

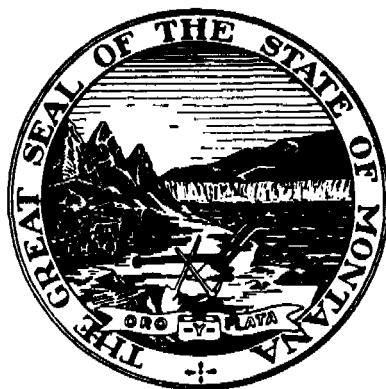
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MONTANA ADMINISTRATIVE REGISTER

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OF MONTANA

1985 ISSUE NO. 3
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PAGES 141-196



MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 3

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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

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STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF HORSE RACING

In the matter of the proposed	)	NOTICE OF PROPOSED AMENDMENTS
amendments of 8.22.502 con-	)	OF 8.22.502 LICENSES ISSUED
cerning licenses issued for	)	FOR CONDUCTING PARI-MUTUEL
conducting pari-mutuel wager-	)	WAGERING ON HORSE RACING
ing on horse racing meetings	)	MEETINGS and 8.22.609
and 8.22.609 concerning	)	STARTER
starters)	

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On March 16, 1985, the Board of Horse Racing proposes to amend the above-stated rules.

2. The amendment of 8.22.502 will amend subsections (4) and (22) of the rule and will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-635 through 8-641, Administrative Rules of Montana)

8.22.502 LICENSES ISSUED FOR CONDUCTING PARI-MUTUEL WAGERING ON HORSE RACING MEETINGS (1) ...

(4) The application for a license to conduct a race meeting with parimutuel wagering during the next succeeding season of racing must be filed with the secretary of the board over the signature of the applicant or the signature of an executive officer of the applicant no later than ~~October~~ September 1, unless, for good cause shown, the board shall otherwise permit.

(5) ...

(22) Each licensee shall file with the board the condition of races it proposes to hold, together with the stake and purse schedule, no later than December 1st. In any stakes race, futurity, maturity, derby and/or added money event, the conditions for said races shall be submitted to the board for approval prior to circulation of any such information by a licensee. The names of all persons, firms or corporations contributing any or all of the purse money must be listed and the amount contributed specified.

(23) ..."

Auth: 23-4-104, MCA Imp: 23-3-201, MCA

3. The board has proposed the amendment of subsection (4) to allow the board more time to allot dates and approve race conditions and personnel prior to the coming season. The amendment of subsection (22) is proposed to provide a deadline to allow for more timely receipt of conditions of stakes races.

4. The proposed amendment of 8.22.609 will amend subsection (2) of the rule and will read as follows: (new

matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-651 and 8-652, Administrative Rules of Montana)

"8.22.609 STARTER (1) ...

(2) The starter is required to lead horses into the starting gate in alternating order of post position with all odd numbered horses being loaded before all even numbered horses unless for cause the starter shall determine otherwise. The starter shall have the option of loading horses in the starting gate either in alternating order of post position or numerical order of post position.

(3) ..."

Auth: 23-4-104, MCA Imp: 23-4-201, MCA

5. The board is proposing the amendment because in many instances the starter feels that loading horses in numerical order is safer and more efficient.

6. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Horse Racing, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than March 14, 1985.

7. If a person who is directly affected by the proposed amendments wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Board of Horse Racing, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than March 14, 1985.

8. If the board receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

BOARD OF HORSE RACING
HAROLD GERKE, CHAIRMAN

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, February 4, 1985.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF HORSE RACING

In the matter of the proposed amendment of 8.22.610 (1)(a) concerning stewards and proposed adoption of a new rule concerning workers' compensation	)	NOTICE OF PUBLIC HEARING
	)	ON THE PROPOSED AMENDMENT OF
	)	8.22.610 (1)(a) STEWARDS and
	)	ADOPTION OF A NEW RULE
	)	CONCERNING WORKERS' COMPENSA-
	)	TION

TO: All Interested Persons.

1. On March 22, 1985, at 1:00 p.m. a public hearing will be held in the downstairs conference room of the Department of Commerce Building, 1430 9th Avenue, Helena, Montana, to consider the amendment and adoption of the above-stated rules.

2. The amendment to 8.22.610 will amend subsection (1)(a) and will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-652 through 8-655, Administrative Rules of Montana)

"8.22.610 STEWARDS (1) Selection of stewards.

(a) The board shall maintain a listing of the licensed racing officials who have been qualified for the position of steward by the board, and the selecting of steward shall be made from such listing. The board shall name one steward and the association shall name one steward. The stewards so named shall name their associate. There shall be three stewards to supervise each race meet; one steward shall be appointed by the board to be the presiding state steward and shall be compensated by the board; one steward shall be assigned by the board to be the deputy state steward and shall be compensated by the association at an amount approved by the board; one steward shall be appointed by the association and shall be compensated by the association. The three stewards so selected comprise the board of stewards. The selection of stewards for a race meeting shall be made as soon as possible after the allocation of dates for a racing meet, but in no event later than 30 days before the race meeting, or should the steward named by the board and the steward named by the association fail to agree upon the selection of their associate, the board may name and appoint the stewards for the meeting or may appoint the associate steward.

(b) ..."

Auth: 23-4-104, MCA Imp: 23-4-201, MCA

3. The amendment is proposed to give the board more control as to the quality of officials to work as stewards.

4. The proposed adoption will read as follows:

"1. WORKERS' COMPENSATION INSURANCE REQUIRED (1) No person may be licensed as a trainer, owner, trainer-driver, or

in any other capacity in which such person acts as the employer of any other licensee at any authorized race meeting, unless his liability for workers' compensation has been secured in accordance with the Labor Code of the State of Montana and until evidence of such security for liability is provided by the board. Should any such required security for liability for workers' compensation be cancelled or terminated, any license held by such person shall be automatically suspended and shall be grounds for revocation of the license. The trainer of a public stable shall provide evidence that the policy of insurance securing his liability for workers' compensation has been endorsed or amended to include, as an additional insured, each person for whom he trains horses to the extent that such person is exposed to liability as the employer of another person, unless such person has procured coverage for such exposure and has furnished evidence of such coverage to the board.

(2) No licensed trainer, for the purpose of avoiding the requirements for workmen's compensation insurance as set forth in this article, shall place any horse in the care of or attendance of any other person."

Auth: 23-4-104, MCA Imp: 23-4-201, (2), 39-71-401, MCA

5. The adoption is proposed to provide adequate insurance for jockeys, apprentice jockeys, exercise personnel and grooms on any track licensed by the board and to bring the tracks in line with state workers' compensation laws.

6. Interested 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 Board of Horse Racing, 1424 9th Avenue, Helena, Montana 59620-0407, no later than March 14, 1985.

7. Geoffrey Brazier, Attorney, Helena, will preside over and conduct the hearing.

BOARD OF HORSE RACING
HAROLD GERKE, CHAIRMAN

BY:

Keith P. Colbo

KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, February 4, 1985.

DEPARTMENT OF COMMERCE
STATE OF MONTANA
BEFORE THE MILK CONTROL BUREAU

In the matter of the amendment) NOTICE OF PROPOSED AMENDMENT
of rule 8.79.301 regarding) OF RULE 8.79.301 LICENSEE
licensee assessments) ASSESSMENTS

NO PUBLIC HEARING CONTEMPLATED

DOCKET #71-85

TO: All Interested Persons

1. On March 28, 1985 the Department of Commerce proposes to amend Rule 8.79.301 relating to an assessment to be levied upon licensees subject to 81-23-202, MCA. The proposed amendment will become effective July 1, 1985.

2. The purpose of the amendment is to change the effective date of the rule as it applies to the assessments. There is an increase in the amount of one cent (\$0.01) per hundredweight in the amount of the assessments. The rule as proposed to be amended should read as follows:

"8.89.301 LICENSEE ASSESSMENTS

(1) Pursuant to Section 81-23-202, MCA, as amended, the following assessments for the purpose of deriving funds to administer and enforce the Milk Control Act during the fiscal year beginning July 1, ~~1984~~ 1985 and ending June 30, 1985 1986, are hereby levied upon the Milk Control Act licensees of this Department.

(a) A fee of ~~eight-cents-(\$0.08)~~ nine cents (\$0.09) per hundredweight on the total volume of all milk subject to the Milk Control Act produced and sold by a producer-distributor.

(b) A fee of ~~eight-cents-(\$0.08)~~ nine cents (\$0.09) per hundredweight on the total volume of all milk subject to the Milk Control Act sold in this state by a distributor home based in another state. Said fee is to be paid either by the foreign distributor or his jobber who imports such milk for sale within this state.

(c) A fee of ~~four-cents-(\$0.04)~~ four and one half cents (\$0.045) per hundredweight on the total volume of all milk subject to the Milk Control Act sold by a producer.

(d) A fee of ~~four-cents-(\$0.04)~~ four and one half cents (\$0.045) per hundredweight on the total volume of all milk subject to the Milk Control Act sold by a distributor, excepting that which is sold to another distributor."

3. Interested persons are asked to note that there is an increase of \$0.01 per hundredweight in the amount of administrative assessments proposed for fiscal year 1986. The increase is necessary to raise the level of income so the agency can maintain its current level of operations. The purpose of the amendment is also to change the effective dates from July 1, 1984 through June 30, 1985 to July 1, 1985 through June 30, 1986.

4. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Department of Commerce, 1430 Ninth Avenue, Helena, Montana 59620, no later than March 16, 1985.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit along with any written comments he has to the above address no later than March 16, 1985.

6. If the agency receives requests for a public hearing on the proposed amendment from either ten percent (10%) or twenty five (25) persons, whichever is less, of the persons who are directly affected by the proposed amendment, from the Administrative Code 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 (10%) of those persons directly affected has been determined to be 32 persons based on an estimate of 318 resident and non-resident producers, producer-distributors, and jobbers subject to this assessment.

7. The authority of the agency to make the proposed amendment is based on Section 81-23-202, MCA, and implements Section 81-23-104, MCA.

