

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 7

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 The Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

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BEFORE THE MONTANA COAL BOARD  
DEPARTMENT OF COMMERCE  
OF THE STATE OF MONTANA

In the matter of the proposed )  
adoption of New Rule I pertaining to )  
the internal management procedures )  
of the Montana Coal Board )

NOTICE OF PUBLIC HEARING ON  
PROPOSED ADOPTION

TO: All Concerned Persons

1. On May 2, 2008, at 10:00 a.m, the Montana Coal Board and the Department of Commerce will hold a public hearing in Room 226 of the Park Avenue Building, 301 South Park Avenue, at Helena, Montana, to consider the proposed adoption of the above-stated rule.

2. The Montana Coal Board and the Department of Commerce will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., April 25, 2008, to advise us of the nature of the accommodation that you need. Please contact Joe LaForest, Community Development Division, Department of Commerce, 301 South Park Avenue, P.O. Box 200523, Helena, MT 59620-0523; telephone (406) 841-2789; TDD (406) 841-2702; fax (406) 841-2771; or e-mail jlaforest@mt.gov.

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

NEW RULE I INCORPORATION BY REFERENCE OF RULES GOVERNING THE PROCEEDINGS OF THE COAL BOARD (1) The Coal Board adopts and incorporates by reference the Internal Management Procedures dated 2008 adopted by it as rules governing the proceedings of the Coal Board.

(2) Copies of the procedures adopted by reference in (1) can be obtained from the Department of Commerce, Community Development Division, P.O. Box 200523, Helena, MT 59620-0523.

AUTH: 90-6-205, MCA

IMP: 90-6-205, MCA

REASON: It is reasonably necessary to adopt this rule because the board is required by its existing administrative rules to adopt rules governing its proceedings.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Joe LaForest, Community Development Division, Department of Commerce, 301 South Park Avenue, P.O. Box 200523, Helena, MT 59620-0523; telephone (406) 841-2789; fax (406) 841-2771; or

e-mail jlaforest@mt.gov, and must be received no later than 5:00 p.m., May 12, 2008.

5. Kelly A. Casillas, Department of Commerce, has been designated to preside over and conduct this hearing.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the Community Development Division, 301 South Park Avenue, P.O. Box 200523, Helena, MT 59620-0523, by fax to (406) 841-2771, or may be made by completing a request form at any rules hearing held by the department.

7. An electronic copy of this Proposal Notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

MONTANA COAL BOARD  
DEPARTMENT OF COMMERCE

/s/ KELLY A. CASILLAS  
KELLY A. CASILLAS  
Rule Reviewer

/s/ ANTHONY J. PREITE  
ANTHONY J. PREITE  
Director  
Department of Commerce

Certified to the Secretary of State March 31, 2008.

BEFORE THE DEPARTMENT OF CORRECTIONS  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC  
ARM 20.7.801 pertaining to Eastmont ) HEARING ON PROPOSED  
Chemical Dependency Treatment Program ) AMENDMENT

TO: All Concerned Persons

1. On May 1, 2008, at 7:00 p.m. a public hearing will be held in the Dawson County Courthouse basement, 207 W. Bell St., Glendive, Montana, to consider the proposed amendment of the above-stated rule.

2. The Department of Corrections will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on April 25, 2008, to advise us of the nature of the accommodation that you need. Please contact Myrna Omholt-Mason, 1539 11th Ave., P.O. Box 201301, Helena, Montana 59620-1301, telephone: (406) 444-3911, fax: (406) 444-4920, e-mail: momholt-mason@mt.gov.

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

20.7.801 DEFINITIONS As used in this subchapter, the following definitions apply:

- (1) "Capacity" means no more than ~~40~~ 50 program participants.
- (2) through (8) remain the same.

AUTH: 53-1-203, MCA  
IMP: 53-1-210, 61-8-731, MCA

STATEMENT OF REASONABLE NECESSITY: The Community Corrections Division of the Department of Corrections proposes to increase the capacity of the residential alcohol treatment program located at the former Eastmont Human Services Center in Glendive, Montana, commonly referred to as WATCh-East. The program has successfully maintained a capacity of 40 program participants since the program's inception in February 2005. The department finds it necessary to increase the program's capacity to accommodate a growing demand for the placement of court-ordered DUI offenders at the treatment facility. Currently, there is a waiting list of approximately 20 offenders who are court-ordered to attend one of the two Department of Corrections approved residential alcohol treatment programs, located at Eastmont and Warm Springs. Under the existing circumstances, these offenders may wait up to three months before a bed opens up to allow them to be admitted and begin treatment. In the meantime these offenders are incarcerated either in county detention facilities or at an assessment center. The state's present sentencing scheme contemplates that a DUI offender would complete treatment

within 13 months of sentencing and provides that a DUI offender must be released after that period of time. Because of the current wait time for admission into treatment, there is a risk an offender would be released into the community without completing treatment.

4. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Myrna Omholt-Mason at the contact information listed in paragraph 2, and must be received no later than 5:00 p.m. on May 12, 2008.

5. The Department of Corrections maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be sent or delivered to the Department of Corrections, 1539 11th Ave., Helena, MT 59601, by fax to (406) 444-4920, by e-mail to momholt-mason@mt.gov, or may be made by completing a request form at any rules hearing held by the department.

6. An electronic copy of this Notice of Public Hearing is available through the department's web site at [www.cor.mt.gov](http://www.cor.mt.gov). The department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register. However, the department advises that it will decide any conflict between the official version and the electronic version in favor of the official printed version. In addition, the department advises that the web site may be inaccessible at times, due to system maintenance or technical problems.

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

8. Brenda Elias, Hearings Examiner, will preside over and conduct the hearing.

/s/ Mike Ferriter  
MIKE FERRITER  
Director of Corrections

/s/ Colleen A. White  
COLLEEN A. WHITE  
Rule Reviewer

Certified to the Secretary of State March 31, 2008.

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

In the matter of the amendment of ARM )  
37.85.212 pertaining to the resource )  
based relative value scale )  
(RBRVS) )

NOTICE OF PUBLIC HEARING  
ON PROPOSED AMENDMENT

TO: All Interested Persons

1. On May 5, 2008, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process (including reasonable accommodations at the hearing site) or who need an alternative accessible format of this notice. If you need an accommodation, contact the department no later than 5:00 p.m. on April 21, 2008. Please contact Rhonda Lesofski, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena MT 59604-4210; telephone (406)444-4094; fax (406)444-1970; e-mail dphhslegal@mt.gov.

3. The rule as proposed to be amended provides as follows. New matter is underlined. Matter to be deleted is interlined.

37.85.212 RESOURCE BASED RELATIVE VALUE SCALE (RBRVS)  
REIMBURSEMENT FOR SPECIFIED PROVIDER TYPES (1) For purposes of this rule, the following definitions apply:

(a) remains the same.

(b) "Conversion factor" means a dollar amount by which the relative value units, or the base and time units for anesthesia services, are multiplied in order to convert the relative value units to a fee for a service. Effective July 1, 2008 there will be four conversion factors. They are:

(i) physician services, which applies to the following health care professionals listed in (2): physicians, mid-levels, podiatrists, public health clinics, independent diagnostic testing facilities, nutrition providers, QMB and EPSDT chiropractors, and dentists rendering medical procedures;

(ii) allied services, which applies to the following health care professionals listed in (2): physical therapists, occupational therapists, speech therapists, optometrists, opticians, audiologists, and school-based services;

(iii) mental health services, which applies to the following health care professionals listed in (2): psychologists, licensed clinical social workers, and licensed professional counselors; or

(iv) anesthesia services, which applies to anesthesia services.



(c) through (e) remain the same.

(f) "Resource based relative value scale (RBRVS)" means the most current version of the Medicare resource based relative value scale contained in the physicians' Medicare Physician Fee Schedule adopted by the Centers for Medicare and Medicaid Services (CMS) of the U.S. Department of Health and Human Services and published at ~~71 Federal Register 69736 (December 1, 2006), effective January 1, 2007~~ 72 Federal Register 227 (November 27, 2007), effective January 1, 2008 which is adopted and incorporated by reference. A copy of the Medicare Physician Fee Schedule may be obtained from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951. The RBRVS reflects RVUs for estimates of the actual effort and expense involved in providing different health care services.

(g) and (h) remain the same.

(2) Services provided by the following health care professionals will be reimbursed in accordance with the RBRVS methodology set forth in (3):

(a) through (q) remain the same.

(r) independent diagnostic testing facilities (IDTF); ~~and~~

(s) school based services; ~~and~~

(t) QMB and EPSDT chiropractic services.

(3) Except as set forth in ~~(7)~~ (8) through ~~(11)(a)(vi)~~ (12)(a)(vi), the fee for a covered service provided by any of the provider types specified in ~~(2)(a) through (2)(s)~~ (2)(t) is determined by multiplying the RVUs determined in accordance with ~~(6)~~ (7) through ~~(6)(a)(ii)(C)~~ (7)(a)(ii)(C) by the conversion factor, which is required to achieve the overall budget appropriation for provider services made by the Montana Legislature in the most recent legislative session and then multiplying the product by a factor of one plus or minus the applicable policy adjustor as provided in (4), if any.

(4) For state fiscal year ~~2008~~ 2009, policy adjustors will be used to accomplish the targeted funding allocations, ~~which apply to family planning services, maternity services, and well child preventative visits as directed by the legislature.~~ The department's list of services affected by policy adjustors through ~~January 1, 2007~~ July 1, 2008 is adopted and incorporated by reference. The list is available from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(5) The 60th Legislature appropriated additional funds for state fiscal year 2009. For all provider services identified in (2)(a) through (2)(t) there will be 1.67% additional funds. There was also an additional appropriation of \$2,043,234 for physician services only; it will be included in the physician conversion factor.

(5) through (6)(a)(ii)(C) remain the same but are renumbered (6) through (7)(a)(ii)(C).

