

# MONTANA ADMINISTRATIVE REGISTER

## ISSUE NO. 3

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

In the matter of the amendment of	)	NOTICE OF PROPOSED
ARM 18.8.519 pertaining to wreckers	)	AMENDMENT
and tow vehicle requirements	)	
	)	NO PUBLIC HEARING
	)	CONTEMPLATED

TO: All Concerned Persons

1. On March 16, 2013, the Department of Transportation proposes to amend the above-stated rule.

2. The Department of Transportation 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 Department of Transportation no later than 5:00 p.m. on March 7, 2013, to advise us of the nature of the accommodation that you need. Please contact Dan Moore, Motor Carrier Services, Department of Transportation, P.O. Box 4639, Helena, Montana, 59604-4639; telephone (406) 444-0454; fax (406) 444-9263; TDD 444-7696 or (800) 335-7592; or e-mail dmoore@mt.gov.

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

18.8.519 WRECKERS AND/OR TOW VEHICLE REQUIREMENTS ~~(1) The following regulations apply to wreckers and/or tow vehicles:~~

~~(a)(1)~~ (1) When proceeding to an emergency, ~~the~~ a wrecker or tow vehicle which exceeds the weight limits set forth in 61-10-141, MCA, must enter an open weigh station except if the emergency creates highway blockage and/or serious threat to life and property. If this condition exists, the wrecker or tow vehicle must have top lights flashing and may pass by the open weigh station.

~~(b)(2)~~ (2) If the licensed gross weight or actual gross weight of the towed power unit does not exceed 26,000 pounds, and separating the combination would create a safety risk to the traveling public, The a wrecker or tow vehicle may tow the vehicles or vehicle combination from the emergency scene or place of disablement on a public roadway to its the operator's place of business or operator's yard or suitable secure facility if it is within 100 miles of the emergency scene ~~provided the licensed gross weight or actual gross weight of the power unit does not exceed 26,000 pounds.~~

(3) If the licensed gross weight or actual gross weight of the towed power unit exceeds 26,000 pounds, and separating the combination would create a safety risk to the traveling public, the disabled vehicle combination may be removed intact from the emergency scene or place of disablement, but must be separated at ~~to~~ the first place where the disabled vehicle combination can be safely reduced to a single unit without creating a safety risk to the traveling public.

~~(e)(4)~~ Combinations, including Double double and triple saddle mount configurations, nondivisible loads, or unusual combinations not readily separated (including but not limited to loaded fuel semi-trailers, stinger steered combinations, and loaded logging trucks with pole trailer connected to the disabled power unit) may be towed from the emergency scene or place of disablement to the operator's place of business or operator's yard if it is within 100 miles of the emergency scene or place of disablement, and if the operator agrees to travel not more than 10 miles per hour below the posted speed limit. If a move exceeds 100 miles, the disabled vehicles may be removed from the emergency scene or place of disablement on a public roadway but must be separated at the first place where the saddle mount configuration combination can be safely reduced to a single unit.

~~(d)(5)~~ When returning from an emergency, the wrecker or tow vehicle and load which exceeds the weight limits in 61-10-141, MCA, must enter an open weigh station.

~~(e)(6)~~ Permit requirements for tow vehicles operating under emergency conditions:

~~(i)(a)~~ If a tow vehicle or the vehicle being towed exceeds statutory limits, special permits are required and must be carried in the tow vehicle when responding to returning from an emergency. An emergency response does not exempt the tow truck operator from special permit requirements. If the type of special permit cannot be determined, the permits must be obtained at the weigh station when returning from the emergency scene or place of disablement through the use of the Motor Carrier Services (MCS) courtesy weight permit process;

~~(ii)(b)~~ A special permit is valid for both the towing vehicle and the disabled vehicle and load;

~~(iii)(c)~~ Special permits for overweight are valid for both divisible and nondivisible loads, however routing and restrictions on the original permit must be followed unless properly amended by MCS;

~~(iv)(d)~~ An emergency response exempts the tow truck operation from restricted hours of operation within 100 miles of the emergency scene; and

~~(v)(e)~~ All flag vehicles, light, and signing regulations found at ARM 18.8.510A, 18.8.510B, and 18.8.511A apply to wreckers and/or tow truck vehicles when responding to or returning from an emergency.