KEITH COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

BY: William E. Ross
William E. Ross, Chief
Milk Control Bureau

Certified to the Secretary of State February 4, 1985.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE MONTANA ECONOMIC DEVELOPMENT BOARD

In the matter of the proposed) NOTICE OF PROPOSED AMENDMENTS
amendments of 8.97.305 con-) OF 8.97.305 APPLICATION PRO-
cerning application pro-) CEDURES and 8.97.402 CRITERIA
cedures and 8.97.402 (3) con-) FOR DETERMINING ELIGI-
cerning the criteria for) BILITY
determining eligibility.)

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On March 16, 1985, the Montana Economic Development Board proposes to amend the above-stated rules.

2. The proposed amendment of 8.97.305 will add a new subsection (4) and will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-3473, Administrative Rules of Montana)

"8.97.305 APPLICATION PROCEDURES (1) ...

(4) An application and all its attachments, including all information submitted to the board subsequent to the submission of the original application for purposes of assisting the board in its evaluation of the application, shall become property of the board, once submitted, and shall be retained by the board in its loan file."

Auth: 17-5-1521, 17-6-324, MCA Imp: 17-5-1505, 17-6-310, MCA

3. The board is proposing the rule amendment to put borrowers on notice that all application materials are the property of the board and shall be maintained on board file.

4. The proposed amendment of 8.97.402 will amend subsection (3) and will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-3488 and 8-3489, Administrative Rules of Montana)

"8.97.402 CRITERIA FOR DETERMINING ELIGIBILITY (1) ...

(3) All financing except short-term certificates of deposit must be for the benefit of a business engaged in 'basic' economic activity, import substitution activity, or the wholesale or retail distribution of Montana-made goods as defined in ARM 8.97.401. For purposes of this section, 'business' shall mean the applicant for financing or such other person as may be shown to directly and substantially benefit from the financing to the satisfaction of the board through reduced rental rates or other verifiable means for the term of the loan.

(4) ..."

Auth: 17-6-324, MCA Imp: 17-6-303, 304, 305, 308, 314, MCA

5. The board is proposing this rule amendment to clarify that either the applicant for financing or the ultimate beneficiary of the financing must meet eligibility requirements of the board.

6. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Montana Economic Development Board, 1424 9th Avenue, Helena, Montana, 59620, no later than March 14, 1985.

7. If a person who is directly affected by the proposed amendments wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Montana Economic Development Board, 1424 9th Avenue, Helena, Montana, 59620, no later than March 14, 1985.

8. If the board receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

MONTANA ECONOMIC DEVELOPMENT
BOARD
D. PATRICK MCKITTRICK
CHAIRMAN

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, February 4, 1985.

BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA

In the matter of the	)	NOTICE OF PROPOSED
adoption of RULE 1,	)	ADOPTION OF RULE
relating to filing of)	
death certificates	)	NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On March 18, 1985, the department proposes to adopt Rule 1, requiring a court order for filing of death certificates when no body has been found.
2. The proposed rule provides as follows:

RULE 1 COURT ORDER REQUIRED, WHEN Whenever a local registrar is requested to complete a death certificate in a case where the body has not been found, the registrar may not complete the death certificate unless he is presented with an order of a court of competent jurisdiction declaring that the death has occurred and setting forth the circumstances thereof.
AUTHORITY: Sec. 50-15-102, MCA IMPLEMENTING: 50-15-404, MCA

3. The policy codified by this proposed rule has been followed by the Department for the past 30 years. In cases where the body cannot be found, a local registrar is not competent nor has he the resources to make a legal determination of death. Because of the potential for fraud and abuse, it is necessary that the registrar be able to rely on a judicial determination of death before certifying the same.

4. Interested persons may submit their data, views, or arguments concerning the proposed adoption in writing to Robert L. Solomon, Cogswell Building, Capitol Station, Helena, Montana, 59620, no later than March 15, 1985.

5. If a person who is directly affected by the proposed action wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Robert L. Solomon at the address stated above, no later than March 15, 1985.

6. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action, from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25 based on the number of local registrars, clerks and recorders, persons in charge of interments and other persons interested in recording of death certificates.


JOHN J. DRYNAN, Director

Certified to the Secretary of State February 4, 1985

BEFORE THE DEPARTMENT OF INSTITUTIONS
OF THE STATE OF MONTANA

In the matter of the proposed)
adoption of rules setting forth) NOTICE OF PUBLIC
an admission policy for the) HEARING
Montana Veterans' Home)

TO: All Interested Persons.

1. On March 15, 1985, at 9:30 A.M., a public hearing will be held in room 315 of the Department of Institutions at 1539 11th Avenue, Helena, Montana, to consider the adoption of rules regarding the admission policy for the Montana Veteran's Home.

2. The proposed rules do not replace or modify any section currently found in the Administrative Rules of Montana.

3. The proposed rules provide as follows:

RULE I MISSION STATEMENT (1) The Montana veterans' home, located at Columbia Falls, is a state operated facility which provides a home for honorably discharged veterans of the armed forces of the United States and the spouses of honorably discharged veterans. The Montana veterans' home provides intermediate nursing care and domiciliary care. All admissions are by voluntary application. Residents of the Montana veterans' home are assessed charges for their care according to their ability to pay.

AUTH: 10-2-403, MCA

IMP: 10-2-403, MCA

RULE II DEFINITIONS (1) For the purpose of interpreting these rules, the following definitions apply:

(a) "Veteran" means a person who served in the active military service and who was discharged with an honorable discharge.

(b) "Spouse" means a person who is legally married to a veteran.

(c) "Surviving Spouse" means a person who was legally married to a veteran, who is the widow or widower of that veteran and who has not remarried.

(d) "Applicant" means a veteran, a spouse, a surviving spouse, or a married couple, one member of which is a qualified veteran, who is seeking admission to the Montana veterans' home or for whom admission is sought by a court appointed legal guardian.

(e) "Intermediate Nursing Care" means the provision of nursing care services, health-related services and social services under the supervision of a licensed nurse to patients not requiring 24 hour nursing care.

(f) "Domiciliary Care" means the provision of services and care which do not require nursing skills to residents needing some assistance in performing the activities of daily

living.

AUTH: 10-2-403, MCA

IMP: 10-2-403, MCA

RULE III ADMISSION CRITERIA (1) Eligibility for admission to the Montana veterans' home is determined without regard to race, color, sex, culture, social origin or condition, political or religious ideas, or ability to pay for the cost of care.

(2) To be admitted to the Montana veterans' home, an applicant must:

- (a) be a veteran, spouse, or surviving spouse;
- (b) be fifty-five years of age or, if younger than fifty-five, an invalid and/or unable to earn a livelihood;
- (c) meet medical and physical requirements for intermediate nursing care or domiciliary care;
- (d) have the mental status necessary to function in a manner conducive to the safety and comfort of residents and staff.

AUTH: 10-2-403, MCA

IMP: 10-2-403, MCA

RULE IV APPLICATION PROCEDURES (1) To be considered for admission, the following documents must be submitted by the applicant to the superintendent of the Montana veterans' home:

- (a) a completed application form which includes a request for admission to either intermediate or domiciliary care;
- (b) documentation of honorable discharge from the armed forces of the United States;
- (c) proof of marriage to a veteran, if a spouse or surviving spouse; and
- (d) a medical history, including the results of a comprehensive medical evaluation conducted no more than 60 days prior to the date of application.

AUTH: 10-2-403, MCA

IMP: 10-2-403, MCA

RULE V ADMISSION PROCEDURES (1) The superintendent will review all application materials and determine the applicant's eligibility for admission.

(2) The superintendent will notify the applicant, in writing, of the decision regarding eligibility.

(3) The eligible applicant will be admitted immediately if there is a bed available which:

- (a) provides the level of care required by the applicant, and
 - (b) is appropriate for a person of the applicant's sex.
- (4) If there is no bed immediately available, the applicant will be placed on a waiting list for either intermediate care or domiciliary care.

(5) As beds become available, the Montana veterans' home will admit applicants from the waiting list on the basis of the date of notification of eligibility. In general, the earlier the determination of eligibility, the earlier the admission. However, veterans on the waiting lists will be given preference over spouses and surviving spouses.

(6) The superintendent may waive use of the waiting lists as described in (5) above if:

(a) the location of an available bed requires that the next person admitted be of a particular sex, or

(b) there is an applicant whose current living conditions require that he or she be admitted immediately.

(7) When two or more applicants have equal priority on the waiting list, the person with the longest documented Montana residence will be admitted first.

AUTH: 10-2-403, MCA

IMP: 10-2-403, MCA

RULE VI DISCHARGE (1) Residents of the Montana veterans' home will be discharged upon request of the resident or his or her legal guardian. The superintendent may discharge a resident for serious violations of the Montana veterans' home rules and regulations.

AUTH: 10-2-403, MCA

IMP: 10-2-403, MCA

RULE VII APPEAL PROCEDURE (1) Applicants who are denied admission may appeal that decision by submitting, in writing, their reasons for appealing the decision to the director of the department of institutions, 1539 11th avenue, Helena, Montana 59620, within 30 days of the denial of admission.

(2) The director will respond to the appeal, in writing, within 30 days of receipt of the appeal.

AUTH: 10-2-403, MCA

IMP: 10-2-403, MCA

RULE VIII APPLICATION MATERIALS (1) Application forms are available from the superintendent, Montana veterans' home, Columbia Falls, MT 59912.

AUTH: 10-2-403, MCA

IMP: 10-2-403, MCA

4. These proposed rules are being adopted to comply with the admission and eligibility requirements of Chapter 469 of the 1983 Legislative Session. The rules will specify the eligibility requirements, the admission process, and appeals to the Montana Veterans' Home at Columbia Falls.

5. Interested parties 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 the Legal Counsel, Department of Institutions, 1539 11th Avenue,

3-2/14/85

MAR Notice No. 20-14-2

Helena, Montana 59620, no later than March 22, 1985.

