

BEFORE THE BOARD OF REAL ESTATE APPRAISERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the adoption of NEW) NOTICE OF ADOPTION
RULE I AMC Audit Rules)

TO: All Concerned Persons

1. On April 25, 2013, the Board of Real Estate Appraisers (board) published MAR notice no. 24-207-36 regarding the public hearing on the proposed adoption of the above-stated rule, at page 580 of the 2013 Montana Administrative Register, issue no. 8.

2. On May 16, 2013, a public hearing was held on the proposed adoption of the above-stated rule in Helena. Several comments were received by the May 24, 2013, deadline.

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

COMMENT 1: Multiple commenters expressed support for the proposed new rule.

RESPONSE 1: The board appreciates all public interest and comment during the rulemaking process.

COMMENT 2: One commenter asked the board to incorporate a "commercially reasonable" standard into its audit rules, because this type of standard would allow the board to assess an AMC's compliance on a broad scale, rather than forcing harsh penalties for a minor infraction when the AMC is otherwise compliant with the law.

RESPONSE 2: The board intends to apply a reasonableness standard at the time it reviews the audit.

COMMENT 3: A commenter encouraged the board to request documentation of and review all situations when an AMC makes a request to an appraiser after the appraisal has been submitted.

RESPONSE 3: The board determined this proposed amendment is too broad, because not all requests by an AMC will potentially infringe on an appraiser's professional independence.

COMMENT 4: A commenter suggested that copies of the original appraisal and review should be submitted during the audit process.

RESPONSE 4: The board intends to request these documents as appropriate.

COMMENT 5: A commenter asked the board to clearly define the difference between a revision request, which may originate from an AMC staff member (nonlicensed appraiser) or robotic quality control examination, and a revision request which may originate from an appraisal review by another Montana-licensed appraiser.

RESPONSE 5: The board does not believe this will be an issue, as appraisers must maintain their professional independence, regardless of the source of the request.

COMMENT 6: A commenter proposed that the board insert the word "appraisal" prior to the word "reviews" in (1)(a) to codify 37-54-102, MCA, which clearly distinguishes between a "quality control examination" and an "appraisal review."

RESPONSE 6: The board agrees that this suggestion would add clarity to the rule and is amending the rule accordingly.

COMMENT 7: One commenter believed it is unclear as to whether the new rule and the information that an AMC is required to maintain replaces ARM 24.207.1507, or whether it is intended to supplement this existing rule.

RESPONSE 7: The board believes the new rule will supplement and expand the current rules regarding AMCs. The board does not intend for the new rule to limit the scope of prior rules, but to provide clarity regarding information AMCs will be expected to produce to satisfy the recordkeeping and audit requirements in 37-54-312 and 37-54-513, MCA.

COMMENT 8: One commenter offered a list of additions to the proposed rule.

RESPONSE 8: The board considered each suggested amendment. The board is not amending the rule to include them, since the changes are beyond the scope of the proposal, they would have gathered more information than the board needs to satisfy the statutory obligations, and the additions would impose unnecessary additional duties on AMCs and appraisers.

COMMENT 9: One commenter observed that AMCs should not be treated differently than any local lender, and stated there could be a perception of prejudice or possibly a perception of punitive action toward AMCs.

RESPONSE 9: The board does not regulate lenders, but will not discriminate in its application of standards and rules to all licensees as required under 37-1-131(1)(a)(ii), MCA.

COMMENT 10: Multiple commenters asserted the board's proposed documentation requirements in (1)(c) are in excess of statutory authority and inconsistent with the implemented statutes. The commenters stated the board should not place AMCs in the position of assessing an appraiser's geographic competency.

RESPONSE 10: The board agrees with the commenters that the USPAP places the duty of weighing geographic competency on the appraisers themselves. The board is therefore amending the rule further to require AMCs to provide their policies for requiring appraisers to comply with USPAP, including the geographic competency requirements.

COMMENT 11: Multiple commenters asserted that 37-54-312 and 37-54-313, MCA, do not give the board authority to review reconsideration of value requests and other business practices of AMCs.

RESPONSE 11: The board disagrees with the commenters, but the board is amending (1)(d)(iii)-(v), (2)(c)(v)-(vii), and (6) and not audit reconsiderations of value. The board does not intend to dictate business practices, except that they must be consistent with statute. The board concluded that potential infringements on appraiser independence as a result of reconsiderations of value could be handled via the complaint process on a case-by-case basis.

COMMENT 12: Multiple commenters asked the board to amend or remove (1)(d), stating that reconsiderations of value may have different reasons, various origins, and unique forms, because the information the board requires under (1)(d) may not exist or be maintained by an AMC that is not the source of the request, and because the board should not dictate how AMCs obtain information.

RESPONSE 12: Except as required by statute, the board does not intend to dictate how AMCs do business. For this reason, and for reasons already stated, the board is amending the rule to remove all subsections applicable to reconsiderations of value.

