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

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| In the matter of the amendment of ARM 24.171.401 fees, 24.171.407 inspection, 24.171.408 outfitter records, 24.171.412 safety provisions, 24.171.413 watercraft identification, 24.171.501 application for outfitter license, 24.171.502 outfitter qualifications, 24.171.504 successorship, 24.171.507 outfitter examination, 24.171.520 amendment to operations plan, 24.171.601 guide qualifications, 24.171.602 guide license, 24.171.701 NCHU categories, transfers, and records, 24.171.2101 renewals, and 24.171.2301 unprofessional conduct, the adoption of NEW RULE I booking agents and advertising, NEW RULE II outfitter assistants, and NEW RULE III nonroutine applications, and the repeal of ARM 24.171.402 effect of fee for expansion of net client hunter use, and 24.171.503 outfitter application | ) ) ) ) ) ) ) ) ) ) ) ) ) ) ) ) ) ) ) ) ) | NOTICE OF AMENDMENT, ADOPTION, AND REPEAL |

TO: All Concerned Persons

1. On October 9, 2014, the Board of Outfitters (board) published MAR Notice No. 24-171-34 regarding the public hearing on the proposed amendment, adoption, and repeal of the above-stated rules, at page 2354 of the 2014 Montana Administrative Register, Issue No. 19.

2. On October 31, 2014, a public hearing was held on the proposed amendment, adoption, and repeal of the above-stated rules in Helena. Several comments were received by the November 7, 2014, deadline.

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

COMMENT 1: Several commenters generally supported the rule changes because they will streamline and clarify reporting requirements, eliminate unnecessary reporting, reduce administrative costs, and allow the industry to operate more efficiently while delivering quality services.

RESPONSE 1: The board appreciates all comments received during the rulemaking process.

COMMENT 2: Several commenters expressed concern over the requirement in ARM 24.171.408(2)(d) that an outfitter must record, for each big game animal taken, whether it was taken on public or private land within the outfitter's operation plan. The commenters stated the requirement will gather no really useful information, and cautioned that many ranches in central and eastern Montana include areas of landlocked public land, sometimes without fenced boundaries or with fenced boundaries that are not placed on the survey lines. In these situations it may be very difficult, even with GPS equipment, to accurately identify whether an animal was taken on public land or private land. If an outfitter is mistaken, even in a good faith effort to report correctly, the commenters were concerned that the mistake will translate into a violation of law and constitute a criminal offense. The commenters further asserted the requirement is costly and ineffective, and an unnecessarily controversial piece of the rules package.

RESPONSE 2: The board notes that the requirement for outfitters to determine where an animal is taken is similar to the standard required of all hunters to know where they are when taking an animal. The information reported has its place for the regulation of outfitters in terms of providing data to the Montana Department of Fish, Wildlife and Parks (FWP) relevant to hunting access and game management. The board believes the value of the data outweighs the concerns raised by the commenters. The board understands that FWP expects a best effort to be made and that unintentional error following a best effort should not result in criminal prosecution or disciplinary action. The board is amending the rule as proposed.

COMMENT 3: A few commenters requested the board confirm that the provision in ARM 24.171.408(2)(f) is not a new requirement. The commenters understand that an outfitter whose deer hunting client also hunts upland game birds while on a deer hunt is still counted as just one Category 2 NCHU, and that if the client were to hunt migratory birds, then the hunter would be recorded as a Category 3 client.

RESPONSE 3: The board confirms that this amendment did not create a new guideline for licensees to follow, but has long been enforced by the board. It should be understood by licensees that only in the use of a combination license (e.g., a B10 or B11 license) can a deer hunting client also hunt upland game birds and be counted as a single Category 2 NCHU for both types of game. In contrast, an outfitter requires both a Category 2 and a Category 3 NCHU if the outfitter serves a hunting client who uses a doe tag to hunt deer and then hunts upland game birds, even if it is done on the same hunting trip.

COMMENT 4: One commenter noted that if ARM 24.171.520 is amended as proposed, then (2) will mistakenly refer to license endorsements supposedly identified in (3) of that rule, even though license endorsements are found in (5).

RESPONSE 4: The board acknowledges the error and is amending ARM 24.171.520(2) accordingly.