6. Nick A. Roterling, Legal Counsel, Department of Institutions, has been designated to preside over and conduct the hearing.

A handwritten signature in dark ink, appearing to read 'Carroll V. South', is written over a horizontal line.

GARROLL V. SOUTH, Director
Department of Institutions

Certified to the Secretary of State February 4, 1985.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF DENTISTRY

In the matter of the adoption	)	NOTICE OF ADOPTION OF NEW
of new rules under sub-chapter	)	RULES UNDER SUB-CHAPTER 5
5, interpretive rules for	)	INTERPRETIVE RULES FOR AD-
advertising	)	VERTISING, 8.16.501 -
	)	8.16.509

TO: All Interested Persons:

1. On December 27, 1984, the Board of Dentistry published a notice of adoption of the above-stated rules at pages 1825 through 1831, 1984 Montana Administrative Register, issue number 24.

2. The board has adopted the rules exactly as proposed.

3. One letter in support of the rules was received from Michael P. Stebbins, D.D.S. and Robert P. Windauer, D.D.S. A phone call was received from Greg Petesch, Lawyer with the Administrative Code Committee with regard to the cited implementing section for the rules. The citation should have been 37-4-322 rather than 37-4-502, MCA. No other comments or testimony were received.

DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PUBLIC ACCOUNTANTS

In the matter of the amendments	)	NOTICE OF AMENDMENT OF
of 8.54.402 (3) concerning	)	8.54.402 (3) EXAMINATIONS
examinations and 8.54.411 (5)	)	and 8.54.411 (5) EXPIRA-
concerning inactive status.	)	TION - RENEWAL - GRACE PERIOD

TO: All Interested Persons:

1. On December 27, 1984, the Board of Public Accountants published a notice of amendments of the above-stated rules at pages 1832 and 1833, 1984 Montana Administrative Register, issue number 24.

2. The board has amended the rules exactly as proposed.

3. No comments or testimony were received.

DEPARTMENT OF COMMERCE

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR

Certified to the Secretary of State, February 4, 1985.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE MONTANA ECONOMIC DEVELOPMENT BOARD

In the matter of the	)	NOTICE OF AMENDMENTS
amendments of 8.97.308 con-	)	OF 8.97.308 RATES, SERVICE
cerning rates, services	)	CHARGES AND FEE SCHEDULE, 8.
charges and fee schedule,	)	97.402 (3) CRITERIA FOR
8.97.402 (3) concerning	)	DETERMINING ELIGIBILITY, 8.
criteria for determining	)	97.507 APPLICATION PROCEDURE,
eligibility, 8.97.507 con-	)	8.97.709 TERMS, RATES, FEES
cerning the application pro-	)	AND CHARGES and PROPOSED
cedure, 8.97.709 concerning	)	ADOPTION OF A NEW RULE UNDER
terms, interest rates, fees &	)	SUB-CHAPTER 4 ENTITLED
charges, and proposed adoption	)	INTERIM FUNDING OF POOLED
of a new rule under sub-chapter	)	INDUSTRIAL REVENUE BOND LOANS
4 concerning interim funding of)	
pooled industrial revenue)	
bond loans)	

TO: All Interested Persons:

1. On December 13, 1984, the Montana Economic Development Board published a notice of amendments and adoption of the above-stated rules at pages 1784 through 1788, 1984 Montana Administrative Register, issue number 23.
2. The board has amended and adopted the rules exactly as proposed.
3. No comments or testimony were received.

DEPARTMENT OF COMMERCE

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR

Certified to the Secretary of State, February 4, 1985.

STATE OF MONTANA
DEPARTMENT OF COMMERCE

In the matter of the adoption	)	NOTICE OF ADOPTION OF
of rules concerning airport	)	AIRPORT CERTIFICATION AND
certification and licensing	)	LICENSING RULES, 8.106.801 -
	)	8.106.808

TO: All Interested Persons:

1. On October 25, 1984, the Department of Commerce published a notice of adoption of the above-stated rules at pages 1538 through 1542, 1984 Montana Administrative Register, issue number 20.

2. The hearing was duly held on December 14, 1984 in the board room of the Aeronautics Division Office Building, 2630 Airport Road, Helena, Montana. In addition to staff approximately 30 persons attended the hearing. Representation included the following: Montana Pilots Association, Montana Aviation Trades Association, Seeley Lake Homeowners Association, Montana Flying Farmers and Ranchers Association, Division of Aeronautics, the Montana Aviation Advisory Council, the Montana Airport Management Association, Montana Board of Aeronautics, several seaplane pilots and other interested individuals. Of the 30 persons present, approximately 18 offered testimony.

Comments were as follows:

COMMENT: The principal reasons against the adoption of the proposed rules was a general feeling by those involved in the aviation industry that airport licensing statutes of the State of Montana should be repealed as being obsolete and preempted by federal laws and regulations.

RESPONSE: The establishment of procedures to license airports and the actual licensing of airports is necessary to meet appropriate criteria mandated by Judge Henry Loble, Lewis and Clark County, District Court Proceeding 49580, August 2, 1984. Also the adoption of rules are necessary to implement provisions of parts 1 and 3 of Chapter 3, Title 67, Montana Code Annotated, providing for regulation and licensing various aspects of aviation including airports, restricted landing areas and air navigation facilities.

COMMENT: Objections to rule I Definitions - The FAA Utility Airport Advisory Circulars referred to in Rule I are merely advisory and are continually rescinded, cancelled or replaced by the FAA. Since the other proposed rules do not make any distinction as to classifications or particular airports, there is no need for the definitions set forth in Rule (1) through (8).

RESPONSE: Rule III, Airport Licensing, does state that the division would make a determination of the appropriate class to which an airport will be assigned. Classification would be helpful in determining whether an airport qualifies for a particular intended use. Also Rule I (6) is intended to cover other types of airports not covered by a specific

classification, namely airports on water such as the Seeley Lake operation.

The rule is being adopted as proposed with the exception that a statement will be included indicating where the material to be adopted by reference can be obtained. Subsection (6) will also be amended.

COMMENT: Proposed rule II, Airport Site Certification - Most airports are already inspected by the Federal Aviation Agency through a contract with this Department under the 5010 program on a rotating basis. The rule is ambiguous in the following respects: it does not specifically refer to seaplane bases or facilities. The term "substantial modification of an existing facility" does not state whether it includes significant change of use of the facility, changes in services offered or other changes which could impact upon the community or environment. The rule should be clarified to reflect whether the applicant must have an exclusive right of control or user in order to qualify the applicant for certification. Any determination of certification should consider other specific factors as required under Chapters 1 through 6 inclusive, Title 67, MCA, the compatibility of airport site with other state laws including the Environmental Policy Act, the Montana Shore Protection Act and any other regulations adopted by our various other state agencies. The department should also adopt imaginary surfaces for seaplane bases which can be applied by the division in making certification determinations.

RESPONSE: Airport licensing and certification is required by Montana law and mandated by a court order. The rule is consistent with and not in conflict with the Montana statutes and contains material reasonably necessary to effectuate the purpose of the statute. The provisions of section 67-3-303, MCA, already set forth the standards for certificates and licenses. Section 2-4-305, MCA provides that rules do not unnecessarily repeat statutory language. It is doubtful that the department may go much beyond the statutory standards and the factors set forth in the proposed rule. The rule will include a requirement that the application indicate the classification applied for. The rule will also include the insertion of the word "laws" to read "... whether the site and usage complies with all other applicable and pertinent laws, governmental regulations and standards." This amendment will make it clear that all federal and Montana laws would be considered in making a determination of whether an airport should be certified.

The rule does not specifically refer to a seaplane base. However, the rule would include airports "on water" if we refer to rule I (6) changed as recommended. A designated seaplane airport would be required to apply for certification.

COMMENT: Proposed rule III - Airport Licensing - It is ambiguous whether the rule applies to seaplane bases and other

aviation facilities. The standards contained in 67-3-303, MCA and other Montana laws are not included within the rule. The rule is not clear as to whether airports are exempt from certification under Rule VIII or Montana statutes are required to be licensed.

RESPONSE: Montana law and court mandate and the rule require licensing only of airports. It is not necessary to set forth verbatim all laws, statutes or regulations and such may be referred to within the rule even though not fully set forth. Considering the provisions of the proposed rule and the provisions of 67-3-303, MCA, there appears to be precise criteria and procedures for airport licensing. The licensing of the actual facilities at the seaplane base should be considered not by themselves, but in connection with the broad consideration of the airport to be licensed.

The rule will be adopted as written except that the applicable Montana laws will be referred to in the rule.

COMMENT: Rule IV - Seaplane and Float Planes - The persons present at the hearing were almost unanimously in opposition to this rule as originally written. The primary reasons were because the rule is directed only towards the owner/operators of seaplanes rather than toward licensing or certification of airports; the rule does not regulate boats, vessels and only regulates seaplanes and is therefore discriminatory. The rule extends an invitation to other authorities and agencies to regulate seaplanes and float planes. The US Department of Transportation has primary authority to regulate seaplanes above-the-ground and above-the-water, and the FAA is the enforcement arm of D.O.T. The rule does not refer to licensing or certification of seaplane bases or facilities. The Coast Guard and the FAA regulate seaplanes on water.

RESPONSE: The rule was included as an attempt to satisfy the court order. The Division of Aeronautics submitted an amended rule. Those in opposition to the amended rule had the same basic objections as to the original rule. Several suggestions were made for other amendments to the rule. The proposed rule will not be adopted, as there is no need to state that seaplanes must follow existing or future laws or regulations and such a rule is superfluous.

