ISSUE NO. 12

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

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PROPOSAL NOTICE SECTION

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

In the matter of the amendment of ARM 2.43.1306 pertaining to actuarial rates and assumptions	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On July 15, 2010, at 9:00 a.m., the Montana Public Employees' Retirement Board (PER Board) will hold a public hearing in the board room at 100 North Park Avenue, Suite 200, at Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The PER Board 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 MPERA no later than 5:00 p.m. on July 12, 2010, to advise us of the nature of the accommodation that you need. Please contact Dena Helman, Montana Public Employee Retirement Administration, 100 North Park Avenue, Suite 200, P.O. Box 200131, Helena, Montana, 59620-0131; telephone (406) 444-2578; TDD (406) 444-1421; fax (406) 444-5428; or e-mail dhelman@mt.gov.

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

2.43.1306 ACTUARIAL RATES AND ASSUMPTIONS (1) The actuary will present the actuarial data and recommend the board adopt specific rates and assumptions. The board in its discretion will adopt rates and assumptions and publish them in a board policy. The board adopts and incorporates by reference board policies BOARD Admin 09 and BOARD Admin 10, providing actuarial rates, assumptions, and methods for valuation purposes and actuarial equivalence purposes, respectively, that were approved by the board on ~~February 14, 2008~~ June 10, 2010.

(2) remains the same.

AUTH: 19-2-403, 19-17-203, MCA
IMP: 19-2-405, 19-17-107, MCA

REASON: The Internal Revenue Service requires public pension systems to adopt actuarial assumptions, rates, and methods in a manner that gives them the force and effect of law. The IRS requirement is an issue that may affect the qualified status of public pension retirement systems. Adopting the applicable actuarial assumptions, rates, and methods into rule by reference gives them the force and effect of law.

The PER Board's actuary performs an experience study every five to seven years. Information obtained through the experience study is used by the actuary to update demographic and financial data relied on when conducting annual valuations of the retirement systems administered by the Board (BOARD Admin 09) and to determine actuarial equivalent option factors for those systems whose members have retirement options (BOARD Admin 10).

The 2009 experience study resulted in the PER Board's actuary recommending, and the PER Board adopting, revisions to the two-board policies mentioned above. Since these policies are adopted by reference, 2-4-307(3), MCA, requires that the amended policies also be adopted by reference. Therefore, it is necessary to amend the rule that adopts the policies by reference.

While preparing this notice of proposed amendment, PER Board staff noted that 19-2-403, MCA, does not apply to the Volunteer Firefighters Compensation Act (VFCA) contained in Title 19, chapter 17 of the Montana Code Annotated. Section 19-17-203, MCA, is the statute that gives the PER Board the authority to adopt rules implementing the VFCA. Therefore, the PER Board proposes to add 19-17-203, MCA, to the list of authorities as ARM 2.43.1306 applies to the VFCA.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Roxanne M. Minnehan, Montana Public Employee Retirement Administration, 100 North Park Avenue, Suite 200, P.O. Box 200131, Helena, Montana, 59620-0131; fax (406) 444-5428; or e-mail rminnehan@mt.gov, and must be received no later than 5:00 p.m., July 23, 2010.

5. Dena Helman, Montana Public Employee Retirement Administration, has been designated to preside over and conduct this hearing.

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

7. An electronic copy of this 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 contact requirements of 2-4-302, MCA, do not apply.

/s/ *Melanie A. Symons*
Melanie A. Symons
Chief Legal Counsel and
Rule Reviewer

/s/ *John Nielsen*
John Nielsen
President
Public Employees' Retirement Board

/s/ *Michael P. Manion*
Michael P. Manion
Chief Legal Counsel and
Rule Reviewer

Certified to the Secretary of State June 14, 2010.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 4.12.601, 4.12.602, 4.12.604, 4.12.606, 4.12.607, 4.12.608, 4.12.609, 4.12.620, 4.12.621, and repeal of 4.12.603 and 4.12.605, relating to fertilizer regulations	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On July 15, 2010, at 10:00 a.m. the Montana Department of Agriculture will hold a public hearing in Room 225 of the Scott Hart Building, 303 N. Roberts at Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Agriculture no later than 5:00 p.m. on July 8, 2010, to advise us of the nature of the accommodation that you need. Please contact Cort Jensen at the Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; phone: (406) 444-3144; fax: (406) 444-5409; or e-mail: agr@mt.gov.

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

4.12.601 ~~GUARANTEED ANALYSIS~~ PLANT NUTRIENTS IN ADDITION TO NITROGEN, PHOSPHATE, AND POTASH (1) ~~Recognized~~ Other plant nutrients ~~in addition to nitrogen, phosphoric acid and potash~~ when mentioned in the labeling shall be registered and guaranteed. Guarantees shall be made on the elemental basis. Sources of the elements guaranteed and proof of availability shall be provided to the department upon request. Except those guarantees for those water soluble nutrients labeled for ready-to-use foliar fertilizers, ready-to-use specialty liquid fertilizers, hydroponic or continuous liquid feed programs and guarantees for potting soil, ~~T~~the minimum percentages which will be ~~considered~~ accepted for registration are as follows:

Element	Minimum Concentration %
Calcium (Ca)	1.00
Magnesium (Mg)	0.50
Sulfur (S)	1.00

Boron (B)	0.02
Chlorine (Cl)	0.10
Cobalt (Co)	0.0005
Copper (Cu)	0.05
Iron (Fe)	0.10
Manganese (Mn)	0.05
Molybdenum (Mo)	0.0005
Nickel (Ni)	0.001
Sodium (Na)	0.10
Zinc (Zn)	0.05

Guarantees or claims for the above listed plant nutrients are the only ones which ~~may~~ will be accepted. Proposed labels and directions for use of the fertilizer shall be furnished with the application for registration upon request. Any of the above listed elements which are guaranteed shall appear in the order listed immediately following guarantees for the primary nutrients of nitrogen, ~~phosphorus~~ phosphate, and ~~potassium~~ potash. When directions for use render the product ineffective (as a fertilizer) the department will not register the product.

(~~2~~ a) A warning or caution statement ~~is~~ may be required on the label for any product which contains ~~0.03% or more of boron~~ micronutrients in water soluble form~~.~~ ~~This statement shall carry the word "WARNING" or "CAUTION" conspicuously displayed, shall state the crop(s) for which the fertilizer is to be used, and state that the use of the fertilizer on any other than those recommended may result in serious injury to the crop(s)~~ when there is evidence that a micronutrient may be harmful to certain crops or where there are unusual environmental conditions.

~~(3) Products containing 0.001% or more of molybdenum also require a warning statement on the label. This shall include the word "WARNING" or "CAUTION" and the statement that the application of fertilizers containing molybdenum may result in forage crops containing levels of molybdenum which are toxic to ruminant animals.~~

EXAMPLES OF WARNING OR CAUTION STATEMENTS:

~~Boron:~~

(~~a~~ i) Directions: Apply this fertilizer at a maximum rate of ~~350 pounds~~ (number of pounds) per acre for ~~Alfalfa or Red Cloverseed production~~ (name of crop).

CAUTION: Do not use on other crops. The ~~boron~~ (name of micronutrient) may cause injury to them.

(~~b~~ ii) ~~Caution~~ CAUTION: Apply this fertilizer at a maximum rate of ~~700 pounds~~ (number of pounds) per acre for ~~Alfalfa or Red Clover seed production~~ (name of crop). Do not use on other crops; the ~~boron~~ (name of micronutrient) may cause serious injury to them.

(~~c~~ iii) ~~Warning~~ WARNING: This fertilizer carries added ~~Borox~~ (name of micronutrient) and is intended for use only on ~~Alfalfa~~ (name of crop). Its use on any other crops or under conditions other than those recommended may result in serious injury to the crops.

~~Molybdenum~~:

(~~a~~ iv) ~~Caution~~ CAUTION: This fertilizer is to be used only on soil which responds to ~~molybdenum~~ (name of micronutrient). Crops high in ~~molybdenum~~ (name of micronutrient) are toxic to grazing animals (ruminants).

(v) CAUTION: (Name of micronutrient) is recommended for all crops where (name of micronutrient) may be deficient; however excessive application to susceptible crops may cause damage.

~~(2) Specialty fertilizer labels containing the following information, if not appearing on the face or display side in a readable and conspicuous form shall occupy at least the upper-third of a side of the container and shall be considered the label.~~

~~(a) Net weight~~

~~(b) Brand and grade~~

~~(c) Guaranteed analysis:~~

~~Total Nitrogen (N) ....._____%~~

~~_____% Ammoniacal Nitrogen**~~

~~_____% Nitrate Nitrogen**~~

~~_____% Water Insoluble Nitrogen*~~

~~Available Phosphoric Acid (P205) ....._____%~~

~~Soluble Potash (K20) ....._____%~~

~~Additional Plant nutrients as prescribed by regulation~~

~~**Potential Acidity or Basicity _____lbs.~~

~~Calcium Carbonate Equivalent per ton.~~

~~(d) Name and address of registrant~~

~~.....~~

~~Notes:~~

~~*If claimed or the statement "organic" or "slow acting nitrogen" is used on the label.~~

~~**If claimed.~~

AUTH: 80-10-301, MCA
IMP: 80-10-102, MCA

REASON: During the 2009 legislative session, Montana's Commercial Fertilizer Act was amended to align state regulations more closely to the current national model regulations and to promote uniformity between states. This proposed rule change is to further clarify and update those statutory amendments. Section (2) is being moved to 4.12.604 Labeling for clarity.

FISCAL IMPACT: There will be no fiscal impact for this rule.

4.12.602 GUARANTEES FOR SOIL AMENDMENTS (1) Lime products shall guarantee:

(a) The minimum percent calcium carbonate equivalent.

(b) through (2)(c) remain the same.

(3) Other soil amendments shall guarantee:

(a) ~~Quantitatively guarantee active~~ Active ingredients. The department will accept ~~as~~ only ~~an~~ active ingredient ~~only~~ substances that can be quantitatively determined analytically.

(b) and (c) remain the same.

(d) The department may allow a soil amending ingredient to be listed or guaranteed on the label or labeling if satisfactory supportive data is provided to the department to substantiate the value and usefulness of the soil amending ingredients. The department may rely on outside sources for assistance in evaluating the data submitted.

AUTH: 80-10-301, MCA
IMP: 80-10-204, MCA

REASON: During the 2009 legislative session, Montana's Commercial Fertilizer Act was amended to align state regulations more closely to the current national model regulations and to promote uniformity between states. This proposed rule change is to further clarify and update those statutory requirements.

FISCAL IMPACT: There will be no fiscal impact for this rule.

4.12.604 LABELING (1) The following information, in the format presented, is the minimum required for all fertilizer labels. For packaged products, this information shall either appear on the front or back of the package, occupy at least the upper third of a side of a package, or be printed on a tag and attached to the package. This information shall be in a readable and conspicuous form. For bulk products, this same information in written or printed form shall accompany delivery and be supplied to the purchaser at the time of delivery.

(a) Net weight

(b) Brand

(c) Grade (Provided that the grade shall not be required when no primary nutrients are claimed).

(d) Guaranteed analysis*:

Total Nitrogen (N)** ..... %
% Ammoniacal Nitrogen
% Nitrate Nitrogen
% Water Insoluble Nitrogen
% Urea Nitrogen
% (Other recognized and determinable forms of N)
Available Phosphate ($P_2 0_5$) ..... %
Soluble Potash ($K_2 0$)..... %
(Other nutrients, elemental basis)***……..... %

*Zero guarantees should not be made and shall not appear in statement except in nutrient guarantee breakdowns.

**If chemical forms of N are claimed or required, the form shall be shown. No implied order of the forms of nitrogen is intended.

***As prescribed by regulation 4.12.601.

(e) Sources of nutrients shall be listed below the completed guaranteed analysis statement.

(f) Beneficial substances or compound guarantees shall appear under the heading "Contains Beneficial Substances" or "Contains Beneficial Compounds":

Contains Beneficial Substances
Beneficial Substance....._____% or acceptable units
Purpose Statement:

OR

Contains Beneficial Compounds
Beneficial Compound....._____% or acceptable units
Purpose Statement:

(g) Name and address of registrant or licensee.

(h) Directions for use for fertilizer distributed to the end user.

(i) For specialty fertilizer, minimum directions for use shall include:

(A) Recommended application rate or rates in units of weight or volume per unit of area coverage (where application rates are given in volume, the label shall provide sufficient information to calculate the application rates by weight); and

(B) Application timing and minimum intervals to apply the product when plants can utilize nutrients; and

(C) The statement "Apply Only as Directed" or a statement of similar designation.

(ii) For all other fertilizers, minimum directions for use shall include at least one of the following:

(A) A statement such as:

Use in accordance with recommendations of a qualified individual or institution, such as, but not limited to, a certified crop advisor, agronomist, crop extension publication, or apply according to recommendations in your approved nutrient management plan; or,

(B) Detailed directions for a specific use.

(~~1~~ iii) For slowly ~~available nutrients~~ released plant nutrients~~.~~:

(~~a~~ A) No fertilizer label shall bear a statement that connotes or ~~infers the presence of a slowly available plant nutrient, unless the nutrient or nutrients are identified~~ implies that certain plant nutrients contained in a fertilizer are released slowly over a period of time, unless the slow release components are identified and guaranteed at a level at least 15% of the total guarantee for that nutrient(s).

~~(b) When a fertilizer label infers or connotes that the nitrogen is slowly available through use of organic, organic nitrogen, ureaform, long lasting or similar terms, the guar-anteed analysis must indicate the percentage of water insoluble nitrogen in the material.~~

~~(c) To supplement (b), it should be established that if a label states the amount of organic nitrogen present in a phrase, such as "25% or the nitrogen from ureaformaldehyde (ureaform)," then the water insoluble nitrogen guarantee must not be less than 60% of the nitrogen so designated.~~

~~Example: 10-6-4 Rose Food~~

~~25% of Nitrogen if Organic~~

~~10(Total N Guaranteed) x .25 (% N Claimed as Organic) x .60= 1.5% WIN~~

~~(d) When the water insoluble nitrogen is less than 15% of the total nitrogen, the label shall bear no references to any designations, such as stated in (b).~~

~~(e) The term "Coated-Slow Release Fertilizer", or "Coated-Slow Release" may be accepted as descriptive of products.~~

~~(f) Further, the above phrases (e) be allowed for any products that can show a testing program substantiating the claim. (Testing under guidance of experiment station personnel, or a recognized reputable researcher, etc.). Water insoluble nitrogen must be guaranteed at the 15% of total nitrogen level as in organic materials.~~

~~(g) Products claiming to be "Coated" or "Slow Release" will be tested without grinding by the most appropriate procedure available to substantiate the claim.~~

(B) Types of products with slow release properties recognized are:

(I) water insoluble, such as natural organics, ureaform materials, ureaformaldehyde products, isobutyidene diurea, oxamide, etc.;

(II) coated slow release, such as sulphur coated urea and other encapsulated soluble fertilizers;

(III) occluded slow release, where fertilizers or fertilizer materials are mixed with waxes, resins, or other inert materials and formed into particles; and

(IV) products containing water soluble nitrogen such as ureaform materials, ureaformaldehyde products, methylenediurea (MDU), dimethylenetriurea (DMTU), dicyanodiamide (DCD), etc. The terms, "water insoluble", "coated slow release", "slow release", "controlled release", "slowly available water soluble", and "occluded slow release" are accepted as descriptive of these products, provided the manufacturer can show a testing program substantiating the claim (testing under guidance of Experiment Station personnel or a recognized reputable researcher acceptable to the department). A laboratory procedure, acceptable to the department for evaluating the release characteristics of the products(s) must also be provided by the manufacturer.

(C) Until more appropriate methods are developed, AOAC International Method 970.04 (15th Edition) is to be used to confirm the coated slow release and occluded slow release nutrients and others whose slow release characteristics depend on particle size. AOAC International Method 945.01 (15th Edition) shall be used to determine the water insoluble nitrogen or organic materials.

AUTH: 80-10-301, MCA
IMP: 80-10-204, MCA

REASON: During the 2009 legislative session, Montana's Commercial Fertilizer Act was amended to align state labeling regulations more closely to the current national model regulations and to promote uniformity between states. This proposed rule change is to further clarify and update those statutory amendments.

FISCAL IMPACT: There will be no fiscal impact for this rule.

4.12.606 DEFINITIONS FOR COMMERCIAL FERTILIZERS (1) As authorized, the department recognizes the ~~names~~ official terms and definitions for commercial fertilizers and soil amendments adopted by the Association of American Plant Food Control Officials.

AUTH: 80-10-205, MCA
IMP: 80-10-205, MCA

REASON: General housekeeping.

FISCAL IMPACT: There will be no fiscal impact for this rule.

4.12.607 INVESTIGATIONAL ALLOWANCES AND OVERALL INDEX VALUE (1) A commercial fertilizer shall be deemed deficient if the analysis of nutrient is below the guarantee by an amount exceeding the values in the following schedule, or if the overall index value of the fertilizer is below 98%~~*~~.

Guarantee Percent	Nitrogen ~~Percent~~ (N)	Available ~~Phosphoric Acid Present~~ Phosphate (P_2O_5)	Soluble Potash ~~Percent~~ (K_2O)
	Investigational Allowance, percent		
4 or less	0.49	0.67	0.41
5	0.51	0.67	0.43
6	0.52	0.67	0.47
7	0.54	0.68	0.53
8	0.55	0.68	0.60
9	0.57	0.68	~~0.65~~0.70
10	0.58	0.69	0.70
12	0.61	0.69	0.79
14	0.63	0.70	0.87

16	0.67	0.70	0.94
18	0.70	0.71	1.01
20	0.73	0.72	1.08
22	0.75	0.72	1.15
24	0.78	0.73	1.21
26	0.81	0.73	1.27
28	0.83	0.74	1.33
30	0.86	0.75	1.39
32 or more	0.88	0.76	1.44

(a) For DAP and MAP the investigational allowance for available phosphate shall be 0.70.

(b) For TSP the investigational allowance shall be 1.53.

(c) For guarantees not listed, calculate the appropriate value by interpolation.

(d) The overall index value is calculated by comparing the commercial value guaranteed with the commercial value found.

~~*Overall index value -~~ Example of calculation for a 10-10-10 grade found to contain 10.1% Total Nitrogen (N), ~~10.2~~ 9.4% Available ~~Phosphoric Acid~~ Phosphate (P_20_5), and 10.1% Soluble Potash (K_20). Nutrient unit values are assumed to be $3 per unit N, $2 per unit P_20_5, and $1 per unit K_20.

10.0 units N	x 3 = 30.0
10.0 units P_20_5	x 2 = 20.0
10.0 units K_20	x 1 = 10.0
Commercial Value Guaranteed	60.0

10.1 units N	x 3 = 30.3
~~10.2~~ 9.4 units P_20_5	x 2 = ~~20.4~~ 18.8
10.1 units K_20	x 1 = 10.1
Commercial Value Found	~~60.8~~ 59.2

Overall Index Value - ~~60.8~~ (59.2/60.0) x 100 = 98.6%

~~$\frac{\quad}{60.0}$ x 100 = 101.3%~~

(2) Secondary and ~~minor elements~~ micro plant nutrients shall be deemed deficient if the analysis of any element is below the guarantee by an amount exceeding the values ~~in~~ calculated according to the following schedule:

Element	Allowable Deficiency
Calcium	0.2 unit + 5% of guarantee
Magnesium	0.2 unit + 5% of guarantee
Sulfur	0.2 unit + 5% of guarantee
Boron	0.003 unit + 15% of guarantee
Cobalt	0.0001 unit + 30% of guarantee
Molyb~~y~~denum	0.0001 unit + 30% of guarantee
Chlorine	0.005 unit + 10% of guarantee
Copper	0.005 unit + 10% of guarantee
Iron	0.005 unit + 10% of guarantee
Manganese	0.005 unit + 10% of guarantee
Sodium	0.005 unit + 10% of guarantee
Zinc	0.005 unit + 10% of guarantee

The maximum allowance when calculated in accordance ~~with~~ to the above shall be one unit (~~1%~~ one percentage point).

AUTH: 80-10-301, MCA
IMP: 80-10-206, MCA

REASON: During the 2009 legislative session, Montana's Commercial Fertilizer Act was amended to align state regulations more closely to the current national model regulations and to promote uniformity between states. This proposed rule change is to further clarify and update those statutory amendments.

FISCAL IMPACT: There will be no fiscal impact for this rule.

4.12.608 ~~REPORTING OF FERTILIZER AND FEE SCHEDULES~~ QUARTERLY REPORTS AND FEE ASSESSMENTS (1) ~~Every manufacturer or person responsible for registering and paying the fees for a commercial fertilizer and/or soil amendment except specialty fertilizers in packages at 10 pounds or less and unmanipulated manures, shall file on or before the 30th calendar day after the end of a month, a monthly statement setting forth the number of tons of each commercial fertilizer and/or soil amendment except specialty fertilizers in packages of 10 pounds or less and unmanipulated manures, distributed in this state during the past month and to whom it was distributed or indicate if no sales or distributions occurred.~~ The manufacturer, the registrant, or the supplier is responsible for paying the assessment fees for all commercial fertilizers and/or soil amendments distributed

in this state. The party responsible for supplying the product into the state shall pay the assessment fees and file a quarterly statement on or before the 30th calendar day after the end of each quarter. The quarterly statement must specify the number of tons of each commercial fertilizer and/or soil amendment distributed in this state during the past quarter, and to whom it was distributed. A quarterly statement is required even if no sales or distributions occurred in a particular quarter. Specialty fertilizers and unmanipulated manures are exempt from the quarterly assessment fee and a quarterly report is not required by persons distributing only these products.

(2) Based upon the filed reports, the person responsible ~~to pay~~ for paying the assessment fee~~s~~ on commercial fertilizers and/or soil amendments shall pay the following ~~fees~~:

(a) remains the same.

(b) inspection fee ~~at~~ of 95 cents per ton for anhydrous ammonia fertilizer distributed;

(c) inspection fee ~~at~~ of 10 cents per ton for ~~a~~ soil amendments distributed ~~and not less than $5.00 total for reporting periods;~~ when 50 tons or more are distributed during the quarter; and

(d) educational assessment of ~~35~~ 75 cents per ton for all fertilizers excluding specialty fertilizers and soil amendments, in addition to the inspection fees.

(3) In the event the responsible party fails to file the ~~monthly~~ quarterly report within 60 days after the end of the filing period, the department may initiate proceedings to revoke registration of the responsible party's registered fertilizer(s). The failure to file a ~~monthly~~ quarterly report shall be evidence of fraudulent or deceptive practice in the evasion of these rules.

~~(4) In the event the responsible party fails to pay the assessment due 30 days after the end of the reported period the department shall assess a collection fee of 10% of the amount due but not less than $10.~~

(~~5~~ 4) No responsible party shall be allowed to register or re-register a fertilizer if the fees owing to the department are more than 30 days past due.

AUTH: 80-10-207, MCA
IMP: 80-10-103, 80-10-207, 80-10-211, 80-10-301, MCA

REASON: During the 2009 legislative session, Montana's Commercial Fertilizer Act was amended. This proposed rule is to further clarify and update those statutory amendments. There are no new or increased fees within this proposed rule.

This rule amendment specifically eliminates the requirement for any person distributing a specialty fertilizer to file a quarterly report, instead of exempting only persons distributing only specialty fertilizers less than ten pounds (specifics were not covered in the 2009 legislative bill). This rule amendment will allow for increased department efficiencies and align state regulations more closely to the current national model regulations and promote uniformity between states.

FISCAL IMPACT: There will be no fiscal impact for this rule as it lessens the requirement already in practice.

4.12.609 ~~REPORTS OF NON-FEE PAYING FERTILIZER DEALERS~~ SEMIANNUAL REPORTS (1) ~~Every~~ Each person who distribute~~d~~s commercial fertilizers and/or soil amendments (except specialty fertilizers ~~in packages of 10 pounds or less~~ and unmanipulated manures)~~, who is not responsible for payment of the fees prescribed in 80-10-207(1), MCA,~~ to nonlicensed end users shall file ~~with the department on forms furnished or approved by the department,~~ semiannual statements for the periods ending June 30 and December 31, setting forth the number of net tons of each commercial fertilizer and/or soil amendment (except specialty fertilizers ~~in packages of 10 pounds or less~~ and unmanipulated manures), received during the ~~6th~~ six-month period and the amount of the ending inventory. The reports shall be filed with the department, on forms approved by the department, on~~/~~ or before the 30th calendar day of the month following the close of each six-month period. A separate semiannual statement is required for each licensed location. A semiannual statement is required even if no sales or distributions occurred within a six-month period.

(2) remains the same.

AUTH: 80-10-301, MCA
IMP: 80-10-207, 80-10-211, MCA

REASON: During the 2009 legislative session, Montana's Commercial Fertilizer Act was amended. This proposed rule is for general housekeeping and to further clarify and update those statutory amendments. Specifically, this rule amendment eliminates the requirement for persons registering specialty fertilizers greater than ten pounds from filing a 6-month report. This proposed rule will allow for increased department efficiencies and align state regulations more closely to the current national model regulations and promote uniformity between states.

FISCAL IMPACT: There will be no fiscal impact for this rule as it lessens the requirement already in practice.

4.12.620 ADULTERATION OF FERTILIZERS AND SOIL AMENDMENTS BY TRACE METALS (1) and (2) remain the same.

(3) Fertilizers and soil amendments, whether waste-derived or not, that contain guaranteed amounts of phosphates or micronutrients, except as exempted within this section, are adulterated when they exceed the levels of metals established by the following table:

Metals	ppm per 1% of P_2O_5	ppm per 1% of Micronutrients
Arsenic (As)	13	112
Cadmium (Cd)	10	83
Cobalt (Co)	136	2,228*
Lead (Pb)	61	463

Mercury (Hg)	1	6
Molybdenum (Mo)	42	300*
Nickel (Ni)	250	1900*
Selenium (Se)	26	180
Zinc (Zn)	420	2900*

Footnote: * Only applies when not guaranteed.

(a) Fertilizers and soil amendments such as compost, manures and manipulated manures or other organic matter, separately or in combination with sewage sludge, even those products making nutrient claims, are exempt from the table above, but are adulterated when the levels of ~~arsenic, cadmium or lead~~ metals exceed the levels permitted in 40 CFR 503.

(b) remains the same.

(c) Micronutrients can include iron, manganese, zinc, copper, molybdenum, boron, cobalt, chlorine, nickel, and ~~selenium~~ sodium.

(d) through (iv) remain the same.

(4) Fertilizers and soil amendments are adulterated when the end product contains:

(a) Sewage sludge and the levels of ~~arsenic, cadmium or lead~~ metals exceed the levels permitted in 40 CFR 503;

(b) remains the same.

(c) Hazardous waste and the levels of ~~arsenic, cadmium, or lead~~ metals in the waste component exceed the levels permitted in 40 CFR 261, 266, and 268.

(5) and (6) remain the same.

(7) Testing methodology used by the department in analyzing metal content for the end product will be for the intent of discovering the total metal content of a fertilizer or soil amendment product. Such methodology includes AOAC Official Method 2006.03 (Arsenic, Cadmium, Cobalt, Chromium, Lead, Molybdenum, Nickel, and Selenium in Fertilizers) ~~laboratory test results from either sample preparation method 3050B or 3051 as described in US EPA Publication SW-846 (third edition, update III, December 1996)~~ or other comparable methods approved by the department.

(8) and (9) remain the same.

~~(10) The department will implement this rule starting July 1, 2003.~~

AUTH: 80-10-301, MCA
IMP: 80-10-205, MCA

REASON: The department is adding six nonnutritive metals and their respective standards to the current list of three nonnutritive metals for which levels have been determined for considering fertilizers and soil amendments adulterated. The metals and respective levels are the same as those published by the Association of American Plant Food Control Officials. Adoption of these metals and

their respective standards will align Montana standards with national model regulations and help to protect Montana's consumers and environment.

The department is also updating the methodology standards by which nonnutritive metals are tested and measured.

FISCAL IMPACT: There will be no fiscal impact for this rule.

4.12.621 REGISTRATION (1) through (6) remain the same.
~~(7) The department will implement this rule starting July 1, 2003.~~

AUTH: 80-10-301, MCA
IMP: 80-10-201, MCA

REASON: General housekeeping.

FISCAL IMPACT: There will be no fiscal impact for this rule.

4. The department proposes to repeal the following rules:

4.12.603 LICENSING EXEMPTION

AUTH; 80-10-301, MCA
IMP: 80-10-212, MCA

REASON: During the 2009 legislative session, Montana's Commercial Fertilizer Act was amended to align state regulations more closely to the current national model regulations and to promote uniformity between states. The repealing of this rule is necessary to align this administrative rule with updated statutory amendments.