~~(7)~~ (8) Except for physician administered drugs as provided in ARM ~~37.86.105(3)~~ 37.86.105(4), clinical, laboratory services and anesthesia services, if neither Medicare nor Medicaid sets RVUs, then reimbursement is by report.

(a) remains the same.

(b) For state fiscal year ~~2008~~ 2009, the by report rate is ~~46%~~ 45% of the provider's usual and customary charges.

~~(8)~~ (9) For clinical laboratory services for which there is an established fee:

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

(b) for clinical laboratory services for which there is no established fee, the department pays the lower of the following for procedure codes without fees:

(i) remains the same.

(ii) the rate established using the by report methodology; or

(A) for purposes of ~~(8)(b)~~ (9)(b) through ~~(8)(b)(iii)~~ (9)(b)(iii), the by report methodology means averaging 50 paid claims for the same code that have been submitted within a 12 month span and then multiplying the average by the amount specified in ~~(7)(b)~~ (8)(b).

(iii) remains the same.

(9) through (9)(c)(ii) remain the same but are renumbered (10) through (10)(c)(ii).

~~(40)~~ (11) For equipment and supplies:

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

(b) the department pays the lower of the following for DME items without fees:

(i) remains the same.

(ii) the by report rate provided in ~~(7)(b)~~ (8)(b).

(c) except for the bundled items as provided in ~~(12)~~ (13), the department pays the lower of the following for supply items with fees:

(i) and (ii) remain the same.

(d) except for bundled items as provided in ~~(12)~~ (13), the department pays the lower of the following for supply items without fees:

(i) remains the same.

(ii) the by report rate provided in ~~(7)(a)~~ (8)(a).

~~(44)~~ (12) Subject to the provisions of ~~(11)(a)~~ (12)(a), when billed with a modifier, payment for procedures established under the provisions of ~~(6)~~ (7) is a percentage of the rate established for the procedures.

(a) through (a)(vi) remain the same.

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

AUTH: 53-2-201, 53-6-113, MCA

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

4. The Medicaid program provides medical assistance to qualified low income and disabled residents of Montana. The state of Montana and the federal government jointly fund the program. The Montana Medicaid program pays enrolled providers for services to eligible individuals.

The purpose of this rule amendment is to update the Resource Based Relative Value Scale (RBRVS) fees paid to enrolled providers in accordance with the most recently published relative value units (RVUs) released by the Centers for Medicare and Medicaid Services (CMS). This rule amendment is necessary to incorporate the updated relative value units (RVUs) published in the Federal Register in December 2007. The updated RVUs are effective for the Medicare program on January 1, 2008. The change in the Montana Medicaid fees is effective July 1, 2008.

The 2007 Legislative Session, in House Bill 2, appropriated an additional 1.67%

(\$2,759,316) provider rate increase. Also, there was a physician specific appropriation of \$2,043,234 for physicians. ARM 37.85.212 specifies the reimbursement methodology for multiple professional providers (therapists, mid-level practitioners, and podiatrists to name a few).

Since August 1997, the Department of Public Health and Human Services (DPHHS) has used RBRVS-based fee schedules as the basis for paying almost all services provided by physicians, mid-level practitioners, therapists, and other individual practitioners. RBRVS was developed by the Medicare program and first implemented in 1992. It is now widely used by the Medicare plans, Workers' Compensation plan, and private sector insurers. For DPHHS and these other payors, the only services not typically paid via RBRVS are anesthesia services, clinical lab services, drugs provided in the office, durable medical equipment and supplies provided in the office, and a few miscellaneous items such as blood products.

Each procedure is identified by a number system, referred to as CPT code and Healthcare Common Procedure Coding System (HCPCS). The CPT and HCPCS code is assigned a relative value unit (RVU). The RVUs represent work, practice expense, and professional liability insurance. Annual updates to RVUs are based on recommendations of a committee of the American Medical Association (AMA) and the Specialty RVS Update Committee (RUC). Montana Medicaid incorporates these updates at the beginning of each state fiscal year. For each CPT and HCPCS code the RVUs are set at a national level and are adjusted to the Montana setting using Medicare's Geographic Practice Cost Index (GPCI) for Montana.

Payments are calculated by multiplying the combined costs (the RVU) by a conversion factor (CF), a monetary amount that is determined by each payor. Medicaid is a payor. Additionally, policy adjustors are applied for those services that receive either fewer or additional targeted funds such as obstetric care, well child screens, and family planning. Policy adjustors can be used to increase or decrease a level of payment.

The RBRVS calculation formula is  $RVU * CF * \text{policy adjustor} = \text{reimbursement rate}$ . The department is also amending the rule to create three medical conversion factors in place of one. The health care professionals reimbursed under the RBRVS system will be grouped as follows:

1. The physician services CF will apply to physicians, mid-levels, podiatrists, public health clinics, independent diagnostic testing facilities, nutrition providers, QMB and EPSDT chiropractors, psychiatrists, and dentists rendering medical procedures.
2. The allied services CF will apply to physical therapists, occupational therapists, speech therapists, optometrists, opticians, audiologists, and school-based services.
3. The mental health services CF will apply to psychologists, licensed clinical social workers, and licensed professional counselors.

4. The anesthesia CF will apply to anesthesia services.

This rule amendment is also required to incorporate the updated relative value units (RVUs) published in the Federal Register. The updated RVUs are effective for the Medicare program January 1, 2008. RVUs are incorporated by reference. The reference changes annually.

The by-report rate specified in (8)(b) is updated to represent the most recent paid to charge ratio. This percentage is a result of dividing the previous years' reimbursement by the total amount billed.

The proposed amendment to ARM 37.85.212 impacts approximately 102,000 clients and about 6,000 RBRVS providers annually.

5. The department intends to apply these rules effective July 1, 2008. In the event the rules are amended retroactively no negative impact is anticipated.

6. Interested persons may submit comments orally or in writing at the hearing. Written comments may also be submitted to Rhonda Lesofski, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena MT 59604-4210, no later than 5:00 p.m. on May 8, 2008. Comments may also be faxed to (406)444-1970 or e-mailed to [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov). The department maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. To be included on such a list, please notify this same person or complete a request form at the hearing.

7. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of this notice conform to the official version of the notice as printed in the Montana Administrative Register, but advises all concerned persons that, in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. The web site may be unavailable at times, due to system maintenance or technical problems.

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

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

/s/ Geralyn Driscoll  
Rule Reviewer

/s/ Joan Miles  
Director, Public Health and  
Human Services

Certified to the Secretary of State March 31, 2008.

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

In the matter of the repeal of ARM	)	NOTICE OF PROPOSED
37.88.1111 pertaining to the direct care	)	REPEAL
wage add-on for certain mental health	)	
care providers	)	NO PUBLIC HEARING
	)	CONTEMPLATED

TO: All Interested Persons

1. On May 10, 2008, the Department of Public Health and Human Services proposes to repeal the above-stated rule.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or who need an alternative accessible format of this notice. If you need an accommodation, contact the department no later than 5:00 p.m. on April 21, 2008. Please contact Rhonda Lesofski, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena MT 59604-4210; telephone (406)444-4094; fax (406)444-1970; e-mail dphhslegal@mt.gov.

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

ARM 37.88.1111 DIRECT CARE WAGE ADD-ON FOR CERTAIN MENTAL HEALTH CARE PROVIDERS found at ARM page 37-21729.

AUTH: 53-2-201, 53-6-113, MCA

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

4. The department is proposing to repeal ARM 37.88.1111. The rule is obsolete and the direct care wage add-on for certain mental health care providers will be accomplished via contracts with the providers instead. The alternative would have been to amend the existing obsolete rule resulting in duplicative details in the rule and in contracts. Contracts are issued even with a rule in place. Having administrative details in contracts will result in more effective management of the direct care wage add-on through contract oversight. There is no negative impact to providers.

5. Interested persons may submit comments concerning the proposed action in writing to Rhonda Lesofski, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena MT 59604-4210, no later than 5:00 p.m. on May 8, 2008. Comments may also be faxed to (406)444-1970 or e-mailed to dphhslegal@mt.gov. The department maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. To be included on such a list, please notify this

same person.

6. If a person who is directly affected by the proposed action wishes to comment orally or in writing at a public hearing, s/he must make a written request for a public hearing and submit such request, with any written comments to Rhonda Lesofski, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena MT 59604-4210; by fax (406)444-1970; or by e-mail to [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov) no later than 5:00 p.m. on May 8, 2008.

7. 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 subdivision or agency; from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 2, based on 16 providers.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of this notice conform to the official version of the notice as printed in the Montana Administrative Register, but advises all concerned persons that, in the event of a discrepancy between the official printed text of the Notice and the electronic version of the notice, only the official printed text will be considered. The web site may be unavailable at times, due to system maintenance or technical problems.

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

/s/ John Koch  
Rule Reviewer

/s/ Joan Miles  
Director, Public Health and  
Human Services

Certified to the Secretary of State March 31, 2008.

BEFORE THE DEPARTMENT OF ADMINISTRATION  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 2.6.205 and 2.6.214 pertaining to )  
state vehicle use )

TO: All Concerned Persons

1. On February 28, 2008, the Department of Administration published MAR Notice No. 2-6-397 pertaining to the proposed amendment of the above-stated rules at page 355 of the 2008 Montana Administrative Register, Issue Number 4.
2. The department has amended the above-stated rules as proposed.
3. No comments or testimony were received.

By: /s/ Sheryl Olson  
Sheryl Olson, Deputy Director  
Department of Administration

By: /s/ Denise Pizzini  
Denise Pizzini, Rule Reviewer  
Department of Administration

Certified to the Secretary of State March 31, 2008.

