

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of NEW)	NOTICE OF PROPOSED ADOPTION
RULE I pertaining to closing a consumer)	AND AMENDMENT
loan business and NEW RULE II)	
pertaining to reimbursement of)	NO PUBLIC HEARING
department costs in bringing an)	CONTEMPLATED
administrative action; and the)	
amendment of ARM 2.59.303 pertaining)	
to credit insurance, 2.59.308 pertaining)	
to examination fees, 2.59.315 pertaining)	
to licensure surrender, and 2.59.318)	
pertaining to annual reports)	

TO: All Concerned Persons

1. On November 30, 2015, the Department of Administration proposes to adopt and amend the above-stated rules.

2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Administration no later than 5:00 p.m. on November 16, 2015, to advise us of the nature of the accommodation that you need. Please contact Wayne Johnston, Division of Banking and Financial Institutions, P.O. Box 200546, Helena, Montana 59620-0546; telephone (406) 841-2918; TDD (406) 841-2974; facsimile (406) 841-2930; or e-mail banking@mt.gov.

3. The rules proposed to be adopted provide as follows:

NEW RULE I REQUIRED PROCEDURE FOR CLOSING A CONSUMER LOAN BUSINESS (1) At least 60 days before the intended closure date of a consumer loan business, the licensee shall provide the following to the department:

- (a) a copy of a notification to all consumers with outstanding loans containing:
 - (i) a current outstanding loan balance including an itemization of unpaid principal, accrued interest, and allowable fees;
 - (ii) notice of intended closure date of the business which date shall not be sooner than 60 days from the date of mailing the notice;
 - (iii) the licensee's succession plan, e.g., sale or assignment of the loan, and the successor's contact information and assumption letter;
 - (iv) any alternatives to the licensee's succession plan that are available to the consumer;
 - (v) contact information for borrower use in obtaining collateral/lien releases;
- and

(vi) the department's name, address, phone number, and e-mail address where any complaints arising from the intended closure may be filed;

(b) the name, physical address, mailing address, e-mail address, and phone numbers of the licensee's post-closure, designated custodian of the licensee's inactive loan files, and the physical address where the records will be maintained for the period required under 32-5-307, MCA; and

(c) a report of active loans containing the following information for each loan:

(i) name, address, and loan number of all active borrowers;

(ii) loan origination date;

(iii) original principal amount of loan;

(iv) current interest rate;

(v) current principal balance;

(vi) maturity date; and

(vii) summary of special provisions related to taxes and insurance reserves, funded maintenance reserves, etc.

(2) The department may conduct a final examination of the consumer loan business at the licensee's expense as provided in 32-5-403, MCA, and ARM 2.59.308 before accepting the surrender of license. The department may, in lieu of an examination, accept an audit report prepared in accordance with generally accepted accounting principles (GAAP) and/or United States generally accepted audit standards (GAAS) by an independent auditor retained by the licensee for the disclosed purpose of closing or selling the business, as applicable.

AUTH: 32-5-401, MCA

IMP: 32-5-103, MCA

STATEMENT OF REASONABLE NECESSITY: This rule is necessary to establish requirements for the orderly closure or sale of a consumer lending business; the seamless continuation of services to existing borrowers by another licensee or financial institution; the continued availability of loan records; and to ensure the licensee's compliance with 32-5-304, 32-5-307, MCA, and other provisions of the Montana Consumer Loan Act. When a consumer loan business closes, the department has numerous concerns, including how the customers of the business will be notified of the closure and the location of the account. The notification to the customer needs to be made in sufficient time to allow the customer to send any existing payment obligation to the new entity collecting the debt.

The department would like to ensure that the accounting is correct for any existing debt by conducting a final examination. The reason for this is that the existing consumer lender is closing and any new entity taking over the debt will take over the obligation as of the date of transfer, but will not have the records to be able to go back and research to determine if the debt payments were calculated and applied correctly in the past. In addition, if some violation of state or federal law has occurred in the calculation or allocation of payments, the responsible entity would be the consumer lender that is going out of business, not the new entity taking over the debt. So the department would need to do an examination to determine that the accounts and disclosures were correct and complete at or near the time of transfer of the accounts.

However, if the consumer lender is large enough to warrant an independent audit of accounts as part of the sale of the business, an audit may be done by the independent auditor, and the department could accept the independent audit in lieu of the department's examination.

Other areas of concern for the department when a consumer lender closes are taxes and insurance. If the consumer lender has been maintaining a reserve for the payment of taxes and/or insurance, those sums must be audited to make certain they are correct and transferred seamlessly to the new entity, meaning, no payment for taxes or insurance can be missed or paid late. In addition, even if reserves are not maintained for taxes and insurance, the department must ensure that all payments are made on a timely basis by the new entity and that all policy documents reflect the name of the new entity that holds the lien.

