sec. 33-20-1315, MCA
IMP: Sec. 33-1-501, 33-20-1308, 33-20-1311, MCA

RULE V DISCLOSURE OF INFORMATION BROCHURE (1) A viatical settlement provider or viatical settlement broker shall provide a viator with a disclosure of information brochure containing the disclosures required in 33-20-1311, MCA, and this rule. A provider or broker shall provide this brochure before or concurrent with taking an application for a viatical settlement contract.

- (2) A brochure must contain:
 - (a) a provider's full name and home address;
 - (b) the following language: "All medical, financial and identifying information solicited or obtained by a viatical settlement provider or viatical settlement broker about an insured's family is confidential.";
 - (c) the following language: "After a viator enters into a viatical settlement contract, a provider may only check on the health of the insured, who has a life expectancy of more than one year, once every three months, and with an insured who has a life expectancy of less than one year, once every month.";
 - (d) language advising that a viatical settlement provider may provide information obtained from a policyholder

or certificate holder to a financing entity but that a financing entity may not further disclose the information; and

(e) language advising a viator and insured that a viatical settlement provider could sell or otherwise transfer a policy that is the subject of a viatical settlement to a financing entity unknown to a viator and insured, without a viator's consent.

(3) A provider or broker shall detach and retain an acknowledgment page from a brochure. A prospective viator shall sign and have notarized the attachment page, in which a prospective viator acknowledges that the viator:

(a) has knowledge that the insured has a terminal illness;

(b) has received and read a disclosure of information brochure;

(c) has received and read all the documents used to effect a viatical settlement; and

(d) is entering into a viatical settlement knowingly and voluntarily.

(4) A brochure must disclose what effect a viatical settlement will have on the payment of premiums and disposition of proceeds, cash values and dividends, and whether a policy that is the subject of a viatical settlement contains a provision for double or additional indemnity for accidental death or contains riders or other provisions insuring the lives of spouses, family members or anyone else other than the insured.

(5) The brochure must explain:

(a) how viatical settlements operate; and

(b) a viator's right to rescind a viatical settlement not later than the 15th day after the date a viator receives viatical settlement proceeds or not later than 30 days after a provider and viator sign a viatical settlement contract, whichever is the longer period.

AUTH: Sec. 33-20-1315, MCA

IMP: Sec. 33-20-1311, MCA

RULE VI TRADE PRACTICE STANDARDS FOR REGULATING ADVERTISING AND SOLICITATION (1) Providers and brokers shall adhere to the following advertising and solicitation standards:

(a) advertising related to a viatical settlement must be truthful and not misleading by fact or implication;

(b) if a provider or broker, in an advertisement, emphasizes the speed with which a viatical settlement will occur, the advertising must disclose the average time frame from completed application to the date of offer and from acceptance of an offer to the receipt of the funds by a viator;

(c) if a provider or broker, in an advertisement, emphasizes the dollar amounts available to viators, the advertising shall disclose an average purchase price as a percentage of face value obtained by viators contracting with

a provider during the past six months. If a provider or broker had no sales in the past six months, the advertising shall contain a minimum percentage of face value to be obtained by a viator upon sale of a policy.

(2) Advertisements and materials for solicitation must contain the statement, "Viatical settlement providers may only enter into viatical settlement agreements with viators who hold policies of terminally ill persons."

AUTH: Sec. 33-20-1315, MCA
IMP: Sec. 33-20-1315, MCA

RULE VII STANDARDS FOR EVALUATION OF REASONABLE PAYMENTS

(1) In order to assure that viatical settlement providers pay viators a reasonable amount for a policy, the following table shows the minimum percentages that must be paid on the face value of a policy:

Insured's Life Expectancy	Minimum Percentage of Face Value Less Outstanding Loans Received by a Viator
Less than 6 months	80%
At least 6 but less than 12 months	70%
At least 12 but less than 18 months	65%
At least 18 but less than 25 months	60%

AUTH: Sec. 33-20-1315, MCA
IMP: Sec. 33-20-1315, MCA

RULE VIII GENERAL RULES

(1) With respect to policies containing a provision for double or additional indemnity for accidental death, the additional payment must remain payable to the beneficiary last named by a viator prior to entering into a viatical settlement contract, or to such other beneficiary, other than a viatical settlement provider, as a viator may thereafter designate, or in the absence of a beneficiary, to the estate of a viator.