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

In the matter of the amendment of	)	NOTICE OF AMENDMENT,
ARM 6.6.3101, 6.6.3102, 6.6.3103,	)	REPEAL, AND ADOPTION
6.6.3104, 6.6.3104A, 6.6.3105,	)	
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6.6.3120, the repeal of 6.6.3116,	)	
and the adoption of New Rule I	)	
(ARM 6.6.3121), New Rule II (ARM	)	
6.6.3122), New Rule III (ARM	)	
6.6.3124), New Rule IV (ARM	)	
6.6.3126), New Rule V (ARM	)	
6.6.3128), and New Rule VI (ARM	)	
6.6.3129) pertaining to Long-Term	)	
Care	)	

TO: All Concerned Persons

1. On February 14, 2008, the State Auditor and Commissioner of Insurance published MAR Notice No. 6-168 regarding the public hearing on the proposed amendment, repeal, and adoption of the above-stated rules at page 222 of the 2008 Montana Administrative Register, issue number 3.

2. On March 6, 2008, the State Auditor and Commissioner of Insurance held a public hearing to consider the proposed amendment, repeal, and adoption of the above-stated rules. Comments were heard at the hearing, and written comments were received before the comment deadline.

3. The department has amended ARM 6.6.3101, 6.6.3102, 6.6.3103, 6.6.3104, 6.6.3104A, 6.6.3105, 6.6.3106, 6.6.3107, 6.6.3108, 6.6.3109, 6.6.3109A, 6.6.3109B, 6.6.3110, 6.6.3111, 6.6.3112, 6.6.3113, 6.6.3114, 6.6.3115, 6.6.3117, 6.6.3118, and 6.6.3119 exactly as proposed.

4. The department has amended the following rule as proposed but with the following changes. New matter is underlined. Matter to be deleted is interlined.

6.6.3120 ADOPTION OF FORMS (1) through (1)(d) remain as proposed.  
(e) ~~LTC Form E Claims Denial Reporting Form~~

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



**For the State of Montana  
For the Reporting Year of \_\_\_\_\_**

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

**Instructions:**

The purposes of this form is to report all long-term care claim denials under in-force long-term care insurance policies. "Denied" means a claim that is not paid for any reason other than for claims not paid for failure to meet the waiting period or because of an applicable preexisting condition.

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

1. The nationwide data may be viewed as a more representative and credible indicator where the data for claims reported and denied for your state are small in number.
2. Example—home health care claim filed under a nursing home only policy.
3. Example—a facility that does not meet the minimum level of care requirements or

the licensing requirements as outlined in the policy.

4. Examples—a benefit trigger not met, certification by a licensed health care practitioner not provided, no plan of care.

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

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

Triggers for a Substantial Premium Increase	
Issue Age	Percent Increase Over Initial Premium
Under 65	50%
65-80	30%
Over 80	10%

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

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

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

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

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

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

**Example:**

- You bought the policy at age 65 with an annual premium payable for 10 years.
- In the sixth year, you receive a rate increase of 35% and you decide to stop paying premiums.
- Because you already paid 50% of your total premium payments and that is more

~~than the 40% ratio, your "paid-up" policy benefits are .45 (.90 times .50) times the total benefit amount that was in effect when you stopped paying your premiums. If you purchased inflation protection, it will not continue to apply to the benefits in the reduced "paid-up" policy.~~

(f) LTC Form F Potential Rate Increase Reporting Form

## LTC Form F

### Instructions:

This form provides information to the applicant regarding premium rate schedules, rate schedule adjustments, potential rate revisions, and policy holder options in the event of a rate increase.

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

### Long-Term Care Insurance Potential Rate Increase Disclosure Form

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

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

2. **Rate Schedule Adjustments:**

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

3. **Potential Rate Revisions:**

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

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

- § Pay the increased premium and continue your policy in force as is.
- § Reduce your policy benefits to a level such that your premiums will not increase. (Subject to state law minimum standards.)

- § Exercise your nonforfeiture option if purchased. (This option is available for purchase for an additional premium.)
- § Exercise your contingent nonforfeiture rights.\* (This option may be available if you do not purchase a separate nonforfeiture option.)

### **Contingent Nonforfeiture**

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

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

- § Your premium after the increase exceeds your original premium by the percentage shown (or more) in the following table; and
- § You lapse (do not pay more premiums) within 120 days of the increase.

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

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

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

### **Example:**

- § You bought the policy at age 65 and paid the \$1,000 annual premium for 10 years, so you have paid a total of \$10,000 in premium.
- § In the eleventh year, you receive a rate increase of 50%, or \$500 for a new annual premium of \$1,500, and you decide to lapse the policy (not pay any more premiums.)
- § Your "paid-up" policy benefits are \$10,000 (provided you have at least \$10,000 of benefits remaining under your policy.)

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

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

Issue Age	Percent Increase Over Initial Premium
29 and under	200%
30-34	190%
35-39	170%
40-44	150%
45-49	130%
50-54	110%
55-59	90%
60	70%
61	66%
62	62%
63	58%
64	54%
65	50%
66	48%
67	46%
68	44%
69	42%
70	40%
71	38%
72	36%
73	34%
74	32%
75	30%
76	28%
77	26%
78	24%
79	22%
80	20%
81	19%
82	18%
83	17%
84	16%
85	15%
86	14%
87	13%
88	12%
89	11%
90 and over	10%

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

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

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

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

<u>Triggers for a Substantial Premium Increase</u>	
<u>Issue Age</u>	<u>Percent Increase Over Initial Premium</u>
<u>Under 65</u>	<u>50%</u>
<u>65-80</u>	<u>30%</u>
<u>Over 80</u>	<u>10%</u>

2. You stop paying your premiums within 120 days of when the premium increase took effect; and
3. The ratio of the number of months you already paid premiums is 40% or more than the number of months you originally agreed to pay.

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

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

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

**Example:**

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

(g) remains as proposed.

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

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

5. The department has repealed ARM 6.6.3116 exactly as proposed.

6. The department has adopted New Rule IV (ARM 6.6.3126), New Rule V (ARM 6.6.3128), and New Rule VI (ARM 6.6.3129) exactly as proposed.

7. The department has adopted the following New Rules as proposed with the following changes. New matter is underlined. Matter to be deleted is interlined.

NEW RULE I (ARM 6.6.3121) REQUIRED DISCLOSURE OF RATING PRACTICES TO CONSUMERS (1) remains as proposed.

(a) except as provided in (2), this provision applies to any long-term care policy issued in Montana on or after ~~July 1, 2008~~ January 1, 2009; and

(b) for certificates issued on or after the effective date of this amended rule under a group long-term care insurance policy as defined in 33-22-1107(5), MCA, which policy was in force at the time this amended rule became effective, the provisions of this rule shall apply on the policy anniversary following ~~July 1, 2008~~ January 1, 2009.

(2) through (5) remain as proposed.

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

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

NEW RULE II (ARM 6.6.3122) INITIAL FILING REQUIREMENTS (1) This rule applies to any long-term care policy issued in this state on or after ~~July 1, 2008~~ January 1, 2009.

(2) through (3)(b) remain as proposed.

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

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

NEW RULE III (ARM 6.6.3124) PREMIUM RATE SCHEDULE INCREASES

(1) Except as provided in (2), this rule applies to any long-term care policy issued in this state on or after ~~July 1, 2008~~ January 1, 2009.

(2) through (12)(b) remain as proposed.

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

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

8. The department has thoroughly considered all commentary received. The comments received and the department's responses to each comment follow:

COMMENT: Several commenters, including ACLI and AHIP commented that the effective dates proposed did not give the industry enough time to prepare for the rule changes.

RESPONSE: Out of consideration for that concern, the department has changed the overall effective date to October 1, 2008. In New Rule I (ARM 6.6.3121), the date is changed from July 1, 2008 to January 1, 2009.

COMMENT: AHIP and ACLI pointed out that a significant portion of text from the model regulation was misplaced in the proposed rule. "Starting on page 252, the remaining text relating to contingent nonforfeiture for limited pay is missing. The bottom of the page goes on to show the replacement/lapse report. The missing text has been inappropriately inserted at the end of the claims denial reporting page on mid-page 248 beginning with "...You are eligible for the reduced 'paid-up'..." This text ends on page 249."

RESPONSE: This correction has been made to ARM 6.6.3120.

9. The effective date of these rules, except where otherwise stated, is October 1, 2008.

/s/ Christina L. Goe  
Christina L. Goe  
Rule Reviewer

/s/ Janice S. VanRiper  
Janice S. VanRiper  
Deputy Insurance Commissioner  
State Auditor/Commissioner of Insurance

Certified to the Secretary of State March 31, 2008.



BEFORE THE DEPARTMENT OF COMMERCE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) CORRECTED NOTICE OF  
ARM 8.99.401, 8.99.404, 8.99.501, ) AMENDMENT  
8.99.502, 8.99.504, 8.99.505, )  
8.99.509, and 8.99.511 pertaining to )  
microbusinesses )

TO: All Concerned Persons

1. On November 8, 2007, the Department of Commerce published MAR Notice No. 8-99-59 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1730 of the 2007 Montana Administrative Register, Issue Number 21. On March 13, 2008, the Department of Commerce published the notice of amendment at page 486 of the 2008 Montana Administrative Register, Issue Number 5.

2. This corrected notice of amendment is being published to correct the inadvertent inclusion of ARM 8.99.505 in items adopted as proposed and omission of ARM 8.99.505 from the list of rules that were adopted as proposed, but with the following changes, stricken matter interlined, new matter underlined. The rule, as amended in corrected form, reads as follows, deleted matter interlined, new matter underlined:

8.99.505 DEVELOPMENT LOAN - MATCHING CONTRIBUTIONS

(1) through (6) remain as amended.