(7) A tow vehicle or wrecker may operate during restricted hours of daylight, weekends, holidays, and during restricted or severe weather travel conditions when returning from an emergency scene or place of disablement. A tow vehicle or wrecker may only travel during restricted or severe weather conditions to the first safe place the vehicles may be safely parked until the restricted or severe driving conditions have been removed.

(8) MCS may recommend a 30-day or longer suspension from the towing program for violation of this rule.

AUTH: 61-10-155, MCA

IMP: 61-10-121, 61-10-122, 61-10-124, 61-10-125, 61-10-141, MCA

REASON: The proposed amendments are necessary to clarify permit and other requirements for tow vehicle and wrecker operators responding to an emergency

scene or a disabled vehicle. The amendments to (2) and (3) are necessary to clarify the requirements for separating combinations both over and under 26,000 pounds to ensure all statutory requirements on overweight loads are also met by wreckers and tow vehicles. The amendments to (4) are necessary to address combination loads and clarify distances which may be traveled to meet all statutory requirements for overweight loads. The amendments to (6) are necessary to address the permit requirements for tow vehicles or wreckers; including addition of language clarifying the procedure for obtaining a permit when the necessary type of permit cannot immediately be determined at the scene. The proposed new (7) will clarify that tow vehicles and wrecker may operate during normally restricted hours and severe travel conditions under the authority and requirements of this rule to avoid confusion with limits set for non-towing or wrecker vehicles. Finally, the proposed new (8) will insert a recommended penalty for violation of the rule to notify tow vehicle operators of the possible suspension.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: Dan Moore, Department of Transportation, P.O. Box 201001, Helena, Montana, 59620-1001; telephone (406) 444-0454; fax (406) 444-9263; or e-mail [dmoore@mt.gov](mailto:dmoore@mt.gov), and must be received no later than 5:00 p.m., March 14, 2013.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to Dan Moore, Motor Carrier Services, MDT at the above address no later than 5:00 p.m., March 14, 2013.

6. If the agency receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 9,307 persons based on the number of permits issued in the 2011 calendar year.

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

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of

State strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. 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.

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

/s/ Carol Grell Morris  
Carol Grell Morris  
Rule Reviewer

/s/ Michael T. Tooley  
Michael T. Tooley  
Director  
Department of Transportation

Certified to the Secretary of State February 4, 2013.

BEFORE THE BOARD OF PRIVATE ALTERNATIVE ADOLESCENT  
RESIDENTIAL OR OUTDOOR PROGRAMS  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF EXTENSION OF  
ARM 24.181.301 definitions and ) COMMENT PERIOD ON  
24.181.2101 renewals ) PROPOSED AMENDMENT

TO: All Concerned Persons

1. On November 23, 2012, the Board of Private Alternative Adolescent Residential or Outdoor Programs (board) published MAR Notice No. 24-181-6 regarding the public hearing on the proposed amendment of the above-stated rules, at page 2310 of the 2012 Montana Administrative Register, issue no. 22. A public hearing was announced in the notice and subsequently held in Helena on December 17, 2012.

2. In response to public request, the board has decided to extend the public comment period to 5:00 p.m., March 8, 2013.

3. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Private Alternative Adolescent Residential or Outdoor Programs no later than 5:00 p.m., on March 1, 2013, to advise us of the nature of the accommodation that you need. Please contact Cyndi Breen, Board of Private Alternative Adolescent Residential or Outdoor Programs, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2392; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdpap@mt.gov.