There are existing federal regulations governing the flight, landing, takeoff, operation of a seaplane over public waters (Title 49 USCS Section 1348). Also, Title 14, Code of Federal Regulations, subpart B, Flight Rules, Sections 91.70 - 91.71, includes rules for operations of aircraft near other aircraft and right of way rules for water operation between water vessels and aircraft. In addition, 33 USC, section 2001 et seq. vests regulation of seaplanes on navigatable waters, in the Coast Guard. It appears that the federal government may have preempted the state in regard to flight rules and aircraft-watercraft operations. In determining whether an

airport on water should be licensed or certified, the department presumably would consider the safety of the proposed landing and takeoff and glide and taxi paths within the criteria set forth in rule III and 67-3-303, MCA, and the standards promulgated by the DOT for Seaplane facilities, Chapter 11 et seq.

COMMENT: Rule V - Inspections - The proposed rule does not clarify when inspections should be made by the Aeronautics Division and it should require inspection upon receipt of public complaints.

RESPONSE: Rules II and III provide for inspections prior to any certification or licensing, and Rule V merely allows the Aeronautics Division to make additional inspections. If a formal inspection was required for every instance when a member of the public had a complaint, without determination of whether the complaint was valid, it would be unreasonable and costly. The rule will be adopted as written with an insertion of the word "reasonable" as follows "... shall be permitted at any reasonable time..."

COMMENT: Rule VI - Revocation - The rule provides that the department may revoke a certificate or license if it is not being maintained or "used" in accordance with the rules. The word "used" could refer to the pilot-operator of an aircraft or a boat or vessel using the public waters or airport, and these persons would not be in the control of the airport authorities. The word "used" should be changed to the word "operated".

The rule is not specific enough in providing for the mechanism for receiving, investigating and determining any consequences of citizen's complaints or for notice and hearing of actions taken by the division, nor does it clarify the specific consequences of revocation.

RESPONSE: The rule contains substantially the same standards for revocation as 67-3-304, MCA. In addition, the rule sets forth other specific reasons for revocation. The rule will be adopted as proposed except the word "used" being changed to "operated".

COMMENTS: Rule VII - Public Hearings - The proposed rule should require a hearing in each and every instance prior to the granting, denying or revoking a certificate of approval or an original license. The rule contains the word "used" in reference to an airport and the word "used" should be stricken as it may refer to use by pilot-operators who may not be under the control of the airport operator.

RESPONSE: The rule provides for public hearings as required by section 67-3-302, MCA, which does not require a hearing in every instance. There are procedures to demand a hearing by an interested party. The procedures for hearings are also governed by the Administrative Procedures Act. The rule will be adopted as proposed with the word "used" will be stricken.

COMMENT: Rule VII - Exemptions - The rule is ambiguous and does not answer the question as to whether the base operation such as Lindy's Landing West is exempt from site certification. The proposed rule does not indicate what is meant by an "official certification from airport sponsor" or what is included in such certification.

RESPONSE: There is no reason to require existing airports to apply for a certificate since an original license must be obtained by each airport and the criteria set forth in Rule III must be met annually in order for the airport to keep its license and authority to operate. Certification is intended for persons or entities acquiring land (or water) for new airports. The licensing provision is intended to cover all airports which by definition in 67-1-102 (9) and (10), MCA include any area of land or water which are designated as airports. Therefore, the licensing provisions would apply to airports on water, including the airport at Seeley Lake. The rule will be adopted as proposed.

COMMENT: Rule IX - Liability - The rule appears to be in contravention of section 18, Article 2 of the Montana Constitution, and section 67-1-102, MCA, et seq., and the department cannot limit and define its liability by adopting its rule.

RESPONSE: Rule IX does not appear to limit the liability of the department, or provide for immunity from suit as prohibited by Section 18, Article II of the Constitution, but rather it advises as to the responsibilities of those involved in the aviation in an advisory. The rule will be adopted as written.

3. Based on comments offered, the rules are adopted with the following changes: (new matter underlined, deleted matter interlined)

Rule I. now "8.106.801 DEFINITIONS Unless the context ...

(1) ...

(6) 'Class E airport' means an airport or restricted landing area as defined in Section 67-1-101 (9), (10), and (34), MCA not meeting any particular dimensional or obstruction criteria. but which is open to use by any pilot who possesses the skill to operate an aircraft which, according to the aircraft manufacturer's specifications can safely operate within the dimensions of that airport. A person using a Class E airport does so at his own risk.

(7) 'FAA Utility Airport Advisory Circular' means Advisory Circular 150/5300-4B published by the Federal Aviation Administration of the United States, containing guidelines and dimensional standards for establishing various classes of general aviation airports.

(8) ...

(9) 'Imaginary surfaces' means those civil airport imaginary surfaces as defined in Part 77.25 of the Federal Aviation Regulations, which establishes standards for determining obstructions in navigable airspace.

(10) ...

(12) Copies of all referenced material are available at the Montana Division of Aeronautics, 2630 Airport Road, Helena, Montana 59620."

Rule II. now "8.106.802 AIRPORT SITE CERTIFICATION (1)

...

(2) The application for certificate of approval of an airport shall contain information pertaining to the type of airport classification that is applied for.

~~(2)~~ (3) Within a reasonable time after receipt of an application for site approval or modification, an inspection will be scheduled. After the division's inspection as provided herein, a determination will be made whether to grant or deny approval. Such determination will take into consideration public safety; the facility's proposed location, size, and layout; the public need and convenience; its relationship and compatibility with the Montana state airport system plan and the national plan of integrated airport systems; whether there exist adequate expansion possibilities; whether the imaginary surfaces criteria contained in FAR Part 77 can be satisfied; whether the site and usage complies with all other applicable and pertinent laws, governmental regulations and standards."

Rule III. now "8.106.803 AIRPORT LICENSING (1) ...

(2) Upon receiving the licensing application and fee, the department shall conduct an inspection which shall take into consideration the criteria and standards set forth in Section 67-3-303, MCA, and any other applicable Montana and Federal laws and whether the facility is serving the public convenience and necessity in a safe and efficient manner; whether or not discrimination is practiced; whether the appropriate FAR Part 77 standards relative to imaginary surfaces are obstruction free; whether or not all things affecting the safety and efficiency of the airport are being operated and/or maintained in accordance with reasonable, effective, and applicable standards. A determination will be made by the division of the appropriate class to which an airport will be assigned. A license issued under the provisions herein shall expire one year from the date of issuance. Licenses issued under these rules will be prominently displayed at the airport."

Rule IV. will not be adopted.

Rule V. now "8.106.804 INSPECTION (1) Aeronautics division personnel shall be permitted at any reasonable time to make such inspections as deemed necessary to determine compliance with Montana Codes Annotated and these rules."

VI. now "8.106.805 REVOCATION (1) The department may temporarily or permanently revoke a certificate of approval or license issued by it when it determines that an airport or restricted landing area fails to meet safety standards; is practicing discrimination; or is not being maintained or used operated in accordance with the provisions of the Montana aeronautics code and these rules."

VII. now "8.106.806 PUBLIC HEARINGS (1) The department may, in its discretion, hold a public hearing before making an order granting or denying a certificate of approval or original license to use ~~or~~ operate an airport, restricted landing area, or other air navigational facility.

(2) ..."

Rules VIII. and IX., now 8.106.807 EXEMPTIONS and 8.106.808 LIABILITY are adopted as proposed.

DEPARTMENT OF COMMERCE

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR

Certified to the Secretary of State, February 4, 1985.

BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA

In the matter of the amendment)	NOTICE OF
of rule 16.20.401 concerning)	AMENDMENT OF
plans for public water and)	RULE 16.20.401
wastewater systems)	(Public Water and
	Wastewater Systems)

TO: All Interested Persons

1. On December 13, 1984, the Board published notice of the proposed amendment of rule 16.20.401 concerning the review of the so-called "plan and spec" rule for public water and wastewater systems at page 1789 of the 1984 Montana Administrative Register, issue number 23.

2. The Board has amended the rule as proposed with the following changes:

16.20.401 PLANS FOR PUBLIC WATER SUPPLY OR WASTEWATER SYSTEM (1) and (2) Same as proposed.

(3)(a) through (c) Same as proposed.

(d) The design report, plans and specifications for non-community sewage systems or other public subsurface sewage treatment systems shall be prepared in accordance with the format and criteria set forth in Department of Health and Environmental Sciences Circular No. 84-10, "Sewers and Sewage Treatment for Multi-Family and Non-Residential Buildings", July, 1984 edition. The Department may require the plans and specifications for such system to be prepared by a professional engineer when the complexity of the proposed system warrants such engineering (e.g., systems that are experimental, pressure dosed, or use more than 500 linear feet of drainfield; systems which require pumping or which use lagoons or other non-subsurface facilities).

(e) The department may grant a deviation from the standards referenced in subsections (3)(a), (b), (c), and (d) of this rule when the applicant has demonstrated to the satisfaction of the department that strict adherence to the standards of this rule is not necessary to protect public health and the quality of state waters (e.g., systems that are experimental, pressure dosed, or use more than 500 linear feet of drainfield; systems which require pumping or which use lagoons or other non-subsurface facilities).

(f) Same as proposed.

(4) through (10) Same as proposed.

3. Two comments were received from the Helena chapter of the Montana Society of Engineers and they are set forth below along with the Board's responses:

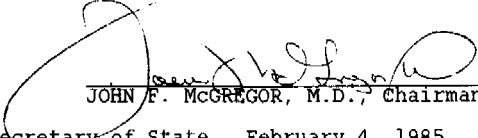
Comment: Any water or sewer system, regardless of complexity, involves the protection of public health and meets the definition of "practice of engineering" as defined

in 37-67-301, MCA. Therefore, only duly registered professional engineers may prepare plans and specifications for public systems, including non-community systems.

Response: The Board disagrees that the practice of engineering is wholly divorced from the complexity of a water or wastewater system. Most non-community systems are quite simple and their design does not require the skill and expertise of a licensed professional engineer in order to protect public health. Where non-community systems are complex, the rule authorizes the department to require engineered plans.

Comment: The rule accords too much discretion to the department in deciding when a non-community system's design is sufficiently complex to require engineering. This is arbitrary rulemaking.