(7) The sum of the outstanding principal balance of the department development loan and the MBDC's matching loan funds is referred to as the "revolving loan fund base". The sum of the revolving loan fund bank account balance and investment bank account balance is referred to as the "revolving loan fund cash balance". The sum of the outstanding principal balance of all performing and delinquent microbusiness loans held by the MBDC in the revolving loan fund is referred to as the "eligible loan receivables balance". All MBDCs shall report and document the revolving loan fund cash balance and the eligible loan receivables balance. The sum of the revolving loan fund cash balance and the eligible loan receivables balance must equal or exceed the "revolving loan fund base" at all times. If the sum of the revolving loan fund cash balance and the eligible loan receivables balance is less than the revolving loan fund base, this difference is referred to as the "revolving loan fund base deficiency". If a MBDC incurs a "revolving loan fund base deficiency," the MBDC shall deposit additional funds equal to or greater than the "revolving loan fund base deficiency" in the revolving loan fund bank account.

3. The replacement pages for this corrected notice were submitted to the Secretary of State on March 31, 2008.

/s/ G. MARTIN TUTTLE  
G. MARTIN TUTTLE  
Rule Reviewer

/s/ ANTHONY J. PREITE  
ANTHONY J. PREITE  
Director  
Department of Commerce

Certified to the Secretary of State March 31, 2008.

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

In the matter of the adoption of a )  
temporary emergency rule closing the ) NOTICE OF ADOPTION OF A  
Smith River from Camp Baker to ) TEMPORARY EMERGENCY RULE  
Eden Bridge )

TO: All Concerned Persons

1. The Fish, Wildlife and Parks Commission (commission) has determined the following reasons justify the adoption of a temporary emergency rule:

(a) There is intermittent ice on the Smith River that has caused the river to be impassable by recreationists. The steep canyon walls provide a perfect place for ice to collect and remain due to lack of sun exposure. The impassible ice jams have caused stranded recreationists to have no choice but to hike for miles to get out of the canyon area.

(b) Persons recreating on the river in these conditions would be subjected to:

- (i) collisions with ice;
- (ii) becoming stranded and having to hike out of steep canyon areas; or
- (ii) drowning.

(c) Therefore, as this situation constitutes an imminent peril to public health, safety, and welfare, and this threat cannot be averted or remedied by any other administrative act, the commission adopts the following temporary emergency rule. The emergency rule will be sent as a press release to newspapers throughout the state. Also, signs informing the public of the closure will be posted at access points. The rule will be sent to interested parties, and published as a temporary emergency rule in Issue No. 7 of the 2008 Montana Administrative Register.

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of the notice. If you require an accommodation, contact the department no later than 5:00 p.m. on April 18, 2008, to advise us of the nature of the accommodation that you need. Please contact Jessica Snyder, Fish, Wildlife and Parks, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-4594; fax (406) 444-7456; or e-mail [jesnyder@mt.gov](mailto:jesnyder@mt.gov).

3. The temporary emergency rule is effective March 27, 2008 when this rule notice is filed with the Secretary of State.

4. The text of the temporary emergency rule provides as follows:

RULE I. SMITH RIVER TEMPORARY EMERGENCY CLOSURE

(1) The closed portion of the Smith River is located in Meagher and Cascade Counties.

(2) The Smith River is closed to all floating on the river between Camp Baker and Eden Bridge.

(3) This rule is effective as long as there is intermittent ice on the Smith River. The commission delegates its authority to the Department of Fish, Wildlife and Parks (department), in consultation with the commissioner in the region, to determine when this portion of the river is again safe for boating, floating, and swimming and any other occupation of the water and to rescind the temporary emergency closure.

AUTH: 2-4-303, 87-1-303, MCA

IMP: 2-4-303, 87-1-303, MCA

5. The rationale for the temporary emergency rule is as set forth in paragraph 1.

6. This rule will expire as soon as the department determines the river is again safe for boating, floating, and swimming and any other occupation of the river. This will depend on the extent and duration of the ice in the area. Signs restricting use of the river will be removed when the rule is no longer effective. Notice of repeal of this emergency rule will be published in the Montana Administrative Register.

7. Concerned persons are encouraged to submit their comments to the department. They should submit their comments along with their names and addresses to Jessica Snyder, Legal Unit, Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-4594; fax (406) 444-7456; or e-mail [jesnyder@mt.gov](mailto:jesnyder@mt.gov). Any comments must be received no later than April 18, 2008.

8. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department or commission. Persons who wish to have their name added to the list shall make written request that includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made by completing the request form at any rules hearing held by the department.

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

/s/ Larry Peterman

Larry Peterman

Acting Secretary

Fish, Wildlife and Parks Commission

/s/ Rebecca Jakes Dockter

Rebecca Jakes Dockter

Rule Reviewer

Certified to the Secretary of State March 27, 2008.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the repeal ) NOTICE OF REPEAL  
of ARM 24.7.302, 24.7.307, 24.7.310, )  
and 24.7.314, related to Board of )  
Labor Appeals procedural rules )

TO: All Concerned Persons

1. On January 17, 2008, the Department of Labor and Industry published MAR Notice No. 24-7-227 regarding the public hearing on the proposed repeal of the above-stated rules at page 8 of the 2008 Montana Administrative Register, issue no. 1.

2. On February 8, 2008, the department held a public hearing in Helena regarding the above-stated rules. No oral or written comments were received from the public prior to the closing date of February 15, 2008.

3. The department has repealed ARM 24.7.302, 24.7.307, 24.7.310, and 24.7.314 as proposed.

/s/ MARK CADWALLADER  
Mark Cadwallader  
Alternate Rule Reviewer

/s/ ELIZABETH BEST  
Elizabeth Best, Chair  
BOARD OF LABOR APPEALS

Certified to the Secretary of State on March 31, 2008.

BEFORE THE BOARD OF CLINICAL LABORATORY SCIENCE PRACTITIONERS  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment ) NOTICE OF AMENDMENT,  
of ARM 24.129.401 fees, 24.129.402 ) ADOPTION, AND REPEAL  
supervision, 24.129.603 standards for )  
licensure, 24.129.2301 unprofessional )  
conduct, adoption of NEW RULE I )  
inspections, and repeal of 24.129.2302 )  
notification )

TO: All Concerned Persons

1. On October 25, 2007, the Board of Clinical Laboratory Science Practitioners (board) published MAR Notice No. 24-129-13 regarding the proposed amendment, adoption, and repeal of the above-stated rules, at page 1584 of the 2007 Montana Administrative Register, issue no. 20.

2. On November 20, 2007, a public hearing was held on the proposed amendment, adoption, and repeal of the above-stated rules in Helena. One comment was received by the November 28, 2007, deadline.

3. The board has thoroughly considered the comment received. A summary of the comment and the board's response is as follows:

COMMENT 1: One commenter noted a necessary correction in ARM 24.129.603(2)(c). The correct name should be American Society for Clinical Pathology not American Society of Clinical Pathology.

RESPONSE 1: The board concurs and is amending the rule to reflect the correct terminology.

4. The board has amended ARM 24.129.401, 24.129.402, and 24.129.2301 exactly as proposed.

5. The board has adopted NEW RULE I (24.129.405) exactly as proposed.

6. The board has repealed ARM 24.129.2302 exactly as proposed.

7. The board has amended ARM 24.129.603 with the following changes, stricken matter interlined, new matter underlined:

24.129.603 MINIMUM STANDARDS FOR LICENSURE (1) through (2)(b) remain as proposed.

(c) American Society of for Clinical Pathology (ASCP);

(d) through (g) remain as proposed.

ROSEMARY SHIVELY  
BOARD OF CLINICAL LABORATORY  
SCIENCE PRACTITIONERS

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

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

Certified to the Secretary of State March 31, 2008

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

In the matter of the amendment of ARM ) NOTICE OF AMENDMENT  
24.174.401 fee schedule )

TO: All Concerned Persons

1. On December 20, 2007, the Board of Pharmacy (board) published MAR Notice No. 24-174-57 regarding the amendment of the above-stated rule, at page 2051 of the 2007 Montana Administrative Register, issue no. 24.

2. On January 14, 2008, a public hearing was held on the proposed amendment of the above-stated rule in Helena. Several comments were received by the January 22, 2008, deadline.

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

COMMENT 1: Two commenters appeared together and objected to increasing the renewal fee for in-state pharmacies by \$50 while increasing the out-of-state mail service pharmacy renewal by \$200. The commenters stated that the proposed fees are disproportionate, unjustified, and in violation of the Commerce Clause to the United States Constitution, and that unequal fees could jeopardize mail service pharmacy delivery to rural patients. The commenters also stated that complaints concerning an out-of-state mail service pharmacy can be addressed by the board in the state where the pharmacy is physically located.

RESPONSE 1: The board notes that Montana's fees have historically been disproportionately low compared to other states and of the 256 licensees affected by this change, only one objection was received. Montana has not required on site inspections of out-of-state mail service pharmacies, only those pharmacies located in this state. However, with an adequate staff and budget, the board anticipates performing inspections on out-of-state mail service pharmacies as well, which would incur much greater costs compared to in-state pharmacies. Further, the board concluded that Montana cannot rely on other states to police Montana licensees located within their jurisdictions and the board must proactively anticipate additional costs involved in the ongoing regulation of out-of-state pharmacies. The board concluded that the difference in renewal fees is not a barrier to interstate commerce and is amending the rule exactly as proposed.

COMMENT 2: One individual supported the proposed fee increase to fund the full-time executive director and pharmacy inspector positions at salaries in line with neighboring states. The commenter noted that in-state pharmacies and their employees also pay Montana state income taxes but out-of-state pharmacies do not.



The commenter further stated that in-state pharmacies are at a competitive disadvantage versus mail service pharmacies as mail service pharmacies purchase inventory at approximately 17 percent less than the average retail pharmacy. The commenter suggested staggered licensure fees based on the number of prescriptions filled in a year to benefit rural and smaller volume pharmacies.

RESPONSE 2: The board notes that tax considerations and competitive advantage/disadvantage for respective licensees are issues beyond the board's purview and jurisdiction. The board concluded that aligning multiple licensure fees to prescriptions sold would be an unreasonable administrative burden and beyond the board's statutory authority.