COMMENT 5: Regarding New Rule III, a commenter questioned whether applications disclosing a "physical or mental impairment" would be considered nonroutine only if the applicant is receiving ongoing treatment for the impairment.

RESPONSE 5: The board affirms that New Rule III makes an application nonroutine if the applicant is receiving ongoing treatment for impairment. However, the answer to the question posed by this commenter is "no." Applications will not be treated as nonroutine only if the applicant is receiving treatment for the impairment, because applications will also be nonroutine if the symptoms of the impairment currently exist in the absence of treatment. In other words, an application from one who is not receiving treatment, but who continues to suffer from the symptoms of an impairment described in New Rule III, will also be treated as nonroutine.

Comments regarding New Rule II:

COMMENT 6 by BILL SPONSOR: The primary sponsor of HB 187 commented in opposition to (2) of New Rule II, which requires an outfitter to inform each client to be served by an outfitter assistant, that the outfitter assistant is not a licensed guide or outfitter, and whether the outfitter assistant has received first aid certification. The sponsor suggested the board strike (2) from New Rule II, stating that the legislature was presented with, but did not include, an amendment to HB 187 that would have added identical requirements as those in the subsection. The sponsor asserted that the requirement in (2) "disregards the will of the Legislature and the law and should be rejected out of hand."

In light of the rejected amendment, the sponsor asserted the board lacks rulemaking authority to require such a disclosure as the board was given restricted authority over the outfitter assistants. The sponsor further stated that the disclosure in (2) is unnecessary, since the law makes outfitters accountable for ensuring outfitter assistants are qualified and competent to perform the tasks of a guide, and that they conduct such services in a way to safeguard the public.

RESPONSE 6: The board is adopting New Rule II as proposed, without incorporating the primary sponsor's comments. As to the comment that the board has no authority to require the adopted disclosure, either because the board lacks rulemaking authority or because the legislature intentionally omitted such a requirement from House Bill 187, the board respectfully disagrees.

The laws relative to outfitting in Montana saw significant amendments in the 63rd legislative session held in 2013. Those changes came through HB 187, as well as through the enactment of House Bill 274, dubbed the "paperwork reduction act." The combined effect of these bills was to take many of the reporting requirements from statute and allow the board to regulate outfitters and guides through appropriate administrative rules. The disclosure required by (2) of New Rule II is a regulation on the conduct of the licensed outfitter, not the outfitter assistant. Such regulation is authorized by statutes in place prior to, and not restricted by, House Bill

187 and House Bill 274. In fact, the enactment of these two bills strengthened, rather than weakened, the board's rulemaking authority.

Regarding the comment that the disclosure required in (2) is unnecessary because the outfitter is already required by law to ensure the safety and competence of the outfitter assistant, the board views the disclosure requirement as important for an outfitter to properly fulfill his or her duty to public protection because it will encourage transparency and fairness in the contractual relationship between the outfitter and the client. The board also sees this disclosure as beneficial to, and not burdensome upon, the outfitters.

Because the board is adopting this requirement as regulation of the conduct of licensed outfitters per 37-1-131, MCA, the board is amending the implementation citations that follow New Rule II to include the statute. This addition will correct a deficiency in the citation list per 2-4-305(8), MCA, and will ensure all statutes implemented via this new rule are identified.

COMMENT 7: A few commenters asserted that the proposed requirement in New Rule II for outfitters to disclose the unlicensed status of an outfitter assistant to each client served by the outfitter assistant was proposed to and rejected by the legislature when the law was passed. In that regard, and considering the limited purposes for which the board was granted rulemaking authority relative to outfitter assistant standards, the commenters believe the disclosure requirement proposed in New Rule II falls outside of the board's rulemaking authority.

RESPONSE 7: While the disclosure requirement was not adopted as part of the law, the law did not limit the board's authority to regulate the conduct of licensed outfitters. The board concluded that the new rule falls within the board's statutory authority to regulate the conduct of outfitters. See also Response 1.

COMMENT 8: Several commenters strongly opposed the requirement that outfitters notify each client that an outfitter assistant is unlicensed, and whether that assistant has first aid certification, stating that the requirement is inconsistent with other rules and sets an unacceptable precedent. The commenters pointed out that an outfitter is, by law, already accountable for ensuring the outfitter assistant, like a licensed guide, is qualified and competent to perform the tasks of a guide, and conducts such services to safeguard public health, safety, and welfare.