4. The rules proposed to be amended remain exactly as proposed and published in the original notice of public hearing, which is referenced in paragraph one above. For clarity, the rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

24.181.301 DEFINITIONS (1) "Adjunct ministry" means a charitable facility that meets all of the following criteria:

(a) is founded directly by the existing church or its officers and wholly owned and operated by the existing church, which is incorporated by the state;

(b) expresses and communicates, as an integral part of the adjunct ministry, the mission of the existing church;

(c) funding for is derived solely from the budget of the existing church;

(d) is accredited by the National Independent Private Schools Association (NIPSA), Council on Accreditation (COA), Commission on Accreditation of

Rehabilitation Facilities (CARF), or Joint Commission on Accreditation of Healthcare Organizations (JCAHO):

(e) complies with the standards established by other governmental entities, including building codes for those structures used as a residence for program participants, health and sanitation requirements, and other standards adopted by the board by rules; and

(f) informs the public that the adjunct ministry is exempt from the licensure requirements in any advertisement.

(1) remains the same, but is renumbered (2).

~~(2)~~ (3) "Average daily census" means the arithmetical average of the number of participants served daily by the program, calculated over a calendar year. This number is calculated by adding the total number of service days, as defined in (2), provided by the program during the last calendar year, and divided by 365 days.

(3) through (6) remain the same, but are renumbered (4) through (7).

~~(7)~~ (8) "Direct care staff" means program personnel who directly participate in the care, supervision, and guidance of program ~~participant~~ participants in a program.

~~(8)~~ (9) "Number of service days" means any portion of a 24 ~~24~~-hour period in which service is provided to one participant, multiplied by the number of actual participants on that day.

(9) and (10) remain the same, but are renumbered (10) and (11).

~~(11)~~ (12) "Significant Change change to Plan plan of Operation operation" means a major addition or deletion of advertised services or location or change of services offered by the program.

AUTH: 37-1-131, 37-48-103, 37-48-113, MCA

IMP: 37-1-131, 37-48-102, 37-48-103, MCA

REASON: After considering the "adjunct ministry" status of a few programs as justification for not requiring licensure, the board determined it is reasonably necessary to define the term to provide guidance on the exemption that exists in statute. Section 37-48-102(6), MCA, defines the private alternative adolescent residential or outdoor programs that must be licensed by the board. The statute also provides six types of programs, schools, or camps that are exempt from the licensure requirement, including organizations or schools that are adjunct ministries of a church incorporated in Montana. The board is proposing to define "adjunct ministry" at this time to clearly set forth the board's intent regarding the parameters of the licensure exemption.

Authority and implementation cites are amended to accurately reflect all statutes implemented through the rule and provide the complete sources of the board's rulemaking authority. Additional nonsubstantive changes are necessary to comply with the formatting requirements of the Secretary of State.

24.181.2101 RENEWALS (1) through (7) remain the same.

(8) The board will conduct random audits of up to 25 percent of renewed licensees to determine if licensees comply with certification requirements for first aid and cardiopulmonary resuscitation.



AUTH: 37-1-131, 37-48-103, 37-48-113, MCA

IMP: 37-1-131, 37-1-134, 37-1-141, 37-48-103, 37-48-113, MCA

REASON: The board is amending this rule to establish a random audit procedure as allowed in 37-1-131, MCA. Licensed programs are required to have staff certified in first aid and CPR to ensure the health and safety of the program participants. Having completed several renewal cycles and noting the potential for program staff turnover, the board determined that annual audits following renewal are necessary to ensure that programs are remaining compliant with these certification requirements.

Authority and implementation cites are amended to accurately reflect all statutes implemented through the rule and provide the complete sources of the board's rulemaking authority.

5. Concerned persons may present their data, views, or arguments to the Board of Private Alternative Adolescent Residential or Outdoor Programs, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to [dlibsdpap@mt.gov](mailto:dlibsdpap@mt.gov), and must be received no later than 5:00 p.m., March 8, 2013.

BOARD OF PRIVATE ALTERNATIVE  
ADOLESCENT RESIDENTIAL OR  
OUTDOOR PROGRAMS  
DR. JOHN SANTA, CHAIRPERSON

/s/ DARCEE L. MOE

Darcee L. Moe  
Alternate Rule Reviewer

/s/ PAM BUCY

Pam Bucy, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State February 4, 2013

BEFORE THE STATE COMPENSATION INSURANCE FUND  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 2.55.320 and 2.55.327A, )  
pertaining to classifications of )  
employments and the construction )  
industry premium credit program )

TO: All Concerned Persons

1. On December 6, 2012, the Montana State Fund published MAR Notice No. 2-55-42 pertaining to the proposed amendment of the above-stated rules at page 2427 of the 2012 Montana Administrative Register, Issue Number 23.