(2) A viatical settlement provider shall pay the proceeds of a viatical settlement pursuant to 33-20-1314, MCA, by means of wire transfer to the account of a viator or by certified check or cashier's check.

(3) A broker may not be an agent for both a viator and a viatical settlement provider on a viatical settlement transaction.

(4) A viatical settlement broker who is an agent for a viator shall not, without the written agreement of a viator obtained prior to performing any services in connection with a viatical settlement, seek or obtain any compensation from a viator.

(5) A viatical settlement provider may only enter into a viatical settlement contract with a viator who holds a policy of an insured with a terminal illness.

(6) A viatical settlement provider or broker may not condition the consideration of an application on exclusive dealing between a viator and a viatical settlement provider or broker.

(7) Contacts for the purpose of determining the health status of an insured by a viatical settlement provider or a financing entity after a viatical settlement has occurred are limited to once every three months for insureds with a life expectancy of more than one year, and to once per month for insureds with a life expectancy of one year or less.

(8) A viatical settlement provider may provide personal information about a policyholder or certificate holder to a financing entity, but a financing entity may not further disclose the information. Prior to disclosing personal information, a provider must have a signed agreement from the financing entity that it will not further disclose the information.

AUTH: Sec. 33-20-1315, MCA

IMP: Sec. 33-20-1313, 33-20-1314, MCA

RULE IX REGULATION AS A SECURITY (1) A viatical settlement broker or a viatical settlement provider may not solicit, enter into, or negotiate viatical settlement contracts unless a broker or provider, through the exercise of due diligence, ensures that:

(a) the method of funding the financial obligations of a viatical settlement provider does not involve, directly or indirectly, an offer and sale of a "security", as defined in 30-10-103(22), MCA; or

(b) if the method of funding the financial obligations of a viatical settlement provider does involve, directly or indirectly, an offer and sale of a "security", as defined in 30-10-103(22), MCA, a related offer and sale of a security is in compliance with the Securities Act of Montana, 30-10-101, et seq., MCA.

(2) A viatical settlement provider shall provide a letter verifying that it is in compliance with (1)(a) and (1)(b) with the application and the yearly report to the commissioner.

AUTH: Sec. 33-20-1315, MCA

IMP: Sec. 33-20-1303, MCA

4. REASON: In 1997, the Montana Legislature passed Senate Bill 49, the Viatical Settlement Act. In a viatical settlement, a life insurance policy insuring the life of a person who is terminally ill is sold to a third party, called a "viatical settlement provider." The provider pays the owner of the policy a percentage of the death benefit amount payable under the policy. In return, the provider is entitled to receive the entire death benefit amount upon the death of the terminally ill person. The Act regulates viatical settlement contracts, establishes license requirements for brokers and

providers, establishes annual fees and reporting requirements, and establishes requirements for advertising, to include the disclosure of information brochures.

These rules are reasonably necessary because the legislature mandated that the department adopt rules and because they regulate situations that are perilous to public health, safety, or welfare. Since the Viatical Settlement Act has been passed in 1997, this department has been inundated with phone calls from Montana citizens who hold life insurance policies of terminally ill Montana insureds who wish to sell to a viatical settlement provider. Providers have been calling this office wanting to enter into viatical settlement contracts. Sales cannot take place until this department enacts rules regulating the brokers and providers and protecting Montana citizens.

RULE I contains definitions to clarify the meaning of technical words.

RULE II defines the licensing requirements and sets out registration fees and bond amounts to comply with the mandatory rule making provisions pursuant to 33-1-1315(2), MCA. This rule is to regulate a situation perilous to public health, safety and welfare. The commissioner has a duty to protect the interests of citizens by licensing providers and brokers. The commissioner must establish registration fees that defray the cost of regulating the industry, to include licensing brokers and providers. A large amount of money can be involved with a provider purchasing a policy requiring the establishment of the amount of a surety bond for providers. This will act as a deterrent for wrongdoing by a provider against Montana citizens because an illegal act may result in a forfeiture of the bond.