Response: While rules should be as definite as possible, the decision of whether a non-community system requires engineering, to some extent, is necessarily discretionary and the rule includes examples of cases which typically will require engineering. The need for engineering is properly determined on a case-by-case basis.



JOHN F. MCGREGOR, M.D., Chairman

Certified to the Secretary of State February 4, 1985

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE REPEAL)	NOTICE OF THE REPEAL of Rules
of Rules 42.11.216,)	42.11.216, 42.11.231, and
42.11.231, and 42.11.241; the)	42.11.241; the AMENDMENT of
AMENDMENT of Rules 42.11.201,) Rules 42.11.201, 42.11.211	
42.11.211 through 42.11.215,) through 42.11.215, 42.11.217,	
42.11.217, 42.11.232,)	42.11.232, 42.11.242 through
42.11.242 through 42.11.244,) 42.11.244, 42.11.251, and	
42.11.251, and 42.11.252)	42.11.252 and the ADOPTION of
relating to liquor vendors;)	NEW RULE I (42.11.205), all of
and the ADOPTION of NEW RULE) which relate to liquor	
I (42.11.205) relating to) vendors.	
vendor's employment of)	
representatives and brokers.)	

TO: All Interested Persons:

1. On November 29, 1984, the Department of Revenue published notice of the proposed general revision of Title 42, chapter 11, subchapter 2, of the Administrative Rules of Montana relating to liquor vendors at pages 1737 through 1740 of the 1984 Montana Administrative Register, issue number 22.

2. The Department has repealed rules 42.11.216, 42.11.231, and 42.11.241 as proposed. The Department has amended rules 42.11.201, 42.11.211 through 42.11.215, 42.11.217, 42.11.232, 42.11.242 through 42.11.244, 42.11.251, and 42.11.252 as proposed. The Department has adopted new rule I (42.11.205) as proposed.

3. A public hearing was held on December 19, 1984, to consider the proposed rule changes. Howard Heffelfinger, Administrator of the Liquor Division, Tom Mulholland, Assistant Administrator of the Liquor Division, and Diana Koon, Chief of the Licensing Bureau appeared on behalf of the Department. One opponent appeared to comment on the proposed revision of Chapter 11, subchapter 2. Mr. Gary Gratton, a representative of the Montana Liquor Vendors' Association, commented on the lack of a rule requiring Montana residency for registered liquor vendors or brokers' representatives. Mr. Gratton proposed a rule change to require each company to have a resident representative within the State in order to conduct business.

The Department does not accept the proposal of the Montana Liquor Vendors' Association. No current provision of the Administrative Rules requires the Montana residency of a liquor agent. The representative, which replaces the prior designation of agent, possesses the same basic authority as an agent, and the Liquor Division fails to find any rational basis for requiring a representative to be a Montana resident.

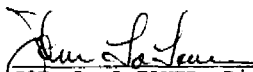
The requirement of Montana residency for a representative would pose a substantial hardship to the out-of-state based vendors and brokers. Because of Montana's limited market, sparse population, and large land mass, many vendors and brokers

cannot justify a Montana resident representative promoting the sale of the vendor or broker's products in Montana. A Montana residency requirement may operate to prevent out-of-state vendors or brokers from securing any representative for the State of Montana. This result would adversely affect the marketing of an out-of-state vendor's or broker's products in Montana.

The Liquor Division has not incurred any enforcement problems with the current liquor agents who are not required to be Montana residents. In the case of the newly proposed system of liquor vendors, brokers, and representatives, it is anticipated the Liquor Division's enforcement remedies against representatives will remain the same as against agents, making a Montana residency requirement unnecessary.

No other comments or testimony were received.

4. The authority for the rules is § 16-1-303, MCA, and the rules implement § 16-3-103, MCA.


JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 02/04/85

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE REPEAL)	NOTICE OF THE REPEAL of Rules
of Rules 42.12.112,)	42.12.112, 42.12.201,
42.12.201, 42.12.311; the)	42.12.311; the AMENDMENT of
AMENDMENT of Rules 42.12.101)	Rules 42.12.101 through
through 42.12.103, 42.12.111)	42.12.103, 42.12.111,
42.12.121, 42.12.123 through)	42.12.121, 42.12.123 through
42.12.128, 42.12.141 through)	42.12.128, 42.12.141 through
42.12.143 relating to license) applications; the AMENDMENT)	42.12.143, 42.12.202,
of Rules 42.12.202,)	42.12.204, 42.12.206,
42.12.204, 42.12.206,)	42.12.221, 42.12.222,
42.12.221, and 42.12.222)	42.12.301 through 42.12.306,
relating to license transfer)	42.12.312 and 42.12.323;
suspension, and revocation;)	and the ADOPTION of New Rules
the AMENDMENT of Rules)	I (42.12.114), II (42.12.121),
42.12.301 through 42.12.306,)	III (42.12.144), IV
42.12.312, and 42.12.323)	(42.12.207), and V
relating to special licenses)	(42.12.208), all of which re-
and permits; the ADOPTION of)	late to liquor division
NEW RULES I (42.12.114) II)	licenses and permits.
(42.12.131), and III)	
(42.12.144) relating to)	
licensing, IV (42.12.207))	
relating to conditional)	
approval of applications,)	
and V (42.12.208) relating to)	
temporary authority.)	

TO: All Interested Persons:

1. On November 29, 1984, the Department of Revenue published notice of the proposed general revision of Title 42, chapter 12, of the Administrative Rules of Montana relating to liquor division licenses and permits at pages 1712 through 1731 of the 1984 Montana Administrative Register, issue number 22.

2. The Department has repealed rules 42.12.112, 42.12.201, and 42.12.311 as proposed. The Department has amended rules 42.12.101 through 42.12.103, 42.12.111, 42.12.121, 42.12.123 through 42.12.128, 42.12.141 through 42.12.143, 42.12.202, 42.12.204, 42.12.206, 42.12.222, 42.12.301 through 42.12.306, 42.12.312 and 42.12.323 as proposed, except as follows:

42.12.123 CONDUCT OF OTHER ACTIVITIES ON PREMISES (1) No licenses ~~(except off-premise beer licenses)~~ FOR ON-PREMISES CONSUMPTION OF ALCOHOLIC BEVERAGES will be issued covering for premises where:

(a) any other business is conducted unless the all-beverage or beer alcoholic beverages business is conducted separate and apart from the other business and the facilities and equipment

of the premises licensed to sell ~~liquor or beer~~ alcoholic beverages can be completely closed off from the other business during the time prescribed by 16-3-304, MCA, for closing of the premises licensed to sell alcoholic beverages; or

(b) any gambling activities licensed under Montana law are conducted unless the facilities and equipment of the premises licensed to sell ~~liquor or beer~~ alcoholic beverages can be completely closed off from the gambling activities during the time prescribed by the Alcoholic Beverage Code 16-3-304, MCA, for closing of the premises licensed to sell ~~liquor or beer~~ alcoholic beverages.

(2) For the purposes of this regulation rule, the words "closed off" means mean to absolutely close the front, sides, and rear of that part of restrict persons from gaining access to any alcoholic beverages located in a room or service area which is used for the purpose of selling or serving alcoholic beverages.

42.12.323 PERMISSIBLE AND PROHIBITED ACTIVITIES (1) A special permit issued pursuant to 16-4-301(1), MCA, shall entitle the holder thereof to sell and deliver serve beer and/or table wine at retail only at a booth, or stand, or other fixed place of business within the exhibition enclosure mentioned in said section and as described in the application. A holder of any such permit, or his agents or employees shall not hawk beer in any grandstand, bleacher, or other than at such fixed place of business area. Sale, service, and consumption of beer and/or table wine under a special permit is to be confined only to specified premises or designated areas approved by the division. A special permit is required for each separate booth or stand located within the exhibition enclosure. A separate fee must be submitted for each booth or stand.

(2) and (3) remain as proposed.

3. The Department has adopted new rules I (42.12.114), II (42.12.131), III (42.12.144), IV (42.12.207), and V (42.12.208) as proposed.

4. A public hearing was held on December 14, 1984, to consider the proposed rule changes. Howard Heffelfinger, Administrator of the Liquor Division, Tom Mulholland, Assistant Administrator of the Liquor Division, and Diana Koon, Chief of the License Bureau, appeared on behalf of the Department.

Oral testimony and written comments were received on only two rules: ARM 42.12.123 and 42.12.323.

Representatives of the Montana Food Distributor's Association, Montana Retail Association, Montana Beer and Wine Wholesaler's Association, and representatives of several Montana wholesale and retail grocery businesses oppose the proposed amendment to rule 42.12.123 deleting the exemption of off-premises consumption retail beer licenses from the "closed off" provisions. The Liquor Division's position is the exemption

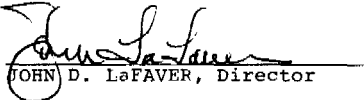
contradicts the plain and clear meaning of §§ 16-3-304 and 16-3-305, MCA.

The Department adopts the proposal of the associations and representatives of Montana's wholesale and retail grocery industry. Amended rule 42.12.323, as proposed, is further amended to only apply to premises licensed for on-premises consumption of alcoholic beverages.

Representatives of several of Montana's Exchange Clubs, State Fair of Great Falls, Billings Beer and Wine Wholesalers, and Blue Rock Beverage Company oppose the proposed amendment to rule 42.12.323 requiring a special permit for each separate booth or stand located within an exhibition enclosure where beer and/or table wine is sold. The opponents contend the proposed amendment contradicts the Department's past construction of § 16-4-301, MCA, and imposes an economic hardship on applicants for special permits. The Liquor Division contends the proposed rule is a reasonable construction of § 16-4-301, MCA, and will result in less inequities than the amendments proposed by the opponents.

The Department adopts the proposal of the opponents. Amended rule 42.12.323, as proposed, is further amended by deleting the last two sentences requiring a special permit for each separate booth or stand located within an exhibition enclosure where beer and/or table wine is sold.