FISCAL IMPACT: There will be no significant fiscal impact for this rule (less than $2,000).

4.12.605 INSPECTION, SAMPLING AND ANALYSIS

AUTH: 80-10-301, MCA
IMP: 80-10-206, MCA

REASON: During the 2009 legislative session, Montana's Commercial Fertilizer Act was amended. The information within this rule was detailed within statute and requires no further explanation in rule. Thereby, it is proposed that this rule be repealed.

FISCAL IMPACT: There will be no fiscal impact for this rule.

5. Concerned persons may submit their data, views, or arguments concerning the proposed action either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Cort Jensen at the Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; telephone (406) 444-3144; fax: (406) 444-5409; or e-mail: agr@mt.gov, and must be received no later than 5:00 p.m. on July 22, 2010.

6. Cort Jensen, Department of Agriculture, has been designated to preside over and conduct this hearing.

7. The Department of Agriculture maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name, e-mail, and mailing address of the person and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; fax: (406) 444-5409; or e-mail: agr@mt.gov or may be made by completing a request form at any rules hearing held by the Department of Agriculture.

8. An electronic copy of this Notice of Proposed Amendment is available through the department's web site at www.agr.mt.gov, under the Administrative Rules section. The department strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by regular mail, e-mail, and phone on June 7, 2010. For previous rule projects involving the same bill, the primary sponsor was given appropriate notice.

DEPARTMENT OF AGRICULTURE

/s/ Ron de Yong
Ron de Yong, Director

/s/ Cort Jensen
Cort Jensen, Rule Reviewer

Certified to the Secretary of State, June 14, 2010.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.56.101, 17.56.102, 17.56.105, 17.56.201, 17.56.202, 17.56.302 through 17.56.305, 17.56.309, 17.56.310, 17.56.401 through 17.56.403, 17.56.408, 17.56.409, 17.56.701 through 17.56.705, 17.56.901, and 17.56.902 pertaining to underground storage tanks	)	NOTICE OF PROPOSED AMENDMENT (UNDERGROUND STORAGE TANKS) (NO PUBLIC HEARING CONTEMPLATED)

TO: All Concerned Persons

1. On July 26, 2010, the Department of Environmental Quality proposes to amend the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, please contact Elois Johnson, Paralegal, no later than 5:00 p.m., July 12, 2010, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.56.101 DEFINITIONS For the purposes of this chapter and unless otherwise provided, the following terms have the meanings given to them in this rule and ~~shall~~ must be used in conjunction with those definitions in 75-11-203, 75-11-302, and 75-11-503, MCA.

(1) through (77) remain the same.

AUTH: 75-11-204, 75-11-319, 75-11-505, MCA
IMP: 75-11-203, 75-11-302, 75-11-319, 75-11-505, MCA

REASON: Except for the proposed addition of new ARM 17.56.309(2) and the amendments to 17.56.901(9) and (10), all the other proposed amendments to ARM 17.56.101, 17.56.102, 17.56.105, 17.56.201, 17.56.202, 17.56.302 through 17.56.305, 17.56.309, 17.56.310, 17.56.401 through 17.56.403, 17.56.408, 17.56.409, 17.56.701 through 17.56.705, 17.56.901, and 17.56.902 are clerical amendments that do not change the meaning of the rules. Most of the clerical amendments involve punctuation, section numbering, or grammar.

17.56.102 APPLICABILITY (1) remains the same.

(2) This chapter does not apply to the following UST systems:

(a) ~~A~~a any UST system holding hazardous wastes listed or identified under Subtitle C of the Solid Waste Disposal Act, or a mixture of such hazardous waste and other regulated substances~~.~~; and

(b) ~~A~~a any wastewater treatment tank system that is part of a wastewater treatment facility regulated under section 402 or 307(b) of the Clean Water Act.

(3) through (6)(c) remain the same.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-319, 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.105 VARIANCES (1) through (3) remain the same.

(4) The department, on its own initiative, may issue a variance from any requirement or procedure of this chapter when noncompliance is discovered as a result of a compliance inspection, immediate compliance is impracticable, and the cost of immediate compliance is disproportionate to the benefit provided. The following criteria apply to a variance issued under this rule:

(a) ~~A~~ a variance ~~under (4)~~ may be issued only when the department makes a written determination that delaying compliance does not create a significant increased threat to the public health, welfare, safety, and the environment~~.~~;

(b) ~~A~~ a variance ~~issued under (4)~~ may postpone compliance only until the earliest practicable time for replacement or upgrading the facility UST systems as identified in department findings~~.~~; and

(c) ~~T~~the department may define a time period for each variance ~~granted~~ issued under ~~(4)~~ this section. In no case may a variance be issued under ~~(4)~~ this section for a term longer than 15 years.

(5) through (6) remain the same.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.201 PERFORMANCE STANDARDS FOR NEW UST SYSTEMS

(1) In order to prevent releases due to structural failure, corrosion, or spills and overfills for as long as the UST system is used to store regulated substances, all owners and operators of new UST systems shall meet the following requirements:

(a) ~~E~~each tank must be properly designed and constructed, and any portion underground that routinely contains product must be protected from corrosion, in accordance with any one of the codes of practice developed by a nationally recognized association or independent testing laboratory identified in (1)(a)(i) through (iii):

(i) remains the same.

(ii) the tank is constructed of steel and cathodically protected in the following manner and in accordance with any one of the standards in (2)(d) through (j):

(A) and (B) remain the same.

(C) impressed current systems are designed to allow determination of current operating status as required in ARM 17.56.302~~(3)~~; and

(D) remains the same.

(iii) the tank is constructed of a steel-fiberglass-reinforced-plastic composite in accordance with all of the standards in (2)(e) and (k)~~.~~;

(b) ~~T~~the piping that may contain regulated substances, including vent lines and fill lines, and is in contact with the ground, must be properly designed, constructed, and protected from corrosion in accordance with any one of the codes of practice developed by a nationally recognized association or independent testing laboratory identified in (1)(b)(i) and (ii):

(i) remains the same.

(ii) the piping is constructed of steel and cathodically protected in the following manner and in accordance with all of the standards in (2)(p) through (s):

(A) and (B) remain the same.

(C) impressed current systems are designed to allow determination of current operating status as required in ARM 17.56.302~~(3)~~; and

(D) cathodic protection systems are operated and maintained in accordance with ARM 17.56.302~~.~~;

(c) ~~T~~to prevent spilling and overfilling associated with product transfer to the UST system, owners and operators ~~must~~ shall use the following spill and overfill prevention equipment:

(i) remains the same.

(ii) overfill prevention equipment that will:

(A) remains the same.

(B) alert the transfer operator when the tank is no more than 90% full by restricting the flow into the tank or triggering a high-level alarm~~.~~;

(d) ~~A~~all tanks and piping must be properly installed in accordance with this chapter, the manufacturer's instructions or specifications, all permit conditions, and all applicable standards identified in (2)(q) and (t) through (v)~~.~~;

(e) ~~U~~upon completion of all work and testing performed pursuant to a permit issued under subchapter 13 for the installation or modification of an underground storage tank system, the licensed installer or department inspector ~~must~~ shall certify, on a form approved by the department, compliance with the following requirements:

(i) through (iv) remain the same.

(2) The department adopts and incorporates by reference the version in effect on July 1, 2006, of the following standards, specifications, and publications:

(a) through (i) remain the same.

(j) Underwriters Laboratories Standard 58, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids," which sets forth requirements for horizontal atmospheric-type steel tanks intended for the underground storage of flammable and combustible liquids, and single wall tanks, secondary containment tanks, multiple compartment single wall, and multiple compartment secondary containment tanks, a copy of which may be obtained from Underwriters Laboratory, Inc., 12 Laboratory Drive, Research Triangle Park, NC 27709~~.~~;

(k) ~~T~~the Association for Composite Tanks ACT-100, "Specification for the Fabrication of FRP Clad Underground Storage Tanks," which sets forth a minimum consensus standard for the fabrication of FRP clad/composite tanks, a copy of which

may be obtained from ~~T~~the Association for Composite Tanks, 108 N. State Street, Suite 720, Chicago, IL 60602;

(l) through (v) remain the same.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.202 UPGRADING OF EXISTING UST SYSTEMS (1) through (1)(c) remain the same.

(2) Steel tanks must be upgraded to meet any one of the following requirements in accordance with all of the standards in (5):

(a) a tank may be upgraded by internal lining if:

(i) the lining is installed in accordance with the requirements of ARM 17.56.304~~.~~; and

(ii) within ten years after lining, and every five years thereafter, the lined tank is internally inspected and found to be structurally sound with the lining still performing in accordance with original design specifications~~.~~;

(b) a tank may be upgraded by cathodic protection if the cathodic protection system meets the requirements of ARM 17.56.201(1)(a)(ii)(B), (C), and (D) and the integrity of the tank is ensured using one of the following methods:

(i) and (ii) remain the same.

(iii) the tank has been installed for less than ten years and is assessed for corrosion holes by conducting two tightness tests that meet the requirements of ARM 17.56.407(1)(c). The first tightness test must be conducted prior to installing the cathodic protection system. The second tightness test must be conducted between three and six months following the first operation of the cathodic protection system~~.~~; and

(c) ~~A~~ a tank may be upgraded by both internal lining and cathodic protection if:

(i) through (5)(d) remain the same.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.302 OPERATION AND MAINTENANCE OF CORROSION PROTECTION (1) All owners and operators of steel UST systems with corrosion protection shall comply with the following requirements to ensure that releases due to corrosion are prevented for as long as the UST system is used to store regulated substances:

(a) ~~A~~all corrosion protection systems must be operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that are in contact with the ground~~.~~;

(b) ~~A~~all UST systems equipped with cathodic protection systems must be

inspected for proper operation by a qualified cathodic protection tester in accordance with the following requirements:

(i) remains the same.

(ii) the criteria that are used to determine that cathodic protection is adequate as required by this rule must be in accordance with National Association of Corrosion Engineers Standard RP0285, "Corrosion Control of Underground Storage Tank Systems by Cathodic Protection~~.~~;"

(c) UST systems with impressed current cathodic protection systems must also be inspected every 60 days to ensure the equipment is running properly~~.~~; and

(d) ~~F~~for UST systems using cathodic protection, records of the operation of the cathodic protection must be maintained in accordance with ARM 17.56.305 to demonstrate compliance with the performance standards in this rule. These records must provide the following:

(i) through (2) remain the same.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.303 COMPATIBILITY (1) Owners and operators ~~must~~ shall use an UST system made of or lined with materials that are compatible with the substance stored in the UST system. Owners and operators storing alcohol blends shall use the following codes to comply with the requirements of this rule:

(a) through (2)(b) remain the same.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.304 REPAIRS (1) and (2) remain the same.

(3) Repairs must meet the following requirements:

(a) ~~R~~repairs to UST systems must be conducted in accordance with all applicable state, federal, and local laws and regulations and the applicable code of practice in (4). If there is a conflict in the referenced codes, the more stringent and protective code ~~shall apply~~ applies~~.~~;

(b) ~~T~~tanks must be repaired according to the manufacturer's recommendation and under the supervision on site of a manufacturer's authorized representative or the tank manufacturer ~~must~~ shall certify that the repaired tank meets the manufacturer's design standards~~.~~;

(c) ~~T~~the tank manufacturer ~~must~~ shall re-warranty the repaired tank for ten years or the remainder of the original warranty period, whichever is longer~~.~~;

(d) ~~T~~the department may require excavation of the tank to be repaired so that the outer wall of the tank may be inspected and tested for defects~~.~~;

(e) ~~M~~metal pipe sections and fittings that are damaged or have released product as a result of corrosion or other damage must be replaced. Fiberglass pipes

and fittings must be repaired in accordance with the manufacturer's specifications or be replaced~~.~~;

(f) ~~U~~upon completion of the repair and before the UST system is placed in service, the following tests must be performed:

(i) remains the same.

(ii) corrosion protection systems circuitry must be tested to ensure it is still functioning~~.~~;

(g) ~~W~~within six months following the repair of any cathodically protected UST system, the cathodic protection system must be tested in accordance with ARM 17.56.302(1)(b) and (c) to ensure that it is operating properly~~.~~; and

(h) through (4)(e) remain the same.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.305 REPORTING AND RECORDKEEPING (1) Owners and operators of UST systems ~~must~~ shall cooperate fully with inspections, monitoring, and testing conducted by the department or the implementing agency, ~~or both~~ as well as requests for document submission, testing, and monitoring by the owner or operator pursuant to section 9005 of Subtitle I of RCRA, as amended or pursuant to other state laws or rules ~~or both.~~, including the following:

(a) ~~O~~owners and operators ~~must~~ shall submit the following information to the department:

(i) through (iii) remain the same.

(iv) a notification before permanent closure or change-in-service~~.~~;

(b) ~~O~~owners and operators ~~must~~ shall maintain the following information:

(i) through (iii) remain the same.

(iv) results of the site investigation conducted at permanent closure~~.~~; and

(c) ~~O~~owners and operators ~~must~~ shall keep the records required either:

(i) through (iii) remain the same.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.309 REQUIREMENTS FOR COMPLIANCE INSPECTIONS (1) The owner or operator of an underground storage tank system shall have all active underground storage tank systems ~~at an individual facility~~ inspected by a licensed compliance inspector, ~~certified under this chapter~~ licensed pursuant to ARM 17.56.1402(3), at least every three years for compliance with the operation and maintenance requirements of ~~Title 75, chapter 11, part 5, MCA, and the rules adopted thereunder~~ this chapter. The ~~i~~inspections must:

(a) be completed at least 90 days before the expiration date of the operating permit issued pursuant to ARM 17.56.308~~.~~; and

~~(a)~~ (b) ~~The inspection must~~ include examination, assessment, and documentation of compliance with all tank operation and maintenance requirements under 75-11-509, MCA, and rules adopted thereunder. The aforementioned "operation and maintenance requirements" are those requirements in ARM Title 17, chapter 56, subchapters 2, 3, and 4 that address the following categories:

(i) through (iv) remain the same.

(2) The owner or operator of an underground storage tank system must have all inactive underground storage tank systems inspected by a compliance inspector or an oversight inspector, licensed pursuant to ARM 17.56.1402(3) and (4), at least every three years for compliance with the requirements of ARM 17.56.701.

~~(b)~~ (3) Underground storage tank systems that~~,~~:

(a) under ARM 17.56.102(3), are exempt from ARM Title 17, chapter 56, subchapters 2, 3, and 4, are also exempt from compliance inspection requirements. Owners or operators of these underground storage tank systems may obtain an operating permit and tag by making a written request to the department and providing evidence, satisfactory to the department, that the ~~subject~~ UST systems qualify for this exemption; and

(b) are referenced in ARM 17.56.102(2), (4), and (5), are not required to have compliance inspections.

(2) through (5) remain the same, but are renumbered (4) through (7).

~~(6)~~ (8) All underground storage tank systems at an individual facility, except as provided in ~~(2)~~(4) , must be inspected at one time.

(7) remains the same, but is renumbered (9).

~~(8)~~ (10) The owner or operator shall submit to the department a follow-up inspection report either within 30 days after completion of the corrective actions required under ~~(7)~~(9), or at least 14 days before the expiration of the facility's operating permit, whichever occurs first.

AUTH: 75-11-505, 75-11-509, MCA
IMP: 75-11-509, MCA

REASON: The department is proposing to add an "inactive" underground storage tank system inspection requirement in new section (2) to conform the rule to the inspection requirements in 75-11-509(2), MCA. Section 75-11-509(2), MCA, requires that: "The owner or operator of an inactive underground storage tank shall comply with requirements for testing, inspection, recordkeeping, and reporting provided in rules adopted pursuant to this part."

The proposed revisions in (1), (1)(a), (3), (3)(a), (8), and (10) are clerical revisions that do not change the meaning of the rule.

The proposed addition of (3)(b) is necessary to clarify that the underground storage tank systems referenced in ARM 17.56.102(2), (4), and (5), are not required to have compliance inspections. The existing language in (1)(b), renumbered (3)(a), implies that the underground storage tank systems referenced in ARM 17.56.102(2), (4), and (5) must have compliance inspections. The intent of the rule is that the underground storage tank systems referenced in ARM 17.56.102(2), (4), and (5) are not required to have compliance inspections.

17.56.310 CONDITIONAL, ONE-TIME FILL AND EMERGENCY OPERATING PERMITS (1) through (5)(b) remain the same.

(6) The department may issue an emergency operating permit to allow operation of an UST without a valid operating permit and tag when operation of the UST is necessary to protect the safety and welfare of persons, property, or national security from imminent harm or threat of harm~~.~~, as follows:

(a) ~~B~~before issuing an emergency operating permit, the department shall determine that~~:~~

~~(i)~~ under all the circumstances, any potential impacts to human health and the environment arising from operation of the UST are outweighed by the interest in preserving health, safety, or welfare of persons, property, or national security; ~~and~~

(b) ~~E~~emergency permits expire when the emergency is abated or 90 days after issuance of the permit, whichever time period is shorter~~.~~;

(c) ~~N~~notwithstanding issuance of an emergency permit, the department may pursue any enforcement measures available under Title 75, chapter 11, part 5, MCA, to address UST violations~~.~~; and

(d) ~~I~~in order to reduce the risk of a release, any emergency operating permit issued by the department under this rule may be subject to conditions or procedures that the department determines are necessary to minimize risks to human health or to the environment.

AUTH: 75-11-505, 75-11-509, MCA
IMP: 75-11-509, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.401 GENERAL REQUIREMENTS FOR ALL UST SYSTEMS

(1) Owners and operators of new and existing UST systems ~~must~~ shall provide a method, or combination of methods, of release detection that:

(a) through (c) remain the same.

(2) When a release detection method operated in accordance with the performance standards in ARM 17.56.407 and 17.56.408 indicates a release may have occurred, owners and operators ~~must~~ shall notify the department and the implementing agency in accordance with subchapter 5.

(3) Owners and operators of all UST systems ~~must~~ shall comply with the release detection requirements of this subchapter by December 22 of the year listed in the following table below:

SCHEDULE FOR PHASE-IN OF RELEASE DETECTION

Year system was installed	Year when release detection is required (by December 22 of the year indicated)				
	1989	1990	1991	1992	1993
Before 1965 or date unknown	RD	P			
1965-69		P/RD			
1970-74		P	RD		

1975-79	P	RD	
1980-88	P		RD

New tanks (after Dec. 22, 1988) immediately upon installation.

P = Must begin release detection for all pressurized piping in accordance with ARM 17.56.402(1)(b)(i) and 17.56.403~~(2)(d)~~(1)(b)(iv).

RD = Must begin release detection for tanks and suction piping in accordance with ARM 17.56.402(1)(a) and (b)(ii), and 17.56.403.

(4) and (5) remain the same.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: In ARM 17.56.401(3), the reference to ARM 17.56.403(2)(d) is proposed to be replaced by ARM 17.56.403(1)(b)(iv). In a rulemaking effective October 26, 2007, ARM 17.56.403(2)(d) was renumbered (1)(b)(iv). Except for the correction of outdated citations, the content of (2)(d) was not changed. Therefore, the proposed change from (2)(d) to (1)(d)(iv) would not change the meaning of the rule.

The proposed revisions to (1) and (2), and the first revision in (3) are for the reason given for ARM 17.56.101.

17.56.402 REQUIREMENTS FOR PETROLEUM UST SYSTEMS

(1) Except as provided in (2), owners and operators of petroleum UST systems ~~must~~ shall provide release detection for tanks and piping as follows:

(a) tanks must be monitored at least every 30 days for releases using one of the methods listed in ARM 17.56.407(1)(d) through (h) except that:

(i) through (iii) remain the same.

(iv) farm or residential tanks of 1100 gallons or less capacity used for storing motor fuel for noncommercial purposes, a tank of 1100 gallons or less capacity used for storing heating oil for consumptive use on the premises where stored, and emergency power generator tanks with capacities of 1100 gallons or less capacity may use yearly tank gauging (conducted in accordance with ARM 17.56.407(1)(b)).~~.~~; and

(b) underground piping that routinely contains regulated substances must be monitored for releases in a manner that meets one of the following requirements:

(i) underground piping that conveys regulated substances under pressure must:

(A) remains the same.

(B) have an annual line tightness test conducted in accordance with ARM 17.56.408(1)(b) or have monthly monitoring conducted in accordance with ARM 17.56.408(1)(c).~~.~~; and

(ii) underground piping that conveys regulated substances under suction must either have a line tightness test conducted at least every three years and in accordance with ARM 17.56.408(1)(b), or use a monthly monitoring method conducted in accordance with ARM 17.56.408(1)(c). No release detection is required for suction piping that is designed and constructed to meet the following standards:

(A) through (D) remain the same.

(E) a method is provided that allows compliance with (1)(b)(ii)(B) through (D) to be readily determined~~.~~;

(iii) underground piping connected to heating oil tanks with a capacity of 660 gallons or less is exempt from the requirements of (1)(b)(i) and (ii) provided that:

(A) through (C) remain the same.

(D) the test results are maintained for at least one year~~.~~; and

(iv) through (5) remain the same.

AUTH: 75-11-302, 75-11-505, MCA
IMP: 75-11-302, 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.403 REQUIREMENTS FOR HAZARDOUS SUBSTANCE UST SYSTEMS (1) Owners and operators of hazardous substance UST systems ~~must~~ shall provide release detection that meets the following requirements:

(a) ~~R~~release detection at existing UST systems must meet the requirements for petroleum UST systems in ARM 17.56.402. ~~By December 22, 1998, a~~All existing hazardous substance UST systems must meet the release detection requirements for new systems in (1)(b)~~.~~; and

(b) ~~R~~release detection at new hazardous substance UST systems must meet the following requirements as provided in 40 CFR 264.193, adopted by reference in this rule:

(i) secondary containment systems must be designed, constructed, and installed to:

(A) and (B) remain the same.

(C) be checked for evidence of a release at least every 30 days~~.~~;

(ii) double-walled tanks must be designed, constructed, and installed to:

(A) remains the same.

(B) detect the failure of the inner wall~~.~~;

(iii) external liners (including vaults) must be designed, constructed, and installed to:

(A) and (B) remain the same.

(C) surround the tank completely (i.e., it is capable of preventing lateral as well as vertical migration of regulated substances)~~.~~; and

(iv) remains the same.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason for ARM 17.56.101.

17.56.408 METHODS OF RELEASE DETECTION FOR PIPING (1) Each method of release detection for piping used to meet the requirements of ARM 17.56.402 must be conducted in accordance with the following:

(a) ~~M~~methods which alert the operator to the presence of a leak by restricting

or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm may be used only if they detect leaks of three gallons per hour at ten pounds per square inch line pressure within one hour;

(b) ~~A~~an annual test of the operation of the leak detector must be conducted in accordance with the manufacturer's requirements. If an automatic line leak detector fails the annual test at 3.0 gallons per hour, it must be replaced or retested at 5.0 gallons per hour. An automatic line leak detector must be replaced if it fails the 5.0 gallons-per-hour test;

(c) ~~A~~ a periodic test of piping may be conducted only if it can detect a 0.1 gallon-per-hour leak rate at 1 1/2 times the operating pressure; and

(d) ~~A~~any of the methods in ARM 17.56.407(1)(e) through (2) may be used if they are designed to detect a release from any portion of the underground piping that routinely contains regulated substances.

(2) through (5) remain the same.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.409 RELEASE DETECTION RECORDKEEPING (1) All UST system owners and operators ~~must~~ shall maintain records in accordance with ARM 17.56.305 demonstrating compliance with all applicable requirements of this subchapter. These records must include the following:

(a) through (c) remain the same.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.701 INACTIVE AND OUT-OF-SERVICE UST SYSTEMS (1) An UST system is inactive when the owner~~s and~~ or operator~~s notify~~ notifies the department, in writing, that the UST is no longer in use for dispensing, depositing, or storing regulated substances. The owner or operator shall continue operation and maintenance of corrosion protection on an out-of-service UST in accordance with ARM 17.56.302, and shall continue operation and maintenance of any release detection in accordance with subchapter 4. Subchapters 5 and 6 must be complied with if a release is suspected or confirmed. However, release detection is not required as long as the UST system is empty. The UST system is empty when all materials have been removed using commonly employed practices so that no more than 2.5 centimeters (one inch) of residue, or 0.3% by weight of the total capacity of the UST system, remains in the system.

(2) through (4)(e)(ii) remain the same.

AUTH: 75-11-505, 75-11-509, MCA
IMP: 75-11-505, 75-11-509, MCA

REASON: See the reason given for ARM 17.56.101

17.56.702 PERMANENT CLOSURE AND CHANGES IN SERVICE (1) At least 30 days before beginning either permanent closure or a change in service under (2) and (3), the owners ~~and~~ or operators shall notify the department and the implementing agency, in writing, of their intent to permanently close or make the change in service, unless such action is in response to corrective action already noticed to the department under subchapter 6. The required assessment of the excavation zone under ARM 17.56.703 must be performed after notifying the department and the implementing agency but before completion of the permanent closure or a change in service.

(2) To permanently close a tank or connected piping ~~or both~~, the owners ~~and~~ or operators shall empty and clean it by removing all liquids and accumulated sludges. All tanks~~,~~ or connected piping~~, or both,~~ taken out of service permanently must also be either removed from the ground or, when approved by the department, filled with an inert solid material.

(3) Continued use of an UST system to store a nonregulated substance is considered a change in service. Before a change in service, the owners ~~and~~ or operators shall empty and clean the UST system by removing all liquid, accumulated sludge, and all combustible and flammable vapors and conduct a site assessment in accordance with ARM 17.56.703.

(4) through (5)(d) remain the same.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.703 ASSESSING THE SITE AT CLOSURE OR CHANGE IN SERVICE (1) Before permanent closure or a change in service is completed, the owners ~~and~~ or operators ~~must~~ shall measure for the presence of a release where contamination is most likely to be present at the UST site. When measuring for the presence of a release, the owners ~~and~~ or operators ~~must~~:

(a) shall ~~C~~collect soil samples, as soon as possible after the tank~~,~~ or piping~~, or both have~~ has been removed, at the base of the tank excavation and piping trench at suspected worst-case locations, which locations may include:

(i) through (iv) remain the same.

(v) beneath the fill lines. ~~For tank removal, at least two soil samples, one from either end of the tank or at suspected worst-case locations, shall be taken at least one to two feet below the base of the maximum excavation depth for each tank over 600 gallons being closed. One soil sample shall be collected beneath tanks with a capacity of 600 gallons or less.~~ For each tank with a capacity of over 600 gallons that is being removed for closure, at least two soil samples, one at each end of the tank, or at suspected worst-case locations, must be taken. For a tank with a capacity of 600 gallons or less, one soil sample must be collected beneath the tank. Each sample must be taken at least one-to-two feet below the base of the maximum excavation depth. If contaminated soil is removed from the excavation site, at least

one composite sample of the contaminated soil ~~shall~~ must be collected for analysis. For piping removal, soil samples ~~shall~~ must be collected every 20 feet at the base of the piping trench, and at suspected worst-case locations. Up to five piping trench samples may be composited~~.~~;

(b) ~~I~~if ground water is encountered in the tank excavation, shall measure the presence of free product ~~should be measured~~ and collect a sample of the water ~~collected~~ for analysis~~.~~;

(c) ~~I~~in selecting sample types, sample locations, and measurement methods, ~~owners and operators must~~ shall consider the method of closure, the nature of the stored substance, type of backfill, depth to ground water, and other factors appropriate for identifying the presence of a release. The department and the implementing agency should be consulted to assist in determining sample types, sample locations, and measurement methods. The Montana Quality Assurance Plan for Investigation of Underground Storage Tank Releases should be used as a guide for the collection, preservation, and analysis of field samples~~.~~; and

(d) may use ~~F~~field hydrocarbon vapor analyzers ~~can be used~~ as screening tools to determine the presence of a release and to assist in determining the extent of contaminated soil to be removed. These analyzers, however, should not be used to confirm the absence of soil or water contamination. Only laboratory analysis of samples will be accepted by the department to confirm the absence of soil or water contamination.