4. The board has amended ARM 24.174.401 exactly as proposed.

BOARD OF PHARMACY  
JAMES CLOUD, CPhT, PRESIDENT

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

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

Certified to the Secretary of State March 31, 2008

BEFORE THE BOARD OF VETERINARY MEDICINE  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of ARM ) NOTICE OF AMENDMENT AND  
24.225.401 fees, 24.225.415 infectious ) ADOPTION  
waste, 24.225.501, 24.225.503, )  
24.225.507, 24.225.511, and 24.225.550 )  
pertaining to licensing, 24.225.704, )  
24.225.709, and 24.225.750 embryo )  
transfer, 24.225.904, 24.225.920, )  
24.225.926, and 24.225.950 euthanasia )  
technicians and agencies, 24.225.2401 )  
complaints, 24.225.2405 screening panel, )  
and adoption of NEW RULE I nonroutine )  
applications )

TO: All Concerned Persons

1. On December 20, 2007, the Board of Veterinary Medicine (board) published MAR Notice No. 24-225-33 regarding the amendment and adoption of the above-stated rules, at page 2062 of the 2007 Montana Administrative Register, issue no. 24.

2. On January 10, 2008, a public hearing was held on the proposed amendment and adoption of the above-stated rules in Helena. No comments or testimony were received.

3. The board has amended ARM 24.225.401, 24.225.415, 24.225.501, 24.225.503, 24.225.507, 24.225.511, 24.225.550, 24.225.704, 24.225.709, 24.225.750, 24.225.904, 24.225.920, 24.225.926, 24.225.950, 24.225.2401, and 24.225.2405 exactly as proposed.

4. The board has adopted NEW RULE I (24.225.425) exactly as proposed.

BOARD OF VETERINARY MEDICINE  
JEAN LINDLEY, DVM, PRESIDENT

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

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

Certified to the Secretary of State March 31, 2008

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

In the matter of the amendment of ARM ) NOTICE OF AMENDMENT  
37.86.2207 pertaining to Medicaid )  
reimbursement for the therapeutic )  
portion of therapeutic youth group )  
home treatment services )

TO: All Interested Persons

1. On January 17, 2008, the Department of Public Health and Human Services published MAR Notice No. 37-427 pertaining to the public hearing on the proposed amendment of the above-stated rule, at page 31 of the 2008 Montana Administrative Register, issue number 1.

2. The department has amended the following rule as proposed with the following changes from the original proposal. New 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) through (2) remain as proposed.

(3) ~~The interim~~ Except as provided in (4), the reimbursement rate for the therapeutic portion of therapeutic youth group home treatment services provided on or after October 1, 2007 ~~through September 30, 2008~~ is the lesser of:

(a) the amount specified in the department's Medicaid Mental Health Fee Schedule. The department adopts and incorporates by reference the department's Medicaid Mental Health and Mental Health Services Plan, Individuals Under 18 Years of Age Fee Schedule dated October 1, 2007. A copy of the fee schedule may be obtained from the Department of Public Health and Human Services, Health Resources Division, Children's Mental Health Bureau, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951; or

(b) the provider's usual and customary charges (billed charges).

(4) ~~The final~~ If a provider does not comply with the cost reporting requirements in (5), the final reimbursement rate for the therapeutic portion of therapeutic youth group home treatment services provided during state fiscal year (SFY) 2008, July 1, 2007 through June 30, 2008 will be determined by adjusting the interim rate adopted in (3)(a) for ~~each~~ the provider so that the total amount received for SFY 2008 equals ~~either the lesser of:~~

~~(a) 100% of allowable costs if a provider complies with the cost reporting requirements set forth in (6), except that a provider's final reimbursement rate may not be more than 10% higher or 10% lower than the interim rates adopted in (3)(a); or~~

~~(b)~~ (a) the amounts specified in the department's Medicaid Mental Health and Mental Health Services Plan, Individual Under 18 Years of Age Fee Schedule dated

July 15, 2005 which is adopted and incorporated by reference, if a provider does not comply with the cost reporting requirements set forth in (5). A copy of the fee schedule may be obtained from the Department of Public Health and Human Services, Health Resources Division, Children's Mental Health Bureau, 1400 Broadway, P.O. Box 202951, Helena MT 59620-2951; or

(b) the provider's usual and customary charges (billed charges).

(5) Each provider of therapeutic youth group home services will report allowable costs for SFY 2008 that starts July 1, 2007 using auditable data, standardized forms, instructions, definitions, and timelines supplied by the department.

(a) The cost settlement study will be performed on an individually licensed therapeutic youth group home basis; and

(b) Reports of allowable costs for SFY 2008 must be received by the department before August 15, 2008.

(6) through (13) remain as proposed.

AUTH: 53-2-201, 53-6-113, MCA

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

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

COMMENT #1: We recommend forgoing the proposed cost settlement for state fiscal year (SFY) 2008, and instead prefer moving directly to an adjusted rate for SFY 2009. The new rate must adequately address a provider's ability to recruit, and retain quality staff, meet licensing requirements, provide quality care, and assure the safety of resident children.

RESPONSE: The department generally agrees. It will forego the proposed cost settlement process and establish an adjusted SFY 2009 rate based on SFY 2008 cost reports. The cost study should reflect the actual cost of services. It is assumed that costs reported will reflect licensure requirements. However, providers who do not participate in the cost study will be subject to recovery of the difference between the SFY 2008 rate and the amount that would have been paid under the SFY 2007 rate.

COMMENT #2: Providers should not be subject to the risk of overpayment recovery.

RESPONSE: The department agrees. It has adopted an alternative to the proposed rule that would have adjusted the SFY 2008 rate up or down a maximum of 10% based on the cost study. The cost study will be used only to develop a new rate for SFY 2009, not to cost settle with providers. For providers who choose not to participate in the cost study, rates will be the same as SFY 2007 (SFY 2005 fee schedule). This way, providers who participate in the cost study will not be at risk of overpayment recovery resulting from the cost settlement process. Providers who do not will be subject to overpayment recovery as explained in the response to

comment #1.

COMMENT #3: We oppose the proposed method of completing the cost study. Examining a previous year's costs only reflects what the department paid providers. Rates should address the ability of providers to determine and pay the fair market value of staff salaries. In addition to cost reports the department should complete a survey of state employee salaries in positions similar to employees of the providers in Montana to adequately approximate the fair market value of staff salaries. Then the department should set benchmark salaries for comparable positions and factor these costs into the 2009 rate.

RESPONSE: The department does not believe there are any state employees in comparable positions to therapeutic group home (TGH) employees. Therefore, it does not plan to conduct a survey of the salaries of state employees comparable to employees of TGH providers. The department believes that the cost study will provide enough information to make an accurate analysis of actual costs including salaries.

COMMENT #4: Providers should not be required to report revenues in the cost report. If revenue from non-Medicaid sources is considered in its cost study, the department might determine it can pay less than allowable expenses if a provider's Medicaid services are subsidized by charitable donations and other non-Medicaid revenues such as endowment income, public grants, and private payer revenue. Do hospitals, physicians, nursing facilities, and other provider types have to report their donations and other non-Medicaid income as a basis for setting Medicaid rates? We would not participate in any methodology that included reporting revenues from donations and other revenues from nongovernment sources.

RESPONSE: The department disagrees. It believes it would not be able to complete a balanced cost study if revenues were not reported. Critical access hospitals are required to report revenue from non-Medicaid sources. The department uses such revenue in the cost settlement process. Hospitals, physicians, and nursing facilities are not reimbursed based on cost. Providers will only be required to report revenues that relate to TGH care. For example, if a TGH has revenue from a charitable endowment, only the amounts donated to the TGH to provide TGH services will be counted by the department. General donations to a provider with more than one cost center will be cost allocated to the TGH services. The cost study will give a provider the opportunity to report exceptional or one time revenues. In addition, providers will have the option of not participating in the cost study.

COMMENT #5: The cost report and the adjusted SFY 2009 rates should take into account an occupancy rate, such as the 85% occupancy rate used by another state to calculate Medicaid reimbursement. The occupancy rate should reflect the number of days youth are continued in service without funding, including additional home visit days beyond those paid for already. We recommend including an allowance for occupancy rate and additional paid therapeutic home visits in the SFY 2009 rate.

RESPONSE: The department will review the occupancy rate when the cost study is completed. The cost study will take into account occupancy rates reflected in data reported in the cost study as well as other data relating to an efficiently run therapeutic group home. The department does not have plans to extend the 14 day therapeutic home visit limit.

COMMENT #6: We recommend a committee be established with equal representation from the department and providers to give input when the cost report data is reviewed and new rates are established for SFY 2009.

RESPONSE: The department will not be establishing a formal committee to conduct the cost study. However, when the cost study is completed, the department will solicit input from providers who participated in the cost study. The department will consider provider recommendations before it proposes adjusted SFY 2009 rates.

COMMENT #7: Will out-of-state TGH providers be participating in the cost reporting process?

RESPONSE: Yes, if they serve a significant number of Montana Medicaid youth.

COMMENT #8: Does the department expect a TGH provider to deliver services to youth and not be reimbursed for allowable costs?

RESPONSE: The purpose of the cost study is to establish a rate based on aggregate allowable costs. The cost study document defines allowable costs, and the department will add clarification to that document if necessary. The new rate will more accurately reflect a provider's ability to recruit and retain quality staff, meet licensing requirements, and provide quality care. The department must stay within legislative appropriations

COMMENT #9: Will the department waive or reduce its expectations of provider compliance with licensure and ARM requirements if these costs are currently not reimbursed?

RESPONSE: No. The department will not wave or reduce its expectations of provider compliance with licensure and ARM requirements. The department will determine through the cost study the actual cost of providing services required by rule.

COMMENT #10: On what basis will the department audit providers if allowable costs for services are established through cost reporting, but not reimbursed?