2. The Montana State Fund has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ Nancy Butler  
Nancy Butler, General Counsel  
Rule Reviewer

/s/ Elizabeth Best  
Elizabeth Best  
Chair of the Board

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

Certified to the Secretary of State February 4, 2013.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )	NOTICE OF AMENDMENT AND
17.38.106 pertaining to fees and the )	ADOPTION
adoption of New Rule I pertaining to )	
significant deficiency )	(WATER QUALITY)

TO: All Concerned Persons

1. On October 11, 2012, the Board of Environmental Review published MAR Notice No. 17-340 regarding a notice of public hearing on the proposed amendment and adoption of the above-stated rules at page 1906, 2012 Montana Administrative Register, issue number 19. On November 8, 2012, the Board of Environmental Review published MAR Notice No. 17-340 regarding an amended notice of public hearing on the proposed amendment and adoption of the above-stated rules at page 2237, 2012 Montana Administrative Register, issue number 21.

2. The board has amended ARM 17.38.106 and adopted New Rule I (17.38.104) exactly as proposed.

3. No public comments or testimony were received.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ John F. North  
JOHN F. NORTH  
Rule Reviewer

By: /s/ Joseph W. Russell  
JOSEPH W. RUSSELL, M.P.H.  
Chairman

Certified to the Secretary of State, February 4, 2013.

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

In the matter of the amendment of )  
ARM 37.34.1501 and the repeal of )  
37.34.1502, 37.34.1506, 37.34.1507, )  
37.34.1511, 37.34.1512, and )  
37.34.1513 pertaining to incident )  
reporting )

TO: All Concerned Persons

1. On October 11, 2012 the Department of Public Health and Human Services published MAR Notice No. 37-608 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 1994 of the 2012 Montana Administrative Register, Issue Number 19. On January 31, 2013 the department published the notice of amendment and repeal at page 148 of the 2013 Montana Administrative Register, Issue Number 2.

2. A typographical error was discovered in the web site address cited in the notice of adoption for the Developmental Disabilities Program Incident Management Procedures Manual. The correct web address is:  
<http://www.dphhs.mt.gov/dsd/adminrules.shtml>.

/s/ Cary B. Lund  
Cary B. Lund  
Rule Reviewer

/s/ Richard H. Opper  
Richard H. Opper, Director  
Public Health and Human Services

Certified to the Secretary of State February 4, 2013.

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

In the matter of the adoption of New	)	NOTICE OF ADOPTION,
Rule I, the amendment of ARM	)	AMENDMENT, AND REPEAL
37.79.101, 37.79.102, 37.79.120,	)	
37.79.201, 37.79.206, 37.79.207,	)	
37.79.501, 37.79.503, 37.79.505,	)	
37.79.602, and 37.79.801, and repeal	)	
of 37.79.301, 37.79.303, 37.79.307,	)	
37.79.308 37.79.309, 37.79.312,	)	
37.79.313, 37.79.316, 37.79.317, and	)	
37.79.325 pertaining to the healthy	)	
Montana kids coverage group of the	)	
healthy Montana kids plan	)	

TO: All Concerned Persons

1. On December 20, 2012, the Department of Public Health and Human Services published MAR Notice No. 37-622 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 2566 of the 2012 Montana Administrative Register, Issue Number 24.

2. The department has adopted New Rule I (37.79.304), as proposed.

3. The department has amended ARM 37.79.101, 37.79.102, 37.79.120, 37.79.201, 37.79.206, 37.79.207, 37.79.501, 37.79.503, 37.79.602, and 37.79.801 as proposed.

4. The department has repealed ARM 37.79.301, 37.79.303, 37.79.307, 37.79.308, 37.79.309, 37.79.312, 37.79.313, 37.79.316, 37.79.317, and 37.79.325 as proposed.