(2) If sampling indicates contaminated soils, contaminated ground water, or if free product as a liquid or vapor is discovered under (1), or by any other manner, the owner~~s and~~ or operator~~s must~~ shall begin corrective action in accordance with subchapter 6. A release must be reported to the department and to the implementing agency by the owner or operator within 24 hours.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.704 APPLICABILITY TO PREVIOUSLY CLOSED UST SYSTEMS

(1) When directed by the department, the owner ~~and~~ or operator of a permanently closed UST system ~~must~~ shall access the excavation zone and close the UST system in accordance with this subchapter if releases from the UST may, in the judgment of the department, pose a current or potential threat to human health and the environment.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.705 CLOSURE RECORDS (1) The ~~O~~owner~~s and~~ or operator~~s must~~ shall maintain records in accordance with ARM 17.56.305 that are capable of demonstrating compliance with closure requirements under this subchapter. Results

of the excavation zone assessment required in ARM 17.56.703 must be maintained for at least three years after completion of permanent closure or change in service in one of the following ways:

(a) through (c) remain the same.

(2) The ~~O~~owners~~ and~~ or operators~~ must~~ shall submit a completed tank closure report to the department within 30 days of closure on a form designated by the department.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

17.56.901 INTERIM NOTIFICATION REQUIREMENTS (1) On or before May 8, 1986, each owner of an underground storage tank currently in use ~~must~~ shall submit, in the form prescribed in (9) ~~of this rule~~, a notice of the existence of such tank to the department.

(2) On or before May 8, 1986, each owner of an underground storage tank taken out of operation after January 1, 1974 (unless the owner knows that such tank has been removed from the ground) ~~must~~ shall submit, in the form prescribed in (9) ~~of this rule~~, a notice of the existence of such tank to the department.

(3) Any owner who brings an underground storage tank into use after May 8, 1986, ~~must~~ shall, within 30 days of bringing such tank into use, submit, in the form prescribed in (9) ~~of this rule~~, a notice of the existence of such tank to the department.

(4) Owners required to submit notices to the department under (1) through (3) ~~of this rule must~~ shall provide the required notice for each underground storage tank they own. Owners may provide notice of several tanks using one notification form, but owners who own tanks located at more than one place of operation ~~must~~ shall file a separate notification form for each separate place of operation.

(5) Notices required to be submitted under (1) through (3) ~~of this rule~~ must provide all of the information indicated on the prescribed form described in (9) ~~of this rule~~ for each tank for which notice must be given.

(6) Any person who deposits regulated substances from December 9, 1985 through May 9, 1987, in an underground storage tank ~~must~~ shall make reasonable efforts to notify the owner or operator of such tank of the owner's obligations under (1) through (3) ~~of this rule~~.

(7) Beginning 30 days after the department issues new tank performance standards pursuant to 75-10-405, MCA, any person who sells a tank intended to be used as an underground storage tank ~~must~~ shall notify the purchaser of such tank of the owner's notification obligations under (1) through (3) ~~of this rule~~.

(8) Sections (1) through (3) ~~of this rule~~ do not apply to tanks for which notice was given pursuant to section 103(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

(9) The form which must be used for notice submitted to the department under this rule is department form, "Notification for Underground Storage Tanks~~"~~, ~~EPA form 7530-1 (11/85) DHES Revised 2/86~~ DEQ form 1 (May, 2010)," or

"Notification for Underground Storage Tanks, DEQ form 2 (May, 2010)."

(10) The department ~~hereby~~ adopts and incorporates by reference the forms ~~entitled~~ "Notification for Underground Storage Tanks, DEQ form 1 (May, 2010)" and "Notification for Underground Storage Tanks, DEQ form 2 (May, 2010)," ~~EPA form 7530-1 (11/85) DHES Revised 2/86,~~ which ~~form~~ asks ~~s~~ for information including, but not limited to, ownership, location, age, material of construction, capacity, use, and internal and external construction. Copies of ~~this~~ these forms may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: The department is proposing to revise the reference to the EPA form cited in (9) and (10) to a reference to the department's versions of the form. The existing rule references the EPA "Notification for Underground Storage Tanks, EPA form 7530-1 (11/85)" form. The UST Program doesn't use this EPA form. Instead, the program uses two modified versions of the EPA form designed for use in Montana. Therefore, the department is proposing to revise the citation to a reference for the department's versions of the form.

All the other proposed revisions are clerical revisions that do not change the meaning of the rule.

17.56.902 NOTIFICATION REQUIREMENTS (1) An owner who brings an underground storage tank system into use after May 8, 1986, ~~must~~ shall within 30 days of bringing such tank into use, submit a notice of existence of such tank system to the department in the form prescribed by the department.

Note: Owners and operators of UST systems that were in the ground on or after May 8, 1986, unless taken out of operation on or before January 1, 1974, were required to notify the state in accordance with the Hazardous and Solid Waste Amendments of 1984, Pub.L. 98-616, on a form published by EPA on November 8, 1985 (50 FR 46602) unless notice was given pursuant to section 103(c) of CERCLA. Owners and operators who have not complied with the notification requirements may use portions I through VI of the notification form prescribed by the department.

(2) Owners required to submit a notice under (1) ~~must~~ shall provide a notice to the department for each tank they own. Owners may provide notice for several tanks using one notification form, but owners who own tanks located at more than one place of operation ~~must~~ shall file a separate notification form for each separate place of operation.

(3) remains the same.

(4) Owners and operators of new or modified UST systems ~~must certify~~ shall provide in the notification form:

(a) a certification that ~~they have~~ the owner or operator has complied with the financial responsibility requirements under subchapter 8; and

(b) ~~must provide~~ the following information:

(i) through (viii) remain the same.

(5) Owners and operators of new or modified UST systems ~~must~~ shall ensure

that, upon completion of all work and testing performed pursuant to the installation permit, the licensed installer or department inspector completes a certification of compliance in accordance with the requirements in ARM 17.56.201(1)(e).

(6) Beginning October 24, 1988, any person who sells a tank intended to be used as an underground storage tank ~~must~~ shall notify the purchaser of the tank of the owner's notification obligations under (1). The form prescribed by the department shall be used to comply with this requirement.

(7) Owners and operators of existing or new UST systems ~~must~~ shall notify the department when any of the information submitted on the form has changed, such as upgrading or repairing new or existing tanks or pipes, or change of owner, or contact person, or meeting the requirements specified in ARM 17.56.202 or subchapter 8.

AUTH: 75-11-505, MCA
IMP: 75-11-505, MCA

REASON: See the reason given for ARM 17.56.101.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov, no later than July 22, 2010. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov, no later than July 22, 2010.

6. If the department receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 150 based on the 1498 regulated UST facilities in Montana.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk

vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. 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 Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; e-mailed to ejohnson@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

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

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL QUALITY

/s/ James M. Madden
JAMES M. MADDEN
Rule Reviewer

BY: */s/ Richard H. Opper*
RICHARD H. OPPER, Director

Certified to the Secretary of State, June 14, 2010.

BEFORE THE BOARD OF MEDICAL EXAMINERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the adoption of New Rule I qualification criteria for evaluation and treatment providers	)))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On July 20, 2010, at 11:00 a.m., a public hearing will be held in room 439 301 South Park Avenue, Helena, Montana to consider the proposed adoption of the above-stated rule.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Medical Examiners (board) no later than 5:00 p.m., on July 16, 2010, to advise us of the nature of the accommodation that you need. Please contact Jean Branscum, Board of Medical Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2360; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdmed@mt.gov.

3. The proposed new rule provides as follows:

NEW RULE I QUALIFICATION CRITERIA FOR EVALUATION AND TREATMENT PROVIDERS (1) The physician assistance program will make appropriate referrals to qualified programs for evaluation and treatment based on the participant's needs.

(2) To be qualified, an evaluation program must meet the following criteria:

(a) possess the knowledge, experience, staff, and referral resources necessary to fully evaluate the forensic and clinical condition(s) of impairment in question;

(b) adhere to all applicable federal and state confidentiality statutes and regulations;

(c) have no actual or perceived conflicts of interest between the evaluator and the referent or patient which includes:

(i) no secondary gain may accrue to the evaluator dependent on evaluation findings/outcome;

(ii) there can be no current treatment relationship with the professional being evaluated; and

(iii) the evaluator cannot be affiliated with the entity requiring the evaluation;

(d) keep the physician assistance program fully advised throughout the evaluation process;

(e) have resources available to conduct a secondary intervention as indicated/needed at the time diagnoses and recommendations are discussed;

(f) have immediate access to medical and psychiatric hospitalization if needed;

(g) be able to arrange for timely intake and admission;

(h) fully disclose costs prior to admission;

(i) evaluate all causes of impairment, including:

(i) mental illness;

(ii) chemical dependency and other addictions;

(iii) dual diagnosis;

(iv) behavioral problems including: sexual harassment, disruptive behaviors, abusive behaviors, criminal conduct; and

(v) physical illness including: neurological disorders and geriatric decline;

(j) employ standardized psychological tests and questionnaires during the evaluation process;

(k) conduct comprehensive and discrete collateral interviews of colleagues and significant others to develop an unbiased picture of all circumstances, behavior, and functioning;

(l) make rehabilitation/treatment recommendations; and

(m) have resources and qualified staff to complete a multidisciplinary assessment if recommended.

(3) To be qualified, a treatment program must meet the following criteria:

(a) meet criteria as listed in (2);

(b) allow physician assistance program staff to visit the treatment site and the referred patients;

(c) maintain a business office capable of and willing to work with insurance providers and assist indigent physicians with payment plans;

(d) have a peer professional patient population and a staff accustomed to treating this population;

(e) make appropriate referrals when faced with a patient who has an illness/issue that is outside of the program's area of expertise;

(f) maintain a staff-to-patient ratio conducive to each patient receiving individualized attention;

(g) inform the physician assistance program throughout the treatment process through calls from the therapists involved, as well as written reports. Type and frequency of contact may be arranged with the physician assistance program, but in all cases should occur no less than monthly;

(h) include a strong family program;

(i) report immediately to the physician assistance program, a patient's threat to leave against medical advice, any discharges against medical advice, therapeutic discharges, any other irregular discharge or transfer, hospitalization, positive urine drug screen, noncompliance, significant change in treatment protocol, significant family or workplace issues, or other unusual occurrences;

(j) specifically, the staff must be vigilant in screening for, identifying, and diagnosing covert co-occurring addictions and comorbid psychiatric illnesses and address these concurrently with the presenting illness. This includes appropriately assessing and managing concurrent chronic pain diagnoses (in house, consultative, and/or referral capacity);

(k) use a multidisciplinary team approach and include psychological, psychiatric, and medical stabilization;

(l) provide disclosure of full fees upfront;

(m) offer a flexible payment plan for the varied income levels of participants, but the patient should make some financial investment into the treatment process;

(n) determine clinically justified length of residential stay;

(o) maintain complete and appropriate records to fully defend diagnoses, treatment, and recommendations; and

(p) provide discharge planning and coordination, including documentation of final diagnoses, recommendations for return to work, and aftercare recommendations.

(4) A treatment program that offers substance use disorder treatment must also meet the following:

(a) use an abstinence-based model with provision for appropriate psychoactive medication as prescribed. In rare cases that are refractory to abstinence-based treatment, alternative evidence-based approaches should be considered;

(b) make available, when a 12-step model is utilized for substance use disorders, appropriate therapeutic alternatives (acceptable to the physician assistance program) to participants with religious or philosophical objections;

(c) provide a strong family program. The family program component should focus on disease education, family dynamics, and supportive communities for family members. Family/significant other needs must be accessed early in the process and participation with family/significant other programs and family and individual therapy and treatment encouraged;

(d) offer treatment services that include:

(i) intervention and denial reduction;

(ii) detoxification; and

(iii) ongoing assessment and treatment of patient needs throughout treatment, with referral for additional specialty evaluation and treatment as appropriate;

(e) offer family treatment;

(f) offer group and individual therapy;

(g) offer educational programs;

(h) offer mutual support experience (e.g. AA/NA/etc.) and appropriate alternatives when indicated;

(i) develop a continuing care plan and sobriety support system for each participant;

(j) offer relapse prevention training;

(k) assess return to work/fitness to practice prior to discharge; and

(l) extend treatment options when indicated.

(5) The physician assistance program will maintain a current list of qualified programs available to accept referrals for evaluation and treatment.

AUTH: 37-3-203, 37-1-131, MCA
IMP: 37-3-203, MCA

REASON: The 2009 Montana Legislature enacted Chapter 326, Laws of 2009 (Senate Bill 401), an act requiring the board to ensure that licensees who are required to participate in rehabilitation programs are allowed to enroll in qualified programs in Montana if available. The bill was signed by the Governor and became effective on April 18, 2009. The board is adopting this new rule to implement the bill's amendments to 37-3-203, MCA. To further implement the legislation, the board is proposing New Rule I to set forth the requirements for qualified evaluation and treatment programs according to the standards and criteria adopted nationally by the Federation of State Physician Health Programs. This new rule also sets forth the models for treatment modalities that are acceptable for qualified programs.

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Medical Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdmed@mt.gov, and must be received no later than 5:00 p.m., July 28, 2010.

5. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at www.medicalboard.mt.gov. The department strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

6. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Medical Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsdmed@mt.gov, or made by completing a request form at any rules hearing held by the agency.

7. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on May 6, 2009, by regular mail.

8. Anne O'Leary, attorney, has been designated to preside over and conduct this hearing.

BOARD OF MEDICAL EXAMINERS
DWIGHT THOMPSON, PA, CHAIRPERSON

/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 June 14, 2010

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

In the matter of the amendment of ARM 24.171.401 fees, 24.171.412 safety provisions, 23.171.2301 unprofessional conduct and misconduct, the adoption of NEW RULE I provisional guide license, and the repeal of 24.171.604 emergency guide license	)))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT, ADOPTION, AND REPEAL

TO: All Concerned Persons

1. On July 15, 2010, at 11:00 a.m., a public hearing will be held in room B-07, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment, adoption, and repeal of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Outfitters (board) no later than 5:00 p.m., on July 9, 2010, to advise us of the nature of the accommodation that you need. Please contact Debbie Tomaskie, Board of Outfitters, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2373; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2309; e-mail dlibsdout@mt.gov.

3. General Statement of Reasonable Necessity: At its March 10, 2010, meeting, the department informed the board that ARM 24.171.604, the Emergency Guide License rule, was not legally defensible and that the department would no longer process applications submitted under this rule. A similar opinion had been provided to the board in 1997, approximately one year before the rule was first adopted; however, the department continued to process applications until abuses became apparent and enforcement proved ineffective. In addition to abuse and enforcement issues, the Emergency Guide rule allows outfitters to license guides without any investigation by the department and without the board's determination of qualifications, in direct conflict with 37-47-307(1), MCA. The board chair appointed a committee to draft a rule to replace the Emergency Guide rule. A proposal was provided to the board at the June 9, 2010, meeting and the board accepted the committee's proposal with a few minor changes.

This board determined it is reasonably necessary to amend and repeal certain existing rules and adopt a new rule to replace the emergency guide license with a legally defensible and enforceable provisional guide license that provides for the protection of the public health, safety, and welfare. The proposed rule changes will ensure the proper vetting of applicants by the board following a department

investigation, the ongoing accountability of outfitters and guides, and the enforcement of the requirement of a first aid card for all actively licensed guides.

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

24.171.401 FEES (1) through (1)(h) remain the same.

~~(i) Guide or professional guide license effective until December 31, 2008~~

~~(i) original guide license 100~~

~~(ii) temporary guide license 100~~

~~(j)~~ (i) Guide or professional guide license ~~effective January 1, 2009~~

(i) remains the same.

(ii) ~~emergency~~ initial processing of provisional guide license ~~150~~ 50

(iii) activation of provisional guide license 100

(iv) renewal of provisional guide license 50

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

(2) remains the same.

AUTH: 37-1-131, 37-1-134, 37-47-201, 37-47-306, MCA
IMP: 37-1-134, 37-1-141, 37-47-304, 37-47-306, 37-47-307, 37-47-308, 37-47-310, 37-47-316, 37-47-317, 37-47-318, MCA

REASON: The board determined it is reasonably necessary to amend this rule to comply with the provisions of 37-1-134, MCA, and set fees to be commensurate with the costs associated with provisional guide licensure. The board estimates that the fee changes will affect approximately 100 guides and result in approximately $5,000 in additional revenue above previous years. That additional revenue is expected to meet the direct costs of processing those 100 applications, but will not meet any additional expenses that are likely to be incurred relative to the implementation and enforcement of this new rule. Because this new rule is designed to serve the needs of outfitters, current and future renewal fees for outfitters are expected to cover any additional expenses relative to this new rule.

24.171.412 SAFETY PROVISIONS (1) remains the same.

(2) ~~Except for the one-time, 30-day exemption provided for emergency guide licenses in ARM 24.171.604, guides~~ Guides and professional guides are required to hold a current basic first aid card while actively licensed.

(3) through (5) remain the same.

AUTH: 37-47-201, MCA
IMP: 37-47-201, MCA

24.171.2301 UNPROFESSIONAL CONDUCT AND MISCONDUCT (1) through (1)(m) remain the same.

~~(n) not employ or retain an emergency guide after the 30th day following the date of the emergency guide's application for licensure without first confirming that the emergency guide has current basic first aid certification;~~

~~(o)~~ (n) not employ or retain a guide or professional guide without first confirming that the guide or professional guide has current basic first aid certification; ~~or~~

~~(p)~~ (o) not exceed the licensee's NCHU~~.~~;

(p) not use a provisional guide prior to ensuring that the form evidencing initial licensure is fully signed and dated;

(q) not use a provisional guide unless the proper fee is mailed within the time provided by rule; or

(r) not fail to return any provisional guide license that is not activated during the license year.

(2) through (2)(b) remain the same.

(c) not provide services to clients who have not been specifically referred to the guide or professional guide from the endorsing outfitter; ~~and~~

(d) not provide guiding services during the same license year in which an outfitter also sponsors the guide or professional guide for an outfitter-sponsored license issued by the Montana Department of Fish, Wildlife and Parks~~.~~;

(e) not act as a guide under a provisional guide license, unless and until the guide and the outfitter have first signed and dated the sworn statement evidencing that the license is active; and

(f) not act as a guide under a provisional guide license, unless the proper fee is mailed within the time provided by rule.

(3) remains the same.

AUTH: 37-1-131, 37-1-319, 37-47-201, MCA
IMP: 37-1-312, 37-1-316, 37-47-201, 37-47-341, MCA

5. The proposed new rule provides as follows:

NEW RULE I PROVISIONAL GUIDE LICENSE (1) An outfitter may endorse up to three additional guides each license year who are designated by the outfitter on the application form as "provisional guides" under this rule.

(2) A guide license must be issued to the outfitter on behalf of a provisional guide if the application is complete, routine, and accompanied by all supporting documentation required by the application, and the initial processing fee for a provisional guide license. A provisional guide license will not be issued if the application is incomplete, nonroutine, or not accompanied by all supporting documentation required by the application and the initial processing fee.

(3) The provisional guide license is not active when issued. A provisional guide license is active only after the guide and the outfitter sign and date the guide license. The fee for activation of the provisional guide license must be sent to the board office within ten days of activation.

(4) A provisional license may be renewed.

(5) Each provisional guide license issued by the board to an outfitter shall be either activated or returned to the board office on or before December 31 of the license year.

AUTH: 37-1-131, 37-47-201, MCA
IMP: 37-1-131, 37-47-201, 37-47-301, 37-47-303, 37-47-307, MCA

6. The rule proposed to be repealed is as follows:

24.171.604 EMERGENCY GUIDE LICENSE found at ARM page 24-18573.

AUTH: 37-1-131, 37-47-201, MCA
IMP: 37-47-201, 37-47-301, 37-47-303, 37-47-307, MCA

7. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Outfitters, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2309, or by e-mail to dlibsdout@mt.gov, and must be received no later than 5:00 p.m., July 23, 2010.

8. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at www.outfitter.mt.gov. The department strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

9. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Outfitters, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2309; e-mailed to dlibsdout@mt.gov; or made by completing a request form at any rules hearing held by the agency.

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

11. Tyler Moss, attorney, has been designated to preside over and conduct this hearing.

BOARD OF OUTFITTERS
LEE KINSEY, CHAIRPERSON

/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 June 14, 2010

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 32.23.102, pertaining to transactions involving the purchase and resale of milk within the state and ARM 32.24.504, pertaining to quota transfers	))))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On July 30, 2010, the Department of Livestock proposes to amend the above-stated rules.

2. The Department of Livestock will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Livestock no later than 5:00 p.m. on July 14, 2010 to advise us of the nature of the accommodation that you need. Please contact Christian Mackay, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001; phone: (406) 444-9321; TTD number: 1 (800) 253-4091; fax: (406) 444-4316; e-mail: cmackay@mt.gov.

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

32.23.102 TRANSACTIONS INVOLVING THE PURCHASE AND RESALE OF MILK WITHIN THE STATE (1) through (7) remain the same.

(8) On or before the eighth business day after the end of each month, in detail and on forms supplied by the department, each distributor must submit to the department a report of the information required by ARM ~~32.23.512~~ 32.24.512, and a report of:

(a) through (16) remain the same.

AUTH: 81-23-103, MCA
IMP: 81-23-103, 81-23-402, MCA

REASON: The rule is being amended to correct a typographical error.

32.24.504 TRANSFER OF QUOTA (1) and (1)(a) remain the same.

(b) The Milk Control Bureau must be notified in writing by the proposed quota transferor at least ~~10~~ seven days prior to the first day of the month during which the transfer is contemplated. Such notice must include the name of the prospective transferee, the effective date of the proposed transfer, and the amount of quota to be transferred. The producer must also notify his pool plant of his transfer. The bureau will notify the producer committee of any proposed transfers.

(c) remains the same.

~~(d) Except for an emergency approved by the producer committee, quota acquired through transfer may not be retransferred for six months.~~

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

AUTH: 81-23-302, MCA
IMP: 81-23-302, MCA

REASON: The rule is being amended to give the dairy producers a little more time to submit quota transfers to the Milk Control Bureau and to repeal the six month requirement to hold quota before it can be transferred after it is purchased.

4. The effective date shall be September 1, 2010.

5. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Christian Mackay, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001, by faxing to (406) 444-4316, or by e-mailing to cmackay@mt.gov to be received no later than 5:00 p.m. July 26, 2010.

6. If persons who are directly affected by the proposed action wish to express their data, views, and arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written comments they have to the same address as above. The written request for hearing must be received no later than 5:00 p.m. July 26, 2010.

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

8. An electronic copy of this proposal notice is available through the department's site at www.liv.mt.gov.

9. The Montana Department of Livestock maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by this department. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies the area of interest that the person wishes to receive notices regarding. 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 Christian Mackay, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001;

faxed to (406) 444-4316 "attention Christian Mackay"; or e-mailed to cmackay@mt.gov. Request forms may also be completed at any rules hearing held by the department.

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

DEPARTMENT OF LIVESTOCK

BY: /s/ Christian Mackay
Christian Mackay
Executive Officer
Board of Livestock
Department of Livestock

BY: /s/ George H. Harris
George H. Harris
Rule Reviewer

Certified to the Secretary of State June 14, 2010.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.59.1701 pertaining to definitions; the adoption of NEW RULES I through IX regarding mortgage loan originator licensing; and the repeal of ARM 2.59.1705 pertaining to continuing education provider requirements	)))))))	NOTICE OF AMENDMENT, ADOPTION, AND REPEAL

TO: All Concerned Persons

1. On April 29, 2010, the Department of Administration published MAR Notice No. 2-59-431 pertaining to the public hearing on the proposed amendment, adoption, and repeal of the above-stated rules at page 945 of the 2010 Montana Administrative Register, Issue Number 8.

2. The department has adopted New Rules II (2.59.1726), III (2.59.1727), IV (2.59.1728), V (2.59.1729), VI (2.59.1730), VII (2.59.1731), and IX (2.59.1733) exactly as proposed.

3. The department has amended ARM 2.59.1701 as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

2.59.1701 DEFINITIONS For purposes of the Montana Mortgage Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act and this subchapter, the following definitions apply:

(1) remains as proposed.

~~(2) "Compensation or gain" means the receipt or the expectation of receiving anything of value in conjunction with offering or negotiating terms of a residential mortgage loan and is not limited to payments that are contingent upon the closing of a loan.~~

(3) through (12) remain as proposed, but are renumbered (2) through (11).

AUTH: 32-9-125, 32-9-130, MCA
IMP: 32-9-102, 32-9-103, 32-9-109, 32-9-116, 32-9-117, 32-9-120, 32-9-122, 32-9-123, 32-9-125, 32-9-127, 32-9-133, MCA

4. The department has adopted New Rules I (2.59.1725) and VIII (2.59.1732) as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (2.59.1725) LICENSING EXEMPTIONS AND VOLUNTARY REGISTRATION BY EXEMPT ENTITIES WITH THE NATIONWIDE MORTGAGE LICENSING SYSTEM (NMLS) (1) through (3) remain as proposed.

(a) ~~(i)~~ whose income is not more than two times ~~at or below~~ the U.S. Department of Health and Human Services Poverty Guidelines for Montana in effect at the time the loan application is processed, adjusted for size of household, as published in the Federal Register under authority of 42 USC 9902(2);

(b) ~~(ii)~~ whose income does not exceed ~~80~~115% of the median income in the applicable area of Montana as determined by the U.S. Department of Housing and Urban development, adjusted for size of household; or

(iii) remains as proposed, but is renumbered (c).

AUTH: 32-9-130, MCA
IMP: 32-9-104, MCA

NEW RULE VIII (2.59.1732) MORTGAGE CALL REPORTS ~~(1) The mortgage call reports required to be submitted to the NMLS by mortgage brokers and mortgage lenders must be submitted on the form required by NMLS as frequently and on such dates as the NMLS sets.~~

(2) remains as proposed, but is renumbered (1).

AUTH: 32-9-130, MCA
IMP: 32-9-151, MCA

5. The department has repealed ARM 2.59.1705 as proposed.

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

Comment 1: Both oral testimony at the rule hearing and a written comment were received from counsel for State Farm Insurance Companies (State Farm) and State Farm Bank, F.S.B. (bank) relating to proposed New Rule I. The bank is a federally chartered savings bank that offers financial products including limited loan products exclusively through State Farm agents. State Farm agents are independent contractors and not bank employees.

The commenter stated that the department's proposed New Rule I and the statement of reasonable necessity for the rule appear to contemplate an exemption from the registration requirement of the law only in the context of the employer-employee relationship. The commenter stated independent contractors should be exempt from registration requirements provided there are adequate assurances of consumer protection. The consumer protection assurances recited by the commenter in support of its position were: 1) the bank is highly regulated by the federal Office of Thrift Supervision (OTS); 2) OTS confirmed in writing that State Farm agents who participate in activities of the bank are subject to OTS regulation; 3) OTS, at its discretion, may conduct on-site examinations at the offices of State Farm agents and does so in conjunction with bank examinations for the purpose of reviewing the banking activities and, thus, the bank is legally responsible for the actions of State Farm agents engaged in mortgage origination and lending activities;

4) compliance oversight of the bank and its exclusive State Farm agents is provided by dedicated bank staff; 5) the bank benefits from cooperative efforts of the State Farm Marketplace Compliance department (Marketplace Compliance) which oversees both sales and service compliance groups that assess and monitor the performance of State Farm agents; 6) Marketplace Compliance has a field presence throughout the United States; and 7) as a condition of participating in marketing of the bank's financial products, State Farm agents must agree to comply with all laws and regulations and all bank guidelines, procedures, and policies.

The commenter stated the rule and the statement of reasonable necessity should be amended to ensure that State Farm agents can continue to provide State Farm customers in Montana with financial products offered by the bank exclusively through State Farm agents.

Response 1: The subject matter of the comment is outside the scope of proposed New Rule I. MAR Notice No. 2-59-431 did not put the public on notice that this rulemaking would interpret the word "employee" as found in the definition of "registered mortgage loan originator" in 32-9-103(29)(a), MCA. "Registered mortgage loan originator" means an individual who (a) meets the definition of a mortgage loan originator and is an "employee" of: (i) a depository institution; (ii) a subsidiary owned and controlled by a depository institution and regulated by a federal banking agency; or (iii) an institution regulated by the farm credit administration; and (b) is registered with and maintains a unique identifier through NMLS. The definition comes from the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 found in Title V of the Housing and Economic Recovery Act of 2008, 12 USC 5102(7), (SAFE Act). Nor did MAR Notice No. 2-59-431 put the public on notice that this rulemaking would consider whether an independent contractor mortgage loan originator acting for an entity that is exempt under 32-9-104 (1)(b), MCA, is exempt from licensing requirements under 32-9-104(1)(c), MCA. The requested amendment to proposed New Rule I and statement of reasonable necessity must be denied on that basis. In addition, the department may not engraft "independent contractors" onto 32-9-103(29)(a), MCA, which refers only to "employees."