RESPONSE: The cost study is a tool to identify allowable costs and establish a rate that reimburses providers within the department's legislative appropriation. The department retains the authority to conduct audits and reviews of all Medicaid providers, as provided in its rules.

COMMENT #11: Will the department be willing to downgrade licensing and rules and requirements to align with a provider's final reimbursement if it does not cover all allowable costs?

RESPONSE: No. The department sets minimum standards to address the therapeutic treatment and safety needs of the youth receiving TGH services. Providers will be expected to meet these minimums within their established rate.

COMMENT #12: In the event of successful litigation brought about by a Medicaid youth harmed while in a provider's care, what culpability will be shared by the department for inadequately funding allowable costs upon which required services are dependent?

RESPONSE: These rules are not intended to change the responsibility, rules, or requirements for maintaining the safety of youths receiving TGH services. An enrolled provider is responsible for providing services for youth in the TGH. The cost study is a tool to better identify allowable expenses and to determine an equitable reimbursement rate for TGH providers.

COMMENT #13: Please describe the "methodology and standard", as required in the Code of Federal Regulation (CFR 447.201) that has been utilized to "equalize" the Campus Based Therapeutic Youth Group Home (CBTYGH) SFY 2008 interim rate to the exact same rate as other licensing levels? If a methodology and standard have been used, please explain how two very different license levels arrive at the same rate.

RESPONSE: The department's methodology was simply to allocate available funds to augment SFY 2007 rates. Since no cost data were available, the department did not compare the cost of providing care at different TGH license levels. For a further explanation, please see the discussion in the response to comment #14.

COMMENT #14: Please describe the existing methodology and standards utilized for existing therapeutic youth group home rates and how the proposed modified cost settlement process differs. With this increased expenditure of \$91,283.56 in state and federal funds for CBTYGH services, what criteria, baseline, and time frame will be utilized to evaluate that client access has been ensured and expenditures were sufficient on the one hand and also justified? What portion of the \$91,283.56 will be sent to out of state CBTYGH providers? What data suggest that client access is a problem, how large of a problem, and for how long? With the extensive differences in licensing and administrative rule requirement between CBTYGH and other therapeutic group homes, will the proposed interim rate for CBTYGH result in an overpayment to CBTYGH and underpayment to others or vice versa for SFY 2008?

RESPONSE: The cost study will be used to develop the methodology to establish the new reimbursement rate for therapeutic group home services for SFY 2009. The department used the following methodology to set the Campus Based Youth Group

Home (CBYGH) rates for SFY 2008. A special appropriation (SA) from the 2007 Legislature was divided by the number of CBYGH bed days in SFY 2007 to get a SA daily rate. This SA daily rate was added to the SFY 2007 rate for the July 1, 2007 to September 30, 2007 rate. For October 1, 2007 to June 30, 2008, the 2007 rate was multiplied by 3.3% and then added to the SA daily rate.

When the appropriation for CBYGH was divided by the number of CBYGH bed days in 2007, the new CBYGH rate did not equal the intensive level TGH rate. The department added an additional \$91,283 (this is the same amount as the appropriation) to increase the CBYGH rates up to the intensive level therapeutic group home rates.

COMMENT #15: With the extensive differences in licensing and administrative rule requirements between CBTYGH and other therapeutic group homes, will the proposed interim rate for CBTYGH result in an overpayment to CBTYGH and underpayment to others or vice versa for SFY 2008?

RESPONSE: No, the reimbursement methodology adopted by the department will not necessarily result in over payments and under payments for SFY 2008. The department will review the licensing requirements and administrative rules after the cost study is completed to ensure that rates and licensing requirements are appropriate for each level of therapeutic group home.

COMMENT #16: The department proposes a cost settlement based upon plus or minus 10% of interim rates to establish final rates for therapeutic group homes. Additionally, correspondence from the CMHB Bureau Chief dated January 18, 2008 stated that the "target reimbursement" for unbundling will be based upon this cost settlement methodology in the event that CMS requires Montana to unbundle rates. If there is not a methodology and standard utilized to establish the interim CBTYGH rate, then the interim rate is an arbitrary benchmarking of CBTYGH interim rates to the other therapeutic group home rates, despite large differences in licensure and requirements. Subsequently, the proposed adjustment of plus or minus 10% is applied to an arbitrary base for CBTYGH. That final rate will then become the "target reimbursement" in the likely event that CMS requires unbundling. Please explain how the proposed rule will not result in an arbitrary CBTYGH final rate that continues to be inadequate in relationship to licensure and ARMS, unfair in relationship to reimbursements at other license levels, and unsuccessful in ensuring eligible client access to in-state Medicaid services. We are concerned about adjusting the TGH reimbursement rate up or down as much as 10% based on our actual cost.

RESPONSE: As explained in the response to comment #1, the department is adopting a payment methodology that will not adjust SFY 2008 rates for providers who choose to participate in the cost study. TGH providers who choose not to participate will be subject to adjustments. The current rates were based on the SFY 2005 base rate. Rates have been increased when legislative appropriations occurred. The department will analyze the cost study to determine the actual cost of



providing services and to establish a rate methodology and standards. If a great disparity in actual cost to rates (and/or charges) is found, it will be reflected in the cost study.

COMMENT #17: The department's proposed rule creates a two tiered fee schedule for SFY 2008 for each therapeutic youth group home licensing category, based upon each provider's compliance or noncompliance with completing a cost report. In correspondence from the CMHB Bureau Chief dated January 18, 2008, the department plans on retaining these two tiers in SFY 2009 whether providers are reimbursed by per diem or unbundled rates. Does the department anticipate operating this two tiered fee schedule for the same licensed services in SFY 2010 and beyond? In the future, which of the two rates will newly licensed therapeutic youth group homes be reimbursed at and based upon what criteria?

RESPONSE: The department will establish one rate for SFY 2009 based on the results of the cost study. It will use actual costs from providers who complete the cost study. The department will use the reimbursement rate from SFY 2007 for providers who do not participate. All providers will have one new rate for SFY 2009, based on the weighted average of "costs" from SFY 2008 and subject to legislative appropriation. The department is waiting for further guidance from CMS regarding unbundled services.

COMMENT #18: On what basis will the department justify expending Medicaid funds to purchase services from a higher cost Medicaid provider who participated in the cost reporting than from a lower cost Medicaid provider who didn't participate for the same licensed service?

RESPONSE: The commentor misinterpreted the department's proposal for SFY 2009. All TGH providers will be paid the same SFY 2009 rate. For a more detailed explanation, please see the response to comment #17. Rates in SFY 2008 may be different based on whether a provider participates in the cost settlement.

COMMENT #19: Which rate will the department offer out-of-state CBTYGH, new and existing providers, and what will be your reasoning?

RESPONSE: All TGH providers will be paid the same rate for SFY 2009 regardless of whether they are an in-state or out-of-state provider. A new provider would be paid based on the methodology described in the rule. The SFY 2008 rate for out-of-state providers will depend on their participation in the cost study. For a more detailed explanation, please see the response to comment #17.

/s/ John Koch  
Rule Reviewer

/s/ Joan Miles  
Director, Public Health and Human Services

Certified to the Secretary of State March 31, 2008.

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

In the matter of the adoption of New            )  
Rules I through X pertaining to 72-hour        )  
presumptive eligibility for adult crisis        )  
stabilization services                            )

NOTICE OF ADOPTION

TO: All Interested Persons

1. On February 14, 2008, the Department of Public Health and Human Services published MAR Notice No. 37-429 pertaining to the public hearing on the proposed adoption of the above-stated rules, at page 307 of the 2008 Montana Administrative Register, issue number 3.

2. The department has adopted New Rules I (37.89.501), Rule II (37.89.505), Rule III (37.89.507), Rule IV (37.89.521), Rule V (37.89.523), Rule VI (37.89.525), Rule VII (37.89.531), Rule VIII (37.89.541), Rule IX (37.89.509), and Rule X (37.89.503) as proposed.

3. No comments or testimony were received.

/s/ John Koch  
Rule Reviewer

/s/ Joan Miles  
Director, Public Health and  
Human Services

Certified to the Secretary of State March 31, 2008.

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 42.31.501 relating to )  
telecommunications license and )  
telecommunication excise tax )

TO: All Concerned Persons

1. On October 25, 2007, the department published MAR Notice No. 42-2-779 regarding the proposed amendment of the above-stated rule at page 1655 of the 2007 Montana Administrative Register, issue no. 20.

2. A public hearing was held on November 14, 2007, to consider the proposed amendment. No oral testimony was provided during the hearing. Written comments were received subsequent to the hearing and are summarized as follows along with the response of the department:

COMMENT NO. 1: Mary Whittinghill, President, Montana Taxpayers Association (MTA), stated that MTA appreciates the department's preliminary amendment to the rule that said that it would not consider the internet moratorium lifted until the 110th (current) Congress adjourned without taking action. However, now that the moratorium has been extended an additional seven years by the 110th Congress, MTA does not believe the rule amendment is necessary. She further stated the proposed amendment made by the department at the hearing, which changes "110th" to "113th" to coincide with the next expiration of the moratorium, simply places unnecessary language in the department's rules. Not only could subsequent Congresses alter the current moratorium, Montana's own Legislature could act on changes to the taxation of the internet passed by Congress prior to the adjournment of the 113th Congress and expiration of the moratorium.

Ms. Whittinghill also stated MTA contends that Montana statutes do not confer upon the department the ability to impose new taxes administratively on the internet. Such an action would only be possible if the Legislature grants such authority by passing legislation sometime in the future.

For these reasons, the MTA requests the department withdraw the amendment to the rule.

RESPONSE NO. 1: The department appreciates MTA's comments, however the department believes it is necessary to explain some of the history surrounding the proposed rule amendment and the law that it implements. That history supports the department's action in moving forward with this rule amendment.