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

37.79.505 DISENROLLMENT (1) through (4) remain as proposed.

(5) Notice is adequate if it includes:

(a) through (f) remain as proposed.

(g) the right to be represented by legal counsel, friend, relative, or other ~~spokesman~~ spokesperson;

(h) through (j) remain as proposed.

AUTH: 53-4-1004, 53-4-1009, 53-4-1105, MCA

IMP: 53-4-1003, 53-4-1004, 53-4-1009, 53-4-1103, 53-4-1104, 53-4-1105, MCA

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: One commenter recommended that the department change the word "spokesman" to "spokesperson."

RESPONSE #1: The department agrees with the recommendation and has changed the text accordingly to eliminate the possibility of gender-specific reference to men implied when using "spokesman."

COMMENT #2: A comment was received in support of the rule changes generally.

RESPONSE #2: The department thanks the commenter for supporting the rule changes.

7. The department intends to apply New Rule I (37.79.304) retroactively to October 1, 2012 except for chiropractic services and durable medical equipment, which will be applied retroactively to January 1, 2013. A retroactive application of the proposed rules does not result in a negative impact to any affected party.

/s/ Geralyn Driscoll  
Rule Reviewer

/s/ Richard H. Opper  
Richard H. Opper, Director  
Public Health and Human Services

Certified to the Secretary of State February 4, 2013

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the adoption of New	)	NOTICE OF ADOPTION,
Rules I (42.4.2801) and II (42.4.2803),	)	AMENDMENT, AND REPEAL
the amendment of ARM 42.4.104,	)	
42.4.201, 42.4.202, 42.4.208,	)	
42.4.209, 42.4.303, 42.4.402,	)	
42.4.1608, 42.4.1702, 42.4.2403,	)	
42.4.2404, 42.4.2704, 42.4.2706,	)	
42.4.2802, 42.4.2905, 42.4.3003,	)	
42.4.3103, 42.4.3202, 42.4.3303,	)	
42.4.4106, and 42.4.4107, and the	)	
repeal of 42.4.2707 relating to tax	)	
credits	)	

TO: All Concerned Persons

1. On November 23, 2012, the department published MAR Notice Number 42-2-889 regarding the proposed adoption, amendment, and repeal of the above-stated rules at page 2347 of the 2012 Montana Administrative Register, Issue Number 22.

2. A public hearing was held on December 17, 2012, to consider the proposed adoption, amendment, and repeal. Jane Egan, of the Montana Society of Certified Public Accountants, and Nicole Rush, of the Montana Community Foundation, appeared and testified at the hearing. Liz Moore, Executive Director of the Montana Nonprofit Association, and Jeff Bretherton, Board of Directors Chairman of the Montana Community Foundation, submitted written comments prior to the hearing. The oral and written comments received are summarized as follows along with the responses of the department:

COMMENT NO. 1: With regard to ARM 42.4.208, Ms. Egan stated that the Montana Society of Certified Public Accountants (MSCPA) would like the department to consider allowing insulated garage doors on attached garages to qualify for the credit, whether the garage is heated or not, because they help conserve energy. An attached garage will keep cold or hot air from entering the house through the access door and conserve energy. She further commented that the wording "that does not consume energy" is unclear. If the meaning is that the garage needs to be heated, can the wording say that?

RESPONSE NO. 1: The department appreciates Ms. Egan's interest in this rulemaking action, and thanks her for the suggestion that insulated garage doors should qualify for the credit when installed on an attached garage. However, at this time, the department is declining to make that change. Information gathered from sources such as the Department of Environmental Quality, show that upgrading to an insulated garage door has, at best, only a minimal impact on the overall energy

consumption of the living space. That means the investment would be considered "impractical or ineffective" as described in 15-32-106, MCA, and therefore the credit should be denied.

Better energy conservation can be obtained by improving the efficiency of the access door. The department will continue to determine if there are situations where installation of an insulated garage door would qualify for the credit, as the credit is intended, and what criteria would need to be met in order to qualify.

The department also appreciates Ms. Egan's comment and suggestion relative to the wording in ARM 42.4.208, but believes the amended language sufficiently clarifies the intention of the example.