5. The authority for the rules is § 16-1-303. The rules implement §§ 16-1-201, 16-1-302, 16-1-303, 16-3-301, 16-3-305, 16-4-104 through 16-4-106, 16-4-109, 16-4-201 through 16-4-205, 16-4-208, 16-4-301, 16-4-401, 16-4-402, 16-4-404 through 16-4-406, 16-6-305, and 16-6-314, MCA.


JOHN D. LaFAVER, Director

Certified to Secretary of State 02/04/85

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMEND-	)	NOTICE OF THE AMENDMENT of
MENT of Rules 42.13.101,	)	Rules 42.13.101, 42.13.103,
42.13.103, 42.13.104,	)	42.13.104, 42.13.106,
42.13.106, and 42.13.107	)	42.13.107, 42.13.301,
relating to general regula-	)	42.13.303, 42.13.304,
tion of licenses; the AMEND-	)	42.13.401, 42.13.402,
MENT of Rules 42.13.301,	)	42.13.501, and 42.13.502; and
42.13.303, and 42.13.304	)	THE ADOPTION of NEW RULE I
relating to storage require-	)	(42.13.222), all of which
ments; the AMENDMENT of Rules)	)	relate to the general revi-
42.13.401 and 42.13.402	)	sion of Chapter 13 relating
relating to wine; the	)	to liquor division regulation
AMENDMENT of Rules 42.13.501	)	of licensees.
and 42.13.502 relating to)	
driveup windows, and the)	
ADOPTION OF NEW RULE I)	
(42.13.222) relating to beer))	
wholesaler and table wine)	
distributor recordkeeping)	
requirements.)	

TO: All Interested Persons:

1. On November 29, 1984, the Department of Revenue published notice of the proposed general revision of Title 42, Chapter 13 of the Administrative Rules of Montana, which relates to liquor division regulation of licensees, at pages 1741 through 1747 of the 1984 Montana Administrative Register, issue number 22.

2. The Department has amended rules 42.13.101, 42.13.103, 42.13.104, 42.13.106, 42.13.107, 42.13.301, 42.13.303, 42.13.304, 42.13.401, 42.13.402, 42.13.501, and 42.13.502 as proposed. The Department has adopted new rule I (42.13.222) as proposed.

3. A public hearing was held on December 19, 1984, to consider the proposed rule changes. Howard Heffelfinger, Administrator of the Liquor Division, Tom Mulholland, Assistant Administrator of the Liquor Division, and Diana Koon, Chief of the Licensing Bureau appeared on behalf of the Department.

The Montana Beer and Wine Wholesaler's Association, represented by Mr. Roger Tippy, appeared to comment on some of the rule changes. Mr. Tippy applauded the Department on its cooperation with the industry in revising the rules.

Mr. Tippy, however, stated his belief that the Department's proposed amendments to rule 42.13.402, Wine Distributor's Monthly Reports, err in removing the penalties for a wine distributor's failure to file a table wine tax form or pay the table wine tax. The Department's position is that the present form of the rule incompletely describes the penalties provided at

§ 16-4-406, MCA, and the proposed amendment referencing the penalties provided in § 16-4-406, MCA, is complete.

The Montana Beer and Wine Wholesaler's Association further opposed the deletion of the last sentence of rule 42.13.402 which provides:

Unless the distributor is able to show good cause, failure to file subjects the distributor to a fine of \$10 for the first failure, \$50 for the second, and \$100 for each failure thereafter.

The Department maintains its position that this last sentence is inconsistent with the penalties provided at § 16-4-406, MCA. Furthermore, the imposition of penalties for multiple violations should be determined on a case-by-case basis. Either civil penalty, suspension of license, written reprimand or revocation of license may be appropriate for multiple violations depending upon the facts and circumstances of each case.

For these reasons the Department has amended rule 42.13.402 as proposed.

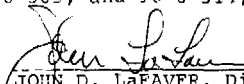
Mr. Tippy also commented on the scope of proposed new rule I (42.13.222), Beer Wholesaler and Table Wine Distributor Record-keeping Requirements. Mr. Tippy stated that the information which the rule requires wholesalers and distributors to maintain is excessive and cannot be easily recorded on their invoices. He indicated the invoices usually contain all the information required by subsection (1) except (1)(f), "date wholesaler or distributor received retailer's payment". Mr. Tippy suggested amending subsection (1) to reflect that commercial records could contain the information required by (1)(a) through (e), and (f) would come from a separate source.

The Department's response to this comment is that new rule I (42.13.222) merely requires the required information to be maintained in the records of the wholesaler or distributor and does not specifically require it to be maintained on an invoice. Further, the information required by (1)(f), "date wholesaler or distributor receives retailer's payment," is vital information which the beer wholesaler must retain to establish compliance with § 16-3-243, Seven-day Credit Limitation, and the wine distributor must retain to establish compliance with § 16-3-406, MCA, Financial Interest in Retailers Prohibited. Section 16-3-406, MCA, similarly creates a seven-day credit limitation in the case of table wine. If the wholesaler and distributor do not retain this information, the Department cannot determine whether the wholesaler or distributor has complied with the seven-day credit limitations. For these reasons, the Department had adopted new rule I (42.13.222) as proposed.

No other comments or testimony were received on these rules.

4. The authority for the rules is § 16-1-303, MCA. The rules implement §§ 16-1-303, 16-1-411, 16-3-201, 16-3-230, 16-3-243, 16-3-301, 16-3-303, 16-3-310, 16-3-404, 16-3-406, 16-4-102 through 16-4-104, 16-4-107, 16-4-204, 16-4-406,

16-6-103, 16-6-104, 16-6-301, 16-6-305, and 16-6-314, MCA.



JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 02/04/85

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION)	NOTICE OF THE ADOPTION of New
of New Rules I through V)	Rules I through V (42.27.601
(42.27.601 through 42.27.605))	through 42.27.605) relating
relating to the implementa-)	to the implementation of the
tion of the alcohol tax in-)	alcohol tax incentive and
centive and administration)	administration act.
act.)	

TO: All Interested Persons:

1. On November 29, 1984, the Department of Revenue published notice of the proposed adoption of new rules I through V (42.27.601 through 42.27.605) relating to the implementation of the alcohol tax incentive and administration act at pages 1698 through 1701 of the 1984 Montana Administrative Register, issue number 22.

2. The Department has adopted new rules I through V (42.27.601 through 42.27.605) as proposed except as follows:

RULE II (42.27.602) DEFINITIONS (1) As used in this subchapter, the definitions found in ARM, Title 42, chapter 27 and 15-70-503 and 15-70-201, MCA, apply.

(2) The following definitions also apply:

(a) "Act" means the "alcohol tax incentive and administration act", Title 15, chapter 70, part 5, MCA.

(b) "Alcohol" means anhydrous ethanol produced in Montana from Montana agricultural products.

(c) "Division" means the motor fuel tax division, department of revenue.

RULE IV (42.27.604) PAYMENT OF ALCOHOL TAX INCENTIVE (1), (2), and (3) remain as proposed.

(4) The division shall calculate the share of the total nonaviation ~~gasohol~~ gasoline and gasohol market represented by gasohol according to information contained in the gasoline distributor's returns on the first state business day after April 1, ~~June~~ July 1, October 1, January 1 of each year the act is in effect. The tax incentive payment provided for in subsection (2) shall be modified in accordance with the provisions of 15-70-522(3), MCA, effective ~~May~~ April 1, July 1, ~~November~~ October 1, or ~~February~~ January 1. ~~7~~ following the date of adjustment

3. A public hearing was held on December 20, 1984, to consider the proposed rules. Mr. Paul Van Tricht appeared in support of the rules on behalf of the Department. No opponents to the rules appeared. Mr. John Braunbeck, representing Alcotech, Inc., presented testimony commenting on the proposed rules. Mr. Braunbeck suggested that the Department define "alcohol" to exclude all alcohol except ethanol. Ethanol is also known as

ethyl alcohol or grain alcohol and is used to produce "gasohol". The definition of the term "gasohol," which is found in § 15-70-201(7), MCA, limits that term to gasoline which is blended to produce a fuel "consisting of not less than 10% anhydrous ethanol produced in Montana from Montana agricultural products". Therefore, in order to eliminate any confusion, the Department has amended subsection (2) of Rule II (42.27.602) to provide that "alcohol" means "anhydrous ethanol produced in Montana from Montana agricultural products".

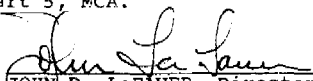
Mr. Braunbeck and Mr. Gordon Doig of Alcotech, Inc., by means of written testimony, also commented on rule III (42.27.603) which requires alcohol producers to submit applications for the tax incentive no later than the 25th day of the calendar month following the month during which the alcohol was sold and delivered to the gasohol distributor. They suggested that 10 days would be sufficient time for producers to apply for the credit and that the 25 days allowed would unnecessarily delay payment of the incentive.

The Department realizes that rule III (42.27.603) will involve some delay in the processing of the tax incentive payments. However, the delay should not be over two months from the date of sale. The delay is necessary to process the applications in an orderly manner and to check the accuracy of the applications against other reports which are not received by the Department until the 25th day of the month as required by § 15-70-205 and 15-17-512, MCA. For these reasons, the Department declines to amend rule III (42.27.603).

The Department has also amended subsection (4) of rule IV (42.27.604) to bring it into compliance with § 15-70-522(3), MCA, by correcting several errors in the effective dates of the adjustment which were made in drafting.

No other comments or testimony were received.

4. The authority for the rules is § 15-70-104 and the rules implement Title 15, chapter 70, part 5, MCA.


JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 02/04/85

BEFCRF THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE
STATE OF MONTANA

In the matter of the	)	NOTICE OF THE ADOPTION OF
adoption of Rule 46.5.669	)	RULE 46.5.669 PERTAINING TO
pertaining to youth foster	)	YOUTH FOSTER HOME, FOSTER
home, foster parents.	)	PARENTS

TO: All Interested Persons

1. On December 27, 1984, the Department of Social and Rehabilitation Services published notice of the proposed adoption of a rule pertaining to youth foster home, foster parents at page 1834 of the Montana Administrative Register, issue number 24.