RULE III sets out the annual fee and reporting requirements for viatical settlement providers to comply with the mandatory rule making provisions pursuant to 33-1-1314 (3)(b), MCA. This rule is to regulate a situation perilous to public health, safety and welfare. The commissioner must obtain information on a yearly basis from providers. The yearly fee is to defray the cost of obtaining and maintaining that information, and also helps defray the cost of regulating that industry.

RULE IV sets out what forms must be filed and what forms the State Auditor must approve to comply with the rule making provisions pursuant to 33-1-1315(1), MCA. This rule outlines a process that brokers and providers shall follow in order to have their forms approved. The rule also regulates a situation perilous to the public health, welfare and safety in that the commissioner shall ensure that the information on the forms is correct since large amounts of money are involved in the purchase of policies from viators.

RULE V sets out that a viator shall be given a disclosure of information brochure and it also details what information must be contained in the brochure to comply with the mandatory rules making provisions pursuant to 33-1-1315, MCA. This rule regulates a situation perilous to the public health, welfare

and safety in that large sums of money are involved with viatical settlement contracts. The commissioner requires certain information so that a viator has information about entering into a viatical settlement contract.

RULE VI sets out the trade practice standards for regulating advertising and solicitation which encourages providers and brokers to be truthful in their advertising claims especially relating to the amount of money a viator will receive and the amount of time that a viator will receive payment for the sale of a policy. It also encourages providers and brokers to disclose that providers may only purchase the policy of a terminally ill person to comply with the mandatory rule making provisions pursuant to 33-1-1315(3)(a), MCA. The rule then regulates a situation perilous to the public health, safety, or welfare in that standards are established to protect a viator from advertising and solicitation that may be misleading.

RULE VII is proposed to ensure that providers pay viators a reasonable amount for the policy to comply with the rule making provisions pursuant to 33-1-1315(1), MCA. In that way, it is regulating a situation perilous to public health, safety, or welfare. A viator may be the insured or closely related to the insured. In dealing with the terminal illness, and probably not having the financial sophistication, a viator could be taken advantage of by an unscrupulous provider or broker who pays below market value for a policy. RULE VII ensures a fair payment for a policy so that citizens are not harmed.

RULE VIII is proposed to regulate a situation perilous to public health, safety, or welfare.

Subsection (1) deals with policies where there is additional indemnity in a case of accidental death, and in that case the additional amount must go to a viator's beneficiary rather than enriching a provider.

Subsection (2) establishes a process by which a viator is to be paid for a policy. It is designed to be as secure as possible so that a viator is not denied payment for the assignment of a policy, and is thus harmed.

Subsection (3) establishes that a broker either has a fiduciary duty to a provider or a viator. Under the rules, a broker cannot act as an agent for both parties at the same time. This is to protect a viator from harm in having a broker that represents both parties and having a conflict of interest.

Subsection (4) protects a viator from hiring a broker without realizing that a broker receives compensation from a viator rather than from a provider.

Subsection (5) clarifies that Montana law does not allow viatical settlements with persons who are not terminally ill.

Subsection (6) protects citizens from unscrupulous providers or brokers who might try to convince viators that they must deal only with that provider or broker. Such a condition hinders free trade, and is harmful to the public welfare.

Subsection (7) establishes the maximum number of times a provider or financial entity may contact a terminally ill insured to determine if the insured has died, so that the insured has some amount of privacy and dignity while dying.

Subsection (8) establishes a right of privacy for a policyholder or a certificate holder in that information given to the financing entity by the provider may not be disclosed by the financing entity.

RULE IX is to regulate a situation perilous to public health, safety, or welfare. It requires brokers and providers to examine the transactions that they are entering into and study Montana securities law to determine if they are in compliance. Brokers and providers then write a letter to that effect that accompanies their application, and in addition, providers write a letter to that effect that accompanies the annual report. This proposed rule protects the citizens from purchasing securities that are not in compliance with Montana law.

5. Section 2-4-302(1)(a) and (b), MCA, requires the department to report certain facts when proposing to adopt, increase, or decrease a monetary payment. RULE II and RULE III contain proposed fees. The department has no way of estimating the impact of these fees as there is no historical data to determine how many applicants there will be for licenses as a broker or provider.

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 Kevin Phillips, Attorney, State Auditor's Office, P.O. Box 4009, Helena, Montana 59604, or by e-mail to kephillips@state.mt.us, and must be received no later than September 7, 2000.