Because licensed mortgage loan originators must work only for a licensed "employing" mortgage broker or mortgage lender under 32-9-116, MCA, a definition of "employing" was previously included in MAR Notice No. 2-59-414, implementing 32-9-116, MCA. The Notice of Amendment, Repeal, and Adoption for MAR Notice No. 2-59-414 was published on February 11, 2010. Under ARM 2.59.1701, "employing" is defined as "the entity for which the individual works is liable for withholding payroll taxes pursuant to Title 26 of the United States Code." The definition is not consistent with an independent contractor relationship. There is no sound reason for employment to mean one thing with respect to the relationship between a mortgage loan originator and the mortgage broker or mortgage lender for whom they originate loans, but have a different meaning regarding the relationship between a mortgage loan originator and a depository institution for whom they originate mortgage loans.

Under 39-71-417(4)(a)(i), MCA, in order to obtain an independent contractor certification, an individual must affirm they have been and will continue to be free from control or direction over their work performance. That principle of the independent contractor relationship is inconsistent with the supervision and control of mortgage loan originators by their employers that the Montana Mortgage Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act (the Act) requires under 32-9-122(5), (6), and (7), MCA.

It is unclear to the department whether the commenter's position is that independent contractor State Farm agents involved in mortgage loan origination or lending activities are or should be exempt not only from state licensing requirements under the Act, but also from "registration requirements" for loan originator employees of depository institutions, subsidiaries owned and controlled by depository institutions and regulated by a federal banking agency, or institutions regulated by the farm credit administration. If so, the issue of exemption from registration requirements is not within the jurisdiction of the department. Rather, registration of such employees through Nationwide Mortgage Licensing System (NMLS) in lieu of state licensure is a matter within the jurisdiction of the Federal Financial Institution Examination Council (FFIEC) compromised of the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration, the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Farm Credit Administration. FFIEC will adopt rules implementing registration through NMLS of exempt mortgage loan originators "employed by": (i) a depository institution; (ii) a subsidiary owned and controlled by a depository institution and regulated by a federal banking agency; or (iii) an institution regulated by the farm credit administration, under the federal SAFE Act. The FFIEC's draft final rule is now under review by the U.S. Office of Management and Budget. The comment period is closed. A number of comments were received by the FFIEC requesting that "employee" as used in the registration context be defined. In response, the draft final rule states that Congress used the term "employee" without defining it and in the past when that has occurred, the Supreme Court has concluded that Congress intended to describe the conventional master-servant relationship as understood in the context of common-law agency doctrine. The draft final rule states that the FFIEC thus intends the meaning of employee under the SAFE Act and under its rule to be consistent with the right-to-control test under the common law agency doctrine. The FFIEC also noted that the right-to-control test is used by the IRS as its basis for classification of workers as employees and the results of the test determine whether an institution files a W-2 or a 1099 for an individual.

The commenter did not specify whether the mortgage loan origination and lending activities of independent contractor State Farm agents pertain to commercial mortgage loans or exclusively to residential mortgage loans. The Act applies only to residential mortgage loans as that term is defined in 32-9-103(30), MCA.

The commenter did not provide a copy of the "written confirmation" from the OTS referred to in the comment, which reportedly addresses OTS's regulatory oversight

of independent contractor State Farm agents. OTS has had the right to examine the institutions that it regulates and to review records pertaining to the institutions' banking business, wherever those records may be found, including presumably, in the offices of independent contractor State Farm agents who market State Farm Bank, F.S.B.'s financial products and originate mortgage loans funded by the bank. In the department's opinion, that does not constitute OTS regulatory jurisdiction over independent contractor State Farm agents.

Comment 2: A representative of a community-based 501(c)(3) not-for-profit corporation (nonprofit) commented on the definition of "bona fide low-income individual" contained in proposed New Rule I. The nonprofit stated that it participates in an FHA-insured mortgage financing program for lower-income persons. The borrowers' household annual income may not exceed 115% of area median income, as determined by the U.S. Department of Housing and Urban Development (HUD), when adjusted for family size.

The commenter also stated it participates in the U.S. Department of Health and Human Services Assets for Independence (AFI) program. Grant monies awarded to qualifying nonprofits and governmental agencies, are used to match earned income saved by lower-income persons in special savings accounts. The account, including the match funds, can be used to acquire a first home mortgage, among other purposes. Persons generally qualify for the program if they are eligible for Temporary Assistance to Needy Families (TANF), Federal Earned Income Tax Credit (EITC), or have income less than two times the federal poverty line.

The commenter requested that the definition of bona fide low-income individual in the rule be amended to ensure that the nonprofit's exempt status would apply to its participation in both of the above-referenced assistance programs.

Response 2: The department agrees that New Rule I should be amended largely as requested to ensure that 501(c)(3) nonprofit corporations, which are not otherwise engaged in or holding themselves out to the public as being engaged in the mortgage loan business, are able to fully participate in governmental housing assistance programs without a license. A person whose income is at or below the federal poverty line might not be able to afford a mortgage, so it is not unusual for the income eligibility cap for housing assistance programs to be in excess of the federal poverty threshold. The department believes it needs to define "bona fide low-income individuals" in reference to individuals' income and not by reference to their eligibility for Temporary Assistance to Needy Families (TANF) or Federal Earned Income Tax Credit. The department believes that if individuals are eligible for those programs, benefits, or tax credits, they will likely meet the income-based definition of "bona fide low-income individuals" included in New Rule I.

The intent to exempt such nonprofits from licensure requirements would be defeated if the definition of "bona fide low-income individuals" in rule sets an income cap so low that it ensures qualifying nonprofits will have to be licensed in order to participate

in some programs regardless of its exemption for purposes of participating in other housing assistance programs.

The department and HUD recognize that it will take time to fully implement the requirements of the SAFE Act as reflected in the Act as they relate to licensing of mortgage loan originators working for 501(c)(3) nonprofit corporations that meet the criteria for entity exemption from licensing requirements under 32-9-104(1)(j), MCA. The department's intent is not to cause the exempt nonprofit entities to cease and desist from the important work they do, particularly during this time when the need for their services is greatest, so long as a good faith effort is being made by the 501(c)(3) corporations to meet the deadlines set in statute for licensing their mortgage loan originators.

Comment 3: A licensed mortgage broker commented that New Rule I(3) defining bona fide low-income individual is unclear and asked whether a mortgage broker that is "low-income" is exempt from having to be licensed.

Response 3: New Rule I(3) does not exempt any individual or entity from the licensing requirements of the Act based on the individual or entity's income. Rather, (3) merely defines the term "bona fide low-income individual" contained in 32-9-104(1)(j), MCA. This is the statute that exempts 501(c)(3) nonprofit corporations from the Act's licensing requirements provided that they are not otherwise engaged in or hold themselves out to the public as being engaged in the mortgage loan business and that they make mortgage loans to promote home ownership or improvements for "bona fide low income individuals". The term "bona fide low income individuals" refers to the clients of certain 501(c)(3) nonprofit corporations. Section 501(c)(3) nonprofit corporations meeting the criteria in 32-9-104(1)(j), MCA, are exempt from having to be licensed as mortgage brokers or mortgage lenders because of the low income clients that they serve. The definition of bona fide low income individual in rule will put nonprofit corporations on notice of the criteria that will be applied by the department to determine whether the clients/borrowers they serve are "bona fide low-income individuals" under 32-9-104(1)(j), MCA.

Comment 4: The commenter proposed an alternative definition of the term "mortgage loan servicer" in lieu of the definition of that term in the proposed amendments to ARM 2.59.1701. The commenter proposed that "mortgage loan servicer" be defined as "an individual, employed by a company which owns the loans or services the loans for others, who administers an existing mortgage loan, which may include but is not limited to explaining the terms of the loan or its escrow account, negotiating, amending or waiving the terms of an existing loan, and taking other actions including the collection of borrower information designed to prevent or avoid default or foreclosure in connection with an existing loan." The commenter stated that the alternative definition comes from a comment submitted by three groups (the American Financial Services Association, the Mortgage Bankers Association, and the American Bankers Association) to HUD on their pending rules implementing the SAFE Act. The commenter stated that since the department is

relying on HUD's proposed rule to define a "mortgage loan servicer" it should not make any decisions until HUD's rule is final.

The commenter stated that the issue relates to licensure, i.e., whether a person who does loan modifications must be licensed, and in that regard, a distinction needs to be made between: 1) the servicer who as part of their obligation must modify a mortgage loan when permissible at no cost to the borrower, and 2) the third party modification company paid by the borrower to negotiate a modification or refinance of a mortgage loan. The commenter stated the former should not have to be licensed while the latter should be licensed.

The commenter stated that the Farm Credit Administration and the federal banking agencies adopted a final rule on November 12, 2009, concluding that the SAFE Act's definition of "loan originator" in general excludes employees engaged in loan modifications or assumptions; consequently, the employees of depository institutions, subsidiaries owned and controlled by depository institutions and regulated by a federal banking agency, or a institution regulated by the Farm Credit Administration, will not be required to register with the Nationwide Mortgage Licensing System and Registry (NMLSR). The commenter stated that if licensing will be required for those engaged in loan modification work outside of that group, an unlevel playing field would result. The commenter provided a list prepared by the Mortgage Bankers Association showing that seven states have concluded that servicers and/or those engaged in loan modifications in some form are not covered by the SAFE Act, six states are covering servicers but delaying licensing them, and nine states are deferring to HUD. The commenter included Montana among the states deferring to HUD.

The commenter stated that now is not the time to hinder the mortgage loan modification process by requiring licensure of mortgage loan servicers. Any delay in providing help to borrowers in foreclosure, of which Montana has its share, should be avoided.

Response 4: The definition of mortgage loan servicer in the proposed amendment to ARM 2.59.1701 attempts to clarify that it is the activities that a person performs relating to residential mortgage loans and not their job title that determines whether they must be licensed. If the person engages in activities that fall within the definition of "mortgage loan originator" under 32-9-103(23)(a), MCA, regardless of their "mortgage loan servicer" job title, they must be licensed as a mortgage loan originator. The alternative definition of "mortgage loan servicer" requested by the commenter would shift the focus of the determination of who needs to be licensed from the nature of the mortgage loan-related activities performed to who owns the loan or pays the person performing the activities. Section 32-9-103, MCA, defines a number of job categories of individuals having some role or involvement with residential mortgage loans including "mortgage broker," "mortgage lender," "mortgage loan originator," and "loan processor or underwriter." In all of the definitions, it is the nature of the activities performed that distinguishes each from the others. Also, under 32-9-129(1), MCA, a loan processor or underwriter may not

represent to the public that they can or will perform any of the activities pertaining to originating a mortgage loan if they are not licensed as a mortgage loan originator. (Emphasis added.) HUD has stated in its rule proposal notice that definitions of terms are key to whether a person must be licensed and because of the great variety of business models utilized in the housing finance industry, the definitions are based on functions rather than on job titles or labels. The department believes that varying from the approach of focusing on the nature of the activities performed, would be inadvisable from a consistency standpoint and would not provide the best protection to consumers.

Regardless of who is paying the mortgage loan servicer to modify the mortgage loan or who owns the loan, the borrower is best protected when the person performing the activities understands Real Estate Settlement Procedures Act, Truth in Lending Act, and other laws applicable to mortgage loans, has completed educational and testing requirements for licensure, and has undergone the requisite background check and credit check. HUD noted in its rule proposal notice published in the Federal Register, Docket No. FR-5271-P-01, RIN 2502-A170, that today's loan modifications may include an increase or decrease in the interest rate, a change to the type of interest rate (e.g., fixed versus adjustable rate), extension of the loan term, increase or write down of principal, the addition of collateral, changes to provisions related to prepayment penalties and balloon payments, and even a change to the parties to the loan through assumption or the addition of a co-signer, all of which can make loan modifications virtually indistinguishable from doing a "refinance" which clearly requires a license.

The commenter stated that federal banking agencies have concluded the SAFE Act's definition of "loan originator" in general excludes employees engaged in loan modifications or assumptions; consequently, such employees of banking institutions and their subsidiaries regulated by banking agencies will not be required to register with the NMLSR. The commenter urges the department to adopt the same conclusion.

It is important to note, however, that a distinction exists between the SAFE Act's definition of "loan originator" and the definition of "mortgage loan originator" in both 32-9-103(23), MCA, and in the State Model Act. Section 32-9-103(23), MCA, and the State Model Act defined the term as an individual who for compensation or gain or in the expectation of compensation or gain does either of two things: (i) takes a residential mortgage loan application; or (ii) offers or negotiates terms of a residential mortgage loan. (Emphasis added.) In contrast, the SAFE Act defines "loan originator" as an individual who takes a residential mortgage loan application and offers or negotiates terms of a residential mortgage loan for compensation or gain. (Emphasis added.)

HUD's rule proposal notice states that since individuals performing loan modifications almost certainly offer or negotiate terms of a residential mortgage loan, the states with laws like Montana's already require licensure of individuals engaged in loan modification activities. HUD stated that a state's decision to cover, under its

licensing laws, those engaged in mortgage loan modification activities is fully consistent with the SAFE Act and that, in any case, states are free to exceed standards required by HUD.

For the foregoing reasons, the federal banking agencies' conclusion that loan modification specialists employed by depository institutions do not need to be registered through NMLSR is not persuasive to the department, which is implementing state law. That being said, an individual who does a loan modification for no compensation or gain does not meet the definition of a mortgage loan originator under 32-9-103(23), MCA, and would therefore not need to be licensed. The department has chosen not to adopt the definition of "compensation or gain" until HUD's final rules are adopted.

Comment 5: The commenter stated it is the nation's only centralized, 100% retail, 50-state, conventional and FHA residential mortgage lender that originates, processes, and closes loans over the Internet through a platform built to directly interface with homeowners using technology, metrics, and trained staff. It employs 1,400 loan officers each of whom must meet the licensing requirements of multiple states.

The commenter opposed proposed NEW RULE VIII relating to Mortgage Call Reports because the rule would vest power in NMLS to determine the "frequency" with which such reports must be submitted. The commenter stated that since NMLS is not a legislative or regulatory body but rather a data repository, the "content and frequency" of required call reports should be established through statute or rulemaking rather than dictated by a privately contracted organization.

The commenter opposed proposed NEW RULE IX relating to expunged criminal records and more generally commented that the statutory bar to licensure in both the SAFE Act and in the Act based on certain felony convictions is overbroad and unfair. The commenter gave an example of a presumably hypothetical license applicant with a felony conviction for DUI or possession of marijuana in the past seven years who would not be eligible for a license even though the crimes bear no relation to the person's ability to be a good mortgage loan originator. The commenter also stated it would be unfair to deny license renewal and permanently bar a presumably hypothetical renewal applicant from future licensure based on a felony conviction involving "fraud, forgery, embezzlement or financial transactions" if the person was convicted of fraudulent use of a credit card more than 20 years ago at age 17, but had been rehabilitated and had been a successful and honest mortgage loan originator for many years after the conviction.

The commenter acknowledged that the SAFE Act and the Act are clear with respect to the statutory prohibitions against licensing a person based on certain felony convictions and that the department cannot change that by rule. The commenter stated, however, that those acts are silent on the issue of expunged criminal records. The commenter stated that because the laws of the state where a person was convicted determine whether the offense was a misdemeanor or felony, it

should also be that state's laws that determine what effect the expungement of the record of conviction has on a person's eligibility for a Montana mortgage loan originator license under Montana law.

The commenter stated that the department would be improperly preempting state law if it brings back to life a conviction for which the record was expunged in another state in order to apply the criteria for license eligibility in a regulated field under Montana law. Expunged records, according to the commenter, are treated as if they never occurred. In some states, the record is made nonpublic and can be viewed and used for limited purposes, not including administrative licensing, while in other states the record is purged altogether.

The commenter stated there is more or better assurance that a person has been rehabilitated when the court having jurisdiction in the criminal case has expunged the record than if the person has been pardoned by a governor or by the President of the United States.

The commenter stated that for purposes of the NMLS registry of mortgage loan originators employed by depository institutions, the federal banking agencies propose to adopt FDIC's regulation excluding convictions from consideration if the record has been expunged. The commenter cited 12 USC 1829 and 12 CFR 303.220-3.

The commenter stated that adoption of proposed New Rule IX would be a rush to judgment, and the department should delay action on the rule until further guidance is rendered.

Response 5: Section 32-9-151, MCA, states the reports of condition (commonly referred to as call reports) must be in the form and must contain the information that the NMLS may require. That statute assures uniformity of the report format and content from state to state. A uniform call report should be advantageous to the commenter and other mortgage lenders and mortgage brokers that are licensed in multiple states. A legislative amendment to or a judicial decision invalidating 32-9-151, MCA, would be required before the department could adopt a rule to require that different or additional information be included in the call report than what the NMLS may require. The commenter stated that due dates for submission of call reports should be set by statute or through rulemaking rather than by NMLS. That statement is correct. Accordingly, the department is deleting (1) of the New Rule VIII and renumbering it (2).

Under 32-9-105(2)(b), MCA, the department is authorized to establish reporting dates necessary to comply with the nationwide mortgage licensing system and registry. When due dates for the reports are established by the NMLS, the department will initiate rulemaking to adopt those due dates in order to comply with the NMLS and to advance the objective of uniformity of processes among the states that is generally favored by the mortgage industry. The NMLS is currently proposing a quarterly reporting schedule. A uniform schedule for submission of call reports

among the states should be advantageous to mortgage brokers and mortgage lenders licensed in multiple states.

Sections 32-9-120(1)(b) and 32-9-127(4)(b), MCA, make clear that only after an individual or the individual's relevant conviction is pardoned will the conviction no longer be a bar to licensure. That provision is consistent with the SAFE Act, the Model State Act, and with HUD's proposed final rule. A pardon is a form of executive clemency. The term "pardon" is defined in 46-23-301, MCA, as a declaration of record that an individual is to be relieved of all legal consequences of a prior conviction. The department is aware of no legal support for the commenter's apparent assertion that expungement of the record of a conviction by a court has the same effect as pardon by a governor or the President of the United States. The department may not, through rulemaking engraft onto 32-9-120 and 32-9-127, MCA, through rulemaking "expungement" of the record of a relevant conviction as an additional circumstance under which the conviction will no longer be a bar to licensure.

Even a pardon that relieves an individual of all legal consequences of a conviction (including ineligibility for licensure based on the fact of a conviction) is distinguishable from the negation or extinguishment of the conviction altogether. For example, 46-23-510, MCA, states that upon final reversal of a conviction for certain crimes "the sentencing court shall order the expungement of any records kept by the court, law enforcement agency, or other state or local government agency under this part." In that example, it is the final reversal of the conviction and not the expungement of the records relating to it that negates the conviction. The conviction would be negated by the final reversal even if the court failed to expunge the records relating to it.

The commenter's recommendation to delay adoption of NEW RULE IX pending further guidance is not practical because state law is clear regarding the pardon exception, and the department may not expand upon the exception.

The federal banking agencies' (FFIEC's) final rules will govern registered mortgage loan originators employed by Montana depository institutions, whereas HUD's final rules implement the SAFE Act's minimum standards for state-licensed mortgage loan originators employed by mortgage brokers and nondepository mortgage lenders. The sets of rules are independent of each other. The department does not expect that HUD will conform its final rule to FFIEC's draft final rule relating to expunged records, but even if that occurs, states are free to set higher standards for the licensing of mortgage loan originators. Therefore, the department's rule relating to expunged records of convictions will not in any event be "in conflict" with the FFIEC's rules or with HUD's rules.

The department does not agree with the commenter's statement that Montana's proposed rule would improperly preempt another state's laws if the record of a felony conviction has been expunged by a court in the other state under its laws. "Expungement" of a record of conviction is an action taken by a court in the exercise

of its criminal jurisdiction. The court's order would determine the effect of the conviction thereafter when, for example, the state's laws provide for enhancement of sentence for a second or subsequent conviction, the applicability of a persistent felony offender status, or eligibility to have a sentence deferred again for a subsequent offense. The exercise by a court of its criminal jurisdiction in one state may not encroach upon the jurisdiction of an administrative agency in another state having exclusive jurisdiction over licensing persons to enter a regulated field in that other state.

The department believes that 32-9-120(1)(b) and 32-9-127(4)(b), MCA, prohibit licensure when there has been a "pretrial diversion" in the criminal case such as a period of deferred imposition of sentence at the conclusion of which the plea of guilt or nolo contendere to the relevant criminal charge is withdrawn and the charge is dismissed under 46-18-204, MCA. The department believes that withdrawal of plea and dismissal of a charge and making the records "nonpublic" following deferred imposition of sentence is what the commenter refers to as an "expungement" of the record of conviction. The department's inclusion of such a conviction in its consideration and application of 32-9-120(1)(b) and 32-9-127(4)(b), MCA, is consistent with both HUD's draft final rule as well as the FFIEC's draft final rule relating to pretrial diversions. As the commenter noted, the Federal Deposit Insurance Corporation (FDIC) does include "pretrial diversions" when applying 12 USC 1829, which bars persons convicted of certain crimes from serving on a bank's board of directors.

In the U.S. District Court for the Middle District of Pennsylvania, a person filed an action in the court to challenge a determination made by the Office of the Comptroller of the Currency (OCC) that the person had entered into a pretrial diversion program or similar program in connection with the dismissal of perjury charges and was therefore prohibited from resuming his position as chairman of the board of directors of a bank under 12 USC 1829(a)(1). The OCC moved for dismissal of the case on the grounds the court lacked jurisdiction. In its decision dated February 4, 2010, the court held that if it adjudicated the plaintiff's claims, that would affect the exercise of authority delegated to the OCC in 12 USC 1818, a result foreclosed by Congress in 12 USC 1818(i)(1). Consequently, the court granted the OCC's motion to dismiss the case for lack of jurisdiction. See, *Denaples v. Office of the Comptroller of the Currency* (2010), 2010 U.S. Dist. LEXIS 9702. The court's recognition of the executive branch agency's jurisdiction in civil administrative matters entrusted to it is consistent with the department's view of its jurisdiction under the Act to interpret and enforce the bars to licensure contained in 32-9-120(1)(b) and 32-9-127(4)(b), MCA.

The SAFE Act and the development of the NMLS and Registry did not create a "national license" such that every state must accept the minimum standards of other states or HUD. Each state is free to set higher standards for licensing mortgage loan originators.

No postconviction adjudication other than a final reversal of the conviction and no executive action other than a pardon of the conviction as defined in 46-23-301(1)(b), MCA, will negate the effect of a conviction for purposes of the department's enforcement of 32-9-120(1)(b) and 32-9-127(4)(b), MCA. A felony conviction of a person who was under 18 years old at the time of an offense, but who was charged and tried as an adult, will be treated the same as if the person had been an adult at the time of the offense.

The term "conviction" includes pretrial diversions including dismissals following deferred imposition of sentence under 46-18-204, MCA, or a similar statute in any other state. Inclusion of pretrial diversions within the term "conviction" is consistent with the position taken by the FFIEC (following FDIC's "Statement of Policy Pursuant to Section 19 of the Federal Deposit Insurance Act [12 USC 1829] Concerning Participation in the Conduct of the Affairs of an Insured Institution by Persons Who Have Been Convicted of Crimes Involving Dishonesty, Breach of Trust or Money Laundering or Who Have Entered Pretrial Diversion Programs for Such Offenses" as published in the Federal Register December 1, 1998, p. 66177). It is possible that HUD was referring to pretrial diversions such as dismissal following deferred imposition of sentence and expungement of the record when it concluded in its draft final rule that "expungement" of a record of a relevant conviction that would bar licensure does not negate the conviction for purposes of the SAFE Act prohibitions against licensing persons convicted of certain felonies.

The department has exclusive jurisdiction over the interpretation of 32-9-120(1)(b) and 32-9-127(4)(b), MCA, as the laws apply to applicants for licensure in a field regulated by it, subject to judicial review under Title 2, chapter 4, part 7, MCA.

As a practical matter, it is unlikely that the department will routinely learn of such pretrial diversions when the record has become nonpublic, confidential criminal justice information if the expungement occurred before the license application or renewal application is submitted. It is conceivable, however, that the department may learn of an undisclosed relevant conviction involving a pretrial diversion and will apply 32-9-120(1)(b) and 32-9-127(4)(b), MCA, and this rule.

The department is not aware of any evidence that a pardoned individual is less likely to have been rehabilitated than a person whose record of conviction was expunged by the court. In any event, the statutory bar to licensure or renewal under 32-9-120(1)(b) and 32-9-127(4)(b), MCA, is based on the objective fact of a conviction rather than the subjective fact of rehabilitation.

By: */s/ Janet R. Kelly*
Janet R. Kelly, Director
Department of Administration

By: */s/ Michael P. Manion*
Michael P. Manion, Rule Reviewer
Department of Administration

Certified to the Secretary of State June 14, 2010.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the adoption of ARM New Rule I relating to the Eurasian Watermilfoil Management Area	)))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On May 13, 2010, the Montana Department of Agriculture published MAR Notice No. 4-14-195 relating to the public hearing on the proposed adoption of the above-stated rule at page 1129 of the 2010 Montana Administrative Register, Issue Number 9.

2. On June 3, 2010, the Montana Department of Agriculture held a public hearing on the proposed amendment of the above-stated rule.

3. The department received the following comments:

COMMENT #1: Nine people commented that they support the proposed rule.

RESPONSE #1: No response is necessary.

COMMENT #2: Two people requested that the department consider hiring private parties to accomplish part of the plan.

RESPONSE #2: The department will consider private contractors at all times. The department was not aware at the time of the original plan that private parties were available for some of the services. No change in the rule is necessary to consider using private parties.

4. The department has adopted the new rule exactly as proposed.

DEPARTMENT OF AGRICULTURE

/s/ Ron de Yong
Ron de Yong, Director

/s/ Cort Jensen
Cort Jensen, Rule Reviewer

Certified to the Secretary of State, June 14, 2010.

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

In the matter of the amendment of ARM 6.6.1906, and the adoption of New Rules I through VI (ARM 6.6.1907, 6.6.1908, 6.6.1910, 6.6.1911, 6.6.1913, and 6.6.1914), pertaining to the administration of a new risk pool by Comprehensive Health Care Association and Plan	))))))))	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On May 13, 2010, the State Auditor and Commissioner of Insurance published MAR Notice No. 6-188 regarding a notice of public hearing on the proposed amendment and adoption of the above-stated rules at page 1132 of the 2010 Montana Administrative Register, issue number 9.

2. On June 2, 2010, at 10:30 a.m., the State Auditor and Commissioner of Insurance held a public hearing to consider the proposed amendment and adoption of the above-stated rules. The hearing was attended by members of the public.

3. The department has amended ARM 6.6.1906 exactly as proposed and adopted New Rules II (6.6.1908), IV (6.6.1911), V (6.6.1913), and VI (6.6.1914) exactly as proposed.

4. The department has adopted New Rules I (6.6.1907), and III (6.6.1910) as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (6.6.1907) ESTABLISHING THE MONTANA AFFORDABLE CARE PLAN (1) through (3) remain as proposed.

(4) The funding for the MACP high risk pool will consist of money awarded by contract or grant from the federal government and premiums paid by the covered individuals in the MACP. No money from the state of Montana, the lead carrier, or assessments paid by the association members pursuant to 33-22-1513, MCA, may be used to fund the MACP.

(5) remains as proposed.

NEW RULE III (6.6.1910) ENROLLMENT CAPS AND OTHER FUNDING LIMITATIONS (1) remains as proposed.

(2) The MCHA board ~~and the lead carrier are~~ is responsible for setting an appropriate reserve for incurred but not reported claims, and for monitoring the financial condition of the MACP pool. The lead carrier is responsible for giving complete and accurate financial and claims payment information, including, but not limited to, appropriate financial projections and a projection of incurred but not

reported claims, as required by the board to enable it to set appropriate reserves. The board shall submit a financial report for the MACP to the commissioner once every quarter, or more often if necessary, or if requested by the commissioner. The first quarterly report must be submitted on October 31, 2010.

(3) through (4)(b)(i) remain as proposed.

(A) pay the same rates as other similarly situated individuals covered under that association plan;

(B) through (C)(ii) remain as proposed.

(5) Any federal grant money that is left in reserve after the MACP terminates coverage and all claims have been paid will revert to the federal government. Any premium money that remains in reserve for the MACP after all final claims and other final expenses have been paid will be paid out in the following manner, as allocated by the board and the commissioner:

(a) to the MCHA association plan, if MCAP members have been transferred to that plan as a result of a closure of the MCAP for solvency reasons; and/or

(b) to individual premium payers on a pro rata basis, who were covered by the MACP at the time it closed.