2. The Department has adopted the rule as proposed with the following changes:

46.5.669 YOUTH FOSTER HOME, FOSTER PARENTS (1) Foster parents and other members of the household must be in good physical and mental health. To assist the department in evaluating the mental and physical health of applicants, foster parents and members of the foster home household, the applicant or licensee shall cooperate with the department in providing the following information:

(a) A CSD-SS-33, "Personal statement of health for licensure" form provided by the department must be completed for each person living in the household and submitted to the department with the initial application for licensure and annually thereafter.

(b) The applicant for licensure or relicensure shall complete the application form provided by the department, which shall include questions regarding whether the applicant or other member living in the household has received inpatient or outpatient treatment for mental illness, drug or alcohol abuse.

(c) Any applicant, ~~any~~ licensed foster parent or ~~any~~ member of the foster home household may be ~~asked~~ required to obtain a psychological evaluation or medical examination ~~by the department.~~

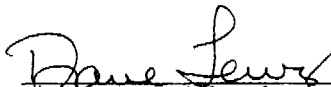
(d) Any applicant, ~~any~~ licensed foster parent or ~~any~~ member of the foster home household may be asked to sign an authorization of release of medical or psychological records allowing the department to obtain medical records concerning the applicant, licensed foster home parent or any other member of the household.

AUTH: Sec. 41-3-1103(2)(c) MCA

IMP: Sec. 41-3-1103(1)(b) and 41-3-1142 MCA

3. The changes to the proposed rule are being made to specify, more clearly, that any applicant, licensed foster parent or member of the foster home household may be required to obtain a psychological evaluation or medical examination.

5. Other than the Department of Social and Rehabilitation Services' testimony and comments, no written comments or testimony were received.



Director, Social and Rehabilitation Services

Certified to the Secretary of State February 4, 1985.

BEFORE THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE
STATE OF MONTANA

In the matter of the amend-	)	NOTICE OF THE AMENDMENT OF
ment of Rules 46.5.909,	)	RULES 46.5.909, 46.5.922,
46.5.922, 46.5.924 and	)	46.5.924 AND 46.5.938 PER-
46.5.938 pertaining to the	)	TAINING TO THE REGISTRATION
registration of family and	)	OF FAMILY AND GROUP DAY
group day care homes and	)	CARE HOMES AND LICENSING OF
licensing of day care	)	DAY CARE CENTERS
centers.)	

TO: All Interested Persons

1. On December 27, 1984, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.5.909, 46.5.922, 46.5.924 and 46.5.938 pertaining to the registration of family and group day care homes and licensing of day care centers at page 1838 of the Montana Administrative Register, issue number 24.

2. The Department has amended the rules as proposed with the following changes:

46.5.909 FAMILY DAY CARE HOME, GROUP DAY CARE HOME REGISTRATION, GENERAL ELIGIBILITY REQUIREMENTS, AND PROGRAM REQUIREMENTS Subsections (1)(a) through (1)(d) remain the same.

(e) Denial and Revocation of registration:

~~{ii}--a-provider-receiving-3-warnings-of-noncompliance shall-be-subject-to-revocation-of-their-registration-certificate;~~

~~{iii}--should-any-one-noncompliance-place-a-child-in danger; revocation-will-be-immediate;~~

~~{iii}-30-days-will-be-given-to-correct-the-noncompliance issue.--This-will-be-monitored-by-the-social-worker.~~

(i) The department, after written notice to the applicant or licensee REGISTRANT, may deny, suspend, restrict, revoke or reduce to a provisional status a registration certificate upon finding that:

(A) the provider has received 3 warnings of non-compliance with the registration standards; however, should any one non-compliance place a child in danger of harm, revocation will be immediate. Where a warning of non-compliance is issued, the provider shall be given 30 days to correct the area of non-compliance; or

(B) the provider has made any misrepresentations to the department, either negligent or intentional, regarding any information requested on the application form or necessary for licensing REGISTRATION purposes; or

(C) the provider or a member of the provider's household has been named as the perpetrator in a substantiated report of CHILD abuse or neglect AS DEFINED IN ARM 46.5.116.

Subsections (1)(f) through (1)(n) remain the same.

AUTH: Sec. 53-4-503 MCA

IMP: Sec. 53-4-508 MCA

46.5.922 DAY CARE CENTERS, STAFFING REQUIREMENTS

(1) Child/staff ratio.

(a) 4:1 for infants 0-2 years; ~~7-and-for--developmentally disabled-or-physically-handicapped-children-when-more-than-25% of-the-total-population-are--developmentally-disabled-or-physically-handicapped-children.~~

Subsections (1)(b) through (3)(e) remain the same.

(4) The provider must assure that members of the staff are in good physical and mental health.

AUTH: Sec. 53-4-503 MCA

IMP: Sec. 53-4-504, 53-4-506, 53-4-508 MCA

46.5.924 GROUP DAY CARE HOMES, PROVIDER RESPONSIBILITIES AND QUALIFICATIONS (1) The provider and all persons responsible for children in the day care provider's absence must be at least 18 years of age and must be in good mental and physical health.

(2) The applicant for ~~license~~ REGISTRATION shall be required to complete the application form provided by the department, which shall include questions regarding whether the applicant or other member living in the household has received inpatient or outpatient treatment for mental illness, drug or alcohol abuse or whether the applicant or any member of the household has been involved in an incident of child abuse or neglect in the past.

(23) The provider shall be responsible for the direct care, protection, supervision, and guidance of the children within a group day care home.

(34) The provider shall have experience in the care and supervision of children.

(45) Family relatives in the day care home shall assure a safe and stable environment for the child.

(56) Personal information about the child or his family must be kept confidential.

(67) The provider shall attend a basic day care orientation or its equivalent within the first 60 days of certification.

(78) It is strongly recommended that the provider have training in cardio-pulmonary resuscitation or multi-media first aid and be familiar with standard Red Cross first aid procedure.

AUTH: Sec. 53-4-503 MCA
IMP: Sec. 53-4-504 MCA

46.5.938 FAMILY DAY CARE HOMES, PROVIDER RESPONSIBILITIES AND QUALIFICATIONS (1) The provider and all persons responsible for children in the day care provider's absence must be at least 18 years of age and must be in good mental and physical health.

(2) The applicant for license REGISTRATION shall be required to complete the application form provided by the department, which shall include questions regarding whether the applicant or other member living in the household has received inpatient or outpatient treatment for mental illness, drug or alcohol abuse or whether the applicant or any member of the household has been involved in an incident of child abuse or neglect in the past.

(23) The provider shall be responsible for the direct care, protection, supervision, and guidance of the children within a family day care home.

(34) The provider shall have experience in the care and supervision of children.

(45) Family relatives in the day care home shall assure a safe and stable environment for the child.

(56) Personal information about the child or his family must be kept confidential.

(67) It is strongly recommended that the provider have training in cardio-pulmonary resuscitation or multi-media first aid and be familiar with standard Red Cross first aid procedure.

AUTH: Sec. 53-4-503 MCA
IMP: Sec. 53-4-504 MCA

3. There were no verbal comments submitted. The Department has thoroughly considered the written comments submitted and responded as follows:

COMMENT: The proposed amendment to 46.5.909(1)(e)(i) should include a definition for the actions taken to suspend or restrict.

RESPONSE: The Department feels that the terms are sufficiently self-explanatory and that no further definition of the terms is necessary.

COMMENT: 46.5.909(1)(e)(i)(C) should define what is meant by a substantiated report of abuse or neglect.

RESPONSE: Substantiated reports of child abuse or neglect are defined in ARM 46.5.116. That definition would apply in these cases. A change was made to clarify this.

COMMENT: Shouldn't the references to licensure and licensees be changed to "registration" and "registrant".

RESPONSE: The Department agrees and these changes have been made.

COMMENT: The Department received a number of comments regarding the proposed amendment to ARM 46.5.922 which would establish a child/staff ratio of 4:1 for developmentally disabled or physically handicapped children when more than 25% of the total population of the day care center of developmentally disabled or physically handicapped.

Those submitting comments objected to the 4:1 ratio as being cost prohibitive. Commentors also objected to the staff ratio because it did not take into account the severity of the handicap of the children. Comments submitted from persons with experience in the delivery of services to the developmentally disabled suggested that the ratio of 4:1 is not consistent with current practice or academic studies available regarding the provision of services to developmentally disabled and handicapped children. Generally, the commentors felt a more flexible child/staff ratio should be developed.

RESPONSE: The Department has determined that additional study is necessary before establishing the child/staff ratio for day care centers serving developmentally disabled and handicapped children. The Department is removing from the final rule the 4:1 ratio and will conduct further research before proposing a child/staff ratio for day care centers serving large numbers of such special needs children.



Director, Social and Rehabilitation Services

Certified to the Secretary of State _____ February 4 _____, 1985.

BEFORE THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE
STATE OF MONTANA

In the matter of the amend-	)	NOTICE OF THE AMENDMENT OF
ment of Rule 46.12.3803	)	RULE 46.12.3803 PERTAINING
pertaining to the medically	)	TO THE MEDICALLY NEEDY
needy income level for medi-	)	INCOME LEVEL FOR MEDICAL
cal assistance.	)	ASSISTANCE

TO: All Interested Persons

1. On December 27, 1984, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.3803 pertaining to the medically needy income level for medical assistance at page 1836 of the Montana Administrative Register, issue number 24.

2. The Department has amended Rule 46.12.3803 as proposed.

3. No written comments or testimony, other than the Department of Social and Rehabilitation Services', were received.

BEFORE THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE
STATE OF MONTANA

In the matter of the amend-)	
ment of Rule 46.12.3002	)	NOTICE OF THE AMENDMENT OF
pertaining to determination	)	RULE 46.12.3002 PERTAINING
of eligibility for medical	)	TO MEDICAL ASSISTANCE
assistance.)	