7. Kevin Phillips, Attorney, 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 request may be mailed or delivered to the State Auditor's Office, P.O. Box 4009, Helena, MT 59604, faxed to 406-444-3497, e-mailed to kephillips@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 bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

MARK O'KEEFE, State Auditor
and Commissioner of Insurance

By: /s/ Peter Funk
Peter Funk
Deputy Insurance Commissioner

By: /s/ Janice VanRiper
Janice VanRiper
Rules Reviewer

Certified to the Secretary of State on July 31, 2000.

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

In the matter of the adoption) NOTICE OF ADOPTION OF
of the temporary emergency) TEMPORARY EMERGENCY RULE
amendment of ARM 46.20.106)
pertaining to mental health)
services plan eligibility)

TO: All Interested Persons

1. The Department of Public Health and Human Services is adopting the following temporary emergency rule amendment to prevent imminent harm to the public health, safety, and welfare of children who have a serious emotional disturbance, adults with severe and disabling mental illnesses and the general public. Imminent and substantial budget deficits in the Mental Health Services Plan (MHSP) for State Fiscal Year 2000 require the Department to make substantial, immediate adjustments to MHSP eligibility and benefits in order to reduce the cost of the program to a level consistent with appropriations. Without the emergency rule, the Department would be required to reduce MHSP eligibility from 150% of the federal poverty level to 120% of poverty. Such a reduction would result in over 700 individuals losing MHSP eligibility. The Department would also have been required to suspend new MHSP enrollments for an indefinite period and to make deep reductions in the scope of MHSP services. Such measures would have left a significant number of seriously mentally ill individuals without treatment. Without adequate and appropriate treatment, mentally ill individuals would suffer exacerbation of their symptoms and a deterioration in their ability to function within the community, posing an imminent risk of harm to the health and safety of those individuals, as well as to the safety of their families and communities.

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 request an accommodation, contact the department no later than 5:00 p.m. on August 22, 2000, 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 dphslegal@state.mt.us.

2. The text of the temporary emergency rule is as follows. Matter to be added is underlined. Matter to be deleted is interlined.

46.20.106 MENTAL HEALTH SERVICES PLAN, MEMBER ELIGIBILITY

(1) An individual is eligible for covered services under the plan if:

(a) the individual is a youth with a serious emotional disturbance or an adult with a severe disabling mental illness; and the family of which the individual is a member has a total family income, without regard to other family resources, at or below 150% of the most recently published federal poverty level (FPL); and

(b) the individual has been denied medicaid eligibility, is ineligible for medicaid by virtue of being a patient in an institution for mental diseases, or has applied for medicaid and the application is pending. An individual who meets medicaid eligibility requirements but does not apply for medicaid is not eligible to receive services under the plan; and

(c) if the individual is under the age of 19 years and the individual is enrolled in or has been denied enrollment in Montana children's health insurance program (CHIP), as established in ARM Title 37, chapter 39. For affected individuals enrolled in the plan on July 31, 2000, this requirement will be effective 60 days following the mailing of written notice by the department to the parent or guardian of record for the individual.

(2) through (11)(a)(ii) remain the same.

AUTH: Sec. 41-3-1103, 53-2-201, 53-6-113, 53-6-131, 53-6-701 and 53-6-706, MCA

IMP: Sec. 41-3-1103, 53-2-201, 53-1-601, 53-1-602, 53-2-201, 53-6-101, 53-6-113, 53-6-116, 53-6-117, 53-6-131, 53-6-701, 53-6-705, 53-6-706, 53-21-139 and 53-21-202, MCA

3. The proposed amendment will add a new provision to the eligibility requirements for the Mental Health Services Plan (MHSP). It will require MHSP applicants under 19 years of age, in addition to existing MHSP requirements, to be first enrolled in CHIP or denied enrollment in CHIP prior to a determination of eligibility for MHSP. Persons under 19 years of age now enrolled in the MHSP would have sixty days after mailing of a written notice by the Department to enroll in or be denied enrollment in CHIP.

The amendment is necessary to prevent imminent harm to the public health, safety and welfare of children who have a serious emotional disturbance and who are currently receiving services through the MHSP.