5. The department has thoroughly considered two written comments received by mail and e-mail. There were no comments made at the hearing. A summary of the comments received and the department's responses are as follows:

COMMENT 1: Blue Cross Blue Shield of Montana (BCBSMT) recommended that the second sentence in New Rule I (ARM 6.6.1907(4)) be amended to clarify that no funding from the lead carrier may be used to fund the MACP.

RESPONSE 1: The department has made that change.

COMMENT 2: BCBSMT stated that the lead carrier acts as the claims administrator and does not have authority to make decisions on behalf of the MCHA or the MACP pool. Therefore, that commenter recommended that the term "lead carrier" be removed from the first sentence of New Rule III (ARM 6.6.1910(2)), which currently states that "the MCHA board and the lead carrier are responsible for setting an appropriate reserve for incurred but not reported claims, and for monitoring the financial condition of the MACP pool."

RESPONSE 2: The department has removed the term "lead carrier" from that sentence, but has added a sentence that clarifies that the lead carrier is responsible for giving complete financial and claims payment information necessary for setting appropriate reserves, including, but not limited to, appropriate financial projections and a projection of incurred but not reported claims.

COMMENT 3: BCBSMT stated that New Rule III (ARM 6.6.1910(4)(b)(i)(A)), which provides as follows: "If termination of coverage is approved, covered individuals will receive:[…] (b) an opportunity to enroll in one of the association plans, with no break in coverage.

(i) Individuals who move to an association plan will:

(A) pay the same rates as other individuals covered under that association plan;"

should be amended to add the term, "similarly situated" before the word "individuals" in (A).

RESPONSE 3: The department has made that change.

COMMENT 4: The commenter from the Montana Logging Association stated that the rules should address the issue of what will happen to any money left in reserves after the MACP ends in 2014.

RESPONSE 4: The federal funding allocated to the Montana pool can only be drawn down as needed to pay claims and other necessary expenses. Any federal money that is "left over" when this coverage ends will revert to the federal government. However, the department has added language to New Rule III (ARM 6.6.1910) indicating what will happen to any premium money that might be left in reserves after all claims and other expenses are paid, and the MACP terminates coverage (see ARM 6.6.1910(5)). The department has no reason to anticipate any serious problem with "surplus" funding. The loss ratio for this program is projected to exceed the premium collected.

COMMENT 5: BCBSMT states that the language in New Rule III (4)(b)(i)(C) and (ii) should be eliminated. That language provides that, if coverage in the MACP is terminated prematurely for solvency reasons, the individuals covered under the MACP will be allowed to move to the MCHA association plan and will be:

"(C) be given full credit for any annual out-of-pocket expenses already met in the MACP.

(ii) No preexisting condition exclusions will be applied to individuals from the MACP who transfer to an association plan because their coverage was terminated under the provisions of this rule."

BCBSMT argues that these provisions conflict with New Rule I which states that no assessment money from association members will be used to fund the MACP. It believes that giving credit for out-of-pocket expenses incurred in the calendar year under MACP coverage and waiving a preexisting exclusionary period would cost the association money.

BCBSMT further argues that these requirements "discriminate against members who are covered (or individuals applying for coverage) under the other association plans, who are not coming from the MACP."

RESPONSE 5: The department disagrees. Should the MACP be terminated early for solvency reasons, the financial effect on the MCHA is anticipated to be minimal or nonexistent. Further, it is important to note that MCHA board members and other interested parties reviewed these rules in draft form and then again after the rules were published. The MCHA board as a whole did not raise these issues.

The plans operated by the MCHA consist of many different categories of eligible individuals, all of whom have different eligibility requirements and often different preexisting condition exclusion periods ["preexisting periods"]. For instance, a TAA-eligible individual has no preexisting period, and federal and state law requires only three months of prior creditable coverage. Other federally eligible individuals must have 18 months of prior creditable coverage in order to be eligible for the same coverage (portability). The MCHA board has decided that persons eligible for the premium assistance program will have a four-month preexisting condition exclusionary period, even though other members of the traditional association plan [traditional plan] have a 12-month preexisting period. Other members of the traditional plan who qualify because their individual health insurance premiums were too high have no preexisting period, if they have 12 months qualifying previous coverage with no more than a 30-day break in coverage.

The MACP eligible individuals have certain eligibility requirements that no other individuals insured by the MCHA have to meet, such as proof of citizenship and no prior insurance for at least six months. The federal law created this new class of eligible individuals and also mandated that no preexisting period be imposed on them. In the unlikely event that MACP terminates for solvency reasons, these individuals may receive only 30 days notice, while other privately insured individuals, including those in the other association plans, may be required by law to receive 180 days notice. The reality is the vast majority of the individuals who might transfer to the association plan in the event of a premature closure of the MACP would have at least 12 months of prior coverage in any event and would be legally entitled to a waiver of the preexisting period under existing law. [33-22-242, MCA] Therefore, the fiscal impact on the association would be minimal. Currently, if a private health insurer in the individual market becomes insolvent or withdraws from the market, those individuals are allowed to enter the MCHA plan, if they meet one of the eligibility requirements, with no preexisting periods, or at least full credit for all their prior coverage.

Furthermore, the board and the commissioner will be monitoring solvency closely. In the unlikely event that a premature closure for solvency reasons occurs, the closure of the pool may be timed to coincide with the end of the calendar year.

The claims for the MACP, including the incurred but not reported claims, will not be transferred to the other MCHA plans. Once the individuals formerly covered by the MACP transfer to the traditional plan, their premiums and new claims would be included in the loss calculations going forward. Furthermore, their premiums would increase to the level of the other participants of the traditional plan, and any remaining premium dollars left after run out of the MACP claims may be transferred to the MCHA. Also, these individuals are "uninsurable" like the other members of the MCHA traditional plan. The protections proposed in this rule, which BCBSMT seeks to eliminate, were designed to protect these individuals if they had to face loss of coverage with only 30 days notice. Therefore, the department disagrees that the costs and expenses of the MACP would be transferred to the MCHA.

With regard to the out-of-pocket expenses, the federal rules for eligibility for the MACP, restated in these rules, require that the maximum out-of-pocket expenses for this class of eligible individuals be restricted to $5950 per calendar year. When coverage is transferred to the traditional plan, those individuals will be subject to the maximum out-of-pocket expenses applicable to the new plan they chose. Again, the rule requiring credit for previously paid out-of-pocket expenses for that calendar year will help smooth the transition for these individuals because of the extremely limited notice they may receive. Enrollment in the MACP will be capped, and the number of individuals who choose to transfer may be small. In most cases, termination of coverage could be timed with the end of a calendar year, and the financial effect on the MCHA for this one-time credit would be minimal or nonexistent.

Accordingly, the department will not remove the provisions of New Rule III (6.6.1910(4)(b)(i)(C) and (ii)).

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

/s/ Robert W. Moon
Robert W. Moon
Deputy Insurance Commissioner

Certified to the Secretary of State June 14, 2010.

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

In the matter of the amendment of ARM 8.111.602 pertaining to the low income housing tax credit program	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 15, 2010, the Department of Commerce published MAR Notice No. 8-111-82 pertaining to the proposed amendment of the above-stated rule at page 814 of the 2010 Montana Administrative Register, Issue Number 7.

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

3. No comments or testimony were received.

/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 June 14, 2010.

BEFORE THE MONTANA STATE LIBRARY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 10.102.1150A, 10.102.1150B, 10.102.1150C, 10.102.1150D, 10.102.1150E, 10.102.1150F, 10.102.1150G, 10.102.1150H, 10.102.1150I, 10.102.1150J, 10.102.1150K, 10.102.1150L, 10.102.1150M and 10.102.1157 pertaining to library standards	)	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 29, 2010 the Montana State Library published MAR Notice No. 10-100-101 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 958 of the 2010 Montana Administrative Register, Issue Number 8.

2. The department has amended the following rules as proposed: ARM 10.102.1150B, 10.102.1150C, 10.102.1150D, 10.102.1150E, 10.102.1150F, 10.102.1150G, 10.102.1150H, 10.102.1150I, 10.102.1150J, 10.102.1150K, 10.102.1150L, 10.102.1150M and 10.102.1157.

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

10.102.1150A PUBLIC LIBRARY STANDARDS: GENERAL (1) through (2)(b) remain the same.

(c) Monthly, or at least ~~every other month~~ six meetings a year with no gap between meetings greater than 90 days, library board meetings are held in an accessible location at times and a place convenient to the public and according to state laws on public meetings; and

(d) through (4) remain the same.

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

COMMENT #1: Commenters supported changing the quarterly meeting requirement for library boards to a lesser time frame; but, actually felt that requiring six meetings a year would be better to accommodate those that don't meet throughout the summer or that have several meetings closer together during the budget process.

RESPONSE #1: We agree that in some instances a larger period of time between meetings might be needed. However, we still feel strongly that meeting more than quarterly is very beneficial. Therefore, the amended standard will require six meetings a year with no more than a 90-day gap between meetings in order to allow some flexibility; but, still address the original concerns.

/s/ Darlene Staffeldt
Darlene Staffeldt
Rule Reviewer

/s/ Donald Allen
Donald Allen
Chairman
Montana State Library

Certified to the Secretary of State June 14, 2010.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.56.506, 17.56.507, 17.56.607, 17.56.608 pertaining to reporting of confirmed releases, adoption by reference, and release categorization	)))))	NOTICE OF AMENDMENT (UNDERGROUND STORAGE TANKS)

TO: All Concerned Persons

1. On January 14, 2010, the Department of Environmental Quality published MAR Notice No. 17-300 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 12, 2010 Montana Administrative Register, issue number 1.

2. The department has adopted the rule amendments exactly as proposed. The department has adopted the Montana Tier 1 Risk-Based Corrective Action Guidance for Petroleum Releases with only one general modification. It has come to the department's attention that on pages 14, 15, and 16 of the proposed Montana Tier 1 Risk-Based Corrective Action Guidance for Petroleum Releases, the explanatory narrative incorrectly indicates that certain numeric screening levels are based on beneficial use (aesthetic) protection. However, the tables themselves clearly indicate that no screening level is based on beneficial use protection. Therefore, the department corrected this language in the narrative. All screening levels are adopted as proposed.

3. The following comments were received and appear with the department's responses:

COMMENT NO. 1: The commentor opposes the addition of Table D-RCRA Metals Screening Levels on page 12 of Montana Tier 1 Risk-Based Corrective Action (RBCA) Guidance for Petroleum Releases. The commentor believes further evaluation of petroleum releases based upon exceedances of the aforementioned screening levels could add significant cost to petroleum release site assessments due to the need for additional laboratory analyses. The commentor states that it is unnecessary to include screening levels for all the RCRA metals when the only metal of concern at petroleum release sites is lead. The commentor further asserts that, if the cleanup process must include removal of all lead contaminants, it will take longer, require more resources, subject both tank owners and the Petroleum Tank Release Cleanup Fund to additional costs, and that the department is over-reaching by incorporating screening levels for RCRA metals in Montana Tier 1 RBCA Guidance for Petroleum Releases.

RESPONSE: The department elected to incorporate screening levels for RCRA metals in Montana Tier 1 RBCA based on historical occurrences of metals in waste oil, and documented past practices of disposing of non-petroleum waste in facility waste oil tanks. The inclusion of Table D in RBCA does not suggest that all

eight RCRA metals need to be analyzed in all sampling conducted in response to all petroleum releases at all facilities. For example, sampling for RCRA metals is not indicated when the source of contamination is known and it is not from a used/waste oil tank. When analytical results from screening samples at sites with known or suspected waste oil contamination do not detect RCRA metals above the Table D screening levels, additional sampling for the listed RCRA metals will not be required. Upon exceedance of a screening level for one or more RCRA metals, the department must be consulted to determine whether further evaluation for RCRA metals is appropriate.

Table A in Montana Tier 1 RBCA states RCRA metal analyses are required when assessing facilities contaminated with used (waste) oil or unknown oil sources. RCRA metals are not normally anticipated at typical petroleum storage tank facilities, and the department does not require metal analyses when there is no indication that metals may be present. Previous versions of RBCA contained these testing requirements, but did not specifically list screening levels for RCRA metals, now listed in Table D. The department finds it necessary to list screening levels for the eight RCRA metals in the Montana Tier 1 RBCA document so that when RCRA metals are analyzed at used/waste oil sites or at sites contaminated with oil from unknown sources, the screening levels are available in one place.

COMMENT NO. 2: The commentor objects to the department's representation that modeling parameters used to establish screening levels are based on statewide conditions. As an example, the commentor refers to the department's statements that the Montana Tier 1 RBCA Guidance for petroleum releases provides risk-based screening levels relied upon by the department to confirm the existence of a release of petroleum, and RBCA sets soil screening levels using input modeling parameters "representative or estimated statewide conditions." The commentor points out that the model actually relies on top horizontal boundary percolation rates of 2.5×10^{-4} meters per day, and that this percolation rate corresponds to Kalispell, which is not representative of estimated statewide conditions. See Montana Tier 1 RBCA, Appendix D, Soil Leaching to Groundwater Modeling. The commentor then points out that percolation rates were examined for six Montana cities (Billings, Great Falls, Havre, Helena, Kalispell, and Miles City), which resulted in a range of rates from 8.3 cm/yr (Kalispell) to 3.8 cm/yr (Helena). The department chose the most conservative of these percolation rates, not a rate that is representative of statewide conditions. The commentor states that this is one of many modal parameters for which a conservative parameter was used to arrive at a tabulated risk-based screening level and not a parameter that is "representative of estimated statewide conditions." The commentor states that "if the department is representing to the public that they are using parameters representative of estimated statewide conditions, then that, in fact, is what they should be using." The commentor agrees that parameters should be representative of statewide conditions so that more representative screening levels may be developed and used to screen and address petroleum contamination in the state.

RESPONSE: It is true that the current and proposed Montana Tier I RBCA screening levels were established using input modeling parameters representative of estimated statewide parameters. In other words, the department estimated the

data for the various conditions that exist around the state. However, this does not mean that the department then averaged the estimated data. Rather, to establish the screening levels, the department used the most protective estimates to avoid underestimation of the risk to receptors. Only by using this conservative methodology can the screening levels achieve their purpose--to provide a level of contamination that can be applied to a site anywhere in the state to determine that there is not an unacceptable risk at the site.

It is true that the risk at some sites will be overestimated. However, when appropriate, and with department approval, petroleum storage tank owners and operators may use parameters that are tailored to specific site conditions to evaluate risks. See ARM 17.56.607(4)(b)(ii) of these rule amendments.

COMMENT NO. 3: The commentor opposes using screening levels for carcinogens that are based on $1x10^{-6}$. The commentor states that the department is developing a rule that is more stringent than the statutory requirement at 75-5-301, MCA, that state water quality standards for protection of human health must not exceed $1x10^{-5}$ for carcinogens other than arsenic. The commentor states that the department has provided no evidence demonstrating that chemical constituents found in petroleum products produce a cumulative carcinogenic risk. The commentor recommends that the department establish screening levels based on a risk level of $1x10^{-5}$ for carcinogens so as to be consistent with 75-5-301, MCA, and avoid risking level challenge of the proposed rules.

RESPONSE: When cleanup levels are calculated, ARM 17.56.607(4)(b) allows for an increased cumulative cancer risk level of $1x10^{-5}$. This is consistent with 75-5-301, MCA, which provides that state water quality standards for protection of human health must not exceed $1x10^{-5}$ for carcinogens other than arsenic. However, at the initial stage of evaluating a site, it is appropriate to use screening levels based on a $1x10^{-6}$ risk level to determine whether a site warrants further evaluation or response because at the time that screening is done, it is probable that the department will not know how many carcinogenic substances exist at the site. Therefore, comparing each hazardous or deleterious substance against a $1x10^{-6}$ screening level will help ensure that the cumulative risk from the site does not exceed $1x10^{-5}$ and is consistent with acceptable risk levels established by statute.

COMMENT NO. 4: The commentor believes the department is attempting to establish guidance for "vapor intrusion" which has not yet been established by the Environmental Protection Agency for potential releases of petroleum. The department should not establish standards that are more stringent than what the federal guidance may be. This could result in huge costs to the Petroleum Tank Release Compensation Fund through increased sampling and analysis requirements. The commentor recommends that the department not establish vapor intrusion standards until the EPA has published its guidance to the states.

RESPONSE: The proposed RBCA does not set vapor intrusion standards. The department currently uses inhalation risk factors to determine whether the vapor intrusion exposure pathway is complete and, if so, whether it may pose an unacceptable risk to human health. A complete pathway means that humans are exposed to vapors originating from site contamination, either from volatilization from

impacted soil, impacted ground water, or both. Calculations to assess the risks to human health from this exposure pathway have been incorporated in previous versions of RBCA. However, the method has been modified in the current version to be consistent with EPA's approach presented in "Risk Assessment Guidance for Superfund, Volume I: Human Health Evaluation Manual (Part F, Supplemental Guidance for Inhalation Risk Assessment) (EPA, January 2009)."

Reviewed by: DEPARTMENT OF ENVIRONMENTAL QUALITY

/s/ James M. Madden By: */s/ Richard H. Opper*
JAMES M. MADDEN RICHARD H. OPPER, DIRECTOR
Rule Reviewer

Certified to the Secretary of State, June 14, 2010.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
AND THE BOARD OF MEDICAL EXAMINERS
STATE OF MONTANA

In the matter of the amendment of ARM 24.156.617 and 24.156.618, medical examiners-licensure	)))	CORRECTED NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On September 24, 2009, the Board of Medical Examiners (board) published MAR notice no. 24-156-72 regarding the proposed amendment of the above-stated rules, at page 1610 of the 2009 Montana Administrative Register, issue no. 18. On January 14, 2010, the board published the notice of amendment of MAR notice no. 24-156-72 at page 73 of the 2010 Montana Administrative Register, issue no. 1.

2. On December 10, 2009, the Department of Labor and Industry (department) and the board published MAR notice no. 24-156-73 regarding the proposed amendment of the above-stated rules, at page 2340 of the 2009 Montana Administrative Register, issue no. 23. On May 13, 2010, the department and board published the notice of amendment of MAR notice no. 24-156-73 at page 1187 of the 2010 Montana Administrative Register, issue no. 9.

3. When preparing replacement pages for the second quarter, it was discovered that a filing overlap had occurred between the above-stated notices. At the time the notices were being prepared for MAR 24-156-73, the replacement pages for MAR 24-156-72 were still in the review process from the first quarter filing. Thus, adjustments need to be made for the second quarter replacement pages to incorporate changes to rules that were finalized in the first quarter. The rules, as amended, read as follows:

24.156.617 LICENSE CATEGORIES (1) If the board determines that an applicant or licensee possesses the qualifications for licensure required under Title 37, chapter 3, MCA, the board may instruct the department to issue licenses in the following categories:

(a) active license;
(b) inactive license;
(c) inactive-retired license; or
(d) limited temporary (resident).

(2) An active license is required for a physician actively practicing medicine in this state at any time during the renewal period.

(a) The term "actively practicing medicine" means the exercise of any activity or process identified in 37-3-102, MCA.

(3) An active license is required for a physician participating in the Montana health corps.

(4) An inactive license may be obtained by a physician who is not actively practicing medicine in this state, and does not intend to actively practice medicine in this state at any time during the current renewal period, but may wish to reactivate in the next renewal period.

(a) To renew a license on inactive status, a physician must pay a fee prescribed by the board, and complete the renewal prior to the date set by ARM 24.101.413.

(5) An inactive-retired license may be obtained by an applicant or licensed physician who is not actively practicing medicine in this state and does not intend ever to practice medicine in this state in the future.

(a) An inactive-retired license must be renewed by the renewal date set in ARM 24.101.413.

(b) If both the renewal fee and completed renewal are not returned prior to the date specified in ARM 24.101.413, the physician must pay the late penalty fee specified in ARM 24.101.403 in order to renew the license.

AUTH: 37-1-131, 37-1-319, 37-3-203, 37-3-802, 37-3-804, MCA
IMP: 37-1-131, 37-1-141, 37-1-319, 37-3-304, 37-3-305, 37-3-802, 37-3-804, MCA

24.156.618 TESTING REQUIREMENT (1) A physician seeking to reactivate a license which has been inactive for the two or more years preceding the request for reactivation must pass the special purpose examination given by the Federation of State Medical Boards.

(2) A physician seeking to participate in the Montana health corps and holding an active license must pass the special purpose examination given by the Federation of State Medical Boards if the physician has not actively practiced medicine for two or more years preceding the health corps application date.

AUTH: 37-1-319, 37-3-203, 37-3-802, MCA
IMP: 37-1-319, 37-3-101, 37-3-202, 37-3-802, MCA

4. The corrected replacement pages for ARM 24.156.617 and 24.156.618 will be submitted for the second quarter to the Secretary of State's office on June 30, 2010.

BOARD OF MEDICAL EXAMINERS
DR. JAMES UPCHURCH, PHYSICIAN,
CHAIRPERSON

/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 June 14, 2010

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

In the matter of the amendment of ARM 24.189.301 definitions, 24.189.607 supervisory experience, and 24.189.2104 and 24.189.2107 pertaining to continuing education	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On February 11, 2010, the Board of Psychologists (board) published MAR notice no. 24-189-32 regarding the public hearing on the proposed amendment of the above-stated rules, at page 302 of the 2010 Montana Administrative Register, issue no. 3.

2. On March 4, 2010, a public hearing was held on the proposed amendment of the above-stated rules in Helena. Several comments were received by the March 12, 2010, deadline.

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

ALL COMMENTS PERTAIN TO ARM 24.189.301:

COMMENT 1: One commenter opposed the proposed amendments to the definition of "one year's academic residency" stating that there has been no scientific or anecdotal evidence that clearly demonstrates the need to amend the current definition. The commenter also stated there is no proof that any Montana licensed psychologists who were trained under the present definition are compromising the quality of psychologists in Montana.

RESPONSE 1: The board acknowledges that while there may be no proof or scientific studies indicating that applicants trained online are a problem, the board also notes that there are no studies or scientific evidence to prove in the other direction. There is just no data and this comment is not relevant to the proposed rule change. The proposed amendment is not proposed to address practice complaint issues. The board proposed this amendment to clarify the definition because some applicants do not appear to understand what is meant by "one year's academic residency". The board determined it is necessary to clarify this definition for students as well, so they can be clear on the licensing requirements, prior to choosing an educational program. This rule amendment is about the board's belief as to what is necessary to have a solid, well-rounded, minimally adequate education in psychology, so as to adequately protect the public.

COMMENT 2: A commenter opposed the amendment to ARM 24.189.301, stating it is unclear whether the new rule would apply to pending applications or those applicants still completing their postdoctoral training. The commenter stated that the proposed rule would "unjustly burden" students who have relied upon the current rule and would prevent students who already have their doctorates from taking additional residency credits or transferring to a different school.

RESPONSE 2: The board reiterates that this is a necessary clarification of the standard that the board has had in place for some years. The board reviews individual applications in accordance with the statutes and administrative rules in effect at the time of the board's review. The board notes that residency is part of the doctoral degree and not something that is added on after a degree is obtained and that nothing prevents someone from transferring to a different school.

COMMENT 3: One commenter opined that the reasonable necessity statement does not adequately justify the proposed amendments and would not withstand judicial scrutiny, because the board did not state that the current rule is unworkable, or that unqualified applicants have been presented to the board. The commenter also pointed out that the board has not discussed studies that address why the changes are necessary, nor alternatives considered by professional groups or other licensing boards.

RESPONSE 3: The board notes that the reasonable necessity requirements of the Montana Administrative Procedure Act (MAPA) have been met. The board is amending this rule to further clarify an existing statute which directs the board to define minimum standards for licensure in rule. The amendment is necessary to clarify an existing definition in the minimum standards rule. The board notes that obtaining alternatives from professional groups or other licensing boards is not required for rulemaking.

COMMENT 4: One commenter asked why the board did not address that the American Psychological Association's (APA) accreditation standards do not require the type of residency contained in the proposed definition.

RESPONSE 4: The board notes that psychologists deal with the most complex and vulnerable people, and complicated ethical issues such as duty to warn and involuntary commitment. These types of skills require hands-on training. This proposed amendment is a clarification of the existing residency definition and not a change in the residency requirements. In 2007, this board authored a letter to the APA supporting the board's belief in the necessity of physical presence for residency. The board also notes that a recent document from the APA Committee on Accreditation describing the primary purposes of residency mirrors the concepts of this rule with the proposed amendments.

COMMENT 5: A commenter opposed the proposed changes to the residency definition saying that they "effectively outlaw online and distance learning activities" for people seeking licensure as psychologists in Montana. The commenter also

stated that the board has not provided any studies showing that individuals with graduate credentials through online or distance learning are any less capable or competent than those who attended a conventional brick-and-mortar institution.

RESPONSE 5: The board disagrees with the statement that the rule change outlaws all online and distance learning. Some distance learning for some types of academic material is fine, but other areas of competence must be assessed by working closely with professors, supervisors, and other students over time. Continuous time together is necessary to assess professional development, emotional stability and well-being, and interpersonal competence of those psychologists obtaining a doctoral degree. These areas must be monitored on a continuous basis for a duration of time. This rule requires only one year of on-site residency. The board has not taken a position against online education. The board discussed the comment that there is no proof or scientific studies that applicants trained online are a problem. It was noted that there are no studies or scientific evidence to prove in the other direction, either. There is just no data and this comment is not relevant to the proposed rule change.

4. The board has amended ARM 24.189.301, 24.189.607, 24.189.2104, and 24.189.2107 exactly as proposed.

BOARD OF PSYCHOLOGISTS
GEORGE WATSON, PhD., CHAIRPERSON

/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 June 14, 2010

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

In the matter of the amendment of ARM 37.87.1202 and 37.87.1206 pertaining to Medicaid reimbursement for psychiatric residential treatment facility (PRTF) services	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 15, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-502 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 862 of the 2010 Montana Administrative Register, Issue Number 7.

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

3. No comments or testimony were received.

4. The department intends to apply these rules retroactively effective February 1, 2010. A retroactive application of the proposed rules does not result in a negative impact to any affected party.

/s/ John Koch
Rule Reviewer

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

Certified to the Secretary of State June 14, 2010.

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

In the matter of the adoption of New Rule I and the amendment of ARM 37.86.2207, 37.87.733, 37.87.809, 37.87.903, and 37.87.2233 pertaining to Medicaid reimbursement of children's mental health services	))))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On April 15, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-503 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 866 of the 2010 Montana Administrative Register, Issue Number 7.

2. The department has adopted New Rule I (37.87.901) as proposed. The department has amended the above-stated rules as proposed.

3. After MAR Notice 37-503 was filed with the Secretary of State on April 15, 2010, the department made some changes to the Children's Mental Health Bureau's Provider Manual and Clinical Guidelines for Utilization Management (provider manual) for clarification. The psychiatric residential treatment facility (PRTF) waiver admission criteria was changed to align with the approved Centers for Medicare and Medicaid Services (CMS) waiver amendment and the enrollment criteria was changed because it was inaccurate. Enrollment does not start with a referral to the plan manager or provider.

On the list of required forms in the provider manual, some forms have been renamed or consolidated and two new forms have been added. The forms themselves are not part of the manual or administrative rules, but the names are. One new form is the Discharge Plan Review form, required with continued stay request at PRTF level of care; the second new form is an Administrative Review Request form. The form is consistent with administrative rules and we encourage, but do not require its use. In the administrative review section of the manual, the department clarified that both the provider and the legal custodian have a right to request an administrative review. Coordination and collaboration between them for a review is encouraged.

The other form changes were: (1) Separating prior authorization of community-based psychiatric rehabilitation and support (CBPRS) concurrent with comprehensive school and community treatment (CSCT) from partial hospital (PHP), day treatment (Day Tx), and therapeutic group home (TGH). The form is not new, however it has a new name and is described in the provider manual. (2) The department combined the PRTF and PRTF-AS (Assessment) forms. (3) The department renamed the therapeutic home visit (THV) form. The number of forms

was reduced from 31 to 28. The department corrected the required forms list at the end of the services sections to align with the names on the list in section 6 and with the instructions in the manual.

In a couple of cases, the department aligned more closely the clinical guidelines in the manual with the forms. The department clarified the lead clinical staff in a TGH or the program therapist in a Day Tx, CSCT, or PHP with direct knowledge of the youth needs to complete the CBPRS prior authorization request, while youth are in these programs. The department clarified that the prior authorization request for outpatient therapy concurrent with CSCT is a separate authorization process from the request for more than 24 outpatient sessions in a state fiscal year (SFY). The department clarified therapeutic home visits beyond three days must be prior authorized. The department also clarified that continued stay reviews may be requested "no more than ten business days prior to the end of the current authorization span", and no less than five business days.