TO: All Interested Persons

1. On December 27, 1984, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.3002 pertaining to determination of eligibility for medical assistance at page 1842 of the Montana Administrative Register, issue number 24.

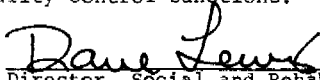
2. The Department has amended Rule 46.12.3002 as proposed.

3. The Department has thoroughly considered the written commentary received:

COMMENT: Anyone having over the resource standard on the first moment of the month would be determined ineligible for the entire month. They would have to pay for their entire

nursing home care for that month, leaving them possibly far less than the resource standard. The previous rule would allow them to spend down their resources to the resource standard and then become Medicaid eligible.

RESPONSE: The department is required to determine eligibility for Medicaid based on the method that the Supplemental Security Income Program uses. Their regulations and interpretations are found in 20 CFR 416 and in the Social Security Administration's Program Operations Manual. These regulations charge us to view the income and resources of an applicant the first moment of the first day of the month. This agreement binds the State to this regulation. Any deviation would possibly result in Federal Quality Control sanctions.



Director, Social and Rehabilitation Services

Certified to the Secretary of State _____ February 4 _____, 1985.

VOLUME NO. 41

OPINION NO. 4

CITIES AND TOWNS - Payment of commission for services performed in connection with offering and sale of revenue bonds;

REVENUE BONDS - Payment of commission for services performed in connection with offering and sale;

REVENUE BONDS - Sale at price below par value;

MONTANA CODE ANNOTATED - Sections 7-7-4401 to 7-7-4435, 7-7-4422, 7-7-4433, 7-7-4434;

SESSION LAWS OF 1983 - House Bill 716;

UNITED STATES CODE - 15 U.S.C. § 78(a) to 78(jj).

HELD: A financial consultant may not receive a commission based on the value of bonds purchased by it for services performed in connection with the municipal revenue bond offering and sale to the extent the commission, when subtracted from the purchase price of the bonds, reduces the bonds' effective selling price below par value.

21 January 1985

Stuart C. MacKenzie
City Attorney
City of Chinook
Chinook MT 59523

Dear Mr. MacKenzie:

You have requested my opinion concerning the following question:

May a city sell sewer revenue bonds to its financial consultant at a public sale if the consultant is the successful bidder and also pay the consultant a contractual fee for services performed in connection with the bond offering without violating section 7-7-4433(1), MCA, requiring sale of revenue bonds at no less than par value?

Your question arises from a situation in which the City of Chinook entered into a contract with an investment firm under which the investment firm was to serve as the financial consultant for a revenue bond offering. The services to be performed by the investment firm were varied and included, among others: (1) consultation with bond attorneys selected to oversee legal aspects of the issuance and sale; (2) provision for an opinion of bond counsel; (3) preparation of technical data such as maturity schedules, call features and the method/timing of the offering and sale; (4) attendance at meetings associated with the offering and sale; (5) coordination of advertisements for the sale; and (6) provision for bond forms. The bonds are to be offered through public sale, and the consultant has expressly reserved the right to bid on the bonds. The consultant's compensation for services is determined under two separate fee schedules, both of which are based on the total dollar amount of the bonds sold, including the value of any bonds purchased by it. One schedule applies if the city chooses to use bond counsel of the fiscal agent's choosing (minimum fee \$9,000). A somewhat reduced fee (minimum \$7,500) applies if the city chooses its own bond counsel. The contract imposes a minimum fee if the amount of the issue is reduced or multiple sales are held. There is no obligation to pay a fee should the bonds for some reason remain unsold. I have assumed, for the purposes of this opinion, that the proposed commission is reasonably related to the value of the services rendered and that the services offered are necessary expenditures in the issuance of revenue bonds.

Issuance of the bonds is governed by the Municipal Revenue Bond Act of 1939, §§ 7-7-4401 to 4435, MCA. Under section 7-7-4422, MCA, a municipality may, in determining the cost of a bond issue, include all fiscal expenses such as consultant fees. Unless sold to the United States, the State, or any State agency, the sale must be public and bonds may not be sold at less than par value. §§ 7-7-4433 to 4434, MCA. The statute does not contain any provisions specifically addressing whether a financial consultant may bid upon bonds as to which the consultant is performing services and upon whose sale the consultant's compensation is directly dependent. There is, as well, no Montana decisional authority relevant to this issue.

Whether a statute requiring municipal bonds, to be sold at no less than par value, is violated by payment of a commission in connection with the sale to a financial consultant who also becomes the purchaser, has been litigated in other jurisdictions. The universal result in those cases is that "the purchaser cannot be allowed a direct commission where the bonds are sold at par." 15 McQuillan, The Law of Municipal Corporations § 43.67 (3d ed. 1970). See also 2 Antieau, Municipal Corporation Law § 15.23 (1983); 64 C.J.S. Municipal Corporations § 1932(b) (1950); Annot., 91 A.L.R. 7, 56 (1934); Annot., 162 A.L.R. 396, 402 (1946); Koochiching County v. Elder, 145 Minn. 77, 176 N.W. 195, 196 (1920) ("[a] commission paid to a buyer is plainly a sale at a discount"); Currie v. Frazier, 48 N.D. 600, 186 N.W. 244, 246 (1921) (when commission must be subtracted, sale at less than par value results); Duff v. Knott County, 328 Ky. 71, 36 S.W.2d 870 (1931); Lucas v. City of Nampa, 41 Idaho 35, 238 P. 288 (1925); Board of Drainage Commissioners v. Arnold, 156 Ga. 733, 120 S.E. 310 (1923); Bay City v. Lumbermen's State Bank, 193 Mich. 533, 160 N.W. 425 (1916); Bayha v. Public Utility District No. 1, 2 Wash. 2d 85, 97 P.2d 614, 629 (1939) (dictum).

Most recently, in Hayes v. Sanitary and Improvement District No. 194, 196 Neb. 653, 244 N.W.2d 505, 512 (1976), the Nebraska court held that payment of a commission for financial consultant services to the purchaser of a bond issue at a private sale was improper, observing that "[u]nder statutes requiring bonds to be sold at not less than par, fees and commissions paid to a purchaser have generally been held to constitute, in substance and effect, a discounted violation of the law." (Citations omitted.)

While, with the exception of Hayes, the decisions finding a violation of the proscription against sales below par are not current, their reasoning remains sound. Payment of a commission to a financial consultant based upon the value of bonds sold to the consultant is uniformly held to constitute in substance a discount of the bonds' purchase price, which reduces the purchase price and may make the sale one in violation of the statutes prohibiting a sale below par. Unquestionably, when the purchase price of municipal revenue bonds is reduced below par value, section 7-7-4433(1), MCA, is violated. Although this

construction of section 7-7-4433(1), MCA, may appear technical since the commission fees have been presumed reasonable for the purposes of this opinion, the weight of decisional authority from other states and the need to minimize the opportunity for abuse of the par value requirement militates strongly against unconditioned permission for a financial consultant to recover commissions predicated upon its purchases. The potential for abuse can be seen clearly where, as in this contract, no fee need be paid if the bonds are not sold, but the consultant retains a right to purchase and, in effect, to guarantee himself a fee.

My opinion, in this regard, is further strengthened by the fact that the 1983 Legislature expressly rejected a provision in House Bill 716 which would have permitted the sale of a variety of bonds at 97% of par value, or at a discount. The purpose of that rejected provision was to permit brokers to take a commission and still sell the bonds at the value required by statute.

A financial consultant, accordingly, may not receive a commission as to revenue bonds which it purchases to the extent the commission, after subtraction from the bond's purchase price, reduces the value received by the municipality for the bonds below their par value. A financial consultant may, however, receive a commission if reasonably related to the value of its services, which is calculated upon the value of the bonds purchased by others. The consultant may also receive a commission calculated upon the value of bonds purchased by it to the extent the commission, after subtraction from the bonds' purchase price, does not reduce below par the value received by the municipality.

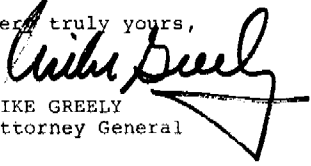
Finally, I note that the Municipal Securities Rulemaking Board has promulgated regulations establishing ethical standards and disclosure requirements under the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78(a) to 78(jjj), as to the purchase of municipal securities by financial advisors under the circumstances involved here. See Rule G-23 of the Municipal Securities Rulemaking Board, reprinted in Municipal Securities Rulemaking Board Manual (CCH) ¶ 3611. The disclosure requirements applicable to a public sale appear to have been met in this case. The Municipal Securities Rulemaking Board's regulations expressly do not supersede any more restrictive provision of state

law applicable to the purchase of municipal bonds by financial consultants. The rule addresses itself to ethical conflicts of interest within the profession. It does not direct itself in any way to the provision of state law prohibiting a sale below par and can, therefore, have no bearing on that question.

THEREFORE, IT IS MY OPINION:

A financial consultant may not receive a commission based on the value of bonds purchased by it for services performed in connection with the municipal revenue bond offering and sale to the extent the commission, when subtracted from the purchase price of the bonds, reduces the bonds' effective selling price below par value.

Very truly yours,


MIKE GREELY
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules or amendment or repeal of existing rules filed with the Secretary of State. Proposals of the Department of Revenue are reviewed only in regard to the procedural requirements of the Montana Administrative Procedure Act. The Committee has 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. In addition, the Committee 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 or amend a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with existing or proposed rules. The address is Room 138, Montana State Capitol, Helena, Montana 59620.

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

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

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statute 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	1. Consult ARM topical index, volume 16.
Subject	Update the rule by checking the
Matter	accumulative table and the table of
	contents in the last Montana
	Administrative Register issued.

Statute	2. Go to cross reference table at end of
Number and	each title which lists MCA section
Department	numbers and corresponding ARM rule
	numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 1984. This table includes those rules adopted during the period January 1, 1985 through March 31, 1985, and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through December 31, 1984, this table and the table of contents of this issue of the MAR.

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