Liens are another area of concern for the department when a consumer lender closes. If a consumer pays off a loan and the consumer lender fails for any reason to release the lien (including because they are out of business), the consumer cannot get the lien released. For example, a consumer decides to sell their car, which was the collateral for the loan, but finds it has a lien from the consumer lender on the title. The consumer cannot get the lien released without authorization from the consumer lender. If the consumer lender is out of business, the motor vehicle division will not accept a lien release from anyone else, including an attorney from the defunct entity. The consumer's only remedy is to go to district court for a court order. This generally costs more than the lien on the vehicle. The department is concerned about all these issues because they result in harm to the borrowers. The department, by this rule, seeks to identify the issues that it has encountered in this area in the past and to address them before the consumer lender closes. This will avoid harm to the borrowers of the consumer lender that is closing. The department also monitors the entity to which the loans are transferred to ensure that the entity is properly licensed in Montana and that it correctly transfers and integrates the new loans into its portfolio.

NEW RULE II DEPARTMENT COSTS IN BRINGING AN ADMINISTRATIVE ACTION (1) The department's "costs in bringing an administrative action" as used in 32-5-207, MCA, for which reimbursement may be ordered by the department are:

- (a) administrative law judge charges;
- (b) court reporter fees;
- (c) exhibit preparation costs if the exhibit was admitted into evidence at the hearing;
- (d) the cost of a deposition if the deposition was used at the hearing;
- (e) fees, if any, for service of subpoenas;
- (f) transcription cost as provided in 2-4-614, MCA;
- (g) witness fees and mileage for the department's lay/fact witnesses; and
- (h) mileage for the department's expert witness if the expert appears personally and testifies at the hearing.

AUTH: 2-4-104, 2-18-503, 25-10-201, 26-2-501, 32-5-207, 32-5-401, MCA
IMP: 32-5-207, MCA

STATEMENT OF REASONABLE NECESSITY: This rule is necessary because 32-5-207(1)(b), MCA, states the department may order reimbursement of its "costs" in bringing an administrative action and there is currently no rule defining what costs the department may order to be reimbursed. The proposed rule specifies the allowable costs for reimbursement purposes. The Montana Administrative Procedure Act (MAPA) 2-4-104, MCA, states that rules regarding witness fees and mileage are the same in administrative contested cases as in civil actions in district court. Witness fees are governed by 26-2-501, MCA, and mileage is governed by 2-18-503, MCA. The additional costs included in the rule are those that a prevailing party may recover in a civil action in state district court under 25-10-201, MCA, as limited by case law. A discussion of numerous types of recoverable costs is included in the Montana Supreme Court's opinion in *Thayer v. Hicks*, 243 Mont. 138, 793 P.2d 784 (1990). The proposed rule includes certain costs that are not applicable to district court actions, but which are necessarily incurred by the department in MAPA contested cases such as costs incurred for the services of a neutral, appointed hearing examiner/administrative law judge. The department uses the services of the Department of Justice Agency Legal Services Bureau, which assigns a hearing examiner to hear the department's contested cases. The approach that the department has taken is that recoverable costs allowed under Montana law are limited so as not to discourage persons from exercising the right to a hearing under 32-5-207, MCA.

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

2.59.303 CREDIT INSURANCE (1) through (3) remain the same.

(4) ~~Licensee shall~~ A licensee may not place credit life insurance, ~~and/or~~ credit disability insurance, or loss of income insurance on any loan of \$300 or less in principal amount exclusive of charges for insurance premiums.

(5) The amount and term of credit life insurance, ~~and/or~~ credit disability insurance, or loss of income insurance placed by a licensee must conform to the provisions of 33-21-202 and 33-21-203, MCA.

(6) and (7) remain the same.

(8) Refunds of unearned premiums for credit life insurance, credit disability insurance, and loss of income insurance must be made in accordance with the Montana Insurance Code (~~32-21-206~~ 33-21-206, MCA).

(9) ~~Licensee~~ A licensee shall enter on each borrower's loan account record the amount of credit life, credit disability, or loss of income insurance premium ~~and credit disability insurance premium~~ charged in connection with the loan.

(10) through (10)(d) remain the same.

(11) For the purpose of providing adequate information for the annual report ~~of licensee~~ required by 32-5-308, MCA, a licensee ~~must~~ shall keep accurate accounts to reflect the following:

(a) total net charges to borrowers for credit life, insurance ~~and~~ credit disability, and loss of income insurance placed by the licensee;

(b) total premiums remitted to insurers for ~~such~~ the coverage;

(c) remains the same.

(d) total of loans and loan balances paid by insurers under credit life policies upon death of borrowers;

(e) total of loans and payments on loans received from insurers on loans under credit disability policies; and

(f) total of loans and payments received from insurers on loans under loss of income policies.