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

COMMENT #1: A commenter indicated that the changes to New Rule I (37.87.901) regarding the concurrent approval of outpatient therapy for youth enrolled in CSCT will be efficient, provide better integration of services, assure both services are warranted, and require the CSCT providers to work closely with community therapists.

RESPONSE #1: The department assumes the commenter is referring to the Medicaid Mental Health and Mental Health Services Plan for Youth Services Excluded from Simultaneous Reimbursement (service matrix) moved to New Rule I (37.87.901) and agrees. However, requiring prior authorization of outpatient therapy on the same day as CSCT is not a new requirement.

COMMENT #2: Healthy Montana Kids (HMK) extended coverage allows for community-based psychiatric rehabilitation and support services CBPRS to be billed for CSCT services provided during the day. This is supportive to children and families and helps improve outcomes. The commenter would like to see this practice continued and allow CSCT providers to bill CBPRS during school hours.

RESPONSE #2: The department assumes the commenter is referring to the service matrix and the new language "When CBPRS is authorized to be reimbursed on the same day as CSCT, CBPRS may not be provided during school hours." The department will not make this proposed change to the service matrix and will remove the proposed language, as CBPRS is allowed in CSCT when prior authorized per ARM 37.87.703. CSCT is not a covered benefit under Healthy Montana Kids (CHIP) program. CSCT is a covered benefit under Healthy Montana Kids Plus (Medicaid program).

COMMENT #3: We believe the language on the service matrix about CBPRS services "during school hours" is not needed. Clarification that this restriction applies only to youth receiving CSCT services should be included. Currently there are schools without CSCT services where CBPRS is authorized during school hours. The state recently allowed CBPRS during school hours for children covered through HMK. This is the right thing to do for kids. It allows for continuation of services from what is happening in the school to follow through in the home, and has high quality outcomes.

We have attached the March 5, 2010 HMK memo describing this policy change. We would like to have clarification of the definitions for HMK and HMK Plus in relationship to the Basic and Extended Mental Health Plan of services.

RESPONSE #3: See response #2. The service matrix does not address CBPRS and whether it can be provided in school. The service matrix identifies mental health services that may duplicate one another if provided on the same day without prior authorization.

A clarification of the definitions for HMK, HMK Plus in relationship to the basic and extended mental health plan of services will not be done as a part of this rule notice because it is outside the scope of the proposed rule changes. Questions outside the scope of the proposed rule changes should be directed to the Children's Mental Health Bureau.

COMMENT #4: Several commenters recommend that targeted case management (TCM) services be allowed for youth in a PRTF in the matrix for Services Excluded from Simultaneous Reimbursement. Not allowing TCM services complicates discharge planning for the youth. Youth are often placed in a PRTF many miles from their home and it is difficult to engage community agencies in developing a plan for the return of the youth without TCM to the home or community placement. This is particularly frustrating since the Centers for Medicare and Medicaid Services (CMS) has reversed their position on this issue and allow Medicaid funding for TCM services for youth in a PRTF.

RESPONSE #4: Adding TCM and PRTF services to the service matrix were for clarification purposes only. TCM services for youth in a PRTF is not allowed per ARM 37.87.1222.

COMMENT #5: A commenter indicated there may be unintended consequences in the service matrix by not allowing outpatient therapy with CSCT. This could disallow evaluations conducted by mental health centers if CSCT is being provided. Please look at codes 90801 and 90802 to assure if this is the intent of the department.

RESPONSE #5: The department assumes commenter is referring to the service matrix in New Rule I (37.87.901). Codes 90801 and 90802 are psychiatric diagnostic or evaluative interview procedures and not considered psychotherapy or outpatient therapy services, per our definition of outpatient therapy in ARM

37.87.102(10). The outpatient therapy or psychotherapy codes listed on the department's service matrix require prior authorization when provided on the same day as CSCT.

COMMENT #6: Many commenters object to the language which references the attributes of a private corporation on page 8 as inappropriate for a technical state government document.

RESPONSE #6: The department assumes commenter is referring to the provider manual in ARM 37.87.903 and the paragraph that starts out "As a pioneer in the management of Medicaid mental health and substance abuse treatment, ..." The department agrees, the paragraph will be taken out of the provider manual.

COMMENT #7: Prior authorization for CBPRS reimbursement requires two different types of authorization, one for group and one for individual. It would be helpful if this could be integrated into one step. The prior authorization process is difficult and takes almost an hour of staff time per request.

The time it takes to request authorization is not reimbursable and takes staff away from providing services. This defeats the purpose of being able to provide efficient services to clients.

RESPONSE #7: The department assumes the commenter is referring to the authorization requirements in the CBPRS section of the provider manual in ARM 37.87.903. The department will clarify the CBPRS authorization requirements in the CBPRS section. The department is not proposing a separate authorization processes for individual and group CBPRS. Prior authorization for CBPRS is required when provided on the same day as other children's mental health services identified on the service matrix in New Rule I (37.87.901).

COMMENT #8: A commenter has heard that CBPRS authorization will be capped at 210 units per month. This equates to 4.4 units per week. If this is the case, this is a disservice to some clients. There are children who will require more units than this arbitrary cap will allow. There are programs that offer afterschool and summer programs that are critical to the support of families and children. These programs provide solid outcomes in creating self-sufficiency of families and permanency for children. Having an arbitrary cap on units for CBPRS would devastate these programs and potentially close several of them. Parents could not function without afterschool and summer programs for children with this level of need. You would see placements break down and permanency lost. Is there a way to clarify the rules to allow enough hours for afterschool and summer programs? Could the number of units allowed for afterschool and nonschool days be treated differently?

RESPONSE #8: The department is not proposing a cap on the number of CBPRS units per month in administrative rule or the CBPRS section of the provider manual in ARM 37.87.903.

COMMENT #9: A commenter asks if the required behavioral assessment for CBPRS authorization could be completed by an in-training practitioner. Completing this will require extra time for which providers are not reimbursed. This defeats the purpose of being able to provide efficient services to clients. Will rates be adjusted to take this into account?

RESPONSE #9: The department assumes the commenter is referring to the CBPRS section of the provider manual in ARM 37.87.903. The department believes the behavior assessment must be completed by the lead clinical staff of a TGH or by the program therapist in a Day Tx or PHP program to get good clinical information on why a CBPRS aide is needed in addition to the program staff already required. Yes, an in-training practitioner may be used to complete the behavior assessment.

The commenter is correct, the time it takes to complete prior authorization requests is not a reimbursable activity. The CBPRS rate will not be adjusted. Administrative expenses are included in the reimbursement rate.

COMMENT #10: The conditions under which prior or continued authorization requirements may be waived by the department is too limited, only allowing for clinical or equipment failure reasons. Several commenters requested the department reconsider this narrow limitation, especially in the case of a continued authorization request that is missed by the provider because of human error. It is clear that the department's statutory responsibility is to determine medical necessity but it is not clear how taking this position is consistent with this role. This requirement seems like a management versus a medical necessity issue. If the youth meets medical necessity criteria the day the authorization runs out and meets medical necessity the day the authorization is renewed, the youth most likely met medical necessity criteria during the time span that was missed due to provider error. This requirement seems unreasonably punitive and unfair to the provider who has to absorb the cost of providing the treatment, when a continued authorization request is late. This seems more applicable to private insurance plans instead of an entitlement program like Medicaid. The commenter requests a limited time period be allowed for requests to be submitted and reviewed to accommodate these errors.

RESPONSE #10: The department assumes the commenter is referring to ARM 37.87.903. The department did not propose changes to the conditions under which prior authorization may be waived. Requiring continued authorizations intermittently is a management tool for checking whether or not a service continues to be medically necessary. Forgetting to request a continued authorization does occur on occasion, however the requirement is not new.

The word "continued" was added to ARM 37.87.903 to clarify that both initial and continued authorization requests must be submitted prior to the service being delivered for Medicaid reimbursement. The department believes the conditions in ARM 37.87.903 to waive authorization requirements remain appropriate.

COMMENT #11: In the provider manual, the statement "All required CON's must actually and personally be signed by each team member" seems contradictory or ambiguous to the statement that a minimum of two signatures are required. Does this means a CON can be signed by a physician and licensed mental health provider and meet the standard, or do all team members have to sign the CON? This statement needs clarification. Requiring every team member to sign the CON would create logistical challenges. The commenter requests the department permit the practitioner in training to sign the CON.

RESPONSE #11: The department assumes the commenter is referring to page 13, in section 2.2.1 of the provider manual, regarding the CON procedure. Yes, a CON can be signed by a physician and licensed mental health professional and meet the standard. Not all team members need to sign the CON. The department's CON requirements are based on the federal CON requirement for inpatient hospitalization.

Regarding the commenter's second recommendation, the department assumes the commenter is referring to an in-training mental health professional defined in ARM 37.87.702(3). The department does not believe in-training mental health professionals have enough experience to sign a CON. The CON is based on the professional's competence in diagnosis and treatment of mental illness, the youth's psychiatric condition and certifies other community services do not meet the youth's needs and the service is expected to improve the youth's condition.

COMMENT #12: Several commenters noted in the provider manual that most of the admission requirements for the clinical programs require that lower level interventions be tried and found insufficient to meet the youth's needs before the next level of treatment may be tried. Youth should not be placed in a level of care that is too restrictive. This approach requires youth to fail before they can access an appropriate service. The commenters request the department reword the clinical guidelines to allow for some flexibility, so youth can access appropriate treatment without having to start and fail at the lowest level. Sometimes it is obvious that they are not likely to succeed and requiring failure just prolongs the time it will take for them to get into the appropriate treatment. The commenters request the guidelines recognize the lack of available lower-level alternatives in some areas of the state. Since the clinical guidelines are being followed quite strictly, please reword them and allow more flexibility.

RESPONSE #12: The department, for the most part, did not propose changes to the admission criteria in the clinical guidelines in the provider manual. The department assumes the commenters' questions and recommendations pertain to all service admission criteria versus a specific service. The commenter is correct. The admission criteria for most services require outpatient interventions or less restrictive services to have been attempted and documented to be insufficient to meet the youth's needs and safety concerns or have failed to meet the youth's needs in the community setting. The admission criteria for each service was developed with an understanding of the specific service requirements and reimbursement in mind, as well as the clinical needs of youth with a serious emotional disturbance.

As indicated in section 5.0 of the provider manual, the utilization management contractor (UMC) uses the clinical guidelines strictly as guidelines along with their professional judgment about whether the medical necessity criteria is met. The guidelines do not prohibit a reviewer, under certain circumstances, from authorizing a higher level of care when less restrictive services have not been attempted.

COMMENT #13: Several commenters noted in the provider manual under Outpatient Therapy that practitioners in training (PITs) are not referenced as eligible providers. Other Medicaid rules (Licensed Mental Health Center) allow for this. It would be helpful and consistent with other rules to reference PITs in this section.

RESPONSE #13: The department assumes the commenter is referring to the outpatient therapy definition section in 5.8 and in-training mental health professionals as defined in Medicaid ARM 37.87.702(3). As commenter points out, Medicaid reimburses mental health centers for in-training mental health professional services. The department agrees with the recommendation and will add the following underlined language to this section.

> "Outpatient therapy services include individual, family, and group therapy in which psychotherapy and related services by a licensed mental health professional acting within the scope of the professional's license or a mental health center in-training mental health professional defined in ARM 37.87.702(3). Outpatient therapy services represent community-based treatment that incorporates Current Procedural Terminology (CPT) codes. Outpatient therapy services may only be provided by individuals licensed by the state of Montana or a mental health center in-training mental health professional. To be reimbursed for outpatient therapy services, the provider must be enrolled in Montana Medicaid."

COMMENT #14: A commenter recognizes the need to restrict eligibility for permanency level therapeutic family care to youth in foster care. This was the original intent of this level of care. The commenter has been successful in using this level of care for youth in birth, kinship, and post-adoptive families from needing higher levels of care and would like an option developed to provide this level of service to these families. Could this service be covered in the PRTF Waiver programs? Consider providing this level of service to these families. It has been proven in the past that if we do not intervene at this level when the child is still in the family, the child and family will continue to "fail up" for higher level of services and end up costing more in the long run.

RESPONSE #14: The department assumes commenter is referring to the Therapeutic Family Care section of the provider manual in ARM 37.87.903. The department wanted to clarify its policy that permanency level therapeutic family care may only be authorized in a foster home intended to support the placement in becoming an adoptive placement and not in a youth's biological or adoptive home.

In the near future the department will work with stakeholders and propose changes to the therapeutic family care administrative rules. In the mean time, moderate level therapeutic family care and CBPRS services are available. During these tight budgetary times, the department is not expanding services.

The PRTF Waiver program provides intensive in-home services similar to permanency level therapeutic family care. If permanency level therapeutic family care services were provided in the Waiver program, the program would follow the same rules governing the service as Medicaid.

COMMENT #15: Can a mental health center bill for respite services even if the child is not in the PRTF Waiver program?

RESPONSE #15: Yes, per the respite definition in ARM 37.87.2202.

5. The department intends for the adoption and amendment of these rules to be effective July 1, 2010.

/s/ John Koch
Rule Reviewer

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

Certified to the Secretary of State June 14, 2010.

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

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

TO: All Concerned Persons

1. On April 29, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-504 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 991 of the 2010 Montana Administrative Register, Issue Number 8.

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

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

2% Provider Rate Comments

COMMENT #1: Nursing facility representatives object to the department's proposal not to distribute the 2% rate increase appropriated for fiscal year 2011. Many specifically request that the 2% rate increase be distributed. The commenters state that the state general fund (GF) estimated ending fund balance for this biennium now exceeds the trigger included in the statute the Governor relied on to order this spending reduction. It is no longer necessary to implement this reduction.

RESPONSE #1: As of April 19, 2010, the date of this proposed rule amendment filing with the Secretary of State, there is a projected Montana GF budget deficit as that term is defined in 17-7-140(3), MCA for state fiscal year 2011. The Governor is required to implement a GF spending reduction plan, when projected state GF revenue projections, when compared to the appropriations for the biennium passed by the 2009 Legislature, may result in an ending fund balance below statutory limits. In accordance with the 17-7-140(3), MCA the Governor has implemented a 5% GF reduction plan. As part of the department's statutorily required spending reduction plan the appropriation for the 2% provider rates will not be implemented for nursing facility providers in fiscal year (FY) 2011.

Adequacy of Rates Comments

COMMENT #2: Nursing facilities need a 2% rate increase to cover increased costs for utilities, food, insurance, and other costs over which we have no control. Some facilities will experience rate cuts due to changes in the case mix indexes. The cost

of recruiting and retaining skilled employees is increasing. Being a highly regulated activity, nursing facilities have few places to cut costs. We will have no choice but to stop accepting residents who are eligible for Medicaid. Some facilities will have to cut staff hours or employment. This will have a detrimental effect on the quality of care we provide.

COMMENT #3: Nursing facilities face a unique problem among medical providers in that Medicaid is often more than 50% of the revenue stream. When Medicaid does not pay its share of treatment costs the burden is shifted onto private pay residents and, in some cases, local taxpayers.

COMMENT #4: Current rates for nursing facilities are about $12 per patient day less than the actual cost of care, and skilled nursing facility (SNF) market basket projections of inflation continue to be about 3% for FY 2011. This means that the gap between cost and rates will increase to about $17 per patient day for FY 2011. Costs for FY 2011 are projected to be about $179.15 per patient day while the rate is $161.58 (without direct care wage (DCW) and Intergovernmental Transfer (IGT) program).

COMMENT #5: The bottom line is that Montana's nursing facilities provide care to our most vulnerable elderly people who can no longer care for themselves. Because so many of those we care for are on Medicaid, and because the state has accepted responsibility for those on Medicaid, the state is our partner in assuring that these people get good care. Our ability to hire enough staff and to pay them a living wage, as well as our ability to pay our other expenses, is all dependent on whether the state pays us enough to get the job done. The state is shirking its responsibility to the elderly in our nursing facilities when it fails to provide adequate funding.

RESPONSE #2, #3, #4, and #5: Federal laws or regulations do not mandate that established Medicaid rates must cover all of the actual costs incurred by nursing facility providers. This is not a standard by which the legal adequacy of rates has been measured in the past nor is it the standard that will be utilized in the future.

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

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

Montana contracts with Myers and Stauffer LC to prepare an annual analysis of each nursing facility's cost of providing nursing facility services to Medicaid recipients, and each facility's reimbursement rate. The analysis provides the department with an evaluation tool as to the adequacy of the statewide pricing for Montana nursing facilities and has done so since 2002. The annual rate to cost analysis that is preformed for the rate setting process indicates for state fiscal year 2009 that Montana's Medicaid day-weighted average total rate that includes all supplemental payments (IGT and DCWs) was $164.32 compared to the Medicaid inflated cost of $172.61, or that on average Medicaid is covering approximately 95% of cost through the various forms of reimbursement to nursing facility providers.

Montana nursing facilities will continue to receive increases from DCW funding that is separate from the 2% provider rate increase funding, and will continue to participate and benefit from the IGT that provides supplemental payments in addition to the Medicaid payment rate set through the reimbursement methodology during fiscal year 2011. The DCW program provides funding separately from the reimbursement rate calculation, to help facilities provide wage increases to its direct care workforce and will provide over $5.7 million dollars in ongoing funding during this fiscal year that can only be used to provide for lump-sum bonus or wage payments to direct care workers. The IGT program provides funding separately to both county and noncounty facilities. County nursing facilities receive total combined funding from Medicaid reimbursement, to the upper payment limit (UPL) or at a minimum a net gain of $5 per day, while noncounty facilities receive IGT funding of almost $2 per day in addition to their reimbursement rates and direct care wage funds to support their Medicaid residents.

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

Acuity Comments

COMMENT #6: The overall acuity of Medicaid residents from FY 2010 to FY 2011 has increased, meaning these residents require more care and more resources. However, no funding was added to account for the increase in acuity. This is an increase that is separate from general inflation and should be paid for regardless of whether there is an inflationary rate increase. The nursing component of the rate did not take into account the increased cost of providing nursing care to residents, nor did it take into account the increased acuity of the residents. The rate spreadsheets reflect rate reductions for approximately half of the nursing facilities providing care to

Medicaid residents due to changes in the case mix indexes. This relates to the operation of the case mix index in the reimbursement formula, which is designed to compensate facilities according to the acuity of the Medicaid residents they serve.

COMMENT #7: The department proposes to update the changes in case mix values without adding funding. This means that some facilities will actually receive less money from Medicaid, while others will receive additional funding. We recommend that the department approve a rate increase for those facilities that have increased patient acuity. We ask that the department freeze those per day rates that would otherwise drop due to a decrease in patient acuity. This policy represents a small concession to those facilities that will face a very difficult time cutting staff or costs. Such an action should not require substantial state GF.

COMMENT #8: Nursing facilities continue to experience increased acuities for residents' conditions. This requires increased levels of care and services. Medicaid rate cuts are not consistent with this trend.

RESPONSE #6, #7, and #8: Currently, nursing facilities are reimbursed under a case mix price-based system of reimbursement.

Each nursing facility receives the same operating per diem rate, which is 80% of the statewide price. The remaining 20% of the statewide price represents the direct resident care component of the rate and is acuity adjusted. Each facility's direct resident care component rate is specific to that facility and is based on the acuity of Medicaid residents served in that facility. As acuity changes in each facility based on the level of complexity of the residents being served relative to the statewide acuity, facility rates adjust upward or downward to account for this change in acuity. This was a component that was considered necessary when the price-based system of reimbursement was first adopted to account for and reflect the level of complexity of residents being served and adjust accordingly to account for this change in acuity in each facility. In order to minimize the volatility of the rates from year to year, which was a negative feature of the previous reimbursement system, only 20% of the overall price is adjusted for these changes in acuity.

With no increases in the overall funding in the system of reimbursement, facility rates will adjust upward or downward based on the acuity of their residents, especially if the acuity level is significantly higher or lower than the acuity of the prior year for that facility. To override this component of the reimbursement methodology, as is being proposed; in order to insulate facilities from these changes in rates would be to circumvent one of the very features that providers believed was important in a rate system, the recognition of changes in the level of acuity of residents in each facility.

In order to protect facilities from rate decreases related to decreased acuity of residents additional funding would be needed. As the department responded previously there is no additional funding being provided in the form of a rate increase to mitigate these decreases. In fact, had the funding for the 2% provider rate been

added to the rate system, there still would have been facilities that had rate decreases due to the significant changes in acuity that occurred at their facilities.

The department will not make the change to the reimbursement system that is being proposed relative to the recognition of acuity in the rate calculation.

Bed Day Comments

COMMENT #9: There are many components to nursing facility rates including the number of days funded and the amount of patient contribution. Declining Medicaid days and increasing patient contribution make funding the increase in acuity and also a modest inflationary rate increase both possible and necessary and is in keeping with the intent of the Legislature.

According to the Legislative Fiscal Division (LFD) Fiscal Report which summarizes the actions of the Legislature related to appropriations, the Legislature appropriated sufficient funding for FY 2011 to pay for 1,132,003 patient days. Estimated days for FY 2011 are 1,119,000, which mean that about $1.6 million in state and federal funds remain unspent. In addition, based on Medicaid days reported by facilities as well as paid claims, it would appear that even the reduced Medicaid days of 1,119,000 used in the rate spreadsheet are too high. It is important that the patient days used to distribute available funding be as accurate as possible to assure that all of the funding currently available and appropriated for nursing facility services is distributed to these facilities that desperately need this funding to continue to provide care to Medicaid beneficiaries.

COMMENT #10: At this time we believe there is sufficient funding appropriated by the Legislature (without the funding for the 2% provider rate increase) to fund both the increase in acuity and a modest rate adjustment. This will assure that no facility receives a rate decrease. Funding is available because of the significant decrease in patient days.

RESPONSE #9 and #10: The department has reviewed paid claims data from March, April, and May of 2010 to estimate the number of days of care that will be provided in FY 2010 in order to determine if there is any flexibility to reduce the Medicaid days used in the 2011 rate calculation based on current utilization patterns. Additionally we have looked at current trends in patient contribution from paid claims data to determine what level of patient contribution will be available for the 2011 rate calculation.

The department estimates that patient contribution will be approximately $29 -$29.15 by the end of FY 2010 using current paid claim information. Patient contribution typically increases on January 1 of each calendar year when the Social Security Administration (SSA) provides a cost of living adjustment (COLA). The COLA typically increases anywhere from 2% to 5% depending on the economy. A more significant increase of approximately 7% was provided in calendar year 2009 resulting in no increase on January 2010 in the COLA. It is not yet certain if there

will be a COLA increase or what level of increase retirement plans will have that may impact the patient contribution provided by nursing facility residents under Medicaid for rate year 2011. The department has estimated a modest increase of 2% which calculates at approximately $29.60 per day for the patient contribution offset in the rate calculation. This is the rate that was used to determine the amount of funding that will be available from patient contribution for rate calculation purposes. We do not believe there is any justification to adjust this component higher in the final rate calculation as this estimate seems reasonable.

The days that are in the LFD report were the estimate of the days that would be available at that time. The level of days that were utilized in FY 2010 was already adjusted lower than this number in order to provide the 2% rate increase in 2010 to nursing facility providers.

For the draft rate sheet the department used an estimate of 1,119,000 Medicaid bed days.

The department has continued to refine our calculation of bed days since this rule was first proposed. With the additional data now available to us, we are decreasing our projected bed days by 1.5% which is 17,000 days less than we utilized in the original proposed rate sheet with the inclusion of the acuity information. This adjustment is based on our estimation of updated actual nursing bed utilization, historic movement of clients to community-based options, and trends in facility occupancy. This adjustment for bed days, without adding any additional funding, will increase the statewide average rate by approximately 1.2% from the 2010 level of $161.99.

This adjustment will result in fewer facilities receiving a rate decrease in combination with the case mix acuity factors in the rate methodology.

Modest Rate Increase Comments

COMMENT #11: We recommend that the department reconsider its decision not to provide the rate hike. In the alternative, we recommend that the department provide a 1.5% increase, or provide a full increase later in the fiscal year if the state budget pressures ease.

RESPONSE #11: The department has responded to this issue in its response to the 2% provider rate increase. As of April 19, 2010, the date of this proposed rule amendment filing with the Secretary of State, there is a projected Montana GF budget deficit as that term is defined in 17-7-140(3), MCA for SFY 2011. The Governor is required to implement a GF spending reduction plan, when projected state GF revenue projections, when compared to the appropriations for the biennium passed by the 2009 Legislature, may result in an ending fund balance below statutory limits. In accordance with the 17-7-140(3), MCA the Governor has implemented a 5% GF reduction plan. As part of the department's statutorily required spending reduction plan the appropriation for the 2% provider rates will not

be implemented for nursing facility providers in fiscal year 2011. There is no ability for the department to provide additional funding for a 1.5% provider rate increase as is suggested.

State-Owned Nursing Facility Comments

COMMENT #12: Comments were received relative to the operation of the state owned and state operated veterans' facility in Columbia Falls. The state knows what kind of financial commitment it takes to provide good care to the elderly in nursing facilities. The state owned nursing facility in Columbia Falls spends about $270 per patient day to provide care in its own nursing facility, while expecting its private partners to provide the same care and meet the same regulations for $161 per patient day.

RESPONSE #12: Montana operates and manages the Montana Veterans' Nursing Home (MVH) in Columbia Falls. This facility runs much like other facilities relying on billing to Medicaid, Medicare, private pay (based on the ability to pay), but is also eligible for federal veterans' administration (VA) funding in the form of VA per diem. Admission to the facility is limited to those 55 and older with active service and an honorable discharge or in some cases, depending on bed availability, spouses of veterans.

To the extent revenues do not match the costs that have been incurred, which are limited by the Legislature for the operation of this facility, they are eligible to use funding up to the levels appropriated by the Legislature in the form of SSR from the cigarette tax. At MVH, residents pay on the basis of their ability to pay, while the VA contributes toward the cost of care for each veteran. The funding from cigarette taxes has been a commitment that has been made since 1992 by the Legislature to offset the expenses for those veterans at the facility who cannot pay full cost.

In the current state fiscal year, FY 2010, MVH has a Medicaid rate of $160.32 which is less than the statewide average Medicaid rate of $161.99. Sixty-one of the eighty-two Montana nursing facilities have a higher Medicaid rate than MVH in FY 2010.

In the most recent "Analysis of Medicaid Nursing Facility Rate for State Fiscal Year 2009," prepared by Myers and Stauffer, LC, three of the seventeen facilities with more beds than MVH (105 beds) have per diem Medicaid costs higher ($337.52, $300.95, and $275.25) than the $261.81 at MVH. Twenty-three of the eighty-three facilities including MVH have per diem costs above $200.

MVH could not participate as the other 82 nursing facilities did in the 2010 DCW as they are part of the state pay plan and could not receive this increased funding when other wages were frozen.

FMAP Comments

COMMENT #13: If the department is unable to provide the appropriated 2% provider rate increase at this time, we ask that it be implemented at such time as the federal government extends the enhanced federal match rate, which is still being strongly considered by the United States Congress. Estimates are that this federal action will increase state GFs this biennium in an amount ranging from $40 million to $49 million.

RESPONSE #13: To date Congress has not passed an extension of the enhanced Medicaid federal medical assistance percentage (FMAP) beyond the December 2010 date. At the present time we do not know when, or if, Congress will pass the extension of the enhanced FMAP. We do not believe that we could simply utilize these funds as suggested due to the GF expenditure reduction that has been implemented under 17-7-140(3), MCA.

IGT Comments

COMMENT #14: The department's comments and justifications to the rules and the proposed IGT spreadsheets provided by the department do not distribute the full amount of IGT funding appropriated by the Legislature. MAR Notice 37-504, published by the Secretary of State on April 29, 2010, issue number 8, page 991 explains that total funding for one-time payments (IGT) to nursing facilities is $5,565,935 in total funds. However, the Legislature appropriated $5,971,191 in total funding, including $845,412 which is not mentioned in MAR Notice 37-504 at all. (See LFD Fiscal Report which summarizes the actions of the Legislature related to appropriations.)

It appears the department is taking the position that the GFs are contingent on certain thresholds being met as was the case in the 2009 biennium. However, no such restrictions were placed on this funding by the 2009 Legislature for the 2011 biennium. The executive budget proposed this amount - unrestricted - and the Legislature approved it as proposed. The Legislative Fiscal Division raised the issue in its analysis of the executive budget and suggested the legislature might want to add language to restrict this funding. The Legislature did not do so.