During the 56th legislative session in 1999, the Montana Legislature considered Senate Bill 192 in order to exempt internet access services from the then license tax on telephone companies (Senate Bill 192, 56th Legislature (introduced January 13, 1999)). Congress had enacted, through the Internet Tax Freedom Act, a moratorium preempting state and local taxes on internet access services in

October 1998. However, Congress had exempted from this moratorium certain laws in effect and enforced prior to the enactment of this federal law. Among those laws exempted from the moratorium ("grandfathered") was the Montana telephone license tax. Thus, Senate Bill 192 sought to enact a state exemption for internet access services in light of the fact that the federal preemption did not apply to the Montana telephone license tax.

During the second reading of Senate Bill 192, language was inserted providing that if House Bill 128 (Retail Telecommunication Excise Tax Act) was passed and approved, then Senate Bill 192 was void. House Bill 128 was enacted by the Legislature, hence voiding Senate Bill 192 providing for a state exemption for internet access charges. House Bill 128 also repealed the telephone license tax and enacted the new Retail Telecommunications Excise Tax Act. Importantly, the new Retail Telecommunication Excise Tax law enacted a broad-based tax without any exemption for internet access services. With the enactment of House Bill 128, the Montana Legislature directly voided the state exemption for internet access services and enacted a new telecommunications tax that included internet access services within the base of the tax.

The enactment of House Bill 128 did one more thing: it surrendered Montana's exemption from the federal moratorium preempting state taxes on internet access charges. Montana's exemption from the Internet Tax Freedom Act moratorium was specific to the prior telephone license tax repealed by House Bill 128. Thus, the 1999 Montana Legislature began with a state telecommunications tax that included internet access charges in its base and that was immune from the federal preemption of such taxation. The 1999 Legislature ended with a state telecommunications tax that included internet access charges in its base as matter of state law, but now subject to preemption under the federal law. The 1999 Legislature's policy decision to continue to include internet access charges in the base of the state telecommunications tax law was made especially clear by its initial enactment and then subsequent nullification of an explicit state exemption for internet access charges.

The fact that this understanding of the 1999 Legislature's decisions was commonly accepted at the time is clear from the history of the hearing on proposed department rules implementing House Bill 128 held on November 16, 1999. Present at that hearing and testifying on issues related to the telecommunications rules were: Mary Whittinghill, Montana Taxpayers Association and Barbara Ranf, U.S. West Communications. Additional written comments were received from the Montana Power Company.

At this rules hearing the department introduced an additional rule which became ARM 42.31.507. This rule dealt specifically with the question of how the department would coordinate the new state law that imposed a tax on internet revenues with the federal law that preempted that taxation. The department answered that question with a rule that reads, in part, as follows:

"1) Imposition of the retail telecommunication excise tax shall not be applied to internet revenue that may be included in the sales price, until the federal moratorium has been lifted. Imposition of the tax will occur after the federal moratorium is lifted and if no federal law prohibits the taxation of internet revenue."

What is significant about this 1999 rule is that it clearly states the contemporaneous understanding that the 1999 Montana Legislature had enacted a telecommunications tax that was imposed on internet revenues, but that tax would not be collected on internet revenues for whatever period the temporary federal law preempted state law.

Comments made at and subsequent to the hearing addressed subjects such as: whether a credit would be provided for bad debts; time and place of audits; requirement to retain records for five years; clarification of when the 60-day period referenced in the rule commences; and that the department should not have arbitrary authority to reject an application, or if rejected, the taxpayer should be informed of the basis of the rejection. There were no comments on the rule with regard to internet revenue taxation. The rule was also subject to the oversight of the Revenue and Transportation Interim Committee without any change in the rule that is now ARM 42.31.507 occurring as result of that oversight.

Ms. Whittinghill represented the Montana Taxpayers Association at the hearing on November 16, 1999. She did not comment on or object to this proposed rule dealing with the 1999 Legislature's imposition of a tax on internet revenues and its temporary preemption by federal law. Nor did Ms. Whittinghill submit written comments or object to this proposed rule subsequent to the hearing. The time for Ms. Whittinghill, on behalf of her association, to have raised the question as to whether the 1999 Montana Legislature had imposed a state tax on internet revenues was during the 1999 rules adoption process.

This rule was subsequently adopted on December 6, 1999, by then Director of Revenue, Mary Bryson.

The Montana Taxpayers Association represented again by Ms. Whittinghill comes now eight years and two administrations later questioning, in effect, whether the 1999 Legislature had imposed a state tax on internet access charges. Ms. Whittinghill raises this question now as a general assertion without presenting any analysis or review of the legislative history and without any acknowledgement that she and the organization she represents participated in the 1999 rules process that dealt directly with the tax imposition issue. Ms. Whittinghill's comment is untimely, unsupported by the legislative and rulemaking history, and is not even relevant to this proceeding.

The comment is not relevant to this proceeding because the proposed amendment defining the term "lifted" does not deal with the question of whether a tax on internet access has been imposed by the Legislature. That was resolved in 1999 by the Legislature and by Director Bryson's adoption of ARM 42.31.507. This proposed rule amendment of ARM 42.31.501 deals only with the technical timing of when the federal preemption of state law actually ends.

Turning now to whether the definition of the term "lifted" is necessary, Ms. Whittinghill states that the language is unnecessary because Congress or the Montana Legislature could change either federal or state law. The department does not adopt rules or fail to adopt rules on the basis of what the law might be, but on the basis of what existing law is. Indeed, the department's rulemaking authority is guided, limited, and authorized only by existing law. The department cannot fail to fulfill its responsibilities to provide an opportunity to the public to participate in its decision making through the rulemaking process simply because state or federal law

might change in the future. If that were the criteria for rulemaking, then the department would never adopt a single rule because all laws are subject to change.

The reference in the rule being adopted with this notice to the "113th Congress" is there because existing federal law is such that the current internet moratorium is scheduled to expire during the time that Congress is in session. The reference to the 113th Congress is necessary to fix precisely the date that the department will consider the federal internet moratorium to have been lifted.

If Congress or the Montana Legislature changes the laws that bear on the rule amendment adopted herein, the department will change the rule. That is the routine and normal process that occurs with any rule affected by a change in applicable law.

The rule amendment adopted here is necessary for several reasons. The rule amendment is needed to provide affected taxpayers and telecommunications providers with the assurance that department will delay the requirement of the 1999 Montana law to collect taxes as long as possible consistent with both state and federal law. Second, the rule amendment is needed to prevent the department from collecting a tax and then needing to refund that tax in the event that a sitting Congress first allows the moratorium to expire and then subsequently in that same Congress retroactively reimposes the moratorium. Such a process would be unnecessarily burdensome to consumers, telecommunication service providers, and to the department. Finally, the rule amendment is needed to resolve the ambiguity as to what the term "lifted" actually means.

3. Consistent with all three of these purposes for the rule, the department is further amending the rule as follows, stricken matter interlined, new matter underlined:

42.31.501 DEFINITIONS The following definitions apply to terms used in this subchapter:

(1) remains as proposed.

(2) "Lifted" means that the internet moratorium either expires under the terms of federal law or the ~~110th~~ 113th Congress of the United States adjourns without reauthorizing the internet moratorium, whichever event occurs later. Through this rule, the department is clarifying what will occur if the 113th Congress adjourns without reauthorizing the internet moratorium before the moratorium expires under the terms of federal law. The rule makes clear that the department will delay the impact of the 1999 Montana law taxing internet revenues as long as possible, that the unnecessary burden of the tax being collected and then refunded will be avoided, and that the operation of the law in this case is clear and certain.

(3) through (6) remain as proposed.

AUTH: 15-53-155, MCA

IMP: 15-53-129, MCA

4. Therefore, the department amends ARM 42.31.501 with the amendments listed above.

5. An electronic copy of this Adoption Notice is available through the department's site on the World Wide Web at [www.mt.gov/revenue](http://www.mt.gov/revenue), under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this Adoption Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

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

Certified to Secretary of State March 31, 2008

ADMINISTRATION, DEPARTMENT OF - Statutory grant of supervision over procurement contracts does not authorize the Department of Administration to supervise federally funded grants awarded by the Board of Crime Control to nongovernmental agencies;  
CRIME CONTROL, BOARD OF - Procurement Act does not apply to federally funded grants to nongovernmental agencies;  
CRIME CONTROL, BOARD OF - Statutory grant of supervision over procurement contracts does not authorize the Department of Administration to supervise federally funded grants awarded by the Board of Crime Control to nongovernmental agencies;  
GRANTS - Procurement Act does not apply to federally funded grants to nongovernmental agencies;  
STATUTORY CONSTRUCTION - Maxim of statutory construction that express mention implies exclusion of things not mentioned is not an inflexible rule but a guideline that gives way where other factors dictate differing interpretation;  
CODE OF FEDERAL REGULATIONS - 28 C.F.R. § 90.11, 28 C.F.R. § 90.12, 28 C.F.R. § 90.16, 28 C.F.R. § 90.18, 28 C.F.R. § 90.19, 28 C.F.R. § 90.23, 28 C.F.R. § 90.24;  
MONTANA CODE ANNOTATED - Title 18, chapter 4; sections 2-15-2006, 18-4-123, (12)(a), -132, (1), (a), (b), (c), (2), (3), (a), -221, -223, (3), -242(1), 44-4-301(1), 77-2-364;  
MONTANA CONSTITUTION OF 1972 - Article X, section 4;  
MONTANA LAWS OF 1983 - Chapter 519;  
UNITED STATES CONSTITUTION - Amendment XI.

HELD: The Montana Procurement Act does not apply to grants awarded by the Montana Board of Crime Control to nongovernmental agencies to fund community projects.

March 25, 2008

Mr. Roland M. Mena  
Executive Director  
Montana Board of Crime Control  
P.O. Box 201408  
Helena, MT 59620-1408

Dear Mr. Mena:

You have requested my opinion on the following question:

Does the Montana Procurement Act, Mont. Code Ann. tit. 18, ch. 4, apply to the awarding of sub-grants by the Montana Board of Crime Control to nongovernmental agencies to fund community projects?