COMMENT NO. 2: With regard to ARM 42.4.402, Ms. Egan commented that the change denies a credit to the beneficiaries for taxes paid to another state by a trust or estate. If the related income is taxed to Montana at the beneficiary level, the credit should certainly be allowed. The rule could also strictly be interpreted to deny the credit for taxes withheld for the beneficiary of a revocable living trust.

RESPONSE NO. 2: The department appreciates Ms. Egan's comments on this rule. The proposed amendment to ARM 42.4.402 does not deny a credit for income taxes paid to another state or country to Montana resident beneficiaries of an estate or trust. As provided in 15-30-2302, MCA, resident taxpayers, including those taxpayers who are beneficiaries of an estate or trust, are allowed to apply a credit towards their income tax liability equal to the amount of income taxes that they paid to another state or country.

If a resident trust pays income tax to another state, the income that was taxed by that other state is part of the trust's Montana taxable income and the fiduciary of the trust can apply the credit for those taxes paid against the trust's Montana tax liability. However, if the trust distributes the income from the other state to a beneficiary, the trust will not pay income tax at all on that distributed amount. Instead, the beneficiary will include the income in their taxable income and will pay the applicable income tax to that other state. If the beneficiary is a Montana resident, then the beneficiary can claim the credit for those taxes paid against their individual income tax liability.

COMMENT NO. 3: With regard to ARM 42.4.2704, Ms. Rush, Ms. Moore, and Mr. Bretherton all commented that in the explanation for the amendment, the department correctly notes that the credit cannot be allowed against the tax liability of partnerships or limited liability companies.

However, pass-through entities such as small business corporations, partnerships, and LLCs are permitted to make outright gifts to qualified endowments qualifying for the 20 percent credit. The credit passes through and is attributed to the owners of the entity, which can be individuals. Thus the rule should recognize and provide for the possibility that the credit for a direct contribution is allowed against the tax liability of the individual when the individual is an owner of the pass-through entity making the contribution.

Ms. Rush, Ms. Moore, and Mr. Bretherton suggested an amendment to include the word "individual" to read as follows: "The credit allowed against the tax



liability of the corporation, estate, trust, or individual for a direct contribution from a corporation, partnership, limited liability company, estate, or trust is equal to 20 percent of the charitable contribution."

With regard to ARM 42.4.2704, Ms. Egan stated that the MSCPA concurs with the comments presented by the MNA and the MCF.

RESPONSE NO. 3: The department thanks Ms. Rush, Ms. Moore, Mr. Bretherton, and Ms. Egan for their comments and appreciates the opportunity to address their concerns. Unfortunately, the department is not able to incorporate the reference to individual income tax liability, because an individual is allowed to deduct 40 percent of the present value of the charitable gift portion of a planned gift, not 20 percent as the proposed language would establish.

The department is also not able to include the proposed language to acknowledge that a pass-through entity can distribute amounts of a qualifying contribution to its owners, because the proposed language would suggest that a C corporation and a limited liability company electing to be treated as a C corporation for income tax purposes can distribute contribution amounts to its shareholders. The proposed language would also conflict with how a beneficiary receives an amount of a qualifying contribution from an estate or trust.

ARM 42.4.2704(5) and (7) provide guidance to pass-through entities about how to distribute a qualifying contribution to its owners. The contribution is passed through to the owners in the same proportion as their distributive share of the entity's income or loss for Montana income tax purposes. ARM 42.4.2704(6) provides direction to estates and trusts about how to claim the credit and how to pass remaining qualifying contribution amounts to beneficiaries.

COMMENT NO. 4: With regard to ARM 42.4.2706, Ms. Rush, Ms. Moore, and Mr. Bretherton commented that the department is proposing to amend the rule to add a requirement that the tax-exempt organization, trustee, or bank or trust company (qualified organization) receiving the contribution must state in the receipt it provides to the donor that the contribution was placed in a permanent, irrevocable fund. The reasonable necessity for the amendment states that the department currently requires that the information be submitted when claiming the credit in order to verify that the gift was placed in a permanent, irrevocable fund as required by law, and this amendment simply informs taxpayers of that requirement.