The $845,000 GF appropriation to the IGT program provided funds necessary to assure that the base funding levels in nursing facilities and community services is made whole. This is ongoing GF money, not one time only funding. It is important that the programs that were intended to receive these funds in fact receive them. It is irresponsible to continue to have these programs dependent on county IGT funds when the Legislature appropriated money to alleviate this problem.

We urge the department to distribute the full amount of IGT funding appropriated by the Legislature, including the use of the $845,412 GF for the purpose for which it was intended.

COMMENT #15: The state of Montana is not only proposing to withhold the 2% provider rate increase approved by the Legislature in House Bill (HB) 645, but is also

proposing to withhold an additional $845,412 GF appropriated for the IGT program in HB 2. This IGT funding was not part of the Governor's 5% cuts, so what is the basis for withholding this money?

RESPONSE #14 and #15: The Decision Package titled Annualize IGT Offset Funding which was part of the Senior and Long Term Care Division 2009 legislative request was to appropriate $845,412 in each year of the biennium to continue the 2007 legislative initiative which added $2.8 million GF over the 2009 biennium. These funds were to offset anticipated reductions in the IGT programs SSR used as state Medicaid match for the current level funding in nursing home and home-based services.

Traditionally this appropriation was restricted and could be used only if there were federal rule changes that restricted the availability of IGT funds as Medicaid match or if the program was not viable. Historically there has been specific language and restrictions on the use of these funds so that they could not be used unless certain conditions were met.

The department in its approach to utilizing these funds went back to the original request to the 2009 Legislature and the decision package language that outlines how these dollars were proposed to be used if the IGT program was not viable. Viable was defined as receiving enough county IGT funds for the state Medicaid match to fund a daily payment of $5 to county nursing facilities and $2 to all other nursing facilities.

In 2008, approximately $720,000 of the IGT offset GF was utilized to fund the base in the nursing facility and home-based program reducing the need for SSR in FY 2010 and 2011 to the $845,412 level that was appropriated.

During the current FY 2010, the department proposes to utilize GF from the IGT offset in the amount of $265,184, in order to offset the reduction in SSR from two counties that could not provide the county funds up to the UPL. The state did not receive enough funding from the counties to make the IGT program viable under the definition of the funding language. As a result, the shortfall in SSR was funded with the offset funding. Thus the department did utilize funding from the IGT offset consistent with previous uses of these funds and for the purpose that they were appropriated. We do not concur that monies were or are being withheld.

The commenter is correct that there is no specific language in HB 2 that says how these funds should or should not be used, nor are they restricted funds which means that unlike other years these funds are available to fund other portions of the program if they are not utilized in the IGT program. There is no legislative direction or language that is consistent with the commenter's analysis that all of the GFs should be or could be used to offset the base funding in the nursing facility or home-based programs from the IGT Offset funding which is why the program maintained the payments for IGT within the parameters that have been applied previously for the distribution of this funding.

For clarification on the comment, the $5,565,935 identified is FY2010 funding appropriated for the IGT program, while the $5,971,191 identified is the FY 2011 funding level.

Direct Care Wage Comments

COMMENT #16: We support the way ARM 37.40.361 Direct Care Wage Reporting implements the funding available for nursing facility workers, including the use of a lump-sum payment made to facilities twice a year. It is our understanding that the available $5,729,330 will be distributed to facilities based on Medicaid bed days.

COMMENT #17: We support the direct care wage increase proposed by the department. It will make it easier for nursing facilities to recruit and retain direct care staff.

RESPONSE #16 and #17: The department will continue to provide the funding available in the DCW appropriation in 2011 in the same manner that these funds were distributed in FY 2010. The Legislature appropriated this funding under HB 645 to be used to specifically raise provider rates for Medicaid services to allow for wage increases or lump-sum payments to workers who provide direct care and ancillary services. This funding must be used to raise direct care worker wages and related benefits or to provide lump-sum payments in the form of bonuses or stipends to workers who provide direct care and ancillary services. Medicaid providers in the Senior and Long Term Care Division's programs are a group of providers that have consistently received targeted funding appropriated by the Legislature directed at increasing direct care workers wages.

COMMENT #18: Last year we appropriated monies in our budget to increase pay for all of our direct care workers. We are a union facility and our contracts extend for three years. Last year we signed a contract, which provided for a raise for our employees and felt sincerely that we could handle this raise. In part due to the funds which were supposed to be made available to us through the Legislative Session of 2009. This we had also accepted "in good faith". Now we are told that the Governor has frozen that money and quite honestly taken back that which was promised to the skilled nursing facilities. Both as a provider of services to our Medicaid recipients and as an honest and fair employer I will not go back on my word; however, I have no choice but to make budget cuts and all of these will affect the resident care all us in health care find most critical.

COMMENT #19: Do you realize what not giving nursing facilities that 2% raise means to not only the residents in our facility but to our staff? We have certified nursing aides (CNAs) that haven't had a raise in years because there is not enough money. Our wages are capped and not a chance of getting a raise in the near future. Our hours are being cut; can you imagine what this is doing to the single parents trying to make ends meet. I hope you will reconsider this as we are paying

wages that are way too low because we are not getting enough from Medicaid. Please reconsider and give us the much needed 2% so that we can all benefit.

COMMENT #20: Staffing levels will be cut, staff will lose their jobs.

Staff who are not let go will not receive a wage increase or a bonus again.

In my facility, all hourly wage staff has not received an adjustment to their wage for two years. Last year, we received a bonus to compensate for the legislative change regarding the 2%. This year, we may not even receive a bonus. Our wages do not reflect the current standard of living. Our wages are basically frozen at the mercy of Governor Schweitzer and the Legislature. If I didn't love my job and where I work so much, I would be looking for another job outside of healthcare to earn a better wage.

COMMENT #21: The cost of recruiting and retaining skilled employees is increasing. Being a highly regulated activity, nursing facilities have few places to cut costs. We will have no choice but to stop accepting residents who are eligible for Medicaid. Some facilities will have to cut staff hours or employment. This will have a detrimental effect on the quality of care we provide.

RESPONSE #18, #19, #20, and #21: The department received several comments stating that the funding provided by the 2009 Legislature for direct care wage initiatives is an important factor allowing providers to continue to deliver quality care to Montana seniors. The department concurs and the DCW funding was not included as part of the 5% GF reduction plan under 17-7-140(3), MCA as implemented by the Governor.

For the last two bienniums (FY 2008-2009 and FY 2010-2011) provider rate increases were given directly to fund wage increases for nursing facility providers. This funding was appropriated separately from any other provider rate increases and was specifically focused at direct care workers.

The 2007 Montana Legislature authorized the Department of Public Health and Human Services, Senior and Long Term Care Division funding of $5,107,142 in both years of the biennium (2008 and 2009) for the purpose of increasing direct care worker wages, to first be used to raise the CNA wages in Nursing Facility Services Bureau and personal care attendants in the Community Services Bureau to $8.50 an hour with related benefits. Any funds that remained after these funds were allotted for moving workers to $8.50 were then used in conjunction with other designated wage funding to increase all wages by up to $.70 cents per hour with related benefits, for all direct care workers in these programs.

The 2009 Montana Legislature authorized the Department of Public Health and Human Services $5,729,357 of one-time-only (OTO) funding in each year of the biennium under HB 645 to raise provider rates for Medicaid services to allow for wage increases or lumps sum payments to workers who provide direct care and ancillary services. During this biennium, funds in the Direct Care Worker Wage

Increase could be used to 1) raise direct care worker and ancillary worker wages and related benefits; and/or 2) to provide lump-sum payments (i.e. bonuses, stipend, etc.) to workers who provide direct care and ancillary services. Since the funds were one time only, nursing facility providers were given the option in determining the best way to distribute those funds. Medicaid programs under the Senior and Long Term Care Division were the only programs to receive direct care wage funding during the 2011 biennium.

In the second year, (FY 2011) of the biennium, funding of $5,729,330 will again be made available to provide for a one-time-only direct care worker wage increase. The funding for FY 2011 will be allocated to facilities using the same methodology that was used in FY 2010.

The designated OTO funds for direct care workers have not been reduced as part of the 5% reduction plan and will again be available to be distributed to providers in FY 2011. It should be noted that these funds are OTO and as such will not be an ongoing source of funding after FY 2011 unless the Legislature continues to appropriate this designated funding.

Other Miscellaneous Comments

COMMENT #22: We are not planning to curtail access to Medicaid services. But Medicaid policy continues to require providers to transfer patients from swing-beds to other long term care facilities. This policy stems from a policy bias adopted years ago when swing-bed providers were a new and limited treatment provider.

We ask that the department act to eliminate the transfer policy imposed on swing-bed providers. The policy is antiquated, imposes considerable costs on the provider, and unnecessarily burdens the facility resident. The policy also confounds the provider's ability to manage its brick and mortar infrastructure and staffing.

Repealing the transfer policy is another way that the department can help providers cope with the payment freeze, reduce administrative costs and assure access to Medicaid beneficiaries.

RESPONSE #22: These comments are not relevant to the rule changes that are being considered as part of these amendments. The department updated the hospital swing-bed rules in September 2009, and received no comments for testimony related to the changes that were proposed at that time. The department will consider these comments if administrative rule changes that encompass the hospital swing-bed program are proposed.

4. The department intends to apply these rules effective July 1, 2010.

/s/ John Koch
Rule Reviewer

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

Certified to the Secretary of State June 14, 2010.

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

In the matter of the amendment of ARM 37.86.805, 37.86.1506, 37.86.2105, 37.86.2207, 37.86.2224, 37.86.2405, 37.86.2505, and 37.86.2605 pertaining to Medicaid reimbursement for hearing aid services, outpatient drugs, home infusion therapy services, eyeglasses, early and periodic screening, diagnostic and treatment services, comprehensive school and community treatment, transportation and per diem, specialized nonemergency medical transportation, and ambulance services	)	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 29, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-505 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 996 of the 2010 Montana Administrative Register, Issue Number 8.

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

3. No comments or testimony were received.

4. The department intends ARM 37.86.805, 37.86.1506, 37.86.2105, 37.86.2207(2), 37.86.2224, 37.86.2405, 37.86.2505, and 37.86.2605 be applied effective July 1, 2010. The department intends ARM 37.86.2207(9) be applied effective October 1, 2010.

/s/ John Koch
Rule Reviewer

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

Certified to the Secretary of State June 14, 2010.

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

In the matter of the amendment of ARM 37.86.2801, 37.86.2803, 37.86.2806, 37.86.2820, 37.86.2901, 37.86.2902, 37.86.2903, 37.86.2904, 37.86.2905, 37.86.2907, 37.86.2912, 37.86.2916, 37.86.2918, 37.86.2920, 37.86.2921, 37.86.2925, 37.86.2928, and 37.86.2947 and repeal of ARM 37.86.2810 and 37.86.2910 pertaining to Medicaid inpatient and outpatient hospital services	)))))))))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 29, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-506 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1002 of the 2010 Montana Administrative Register, Issue Number 8.

2. The department has amended ARM 37.86.2801, 37.86.2803, 37.86.2806, 37.86.2820, 37.86.2902, 37.86.2903, 37.86.2904, 37.86.2905, 37.86.2907, 37.86.2912, 37.86.2916, 37.86.2918, 37.86.2920, 37.86.2921, 37.86.2925, 37.86.2928, and 37.86.2947 and repealed ARM 37.86.2810 and 37.86.2910 as proposed.

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

37.86.2901 INPATIENT HOSPITAL SERVICES, DEFINITIONS (1) through (23) remain as proposed.

(24) "Inpatient hospital services" means services that are ordinarily furnished in an acute care hospital for the care and treatment of an inpatient under the direction of a physician, dentist, or other practitioner as permitted by federal law, and that are furnished in an institution that:

(a) and (b) remain as proposed.

(c) provides ~~inpatient~~ acute care psychiatric hospital services as defined in this rule for individuals under age 21 ~~pursuant to ARM 37.88.1410~~.

(25) through (42) remain as proposed.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-141, 53-6-149, MCA

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

COMMENT #1: Please maintain the text of ARM 37.86.2901(20)(d) as is, without deleting or in any way changing the reference to Title 37, chapter 88, subchapter 11.

RESPONSE #1: ARM Title 37, chapter 88, subchapter 11 was repealed in January, 2009. ARM 37.86.2901(20)(d) has now been renumbered to ARM 37.86.2901(24)(c) and has been amended to read as follows:

"(c) provides acute care psychiatric hospital services as defined in this rule for individuals under age 21."

COMMENT #2: The department proposes to reduce per case payment by about 2.6%. The department is moving to reduce hospital payments by more than $2 million over the current year.

RESPONSE #2: Each year, the department must stay within the appropriation amount allocated by the Legislature. Inpatient expenditures in state fiscal year 2009 exceed the budgeted amount by over $4 million. The department had to make adjustments to the inpatient reimbursement system to stay within legislative appropriation for state fiscal year 2011. As part of the department's spending reduction plan approved by the Governor, appropriated provider rate increases for state fiscal year 2011 will not be implemented.

COMMENT #3: The department plans to boost payments to certain hospitals located outside of Montana by nearly 10%. Other factors have been manipulated to reduce reimbursement levels to in-state hospitals and to transfer those savings to increased reimbursement levels for out-of-state hospitals. MHA, an Association of Montana Health Care Providers, recommends that the department limit payments to out-of-state hospitals at the 2009 amount. The savings from this action should be plowed back into in-state payments in order to ease the budget impact of the proposal.

RESPONSE #3: The department agrees that some out-of-state facilities that provide services which are currently not available in Montana will see payment increases. There are also in-state facilities which will see payment increases as well. However, it is important to note that when the All Patient Refined Diagnosis Related Groups (APR-DRG) payment methodology was implemented in October 2008, payments to in-state hospital facilities increased by 18%. This increase was made possible because payments to out-of-state facilities were significantly decreased allowing the department to allocate more monies to in-state facilities. The department denies that it "manipulated other factors" in order to reduce reimbursement levels to in-state hospitals. The rebase process was identical to that used for the October 2008 APR-DRG implementation with the exception of the higher base price for distinct part rehabilitation units and long term care (LTC)

facilities. This will be explained further in response #5. In-state and out-of-state hospitals are reimbursed by the same methodology. Reimbursement to out-of-state hospitals must remain at a level to insure access to services which are currently not available in-state. Out-of-state hospital costs cannot be recouped through the disproportionate share hospital (DSH) payment; whereas, in-state hospitals are eligible to recoup costs through DSH payments.

COMMENT #4: Section 5 of the administrative rule is not an adequate analysis of proposed changes to the rule. The department has not assessed the impacts of the proposed rule on the provider community or the Medicaid beneficiaries.

RESPONSE #4: The department assumes the commenter is referring to ARM 37.86.2907(1)(c). The department is not proposing an increase or decrease in base rates. Some APR-DRGs will increase and others will decrease, some hospital reimbursement amounts will increase and others will decrease; but overall, the proposed changes will expend all Medicaid appropriations allocated by the 2009 Legislature. The department does not anticipate an access problem due to the new reimbursement rates and, therefore, does not anticipate an impact to clients.

COMMENT #5: Our request to the department is for a display of the national data used this year that resulted in the rebasing of the Montana APR-DRGs. This reduction is being implemented without any contact or discussion with the industry.

RESPONSE #5: The criteria used when the APR-DRG payment methodology was first implemented in 2008 was also used in rebasing the APR-DRG payment methodology for state fiscal year 2011. Considerable input was received from providers during the initial planning and implementation phases of the APR-DRG project. The national relative weights were recentered based on Montana Medicaid data and the same policy adjustors and age adjustors were used. This recentering did not change the relativity of the APR-DRG system, but adjusted all weights to a Montana Medicaid average case mix. The only difference from 2008 was that two base prices were used instead of three. The higher base price for distinct part rehabilitation units and LTC facilities was eliminated. Since the same criteria was used for rebasing the base rates for state fiscal year 2011 and 2008, the department did not feel additional input from providers was needed at this time. The proposed relative weights, average length of stays, and cost outlier thresholds for each APR-DRG were sent to each in-state prospective payment system (PPS) hospital.

The national relative weights used for the rebase regarding the APR-DRG payment methodology may be accessed by visiting 3M's web site at www.3MCustomerCare.com. Providers may also contact the department for a copy of the national relative weights.

COMMENT #6: This payment reduction is being implemented without any contact or discussion with the industry. Factors other than the base rate that dramatically impact hospital reimbursements are buried in tables not displayed in the notice and not available until the day of the public meeting.

RESPONSE #6: The department will continue to make information available related to these changes as soon as it is compiled and to respond to questions from the public. We regret that the information could not be accessed earlier.

COMMENT #7: In regards to ARM 37.86.2907(1)(c) the department proposes to reduce inpatient rehabilitation services by 48.5%. The following comments were noted: one hospital can expect payments for rehab unit care to drop by 60%; another can expect payment cuts of 59% for rehabilitation care; and a third hospital's rehabilitation payments will drop by 55%.

RESPONSE #7: The department is proposing to eliminate the higher base rate for in-state and out-of-state distinct part rehabilitation units and LTC facilities. The department feels that under the APR-DRG reimbursement methodology, rehabilitation services would be appropriately reimbursed using the base rate described in ARM 37.86.2907(1)(c). The current APR-DRG reimbursement methodology reflects relative costs more accurately and efficiently than the former DRG payment system.

COMMENT #8: The department proposes to reduce adult psychiatric care by more than 11%, and children's psychiatric care by 10%.

RESPONSE #8: Changes in the national relative values indicate that initial weight for these services may have been set too high. National relative values for these services have, therefore, been reduced to more accurately reflect the cost of these services. The age adjustor used in the original APR development for pediatric mental health services is still in effect.

COMMENT #9: We are concerned about the impact these Medicaid payment reductions and changes will have on Montana's commercial insurance market. Our state's hospitals must recover the unpaid costs that occur when Medicaid reduces its payments.

RESPONSE #9: The department does not feel that hospitals will need to recover any unpaid costs due to the reduction in Medicaid payments because most unpaid costs will be paid through the distribution of the DSH payment. Out-of-state facilities do not benefit from the DSH payment.

5. The department intends to apply these rules effective July 1, 2010.

/s/ John Koch
Rule Reviewer

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

Certified to the Secretary of State June 14, 2010.

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

In the matter of the amendment of ARM 37.90.401 and 37.90.410 pertaining to home and community-based services for adults with severe disabling mental illness	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 29, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-507 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1020 of the 2010 Montana Administrative Register, Issue Number 8.

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

3. No comments or testimony were received.

/s/ John Koch
Rule Reviewer

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

Certified to the Secretary of State June 14, 2010.

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

In the matter of the amendment of ARM 37.79.135, 37.79.201, 37.79.303, 37.79.316, 37.79.317, and 37.79.325 pertaining to Healthy Montana Kids Plan	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 29, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-508 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1024 of the 2010 Montana Administrative Register, Issue Number 8.

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

3. No comments or testimony were received.

4. The department intends to apply these rules effective July 1, 2010.

/s/ Geralyn Driscoll
Rule Reviewer

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

Certified to the Secretary of State June 14, 2010.

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 AMENDMENT

TO: All Concerned Persons

1. On April 29, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-509 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1030 of the 2010 Montana Administrative Register, Issue Number 8.

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

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

(a) through (b)(ii) remain as proposed.

(iii) mental health services, which applies to the following health care professionals listed in (2): licensed psychologists, licensed clinical social workers, and licensed professional counselors. The conversion factor for mental health services for state fiscal year 2011 is ~~$24.26~~ $25.45; and

(iv) through (14) 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 the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: MHA, an Association of Montana Health Care Providers, commented against maintaining physician rates in state fiscal year (SFY) 2011 at the SFY 2010 level. It asserts the 60th Montana Legislature, meeting in 2007, mandated future, annual increases in the rate Montana Medicaid pays physicians regardless of future sessions' appropriations or actual state revenue collected.

The MHA commented that ". . . the Medicaid program has severely underpaid physicians, which . . . discouraged physicians from taking additional Medicaid beneficiaries into their practices." As a result, MHA comments, Medicaid beneficiaries cannot access primary care; instead they access hospital emergency departments, which is the most expensive place to provide these services.

The MHA commented that the proper course of action is to debate this issue when the Legislature reconvenes but the department should implement a 6% Medicaid physician payment rate increase now.

COMMENT #2: The Billings Clinic commented against maintaining physician rates in SFY 2011 at the SFY 2010 level. Like the MHA, it also asserts legislation passed by the 2007 Legislature (Senate Bill 354 (SB 354) 2007 Laws of Montana, Chapter 505, codified at 53-6-124, 53-6,125, 53-6,126, and 53-6-127, MCA) intended a gradual increase in physician rates to equal those paid under commercial insurance. The Billings Clinic comments that the purpose of SB 354 was to secure and enhance access to physician services for Medicaid clients by removing a financial barrier to physician participation in Medicaid. "Access to primary and preventive medical services reduces avoidable, more costly use of emergency departments therefore Montana Medicaid should set rates that ensure Montana physicians are willing to see Medicaid patients." Not implementing the scheduled 6% physician rate increase, undermines the long-term goal of all Montanans having access to affordable coverage.

Billings Clinic commented that it provides physician, hospital, and long-term care services in Billings and regional Montana clinics. It is a major Medicaid provider and Medicaid is an important payer. Failure to enact the scheduled physician rate increase will create additional financial burden for Billings Clinic and access problems for its patients. It continues to look for ways to reduce costs without compromising quality and patient safety standards and urges the department to amend the proposed rule to provide a rate increase for physicians and other medical providers.

COMMENT #3: Legislative Counsel commented as rule reviewer for the Children, Family, Health, and Human Services Interim Committee against maintaining physician rates in SFY 2011 at the SFY 2010 level. Its position is that the 2007 Legislature could require a 6% increase in the conversion factor used to calculate physician reimbursement rates for FY 2011, 2012, and 2013 regardless of actual revenue currently collected. "Given the clear statutory requirement that a 6% increase in the conversion factor (for physicians) is required, it seems impermissible to lower the increase below the 6% floor for FY 2011, 2012, or 2013. If the department desires to lower the conversion factor, it must do so legislatively. The executive branch is not allowed to lower the 6% floor using 17-7-140, MCA."

RESPONSE #1, #2, and #3: The department appreciates the effort and expertise of the commenters. It agrees that Medicaid programs must consider Medicaid clients' access to services and must set reimbursement rates high enough that health care providers, including primary care providers, have an economic incentive to accept Medicaid patients.

The department does not agree that Montana Medicaid patients cannot access primary care in Montana because of Medicaid's reimbursement rates. The

department reviewed utilization data prior to setting the rates in this rule and concluded that Montana Medicaid's primary care reimbursement rates and its client access rates compare favorably with other public health plans in Montana. Montana Medicaid also has implemented several programs including PASSPORT, utilization (bed fee) tax, provider based clinics and health improvement programs in efforts to reduce the improper usage of health care services and provide incentives for health improvement and appropriate primary care.

The department also does not agree with the commenters that it is statutorily mandated to increase the rate the state of Montana pays physicians for services to Montana Medicaid clients without regard to the state's projected general fund budget deficits. The Legislature also enacted 17-7-140, MCA, which states "the governor shall ensure that the expenditure of appropriations does not exceed available revenue."

The Legislature is bound by Article VIII, Section 9 (Mt. Const.) "Balanced budget. Appropriations by the Legislature shall not exceed anticipated revenue." The 2007 Legislature cannot compel spending in SFY 2011. The department does not agree that the Montana Legislature mandated that physicians would receive rate increases regardless of the impact on other providers. There is nothing in 53-6-125, 53-6-126, and 53-6-127, MCA to support increasing physicians' rates by decreasing the rates paid to all other Medicaid providers, which would be the result of holding spending at the SFY 2010 level while increasing physician reimbursement rates.

Despite the state's revenue shortfall, the department is attempting to hold all Medicaid providers' reimbursement rates constant at SFY 2010 levels. It is setting SFY 2011 rates at a level it hopes will avoid decreases in any provider groups' rates in SFY 2011.

The department does not agree with the commenters that the 2007 Legislature mandated an increase in physician rates in SFY 2011 regardless of actual revenues or the impact of the rate increase on other Medicaid programs and providers. If that were the case, physician provider rates would be listed in 17-7-140(2), MCA. This list does not include Medicaid provider rates paid to physicians as spending that may not be directed by the Governor.

The Legislature appropriates the Montana Medicaid budget but it does not set the rates Montana Medicaid pays its providers. The Legislature has unequivocally delegated to the department the responsibility for setting provider rates. See 53-6-101(8) and 53-6-113(3), MCA. The department does not take lightly its statutory authority to set Medicaid provider rates, including physician rates, at the SFY 2010 level. The department recognizes the contribution Medicaid providers make to quality health care and agrees with the commenters that access to physicians, in particular primary care physicians, is important for Medicaid clients. Montana has a history of attempting to maintain rates at a level that maintains access.

Montana Medicaid's reimbursement rates compare favorably to Medicare rates according to the Urban Institute's 2008 Medicaid Physician Survey. That organization's research shows Montana Medicaid average fee for all services is 3% more than the average fee for Medicare. The Urban Institute's survey also shows that Montana Medicaid rates compare favorably to other states' Medicaid rates. Montana's rates are approximately 33% higher than the U.S. average for state Medicaid rates.

COMMENT #4: The department commented that due to relative value unit (RVU) decreases specific to mental health services using the SFY 2010 conversion factor would reduce reimbursement rates to a level below SFY 2010 levels. As stated in the proposed amendment, the department is maintaining all provider reimbursement rates at the SFY 2010 level. The department did not know the impact of the RVU changes until after the proposed notice was published.

RESPONSE #4: The department will increase the conversion factor for mental health services to $25.45 to maintain reimbursement at the SFY 2010 appropriated level.

4. The department intends for the adoption and amendment of these rules to be effective July 1, 2010.

/s/ Geralyn Driscoll
Rule Reviewer

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

Certified to the Secretary of State June 14, 2010.

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

In the matter of the amendment of ARM 37.86.5201, 37.86.5202, 37.86.5204, 37.86.5205, and 37.86.5206 pertaining to Medicaid Health Improvement Program	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 29, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-510 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1037 of the 2010 Montana Administrative Register, Issue Number 8.

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

3. No comments or testimony were received.

/s/ Geralyn Driscoll
Rule Reviewer

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

Certified to the Secretary of State June 14, 2010.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 44.3.105, 44.3.106, 44.3.1101, 44.3.1403, 44.3.1701, 44.3.1704, 44.3.1706, 44.3.1707, 44.3.1710, 44.3.1713, 44.3.1717, 44.3.2002, 44.3.2005, 44.3.2012 through 44.3.2016, 44.3.2102, 44.3.2103, 44.3.2109 through 44.3.2111, 44.3.2113 through 44.3.2115, 44.3.2203, 44.3.2302 through 44.3.2304, 44.3.2401, 44.3.2402, and 44.3.2501, repeal of ARM 44.3.2601 and 44.9.313 pertaining to elections	)))))))))))))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On November 12, 2009, the Secretary of State published MAR Notice No. 44-2-151 pertaining to the proposed amendment and repeal of the above-stated rules at page 2126 of the 2009 Montana Administrative Register, Issue Number 21.

2. On May 13, 2010, the Secretary of State published an Amended Notice and Extension of Comment Period for MAR Notice No. 44-2-151 at page 1174 of the 2010 Montana Administrative Register, Issue Number 9.

3. The Secretary of State has amended ARM 44.3.105, 44.3.106, 44.3.1101, 44.3.1403, 44.3.1701, 44.3.1704, 44.3.1707, 44.3.1710, 44.3.1713, 44.3.1717, 44.3.2002, 44.3.2005, 44.3.2012 through 44.3.2016, 44.3.2102, 44.3.2103, 44.3.2109 through 44.3.2111, 44.3.2113 through 44.3.2115, 44.3.2203, 44.3.2302 through 44.3.2304, 44.3.2401, 44.3.2402, and 44.3.2501, and repealed ARM 44.3.2601 and 44.9.313 as proposed.

4. The Secretary of State has amended the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

44.3.1706 NOTIFICATION ~~OF~~ TO APPLICANT (1) through (3) remain as proposed.

AUTH: 13-17-107, MCA
IMP: 13-17-101, 13-17-103, MCA

5. The Secretary of State received the following e-mailed comments from David Niss on behalf of the State Administration and Veterans' Affairs Interim

Committee and has thoroughly considered the comments. The comments received and the Secretary of State's responses are as follows:

COMMENT #1: " Most of the issues I see in the notice and that I discussed with our new attorneys involve the following:

(1) statements of reasonable necessity, that I believe are insufficient because those statements only explain what a rule does. Look, for example, at the statement of reasonable necessity for 44.3.2115. Under 2-4-305(6)(b), a statement of what a rule does is not an adequate statement of reasonable necessity. Many of the statements of reasonable necessity in this notice fall into this category. As I mentioned in my brief telephone conversation on this subject, insufficient statements of reasonable necessity are problematic because they will require a new notice of adoption because of the language of 2-4-305(8)(b)."