The proposed amendment will ensure that MHSP children, virtually all of whom are potentially eligible for CHIP, will be covered by the CHIP program. In addition to ensuring that these children, all of whom have identified health problems, can receive treatment for all aspects of their illness, this change will ensure that the MHSP program pays only for mental health services beyond those covered under CHIP. It will also allow the Department to obtain federal financial participation at the rate of 80% of treatment costs for all mental health services to eligible children.

Because of imminent and substantial budget deficits in State Fiscal Year 2000, the Department is required to make substantial, immediate adjustments to MHSP eligibility and benefits in order to reduce the cost of the program to a level consistent with appropriations. In the absence of immediate eligibility changes the Department would be required to make deep reductions in the scope of MHSP services. As a result, a significant number of children and adults with severe and disabling mental illnesses would no longer have coverage for the costs of their mental health treatment. The Department finds that the lack of coverage would pose an imminent danger to the public health and welfare because the affected persons would not receive necessary mental health treatment.

The Department believes the savings resulting from this rule will allow the Department to avoid an immediate reduction of the upper income limit for the MHSP program and may mitigate the need for such reductions or other cost-cutting measures in the future. To achieve the same savings, MHSP eligibility would have to be reduced from 150% of the federal poverty level to 120% of poverty. Such a reduction would result in over 700 individuals losing MHSP eligibility. All of these are children who have been identified as having a serious emotional disturbance or adults who have been identified as having a severe and disabling mental illness.

This rule amendment will also allow the Department to avoid immediate suspension of new MHSP enrollments for an indefinite period. Such a measure would also leave a significant number of seriously mentally ill individuals without treatment.

The alternatives to this rule would be to reduce the upper income limit for the MHSP program from 150% of the federal poverty level to 120% of poverty and to suspend enrollment indefinitely. These measures were identified by the Department as having the potential to achieve the cost reductions required with the least negative impact on the system of care.

The Department rejected the other options because they would have had potentially severe impacts on the individuals who would have been dropped from service. Without adequate and appropriate treatment, mentally ill individuals will suffer exacerbation of symptoms and a deterioration in their ability to function within the community, posing a certain and imminent risk of harm to the health and safety of those individuals, as well as to the safety of their families and communities.

The Department anticipates that the alternative measures would have saved approximately \$4.1 million in State Fiscal Year 2001. The individuals affected would obviously not have been able to pay for the services no longer covered by MHSP because they do not have the resources to do so. However, the other options would have had a substantial financial impact on the individuals and families affected and upon county and local governments.

The Department estimates the fiscal impact of this rule amendment will be an overall cost savings to the Mental Health Access Plan of 4.3 million dollars over the next 12 months.

4. The temporary emergency amendment will be effective July 31, 2000.

5. A standard rulemaking procedure will be undertaken by the Department prior to the expiration of the temporary emergency rule changes.

6. Interested persons may submit their data, views or arguments during the standard rulemaking process. 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 to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, submitted 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 September 7, 2000.

/s/ Dawn Sliva
Rule Reviewer

/s/ Laurie Ekanger
Director, Public Health and
Human Services

Certified to the Secretary of State July 31, 2000.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the proposed) NOTICE OF ADOPTION
adoption of New Rule I (42.15.)) AND AMENDMENT
519 and the amendment of ARM)
42.15.507, 42.15.514, 42.15.)
515, and 42.15.516 relating)
to Endowment Tax Credit)

TO: All Concerned Persons

1. On March 30, 2000, the Department published notice of the proposed adoption of New Rule I (ARM 42.15.519) and amendment of ARM 42.15.507, 42.15.514, 42.15.515, and 42.15.516 relating to Endowment Tax Credit at page 806 of the 2000 Montana Administrative Register, issue no. 6.

2. A public hearing was held on April 28, 2000, where oral and written comments were received.

Oral and written comments received during and subsequent to the hearing are summarized as follows along with the response of the Department:

COMMENT NO. 1: James Soft and Gary Hickle with the Montana Governor's Task Force on Endowed Philanthropy and the Yellowstone Boys and Girls Ranch Foundation submitted oral and written comments reflecting a minor change regarding New Rule I. Mr. Soft suggested adding the words "based on" in (1) so that the rule would read: "The present value of a gift contributed to a qualified endowment is based on its fair market value on the date of the gift." His concern is with charities booking the full-face amount of the planned gift as the historic dollar value endowment, rather than the present value of the gift portion of the planned gift at the time the gift is established.