RESPONSE 8: The board concluded that while the law clearly requires that outfitters ensure outfitter assistants are qualified and practicing safely, it is also important to inform clients regarding licensure and first aid training before providing services. Before the occurrence of an emergency situation that requires the use of an outfitter assistant, each client will have contracted with a licensed outfitter for the services of a licensed guide. Whenever an outfitter places an outfitter assistant into service in lieu of a licensed individual, the board believes the clients have a right to be notified of that change and what it means in terms of first aid training.

COMMENT 9: A few commenters emphasized the importance of adopting the requirement found in (2) of New Rule II, that outfitters, prior to serving a client,

disclose to the client that an outfitter assistant is not licensed as a guide or outfitter, and whether the assistant has obtained first aid certification. The commenters viewed this requirement as reasonable in light of an anticipated extension of the sunset provision in the law that created the outfitter assistant.

The commenters stressed that disclosure is also needed to maintain a transparent and quality relationship between the public and licensed outfitters and to measure the success of the outfitter assistant in practice. The commenters suggested that outfitters should sign an agreement or an affirmation that the disclosures have been made to clients, and said the disclosure requirement is the most important aspect of this rulemaking project.

RESPONSE 9: The board agrees with this comment, in general, and is adopting New Rule II as proposed.

COMMENT 10: Several commenters stated that the proposed requirement that outfitters disclose the unlicensed status of outfitter assistants to clients is an infringement on the outfitter's right to contract or on the outfitter's right of privacy inherent in a client contract.

RESPONSE 10: The board's authority to regulate the outfitter to contract with his client is apparent in statute. Two examples of how these contracts are already being regulated by the board can be found in ARM 24.171.2301(1)(f) and (g), where the board requires an outfitter to provide each client with a current and complete rate schedule, in writing, and where the board requires an outfitter offering services to a nonresident hunting client to specify the refund policy, in writing, for those occasions when the client fails to draw a license required to participate in the service offered.

COMMENT 11: Several commenters asserted that the requirement that outfitters disclose the unlicensed status of outfitter assistants to clients is unenforceable, leading to "he said, she said" accusations against outfitters, leaving the agencies responsible for enforcement of the standard without any real means to determine compliance.

RESPONSE 11: The board acknowledges the potential difficulty of enforcing a rule that, like many other reporting requirements, relies on the integrity of the licensees and on the reporting of violations by those affected. The board discussed a possible amendment to require that outfitters provide clients a written disclosure that would then be signed by the client, but the board is not proceeding with that change at this time.

4. The board has amended ARM 24.171.401, 24.171.407, 24.171.408, 24.171.412, 24.171.413, 24.171.501, 24.171.502, 24.171.504, 24.171.507, 24.171.601, 24.171.602, 24.171.701, 24.171.2101, and 24.171.2301 exactly as proposed.

5. The board has adopted NEW RULES I (24.171.404) and III (24.171.403) exactly as proposed.

6. The board has repealed ARM 24.171.402 and 24.171.503 exactly as proposed.

7. The board has amended ARM 24.171.520 with the following changes, stricken matter interlined, new matter underlined:

24.171.520 OPERATIONS PLANS AND AMENDMENTS (1) remains as proposed.

(2) An outfitter may amend the operations plan by submitting the additional or replacement information to the board, except that when adding a service identified in ~~(3)~~ (5), the outfitter must apply for an amendment to the outfitter's operations plan by stating in writing the proposed changes and submitting it to the board, along with the fee required in ARM 24.171.401.

(3) through (5) remain as proposed.

8. The board has adopted NEW RULE II (24.171.410), with the following changes, stricken matter interlined, new matter underlined:

NEW RULE II OUTFITTER ASSISTANTS (1) through (4) remain as proposed.

AUTH: 37-1-131, 37-47-201, MCA
IMP: 37-1-131, 37-47-201, 37-47-301, 37-47-325, 37-47-405, MCA

BOARD OF OUTFITTERS
ROBIN CUNNINGHAM, CHAIRPERSON

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

/s/ PAM BUCY
Pam Bucy, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State January 20, 2015