(12) The insurance information required under (11) must be reported in the aggregate in the licensee's annual report and must also be broken down by loan and maintained in each individual loan file.

AUTH: 32-5-401, MCA

IMP: 32-5-306, 32-5-307, 32-5-308, MCA

STATEMENT OF REASONABLE NECESSITY: It is necessary to amend (4), (5), (9), and (11) to add loss of income insurance to the types of credit insurance available to borrowers under 32-5-306, MCA. A similar amendment was made to other sections of the rule in MAR Notice No. 2-59-501, but the above-referenced sections were not otherwise being amended and were overlooked. An amendment to (8) is necessary to correct a typographical error in the citation of 32-21-206, MCA. It is necessary to amend (11)(d) to clarify that it applies only to credit life insurance, since that is the only type of insurance that would pay a loan balance on the death of the borrower. Subsection (11)(f) is being added to specify the recordkeeping requirements pertaining to loss of income insurance being included in the annual report under 32-5-308, MCA. This break down allows the department examiners to determine the amounts being paid out for each type of insurance each year. Section (12) is necessary to ensure that in addition to having information reported in the aggregate in the annual report, the information is broken down by loan and maintained on an individual loan basis so that the department's examiners can verify appropriate application of insurance payments and appropriate refunds of unearned premiums in individual loan files.

2.59.308 EXAMINATION FEES (1) ~~A consumer loan business shall pay the Division of Banking and Financial Institutions a fee in the amount of \$37.50 per hour for each examiner required to conduct an investigation or examination under 32-5-402 or 32-5-403, MCA.~~ The examination fee charged by the department to the examinee must be in an amount sufficient to recover all of the department's actual costs for its supervision program related to the subject examination.

(2) The term "actual costs" means the "hourly cost of employee" for each examiner performing the examination plus actual travel expenses incurred in conjunction with the examination.

(3) The term "hourly cost of employee" means the cost incurred by the department for each hour that an employee is performing the examination; the cost includes the employee's wages and benefits.

(4) The term "performance of an examination" or "performing an examination" means pre-examination preparation, travel time, examination, examination report writing, review of a licensee's response to the examination report, and, if appropriate, amending the report based on the licensee's response.

(5) The term "travel expenses" means the "hourly cost of employee" for each examiner's travel time; motor pool and fuel charges; airfare, cab, or other public transportation fare; lodging; per diem; and, if approved by the department in advance, charge for rental vehicle for use at the examination site. The term also includes mileage paid to an examiner under 2-18-503, MCA, for use of personal vehicle for examination travel if use of the personal vehicle was approved by the department in advance.

AUTH: 32-5-401, 32-5-403, MCA
IMP: 32-5-402, 32-5-403, MCA

STATEMENT OF REASONABLE NECESSITY: An audit report of the Legislative Audit Division dated September 5, 2014, noted that without a documented basis for establishing the rates charged to consumer loan licensees for examinations under the current rule, it could not be determined whether the fees were commensurate with costs incurred. Section 32-5-403(2), MCA, states the expenses of the department incurred must be charged at a rate established in rule and the amount charged must be established to recover all of the costs of the department's supervision program. The amendments are needed to define terms used in the statute concerning examination fees to aid in the audit process and to facilitate transparency. Actual expenses incurred by the department in the performance of an examination are documented and tracked and charged to the licensee accordingly. Examiner time is tracked in the department's database. "Hourly cost of employee" information is tracked by the department. The rule amendments identify the components of an examination to enable auditors to verify that the fees charged under (1) are commensurate with costs.

2.59.315 LICENSE SURRENDER (1) remains the same.

(2) The department may decline to accept a licensee's offer to surrender a license under the following circumstances:

- (a) the licensee has not fully complied with [NEW RULE I];
- (b) the licensee has not made a succession plan that adequately protects consumers related to the continued servicing of the licensee's active loan files;
- (c) the licensee has not fully complied with a final order issued by the department in an enforcement action even though compliance is not yet due;
- (d) the department has an outstanding complaint or a pending enforcement action against the licensee; or
- (e) the licensee has not submitted an annual report covering the final calendar year or partial year that the licensee was in business irrespective of whether the licensee had any Montana loan activity during that reporting period.

(3) Once the department accepts an offer to surrender a license, the license may not be reinstated but the former licensee may reapply for a new license at any time.