RESPONSE NO. 1: The department agrees with this amendment and will amend the new rule to reflect this change.

COMMENT NO. 2: Mr. Soft provided comments and supporting Internal Revenue Rulings regarding the proposed deletion of (7) in ARM 42.15.514. Mr. Soft indicated that the federal rulings do permit the donor/trustee or the income beneficiary the power to indeed name or substitute, subsequent to the creation of the trust, another qualified tax-exempt organization in place of the original organization named in the trust instrument. In these instances, although the donor/trustee is no longer the "owner" of the trust in the technical sense, they can retain the right to substitute or name, at a later date, a different charity without disqualifying the trust. Mr. Soft indicated that if the rule were amended as proposed it would inhibit the creation of charitable remainder trusts in Montana, and thus would be counterproductive to the spirit of the tax credit law. Therefore, Mr. Soft strongly urged the department to not eliminate (7) of ARM 42.15.514.

RESPONSE NO. 2: The department concurs with Mr. Soft's comments regarding the power of the donor/trustee or income beneficiary to indeed name or substitute, subsequent to the creation of the trust, another qualified tax-exempt organization in place of the original organization named in the trust instrument.

The department proposed to delete ARM 42.15.514(7) because it understood, that at least with insurance policies, once the donor donated the policy they no longer own it, and thus had no control over it. Therefore, they would not be allowed to change the tax-exempt organization in the future. Based on the comments received, the department will further amend ARM 42.15.514 as shown in this notice to clarify the acceptance of changing a donor/trustee or income beneficiary under certain circumstances.

COMMENT NO. 3: Steve Hample, KMS Financial Services, Inc., provided written comments regarding the rules and stated that his business has participated in discussions with the department and the State auditor's office seeking clarification of tax treatment of, and administration of, life insurance policies donated to charities. Mr. Hample stated that he agreed with the proposed amendments and specifically welcomed New Rule I and the "fair market value" language.

Mr. Hample explained that the "fair market value" could be the cash surrender value of a life insurance policy at any given day. It is also what a willing buyer would be willing to pay for it.

Mr. Hample agreed with Mr. Soft's suggestion to add "based on" to (1) of New Rule I.

RESPONSE NO. 3: The department appreciates Mr. Hample's comments and as stated in Response No. 1, the department will amend New Rule I to reflect Mr. Soft's suggested language.

COMMENT NO. 4: Daniel McLean, attorney with Crowley, Haughey, Hanson, Toole & Dietrich, PLLP, and the Governor's Task Force on Endowed Philanthropy testified at the hearing regarding New Rule I and the amendment to ARM 42.15.514.

Mr. McLean stated that the addition of New Rule I did not improve the definition already contained in ARM 42.15.507(10) concerning the present value of a charitable gift portion of a planned gift. He said he could understand with regard to a life insurance policy where this might be necessary and if that could be clarified, they would have no objection to that rule being adopted. It is difficult to define what "fair market value" means since it applies to different instruments. He said the definition found in ARM 42.15.507(10) is consistent with federal law and should be sufficient for this purpose. He attributes his comments to other applications besides insurance policies. Mr. McLean testified that they strongly oppose deleting subsection (7) of ARM 42.15.514. They believe this subsection is clearly consistent with federal law. Mr. McLean agreed with the testimony whereby the right to make a change must be

provided for in the initial trust documents when they are developed. Since 1976, federal law has allowed a donor/trustee or income beneficiary to name more than one charitable trust and/or change the trust. That does not mean that the charity owns that trust. The trust is a charitable entity itself and a professional trustee or the individual might manage it themselves. The donor has the right to change the charity. Therefore, he strongly opposes the deletion of this subsection to ARM 42.15.514.

RESPONSE NO. 4: The department will amend the rule to clarify the change as it applies to insurance policies and not other trust documents.

COMMENT NO. 5: Clark Pyfer, Certified Public Accountant, and a member of the Governor's Task Force on Endowed Philanthropy, testified that he thought the real reason for considering the deletion of (7) in ARM 42.15.514 was to prevent someone from taking the tax credit and then switching to a charity that would not have otherwise qualified. He stated that is more than likely why the recommendation to eliminate that subsection was made rather than to address the insurance company issues. The real test is what the Internal Revenue will allow. The only change that is necessary is to add "Montana" to (7) to clarify that this section applies only to a Montana qualified endowment.