However, contrary to the reasonable necessity statement for the proposed amendment, it does not appear that the department currently requires taxpayers to submit a receipt setting forth that the contribution was placed in a permanent, irrevocable fund when an outright contribution is made. ARM 42.4.2706 currently does not contain such a requirement, nor does the Form QEC. Paper filers of the Form QEC are not instructed to even attach all the information currently required by ARM 42.4.2706, such as the receipt, and in the case of a charitable trust, where the charity is yet to be named, a copy of disposition clause of the charitable trust. The Form QEC instructs electronic filers to not even submit the form.

Ms. Rush, Ms. Moore, and Mr. Bretherton requested that the proposed amendment not be adopted at all unless it is addressing a material problem identified by the department related to credits being taken for outright gifts made to

permanent, irrevocable funds created by qualified organizations under separate governing documents. If the department has identified such a problem, but it has arisen in the situation where qualified organizations are not following the restriction of the taxpayer contained in taxpayers' separate gift documents accompanying their outright contributions, the department should report these violations to the Attorney General's office to be addressed rather than adopt the proposed amendment.

If the department has identified such a problem, but it has arisen in the situation where the taxpayer has not provided the qualified organization with a separate gift document containing the restriction, then they request that the proposed amendment be modified in (f) to permit those taxpayers who do make outright gifts to permanent, irrevocable funds created by their separate gift document, to submit the separate gift document rather than ensure the qualified organization timely and correctly provides a sufficient receipt as follows: "in the case of an outright gift, a copy of the separate gift document which accompanied the outright contribution, or the receipt in (a) must state that the contribution was placed in a permanent irrevocable fund as defined in ARM 42.4.2701."

Ms. Rush, Ms. Moore, and Mr. Bretherton further explained that the reason for the request is that, in their experience, most permanent, irrevocable funds holding outright gifts are created by the taxpayer, not the qualified organization, and the validity of a taxpayer's credit in such a case should not depend on whether the qualified organization makes the proper recitation in a receipt to the taxpayer.

Current rules provide that in the case of an outright gift, a permanent, irrevocable fund can be created either by the taxpayer in a separate gift document accompanying an outright contribution, or by the qualified organization under a separate governing document. Most taxpayers contributing outright gifts create the permanent, irrevocable fund by a separate gift document accompanying the outright contribution. The taxpayer can ensure that the separate gift document is provided and contains sufficient restriction, and submit that document to the department.

Although most qualified organizations are accustomed by federal tax law to providing receipts to donors, they are not accustomed to including this additional recitation. Taxpayers should not have to risk having their credit denied because a qualified organization did not timely and properly include the statement in the receipt. A taxpayer restriction in a separate gift document creates a legal obligation on the qualified organization to hold the contribution pursuant to that restriction, (72-30-209, MCA). If the qualified organization does not honor the restriction, the taxpayer's credit should not be impacted. Instead, the Attorney General should compel the qualified organization to honor the taxpayer's restriction.

Ms. Rush, Ms. Moore, and Mr. Bretherton requested that regardless of the department's decision on this issue, the requirements of ARM 42.4.2706 be included in the Form QEC to give taxpayers better notice of the information that needs to be attached to their tax returns to qualify for the credit.

Ms. Egan stated that the MSCPA concurs with the comments regarding ARM 42.4.2706 presented by the MNF and the MCF. She further requested that the proposed amendment not be adopted unless it addresses a material problem. If an amendment must be made, then taxpayers making outright gifts intended to qualify for the credit should be permitted to attach to their return the separate gift document which accompanied their gift, and the requirements of ARM 42.4.2706 be included

on Form QEC.

RESPONSE NO. 4: The department appreciates the opportunity to address the questions submitted by Ms. Rush, Ms. Moore, Mr. Bretherton, and Ms. Egan.