RESPONSE #1: The Secretary of State published the Amended Notice and Extension of Comment Period referenced in paragraph 2 above to correct the deficiencies in citations of authority and/or implementation and to revise the statements of reasonable necessity at issue.

COMMENT #2: "(2) statements of reasonable necessity that do not address a part of the rule being amended. For example, look at the statement for the changes to 44.3.2113. The statement of reasonable necessity is written as if all of the changes to the rule are to change 'elector' to 'individual'. However, the changes to subsections (5)(c) and (e) are not those types of changes and the statement of reasonable necessity therefore doesn't apply to those subsections."

RESPONSE #2: The Secretary of State published the Amended Notice and Extension of Comment Period referenced in paragraph 2 above to revise the statements of reasonable necessity at issue.

COMMENT #3: "(3) incorrect citations to authorizing or implemented sections. For example, look at the authorizing and implemented citations for the amendments to 44.3.2303. If 13-13-603 is going to be used for the authorizing section for the rule, that section appears to limit the implemented sections, in the order listed in that section, to 13-13-114, Title 13, chapter 13, part 1, 13-13-241, and 13-15-107, MCA. It appears, therefore, that either the section cited for authority or cited as being implemented will have to change."

RESPONSE #3: The Secretary of State published the Amended Notice and Extension of Comment Period referenced in paragraph 2 above to correct the deficiencies in citations of authority and/or implementation.

COMMENT #4: "(4) also, and I don't want to this this [sic] too hard because I understand that what constitutes a change for the purposes of 'clarity' can differ from person to person, some of the amendments that are explained to be for purposes of

'clarity' are actual substantive changes. Please take a look at the changes to such rules as 44.3.1701(3), that are explained to be for purposes of clarity, and their accompanying statements of reasonable necessity, to see if the changes are substantive changes. If they are substantive changes, then the substance of the change needs to be explained."

RESPONSE #4: The Secretary of State published the Amended Notice and Extension of Comment Period referenced in paragraph 2 above to revise the statement of reasonable necessity at issue.

COMMENT #5: "(5) finally, there are several rules in which language is being added to the rule that would allow the secretary of state to 'prescribe' certain forms or requirements. Examples of these types of rules are 44.3.1701, 44.3.1717, 44.3.2013, and 44.3.2303. In writing these types of rule changes it should be kept in mind that there is no way for an agency to prescribe any requirement or adopt any policy having the effect of law unless the agency adopts a rule under MAPA. This requirement is found in the definition of a 'rule' in 2-4-102, MCA and in the case law in cases such as State v. Vainio, 2001 MT 220, 306 M 439, 35 P3d 948 (2001). I don't know if the Secretary of State has, in fact, adopted a rule or rules in which the desired information has been 'prescribed' but we'll certainly discuss that when we meet concerning this rulemaking notice."

RESPONSE #5: The Secretary of State published the Amended Notice and Extension of Comment Period referenced in paragraph 2 above to revise the statements of reasonable necessity at issue. In the revised statements of reasonable necessity, the Secretary of State referenced section 13-1-202, MCA, which gives the Secretary of State the statutory authority to "prescribe the design of any election form required by law" and/or section 13-1-202, MCA, which gives the Secretary of State the statutory authority to "prepare and deliver to the election administrators … written directives and instructions relating to and based on the election laws."

/s/ JORGE QUINTANA
Jorge Quintana
Rule Reviewer

/s/ LINDA MCCULLOCH
Linda McCulloch
Secretary of State

Dated this 14th day of June, 2010.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I, II, and III pertaining to postelection audits	)))	CORRECTED NOTICE OF ADOPTION

TO: All Concerned Persons

1. On February 25, 2010, the Secretary of State published MAR Notice No. 44-2-156 pertaining to the public hearing on the proposed adoption of the above-stated rules at page 516 of the 2010 Montana Administrative Register, Issue Number 4.

2. On April 15, 2010, the Secretary of State published a Notice of Adoption for MAR Notice No. 44-2-156 at page 918 of the 2010 Montana Administrative Register, Issue No. 7.

3. The Secretary of State is filing a corrected notice of adoption because two MCA citations referenced in NEW RULE II (ARM 44.3.1719) were incorrect. The rule, as adopted in corrected form, reads as follows, deleted matter interlined, new matter underlined:

NEW RULE II (44.3.1719) SELECTION PROCESS FOR RANDOM-SAMPLE AUDIT (1) and (2) remain as adopted.

(3) Pursuant to 1~~5~~3-17-503, MCA, at least 5% of the precincts in each county, or a minimum of one precinct in a county, shall be audited, whichever is greater. The board shall utilize current official precinct information provided by the counties to the Secretary of State to determine the number of precincts to be audited per county. Three additional precincts in each county will be selected pursuant to 1~~5~~3-17-505, MCA, in case a discrepancy in vote tallies occurs that necessitates further auditing.

(4) through (7) remain as adopted.

AUTH: 13-17-503, MCA
IMP: 13-17-503, 13-17-504, 13-17-505, 13-17-506, 13-17-507, MCA

/s/ Jorge Quintana
JORGE QUINTANA
Rule Reviewer

/s/ Linda McCulloch
LINDA MCCULLOCH
Secretary of State

Dated this 14th day of June, 2010.

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

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

Economic Affairs Interim Committee:

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

Education and Local Government Interim Committee:

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

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

- Department of Public Health and Human Services.

Law and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration and Veterans' Affairs Interim Committee:

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

Environmental Quality Council:

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

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

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

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

Definitions:

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

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

Use of the Administrative Rules of Montana (ARM):

Known Subject

1. Consult ARM Topical Index.
   Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute

2. Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 2009. This table includes those rules adopted during the period January 1, 2010, through March 31, 2010, 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, 2010, 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 2009 and 2010 Montana Administrative Register.

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

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BOARD APPOINTEES AND VACANCIES

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

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

In this issue, appointments effective in May 2010 appear. Vacancies scheduled to appear from July 1, 2010, through September 30, 2010, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

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

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of June 1, 2010.

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

BOARD AND COUNCIL APPOINTEES FROM MAY 2010

Appointee	Appointed by	Succeeds	Appointment/End Date
Board of Plumbers (Labor and Industry)			
Mr. Timothy E. Regan	Governor	reappointed	5/4/2010
Miles City			5/4/2014
Qualifications (if required): master plumber			
Mr. Olaf Stimac	Governor	reappointed	5/4/2010
Great Falls			5/4/2014
Qualifications (if required): journeyman plumber			
Concealed Weapon Advisory Council (Board of Crime Control)			
Mr. Mike Batista	Governor	McGrath	5/24/2010
Helena			0/0/0
Qualifications (if required): law enforcement representative			
Mr. Jed Fitch	Governor	Peterson	5/24/2010
Dillon			0/0/0
Qualifications (if required): law enforcement representative			
Mr. Thomas Kuka	Governor	Liedle	5/24/2010
Valier			0/0/0
Qualifications (if required): law enforcement representative			
Education Commission of the States (Office of Public Instruction)			
Ms. Jane Karas	Governor	not listed	5/3/2010
Kalispell			0/0/0
Qualifications (if required): educator engaged in Higher Education			

BOARD AND COUNCIL APPOINTEES FROM MAY 2010

Appointee	Appointed by	Succeeds	Appointment/End Date
Education Commission of the States (Office of Public Instruction) cont.			
Secretary Linda McCulloch	Governor	not listed	5/3/2010
Helena			0/0/0
Qualifications (if required): educator engaged in K-12 education			
Ms. Carmen Taylor	Governor	not listed	5/3/2010
Polson			0/0/0
Qualifications (if required): educator engaged in K-12 education			
Grant Review Committee (Commerce)			
Ms. Karen Byrnes	Governor	Beck	5/4/2010
Butte			6/30/2013
Qualifications (if required): private sector economic development			
Mr. John Cech	Governor	reappointed	5/4/2010
Billings			6/30/2013
Qualifications (if required): representative of a two-year postsecondary institution			
Ms. Linda Kindrick	Governor	Stewart	5/4/2010
Clancy			6/30/2013
Qualifications (if required): representative of private sector economic development			
Mr. Andy Poole	Governor	reappointed	5/4/2010
Helena			0/0/0
Qualifications (if required): representative of the Department of Commerce			

BOARD AND COUNCIL APPOINTEES FROM MAY 2010

Appointee	Appointed by	Succeeds	Appointment/End Date
Library Commission (Higher Education)			
Ms. Marsha Hinch	Governor	reappointed	5/18/2010
Choteau			5/22/2013
Qualifications (if required): public representative			
Ms. Lee Phillips	Governor	Funda	5/18/2010
Butte			5/22/2011
Qualifications (if required): public representative			
Mental Disabilities Board of Visitors (Governor)			
Ms. Patricia Harant	Governor	Wayne	5/3/2010
Helena			7/1/2011
Qualifications (if required): consumer of mental health services			
Montana Heritage Preservation and Development Commission (Commerce)			
Mr. Randy Hafer	Governor	reappointed	5/24/2010
Billings			5/23/2013
Qualifications (if required): business person			
Mr. Philip Maechling	Governor	reappointed	5/24/2010
Florence			5/23/2013
Qualifications (if required): community planner			
Mr. Colin Mathews	Governor	reappointed	5/24/2010
Virginia City			5/23/2013
Qualifications (if required): public representative			

BOARD AND COUNCIL APPOINTEES FROM MAY 2010

Appointee	Appointed by	Succeeds	Appointment/End Date
Montana Heritage Preservation and Development Commission (Commerce) cont.			
Ms. Marilyn Ross	Governor	reappointed	5/24/2010
Twin Bridges			5/23/2013
Qualifications (if required): having experience in historic preservation			
Small Business Compliance Assistance Advisory Council (Environmental Quality)			
Mr. Carson Coate	Director	not listed	5/17/2010
Helena			5/5/2013
Qualifications (if required): representative of the Department of Environmental Quality			
Ms. Michelle Bryan Mudd	Governor	Schultz	5/5/2010
Missoula			5/5/2013
Qualifications (if required): public representative			
Ms. Diana Vanek	Governor	Hamler	5/5/2010
Bozeman			5/5/2013
Qualifications (if required): public representative			
State Emergency Response Commission (Military Affairs)			
Mr. Pete Lawrenson	Governor	Johnson	5/5/2010
Missoula			10/1/2011
Qualifications (if required): representative of a railroad company			
Statewide Independent Living Council (Public Health and Human Services)			
Mr. Jim Brown	Governor	Swanson	5/3/2010
Billings			12/1/2012
Qualifications (if required): public representative/disabilities community			

BOARD AND COUNCIL APPOINTEES FROM MAY 2010

Appointee	Appointed by	Succeeds	Appointment/End Date
Statewide Independent Living Council (Public Health and Human Services) cont.			
Mr. Robert Bushing	Governor	reappointed	5/3/2010
Billings			12/1/2012
Qualifications (if required): public representative/disabilities community			
Mr. Peter Dupree	Governor	Pease	5/3/2010
Poplar			12/1/2012
Qualifications (if required): public representative/disabilities community			
Ms. June Hermanson	Governor	Lambert	5/3/2010
Billings			12/1/2012
Qualifications (if required): public representative/disabilities community			
Mr. Gerald Hutch	Governor	reappointed	5/3/2010
Helena			12/1/2012
Qualifications (if required): public representative/disabilities community			
Ms. Peggy Williams	Governor	reappointed	5/3/2010
Helena			12/1/2012
Qualifications (if required): designated state unit representative			

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Aging Advisory Council (Public Health and Human Services)		
Ms. Betty Aye, Broadus Qualifications (if required): public representative	Governor	7/18/2010
Ms. Pat Ludwig, Chester Qualifications (if required): public representative	Governor	7/18/2010
Ms. Connie Bremner, Browning Qualifications (if required): public representative	Governor	7/18/2010
Mr. Robert Maxson, Billings Qualifications (if required): public representative	Governor	7/18/2010
Ms. Grace Bowman, Billings Qualifications (if required): public representative	Governor	7/18/2010
Agriculture Development Council (Agriculture)		
Mr. Ervin Schlemmer, Joliet Qualifications (if required): agriculture producer	Governor	7/1/2010
Mr. Verges Aageson, Guildford Qualifications (if required): agriculture producer	Governor	7/1/2010
Alternative Health Care Board (Labor and Industry)		
Ms. Mary Anne Brown, Great Falls Qualifications (if required): midwife	Governor	9/1/2010

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Alternative Health Care Board (Labor and Industry) cont.		
Mr. Tom Mensing, Red Lodge	Governor	9/1/2010
Qualifications (if required): public representative		
Board of Banking (Administration)		
Ms. Evelyn Casterline, Vida	Governor	7/1/2010
Qualifications (if required): public representative		
Mr. Mark Huber, Helena	Governor	7/1/2010
Qualifications (if required): national bank officer of a medium size bank		
Board of Funeral Service (Labor and Industry)		
Mr. Thomas Meeks, Great Falls	Governor	7/1/2010
Qualifications (if required): crematory operator		
Board of Hearing Aid Dispensers (Labor and Industry)		
Mr. Gene Bukowski, Billings	Governor	7/1/2010
Qualifications (if required): hearing aid dispenser with a master's degree and national certification		
Dr. Stephen Kramer, Billings	Governor	7/1/2010
Qualifications (if required): otolaryngologist		
Board of Medical Examiners (Labor and Industry)		
Dr. Michael LaPan, Sidney	Governor	9/1/2010
Qualifications (if required): podiatrist		
Dr. Arthur K. Fink, Glendive	Governor	9/1/2010
Qualifications (if required): osteopath		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Board of Medical Examiners (Labor and Industry) cont.		
Dr. Anna Earl, Chester	Governor	9/1/2010
Qualifications (if required): doctor of medicine		
Ms. Deborah Hanson, Miles City	Governor	7/1/2010
Qualifications (if required): public representative		
Board of Nursing (Labor and Industry) cont.		
Ms. Brenda Schye, Fort Peck	Governor	7/1/2010
Qualifications (if required): public representative		
Ms. Karen Pollington, Havre	Governor	7/1/2010
Qualifications (if required): registered nurse		
Ms. Kathleen Sprattler, Billings	Governor	7/1/2010
Qualifications (if required): licensed practical nurse		
Board of Pharmacy (Labor and Industry)		
Mr. Jim MacKenzie, Whitefish	Governor	7/1/2010
Qualifications (if required): licensed pharmacist		
Ms. Lee Ann Bradley, Missoula	Governor	7/1/2010
Qualifications (if required): licensed pharmacist		
Board of Physical Therapy Examiners (Labor and Industry)		
Ms. Robin Peterson Smith, Billings	Governor	7/1/2010
Qualifications (if required): physical therapist		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Board of Private Security (Labor and Industry)		
Mr. Mark Chaput, Billings	Governor	8/1/2010
Qualifications (if required): electronic security company		
Board of Professional Engineers and Land Surveyors (Labor and Industry)		
Mr. Steve Wright, Columbia Falls	Governor	7/1/2010
Qualifications (if required): licensed chemical engineer		
Mr. David Elias, Anaconda	Governor	7/1/2010
Qualifications (if required): licensed land surveyor		
Board of Psychologists (Labor and Industry)		
Ms. Bonnie Hyatt Murphy, Livingston	Governor	9/1/2010
Qualifications (if required): public representative		
Board of Public Accountants (Labor and Industry)		
Ms. Irma Paul, Helena	Governor	7/1/2010
Qualifications (if required): public representative		
Mr. Michael Johns, Deer Lodge	Governor	7/1/2010
Qualifications (if required): certified public accountant		
Ms. Pamela K. Lynch, Plains	Governor	7/1/2010
Qualifications (if required): certified public accountant		
Board of Radiologic Technologists (Labor and Industry)		
Mr. Mike Nielsen, Billings	Governor	7/1/2010
Qualifications (if required): radiologic technician/radiology practitioner assistant		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Board of Sanitarians (Labor and Industry)		
Mr. James Zabrocki, Miles City	Governor	7/1/2010
Qualifications (if required): sanitarian		
Board of Veterans' Affairs (Military Affairs)		
Sen. Joe Tropila, Great Falls	Governor	8/1/2010
Qualifications (if required): representative of the State Administration and Veterans' Affairs Committee		
Ms. Sylvia Beals, Forsyth	Governor	8/1/2010
Qualifications (if required): Veteran and resident of Region 4		
Ms. Kelly Williams, Helena	Governor	8/1/2010
Qualifications (if required): representative of the Department of Public Health and Human Services		
Ms. Teresa Bell, Fort Harrison	Governor	8/1/2010
Qualifications (if required): representative of the U.S. Department of Veterans' Affairs		
Mr. Harry LaFriniere, Florence	Governor	8/1/2010
Qualifications (if required): Veteran and resident of Region 1		
Ms. Mary Creech, Butte	Governor	8/1/2010
Qualifications (if required): Veteran and resident of Region 2		
Mr. Thomas Huddleston, Helena	Governor	8/1/2010
Qualifications (if required): experience with veterans' issues		
Mr. James English, Helena	Governor	8/1/2010
Qualifications (if required): individual with experience with veterans' issues		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Board of Veterinary Medicine (Labor and Industry)		
Ms. Joan Carey Marshall, Ekalaka	Governor	7/31/2010
Qualifications (if required): veterinarian		
Ms. Kim Baker, Hot Springs	Governor	7/31/2010
Qualifications (if required): consumer		
Board of Water Well Contractors (Natural Resources and Conservation)		
Mr. Pat Byrne, Great Falls	Governor	7/1/2010
Qualifications (if required): water well contractor		
Burial Preservation Board (Administration)		
Mr. Robert P. Four Star, Poplar	Governor	8/22/2010
Qualifications (if required): representative of the Northern Cheyenne Tribe		
Mr. Linwood Tall Bull, Lame Deer	Governor	8/22/2010
Qualifications (if required): representative of the Northern Cheyenne Tribe		
Mr. Reuben Mathias, Pablo	Governor	8/22/2010
Qualifications (if required): representative of the Salish-Kootenai Tribes		
Mr. William Big Day, Crow Agency	Governor	8/22/2010
Qualifications (if required): representative of the Crow Tribe		
Mr. Morris Belgard, Hays	Governor	8/22/2010
Qualifications (if required): representative of the Fort Belknap Indian Community		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Burial Preservation Board (Administration) cont.		
Mr. Videl Stump Sr., Box Elder	Governor	8/22/2010
Qualifications (if required): representative of the Chippewa Cree Tribe		
Mr. Rusty Randolph, Havre	Governor	8/22/2010
Qualifications (if required): representative of the Little Shell Tribe		
Dr. Ruthann Knudson, Great Falls	Governor	8/22/2010
Qualifications (if required): representative of the archaeological association		
Mr. Terry Bullis, Hardin	Governor	8/22/2010
Qualifications (if required): representative of the coroner's association		
Community Service Commission (Labor and Industry)		
Director Keith Kelly, Helena	Governor	7/1/2010
Qualifications (if required): representative of the Montana Department of Labor		
Rep. Sheila Rice, Great Falls	Governor	7/1/2010
Qualifications (if required): representative of volunteer agencies		
Dr. Johnel Barcus, Browning	Governor	7/1/2010
Qualifications (if required): representative of the private sector		
Mr. Cedric Jacobson, Missoula	Governor	7/1/2010
Qualifications (if required): youth representative		
Ms. Jackie Girard, Helena	Governor	7/1/2010
Qualifications (if required): representative of the National Service Corporation		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Community Service Commission (Labor and Industry) cont.		
Mr. Doug Braun, Billings Qualifications (if required): representative of organized labor	Governor	7/1/2010
Ms. Kimberly Miske, Wibaux Qualifications (if required): representative of local government	Governor	7/1/2010
Ms. Laura Pflum, Missoula Qualifications (if required): youth representative	Governor	7/1/2010
Consumer Settlement Advisory Council (Attorney General)		
Rep. Bill Thomas, Hobson Qualifications (if required): none specified	Attorney General	7/10/2010
Rep. Eve Franklin, Helena Qualifications (if required): none specified	Attorney General	7/10/2010
Mr. Matthew Dale, Helena Qualifications (if required): none specified	Attorney General	7/10/2010
Ms. Tara Veazey, Helena Qualifications (if required): none specified	Attorney General	7/10/2010
Ms. Ali Bovingdon, Helena Qualifications (if required): none specified	Attorney General	7/10/2010

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Economic Development Advisory Council (Commerce)		
Mr. Joseph B. Reber, Helena	Governor	7/23/2010
Qualifications (if required): public representative		
Mr. Jim Smitham, Butte	Governor	7/23/2010
Qualifications (if required): public representative		
Mr. Paul Tuss, Havre	Governor	7/23/2010
Qualifications (if required): public representative		
Ms. Corlene Martin, Choteau	Governor	7/23/2010
Qualifications (if required): public representative		
Information Technology Managers' Advisory Council (Administration)		
Mr. Mike Jacobson, Helena	Director	7/1/2010
Qualifications (if required): Department of Justice representative		
Mr. Dick Clark, Helena	Director	7/1/2010
Qualifications (if required): Department of Administration representative		
Mr. Rick Bush, Helena	Director	7/1/2010
Qualifications (if required): Department of Natural Resources and Conservation representative		
Mr. Mike Bousliman, Helena	Director	7/1/2010
Qualifications (if required): Department of Transportation representative		
Mr. Joe Frohlich, Hamilton	Director	7/1/2010
Qualifications (if required): Ravalli County representative		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Information Technology Managers' Advisory Council (Administration) cont.		
Ms. Tammy LaVigne, Helena	Director	7/1/2010
Qualifications (if required): Department of Labor and Industry representative		
Mr. Mark Van Alstyne, Helena	Director	7/1/2010
Qualifications (if required): Secretary of State representative		
Kindergarten to College Work Group (Governor)		
Director Keith Kelly, Helena	Governor	9/11/2010
Qualifications (if required): ex-officio member		
Rep. David Ewer, Helena	Governor	9/11/2010
Qualifications (if required): ex-officio member		
Rep. Jonathan Windy Boy, Box Elder	Governor	9/11/2010
Qualifications (if required): representative of the governor		
Mr. Evan Barrett, Butte	Governor	9/11/2010
Qualifications (if required): ex-officio member		
Ms. Sheila Stearns, Helena	Governor	9/11/2010
Qualifications (if required): Commissioner of Higher Education		
Mr. Dick Clark, Helena	Governor	9/11/2010
Qualifications (if required): ex-officio member		
Ms. Jan Lombardi, Helena	Governor	9/11/2010
Qualifications (if required): representative of the governor		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Kindergarten to College Work Group (Governor) cont.		
Director Anthony Preite, Helena Qualifications (if required): ex-officio member	Governor	9/11/2010
Ms. Janine Pease, Billings Qualifications (if required): Board of Regents representative	Governor	9/11/2010
Ms. Erin Williams, Missoula Qualifications (if required): parent representative	Governor	9/11/2010
Mr. Steve Meloy, Helena Qualifications (if required): Board of Public Education executive secretary	Governor	9/11/2010
Mr. Steve Gettel, Great Falls Qualifications (if required): School for the Deaf and Blind representative	Governor	9/11/2010
Ms. Anna Whiting-Sorrell, Helena Qualifications (if required): ex-officio member	Governor	9/11/2010
Superintendent Denise Juneau, Helena Qualifications (if required): Superintendent of Public Instruction	Governor	9/11/2010
Mr. Bernard Olsen, Lakeside Qualifications (if required): Board of Public Education representative	Governor	9/11/2010
Ms. Kelly Chapman, Helena Qualifications (if required): Student Assistance Foundation representative	Governor	9/11/2010

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Kindergarten to College Work Group (Governor) cont.		
Ms. Mara Menehan, Helena	Governor	9/11/2010
Qualifications (if required): student representative		
Mental Disabilities Board of Visitors (Governor)		
Ms. Joan Nell Macfadden, Great Falls	Governor	7/1/2010
Qualifications (if required): experience with emotionally disturbed children		
Mr. Graydon Davies Moll, Polson	Governor	7/1/2010
Qualifications (if required): experience with developmentally disabled adults		
Ms. Sandra Mihelish, Helena	Governor	7/1/2010
Qualifications (if required): experience with welfare of mentally ill individuals		
Montana Historical Society Board of Trustees (Historical Society)		
Mr. John G. Lepley, Fort Benton	Governor	7/1/2010
Qualifications (if required): public member		
Ms. Shirley Groff, Butte	Governor	7/1/2010
Qualifications (if required): public member		
Mr. James W. Murry, Clancy	Governor	7/1/2010
Qualifications (if required): public member		
Montana Noxious Weed Seed Free Forage Advisory Council (Agriculture)		
Mr. Dennis Cash, Bozeman	Director	9/17/2010
Qualifications (if required): ex-officio non-voting member representing Montana State University Extension		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Montana Noxious Weed Seed Free Forage Advisory Council (Agriculture) cont.		
Mr. Charles Miller, Hamilton	Director	9/17/2010
Qualifications (if required): forage producer		
Mr. Keith Brophy, Valier	Director	9/17/2010
Qualifications (if required): pellets cubes or related products processor		
Mr. Richard Maki, Belt	Director	9/17/2010
Qualifications (if required): forage producer		
Mr. Miles Hutton, Turner	Director	9/17/2010
Qualifications (if required): outfitter or guide		
Mr. David Wichman, Moccasin	Director	9/17/2010
Qualifications (if required): ex-officio non-voting member representing Montana State University Agriculture		
Ms. Stacey Barta, Big Timber	Director	9/17/2010
Qualifications (if required): from an Eastern weed district		
Montana Wheat and Barley Committee (Agriculture)		
Mr. Donald Fast, Glasgow	Governor	8/20/2010
Qualifications (if required): resident of District 2		
Mr. Arlo Skari, Chester	Governor	8/20/2010
Qualifications (if required): resident of District 3		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Professional Engineers and Land Surveyors (Labor and Industry)		
Rep. Hal Jacobson, Helena	Governor	7/1/2010
Qualifications (if required): public representative		
Public Defender Commission (Administration)		
Mr. Richard E. Gillespie, Helena	Governor	7/1/2010
Qualifications (if required): attorney nominated by the State Bar who represents criminal defense lawyers		
Mr. Mike Sherwood, Missoula	Governor	7/1/2010
Qualifications (if required): attorney nominated by the Montana Supreme Court		
Mr. William Snell, Billings	Governor	7/1/2010
Qualifications (if required): employee of organization providing addictive behavior counseling		
Ms. Tara Veazey, Helena	Governor	7/1/2010
Qualifications (if required): member of an organization advocating on behalf of indigent persons		
Research and Commercialization Technology Board (Commerce)		
Mr. Michael Dolson, Plains	Governor	7/1/2010
Qualifications (if required): public member (Native American)		
Teachers' Retirement Board (Administration)		
Mr. James Turcotte, Helena	Governor	7/1/2010
Qualifications (if required): public representative		
Telecommunications Advisory Council Services for Persons with Disabilities (Public Health and Human Svcs.)		
Mr. Ron Bibler, Great Falls	Governor	7/1/2010
Qualifications (if required): individual with a hearing disability		

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2010 THROUGH SEPTEMBER 30, 2010

Board/current position holder	Appointed by	Term end
Telecommunications Advisory Council Services for Persons with Disabilities (Public Health and Human Services) cont.		
Ms. Linda Kirkland, Helena	Governor	7/1/2010
Qualifications (if required): agency representative		
Ms. Amber Lang, Kalispell	Governor	7/1/2010
Qualifications (if required): individual with a hearing disability		
Ms. Chris Caniglia, Helena	Governor	7/1/2010
Qualifications (if required): non-disabled business person		
Mr. Matt Bugni, Helena	Governor	7/1/2010
Qualifications (if required): agency representative		
Tourism Advisory Council (Commerce)		
Ms. Rhonda Fitzgerald, Whitefish	Governor	7/1/2010
Qualifications (if required): resident of Glacier Country		
Mr. Stan Ozark, Glasgow	Governor	7/1/2010
Qualifications (if required): resident of Missouri River Country		
Ms. Sandy Watts, Garryowen	Governor	7/1/2010
Qualifications (if required): resident of Custer Country		
Mr. Bill McGladdery, Butte	Governor	7/1/2010
Qualifications (if required): resident of Goldwest Country		