Mr. Pyfer testified strongly against deleting (7) and recommended adding "Montana" before "tax exempt organization."

RESPONSE NO. 5: As stated in Response No. 4, the department will amend this rule to clarify the intent further.

3. The Department has amended New Rule I (ARM 42.15.519) and ARM 42.15.514 as follows:

NEW RULE I (42.15.519) DETERMINING PRESENT VALUE FOR THE ENDOWMENT CREDIT (1) For purposes of determining the endowment credit, the present value of a contribution is the amount reported to the internal revenue service for that contribution. The present value of a gift contributed to a qualified endowment is BASED ON its fair market value on the date of the gift.

AUTH: 15-30-305-15-31-501, MCA

IMP: 15-30-166, MCA

42.15.514 TAX CREDIT AND DEDUCTION LIMITATIONS (1) through (6) remain the same as proposed.

(7) A ~~contributor~~ DONOR may, at a later date, name or substitute the ~~particular tax-exempt organization~~ MONTANA QUALIFIED ENDOWMENT, AS DEFINED IN 15-30-165, MCA, to receive the planned gift PROVIDED THAT THE ORIGINAL TRUST OR GIFT DOCUMENT RESERVES IN THE DONOR THE RIGHT TO DO SO. ~~However, the trust document or gift document must provide that the recipient of the charitable gift portion of the planned gift is a qualified endowment as defined in 15-30-165, MCA.~~

AUTH: 15-30-305, 15-31-501, MCA
IMP: 15-30-165, 15-30-166, 15-30-167, 15-31-161, and 15-31-162, MCA

4. The Department has adopted New Rule I (ARM 42.15.519) and amended ARM 42.25.514 with the amendments listed above, and the Department has amended 42.15.507, 42.15.515, and 42.15.516 as proposed.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Mary Bryson
MARY BRYSON
Director of Revenue

Certified to Secretary of State 7/31/00

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption) NOTICE OF ADOPTION
of new rules I (42.31.701),)
II (42.31.702), III (42.31.703),)
IV (42.31.704), V (42.31.705),)
and VI (42.31.706) relating to)
Tobacco Rules)

TO: All Concerned Persons

1. On June 15, 2000, the Department published notice of the proposed adoption of New Rules I (42.31.701), II (42.31.702), III (42.31.703), IV (42.31.704), V (42.31.705) and VI (42.31.706) relating to tobacco rules at page 1495 of the 2000 Montana Administrative Register, issue no. 11.

2. A public hearing was held on July 10, 2000, to consider the proposed adoption. No one testified and no written comments were received.

3. The Department determined that an effective date as required by 2-4-307, MCA, for ARM 42.2.613 through 42.2.621 was missing from New Rule VI (42.31.706). The rule is amended to include the effective date as follows:

NEW RULE VI (42.31.706) DISPUTES (1) Disputes concerning the amount of state excise tax due on the cigarettes as defined in ARM 42.31.701 will be heard by the department's office of dispute resolution. For this purpose, ARM 42.2.613 through 42.2.621, EFFECTIVE DECEMBER 17, 1999, are adopted by reference. Copies may be obtained by contacting the department.

AUTH: 15-1-201, 15-1-211, and 16-11-402, MCA

IMP: 15-1-211, 16-11-143, and 16-11-403, MCA

4. Therefore, the Department adopts the New Rule VI (42.31.706) with the amendments listed above.

5. The Department adopts New Rules I (42.31.701), II (42.31.702), III (42.31.703), IV (42.31.704) and V (42.31.705) as originally proposed.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Mary Bryson
MARY BRYSON
Director of Revenue

Certified to Secretary of State 7/31/00

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.

Business and Labor Interim Committee:

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

Education 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, Justice, and Indian Affairs Interim Committee:

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

Revenue and Taxation Interim Committee:

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

State Administration, Public Retirement Systems, 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
Matter | 1. Consult ARM topical index.
Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued. |
| Statute
Number and
Department | 2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers. |

ACCUMULATIVE TABLE

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To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 2000, 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 1999 and 2000 Montana Administrative Registers.

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

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