The Montana Board of Crime Control is an eighteen member board attached for administrative purposes to the Montana Department of Justice. Mont. Code Ann. § 2-15-2006. Among other functions, the board serves as the "state planning agency" under the Omnibus Crime Control and Safe Streets Act of 1968. Mont. Code Ann. § 44-4-301(1). As its name implies, the Omnibus Crime Control and Safe Streets Act, with its frequent subsequent amendments, is a multifaceted federal effort to attack the problem of crime in America. Its provisions, and those of other federal statutes, include statutes that provide federal grants to states for certain purposes related to enforcement of criminal laws.

The Omnibus Act and other federal statutes authorize the states to "sub-grant" certain federal funds to local governments and, in some cases, to nongovernmental agencies within the states. See, e.g., 28 C.F.R. § 90.11 (authorizing state grants under the Violence Against Women Act to local governments and "nonprofit, nongovernmental victim services programs for the purpose of developing and strengthening effective law enforcement and prosecution strategies to combat violent crimes against women, and to develop and strengthen victim services . . . .") The grants in question under your request involve the pass-through of federal funding to local nongovernmental agencies that in turn provide services in their communities. Your request involves the proper procedures for sub-grants to such nongovernmental agencies that then use the grants to provide services within the community to persons or entities that are not agencies of the state.

Your question requires an analysis of the scope of the Montana Procurement Act ("the Act"), which was adopted in 1983 based on the American Bar Association Model Procurement Act. The Act contains definitions that are pertinent:

In this chapter, unless the context clearly requires otherwise or a different meaning is prescribed for a particular section, the following definitions apply:

....

(3) "Contract" means all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies or services.

....

(15)(a) "Procurement" means acquisition with or without cost, buying, purchasing, renting, leasing, or otherwise acquiring any supplies or services. The term includes all functions that pertain to the obtaining of any supply or service, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

(b) Procurement does not include the acquiring of supplies or services by gift.

....

Mont. Code Ann. § 18-4-123.

The coverage of the Act is generally defined in Mont. Code Ann. § 18-4-132:

(1) This chapter applies to:

(a) the expenditure of public funds irrespective of their source, including federal assistance money, by this state acting through a governmental body under any contract, except a contract exempted from this chapter by this section or by another statute;

(b) a procurement of supplies or services that is at no cost to the state and from which income may be derived by the vendor and to a procurement of supplies or services from which income or a more advantageous business position may be derived by the state; and

(c) the disposal of state supplies.

(2) This chapter or rules adopted pursuant to this chapter do not prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

(3) This chapter does not apply to:

(a) either grants or contracts between the state and its political subdivisions or other governments, except as provided in part 4;

....

The Act confers broad powers on the Department of Administration to regulate the contracts to which the Act applies, including the authority "to consider and decide matters of policy within the provisions of [the Act]," and to adopt rules. Mont. Code Ann. §§ 18-4-221, -223.

In my opinion, application of the Act to the grants in question is inappropriate for several reasons.

First, parsing the language of the Act leads to the conclusion that it does not apply. Pursuant to Mont. Code Ann. § 18-4-132(1)(a), the Act applies to "expenditure of funds . . . under any contract." "Contract" is defined to include only "state agreements . . . for the procurement or disposal of supplies or services." Mont. Code Ann. § 18-4-123(3). "Disposal" is not pertinent to your request, since the term refers to "disposal of supplies." Mont. Code Ann. § 18-4-132(1)(c). "Procurement" means acquisition with or without cost, buying, purchasing, renting, leasing, or otherwise acquiring any supplies or services." Thus by its terms the Act applies only to contracts for "procurement" which in turn is limited to contracts under which the state "acquires" supplies or services.

The legislative history supports this reading. The Act was adopted as 1983 Mont. Laws, ch. 519. The title of the bill included the following description: "An Act to generally revise the laws governing procurement of supplies and services for state agencies."

Montana Code Annotated § 18-4-123 requires that the Act's definitions be applied with an eye to context, and there may be situations in which it would be appropriate to apply the Act to contracts under which the state contracts for supplies or services for an entity that is not a state agency. That is clearly not the case with respect to the sub-grants at issue here.

The policies served by these sub-grants are federal. The sub-grants provide services to individuals in communities throughout Montana that the State does not provide and is not obligated by law to provide. The federal granting programs typically include nonsupplantation provisions in their regulations to ensure that the federal money does not displace funding for state programs already in place. See, e.g., 28 C.F.R. § 90.18 ("Federal funds received under this part shall be used to supplement, not supplant non-Federal funds that would otherwise be available for expenditure on activities described in this part.")

Federal law dictates that the sub-grants be administered by the board pursuant to a plan whose contents must comply with federal regulations. See, e.g., 28 C.F.R. §§ 90.19, 90.23. This requirement obviously clashes with the Act's delegation to the Department of Administration of policy-making authority over procurement. Federal law dictates the purposes for which grant funds may be used and creates preferences for the allocation of grant funds. See, e.g., 28 C.F.R. § 90.12, 90.16. Most tellingly, the Act cannot provide the "exclusive remedies for unlawful . . . contract awards" with respect to these sub-grants. Mont. Code Ann. § 18-4-242(1). Federal law provides for federal oversight of state granting activities and provides sanctions for improper allocation of grant funds. See, e.g., 28 C.F.R. § 90.24. The Act itself recognizes that its provisions are subservient to requirements imposed by federal programs. Mont. Code Ann. § 18-4-132(2).

The Department of Administration has suggested that the inclusive language of Mont. Code Ann. § 18-4-132(1)(a) leads to the conclusion that the Act applies. I respectfully disagree. The relevant language provides that the Act "applies to . . . the expenditure of public funds irrespective of their source, including federal assistance money, by this state acting through a governmental body under any contract, except a contract exempted from this chapter by this section or by another statute." This language applies only to an agreement that meets the definition of "contract" found in the Act, i.e., an agreement for the procurement of goods and services to be used by the state or its agencies. As noted above, this limiting language is probably enough by itself to exclude the sub-grant contracts at issue here.

A reading of the statute that ignores this limitation could produce absurd results. There are instances in which the state or its agencies enter into contracts for the

expenditure of state money that are not expressly excepted from the coverage of the Act but nevertheless do not fall under its rules. For example, Mont. Code Ann. § 77-2-364 authorizes the Board of Land Commissioners to enter into contracts for the purchase of land. Nothing in the applicable statutes explicitly provides an exemption for these contracts from the broad provision in Mont. Code Ann. § 18-4-132(1)(a) applying the Act to "the expenditure of public funds . . . by this state acting through a governmental body under any contract." It has never been suggested, however, that the Department of Administration, rather than the Board of Land Commissioners, has the authority to administer these purchases. Cf. Mont. Const. Art. X, § 4.

The department has also argued that the specific exclusion of "grants or contracts between the state and its political subdivisions or other governments" in Mont. Code Ann. § 18-4-123(12)(a) implies the inclusion of grants to nongovernmental organizations. I find this argument unpersuasive.

The maxim on which the department relies is a guideline for interpretation, not an inflexible rule. State v. Driscoll, 101 Mont. 348, 359, 54 P.2d 571, 576 (1936). The specific reference to a subject in a statute could mean that the Legislature intended to exclude all items not mentioned. See, e.g., In re M.P.M., 1999 MT 78, ¶ 23, 294 Mont. 87, 93, 976 P.2d 988, 992. However, the enacting body sometimes carves out exclusions simply to confirm by a specific reference a general principle or assumption that is embedded in the enactment in all of its applications. The Eleventh Amendment to the United States Constitution is perhaps the best known example of this practice. Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) (Amendment's exclusion of federal court jurisdiction over actions "against a state by the citizens of another state" does not imply that actions by the citizens of the defendant state are permitted; the Amendment confirms the underlying assumption of the Constitution that states are not subject to suit in federal court.) It is certainly plausible to think that by excluding intergovernmental grants the framers of the Model Act, and by extension the Legislature, intended to confirm that grants of the kinds at issue here are not procurement contracts.

THEREFORE IT IS MY OPINION:

The Montana Procurement Act does not apply to grants awarded by the Montana Board of Crime Control to nongovernmental agencies to fund community projects.

Very truly yours,

/s/ Mike McGrath  
MIKE MCGRATH  
Attorney General

mm/cdt/jym

## **NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE**

### **Interim Committees and the Environmental Quality Council**

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

#### **Economic Affairs Interim Committee:**

- Department of Agriculture;
- Department of Commerce;
- Department of Labor and Industry;
- Department of Livestock;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

#### **Education and Local Government Interim Committee:**

- State Board of Education;
- Board of Public Education;
- Board of Regents of Higher Education; and
- Office of Public Instruction.

#### **Children, Families, Health, and Human Services Interim Committee:**

- Department of Public Health and Human Services.

#### **Law and Justice Interim Committee:**

- Department of Corrections; and
- Department of Justice.

#### **Energy and Telecommunications Interim Committee:**

- Department of Public Service Regulation.

**Revenue and Transportation Interim Committee:**

- Department of Revenue; and
- Department of Transportation.

**State Administration and Veterans' Affairs Interim Committee:**

- Department of Administration;
- Department of Military Affairs; and
- Office of the Secretary of State.

**Environmental Quality Council:**

- Department of Environmental Quality;
- Department of Fish, Wildlife, and Parks; and
- Department of Natural Resources and Conservation.

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is P.O. Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA  
AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR or Register) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the Attorney General (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

- |               |   |
|---------------|---|
| Known Subject | 1. Consult ARM Topical Index.<br>Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued. |
| Statute       | 2. Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers.                     |

## ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 2007. This table includes those rules adopted during the period January 1, 2008, through March 31, 2008, and any proposed rule action that was pending during the past six-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through December 31, 2007, 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 2007 and 2008 Montana Administrative Register.

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