AUTH: 32-5-205, 32-5-209, MCA
IMP: 32-5-205, 32-5-209, MCA

STATEMENT OF REASONABLE NECESSITY: The amendment is needed to identify the conditions referred to in 32-5-205, MCA, under which a licensee's offer to surrender a license may be declined. NEW RULE I in this notice creates requirements related to the closure or sale of a licensed consumer loan business. A closure or sale would necessarily involve the surrender of the licensee's license. Therefore, the requirements contained in NEW RULE I are incorporated into (1)(a) and (1)(b) and must be satisfied before the department may accept a licensee's offer to surrender its license. Occasionally in a MAPA contested case, the department orders a licensee to pay a civil penalty in installments. If the licensee offers to surrender its license before the penalty is fully paid, (1)(c) would allow the department to decline the offer even though the remaining installments are not yet due. The ability to decline the offer of surrender in that circumstance is necessary because 32-5-205, MCA, states the surrender of a license does not affect the licensee's liability for acts committed prior to the surrender. If a license could be surrendered before a penalty is fully paid and the former licensee subsequently failed to pay the remaining installments, the violation (noncompliance with the terms of the order) would have been committed after the license surrender, which circumstance is not covered by 32-5-205, MCA. Subsection (2)(d) makes clear that a licensee may not surrender a license to avoid a pending complaint or enforcement action. Subsection (2)(e) is necessary because 32-5-308, MCA, requires all licensees to file an annual report covering their licensee activity in this state. That information allows the department to do analytics on the types of loans being made in Montana for statistical and examination purposes. This rule makes clear that report must be filed before a licensee may surrender the license. Section (3) states the obvious. Once a license is surrendered it is gone. It cannot be reinstated but the former licensee can apply for a new license.

2.59.318 ADOPTION OF ANNUAL REPORT FORM AND DUE DATE

(1) ~~All entities~~ An entity holding a consumer loan license ~~at any time during 2014 for any period of time during a calendar year reporting period~~ shall complete ~~the~~ and file with the department by April 15 of the following calendar year a Consumer Loan Annual Report of Licensee dated August 5, 2014, and file it with the department by April 15, 2015. Instructions for filing are in the report. The annual report must be filed whether or not any loans were originated during the reporting period and whether or not the licensee renewed its license at the end of the reporting period or held a license when the report came due the following April 15.

(2) A completed annual report may be mailed to the Division of Banking and Financial Institutions, 301 S. Park Ave., Suite 316, P.O. Box 200546, Helena, MT 59620-0546; faxed to (406) 841-2930; or e-mailed to banking@mt.gov.

(3) The Consumer Loan Annual Report of Licensee form, 7/1/2015 edition, is adopted and incorporated by reference.

~~(2)~~(4) Copies of the annual report form and instructions for completion are available on the division's web site, www.banking.mt.gov <http://banking.mt.gov/Home/Forms#164912244-consumer-loan>.

AUTH: 32-5-308, MCA

IMP: 32-5-308, MCA

STATEMENT OF REASONABLE NECESSITY: In (1), it is necessary to delete the reference to holding a license during 2014 and to delete the "April 15, 2015" due date for the annual report to avoid the need for repeated rule amendments to reflect the correct reporting period and annual report due date. The current rule was intended to be temporary while the due date and content of the report were under consideration. The edition date for the annual report form in (1) must be amended because the form has been revised to accommodate inclusion of credit insurance information required under ARM 2.59.303(11) and 32-5-308, MCA. An amendment to expressly adopt and incorporate the report form is necessary to eliminate any potential legal infirmity of the rule on that basis. The department is requiring licensees to file a report showing no loans because otherwise the department has no way to know if the licensee made no loans or failed to file the report. The web site address is being changed because the department recently updated its web site and the uniform resource locator has changed.

5. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Kelly O'Sullivan, Legal Counsel, Division of Banking and Financial Institutions, P.O. Box 200546, Helena, Montana 59620-0546; faxed to the office at (406) 841-2930; or e-mailed to banking@mt.gov; and must be received no later than 5:00 p.m., November 23, 2015.

6. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to the person listed in 5 above no later than 5:00 p.m., November 16, 2015.

7. If the Division of Banking and Financial Institutions receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be six persons based on the number of licensed consumer loan lenders.

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

9. The Division of Banking and Financial Institutions maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this division. Persons who wish to have their name added to the mailing list shall make a written request which includes the name, mailing address, and e-mail address of the person to receive notices and specifies that the person wishes to receive notices regarding division rulemaking actions. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written requests may be mailed or delivered to Wayne Johnston, Division of Banking and Financial Institutions, 301 S. Park, Ste. 316, P.O. Box 200546, Helena, Montana 59620-0546; faxed to the office at (406) 841-2930; e-mailed to banking@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

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

11. The department has determined that under 2-4-111, MCA, the adoption and amendment of the above-stated rules will not significantly and directly affect small businesses.

By: /s/ Sheila Hogan
Sheila Hogan, Director
Department of Administration

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

Certified to the Secretary of State October 5, 2015