The department has updated the 2012 Form QEC to include the requirements of ARM 42.4.2706, in an effort to provide taxpayers with better notice of the information the department needs to verify the credit. The department believes that it is important that the donor and qualified organizations communicate the intent of the law and suggest that the donor provide the qualified organization the list of items that should be included in the receipt at the time of the donation. The list is included in the 2012 Form QEC instructions.

Although the department understands the concerns relating to obtaining a receipt from the qualified organization, the department still feels a receipt should be obtained and that both the donor and the qualified organization understand that the gift must be made to a permanent, irrevocable fund. Whether there has been a material problem or not, the department believes this requirement will help ensure the credit is properly claimed by the taxpayer, and allowed by the department. It should also be noted that the requirement that an individual must make a planned gift to a permanent, irrevocable fund, has been a statutory requirement, as set forth in 15-30-2328, MCA, since this credit was enacted in 1997.

As stated in the 2012 Form QEC instructions, when a taxpayer files electronically, they represent that they have retained the required documents in their tax records and will provide them upon the department's request.

3. As noted at the hearing, the department is further amending ARM 42.4.104 for better clarity and to add an example as follows:

42.4.104 ENERGY GENERATING SYSTEMS (1) through (4) remain as proposed.

(4) The cost for repair or replacement of a component installed in an existing system is not eligible for the credit ~~regardless of whether the repair or replacement changes the output of the energy system.~~

(5) The cost of additional components installed to expand the output of an existing system is eligible for the credit ~~provided that the additional components do not repair or replace any portion of the existing system.~~ For example, if a taxpayer expands their solar photovoltaic energy system from one module to four modules, the energy credit is only available for the three new components, not all four.

(6) through (9) remain as proposed.

AUTH: 15-1-201, 15-32-105, 15-32-203, MCA

IMP: 15-6-224, 15-6-225, 15-32-102, 15-32-105, 15-32-115, 15-32-201, 15-32-202, MCA

4. Therefore, the department amends ARM 42.4.104, as shown above, and adopts New Rule I (42.4.2801) and II (42.4.2803); amends ARM 42.4.201, 42.4.202, 42.4.208, 42.4.209, 42.4.303, 42.4.402, 42.4.1608, 42.4.1702, 42.4.2403, 42.4.2404, 42.4.2704, 42.4.2706, 42.4.2802, 42.4.2905, 42.4.3003, 42.4.3103,

42.4.3202, 42.4.3303, 42.4.4106, and 42.4.4107; and repeals ARM 42.4.2707 as proposed.

5. An electronic copy of this notice is available on the department's web site at [www.revenue.mt.gov](http://www.revenue.mt.gov). Select the "Laws and Rules" link in the left hand column, and click on the "Rules" link within to view the options under the "Current Rule Actions – Published Notices" heading. 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. While the department also strives to keep its web site accessible at all times, in some instances it may be temporarily unavailable due to system maintenance or technical problems.

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

/s/ Mike Kadas  
MIKE KADAS  
Director of Revenue

Certified to Secretary of State February 4, 2013

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 42.5.201, 42.5.202, and )  
42.5.213 relating to electronic )  
payment and return filing )

TO: All Concerned Persons

1. On December 20, 2012, the department published MAR Notice Number 42-2-892 regarding the proposed amendment of the above-stated rules at page 2588 of the 2012 Montana Administrative Register, Issue Number 24.

2. A public hearing was held on January 15, 2013, to consider the proposed amendment. No one appeared at the hearing to testify and no written comments were received. Therefore, the department amends ARM 42.5.201, 42.5.202, and 42.5.213 as proposed.

3. An electronic copy of this notice is available on the department's web site at [www.revenue.mt.gov](http://www.revenue.mt.gov). Select the "Laws and Rules" link in the left hand column, and click on the "Rules" link within to view the options under the "Current Rule Actions – Published Notices" heading. 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. While the department also strives to keep its web site accessible at all times, in some instances it may be temporarily unavailable due to system maintenance or technical problems.

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

/s/ Mike Kadas  
MIKE KADAS  
Director of Revenue

Certified to Secretary of State February 4, 2013

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



## ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 2012. This table includes those rules adopted during the period October 1, 2012, through December 31, 2012, and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 2012, 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 2012/2013 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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