COMMENT 13: One commenter asked the board to delete (1)(d), asserting that the rule directly conflicts with federal mandates placed on AMCs.

RESPONSE 13: While the board disagrees with the comment, the board is deleting (1)(d) for previously stated reasons.

COMMENT 14: One commenter suggested that the board should amend the definition of reconsideration of value in (6) to clarify that a reconsideration of value, for purposes of the audit rule, is limited to only those reconsiderations that are submitted to the appraiser directly by the AMC.

RESPONSE 14: The board is deleting (6) entirely in response to other comments, and appreciates all comments and suggestions made in the rulemaking process.

COMMENT 15: A commenter asked the board to remove the definition of a reconsideration from (6), stating it would impose an unreasonable burden on market participants and does not properly reflect the intent of the framers of the statutes.

RESPONSE 15: The board does not agree; however, the board is striking (6) for other reasons.

COMMENT 16: A commenter asked the board to clarify (1)(e) to ensure that an AMC can satisfy the requirements for removal of an appraiser by submitting the removal notice.

RESPONSE 16: The board believes removal notices will often provide the information in (1)(e). The board is therefore amending the rule to reflect that the auditor will not request duplicate information if the AMC's removal notice already contains the information sought by the board.

COMMENT 17: One commenter suggested that (2) is confusing, as it is unclear whether the information requested applies to the appraisals that were reviewed or to the appraisal reviews themselves. Specifically, (2)(c) lists information that must be disclosed, and it is not clear whether this disclosure applies to the appraiser who prepared the appraisal initially or the reviewing appraiser.

RESPONSE 17: The board agrees that (2) could be confusing, and is amending (2) to clarify which parts pertain to appraisers and appraisals, and which parts pertain to the annual appraisal review.

COMMENT 18: A commenter suggested the board strike (2)(c)(i)-(viii), stating that it goes beyond ensuring that AMCs have a process in place to perform the required reviews annually.

RESPONSE 18: The board is amending the rule to remove these subsections, because they refer to reconsiderations of value and other issues that touch on appraiser independence. The board concluded that these issues can be addressed more efficiently and appropriately through the complaint process.

COMMENT 19: One commenter contended that (2)(c)(vii) is in excess of the board's authority and should be deleted.

RESPONSE 19: The board is deleting (2)(c)(vii) for other previously stated reasons.

COMMENT 20: One commenter indicated the board should remove (3), the provision on establishing by motion the information that AMCs that are subject to audit in a particular year, as audited AMCs may focus on only those areas and ensure that its records are always in compliance.

RESPONSE 20: The board expects all AMCs to abide by the requirements imposed on them by statute and rule. The board acknowledges that AMCs will likely be particularly careful regarding matters that the board emphasizes, but that this will not excuse companies from their remaining obligations under statute and rule. Thus, it is appropriate that the board inform AMCs of areas that will be scrutinized during upcoming audits.

COMMENT 21: A commenter noted that the board may be limited in the information it can collect from AMC's if (3) is included as proposed.

RESPONSE 21: The board will collect the data it is statutorily authorized to collect and only intends (3) to provide licensees notice regarding areas of particular emphasis during a particular audit cycle.

COMMENT 22: One commenter suggested the board's annual identification of the information to be collected from each audited AMC under (3) provides for an inconsistent, arbitrary, and capricious audit process.

RESPONSE 22: The board concluded that identifying specific areas of focus for each annual audit will prevent arbitrary results, as each AMC will know in advance what auditors will be looking for, and the auditors will be looking for the same information from every company.

COMMENT 23: One commenter asked the board to strike (3) and substitute language that would define auditing standards that would apply every year in order to give licensees time to anticipate and respond to the reporting requirements.

RESPONSE 23: The board contends AMC's should already be keeping all of the information required by law, thus the recordkeeping requirements will not change annually. Adopting (3) as proposed will assist AMC's in preparing for audits by giving them notice of records they should expect the auditors to request and review.

COMMENT 24: A commenter suggested the board strike (3), stating that it does not define how and when recordkeeping changes would be implemented and because will set a standard for small businesses/licensees that is impossible to meet.

RESPONSE 24: The board does not agree, because (3) does not change the recordkeeping requirements in statute. Instead, (3) requires the board to provide notice to AMC's regarding specific areas of emphasis in order to streamline the audit process for the AMC's and the board.

COMMENT 25: One commenter suggested the board delete (5), since it does not define by type, category, or by specific definition any limitations of any kind on the fees, which may be assessed on an audited AMC in addition to those defined in the statute.

RESPONSE 25: The board determined that (5) implements the requirement of 37-54-512, MCA, to attribute to AMC's the costs incurred by the board during an audit. Companies can limit their audit costs by providing records in an organized and timely manner.

COMMENT 26: A commenter predicted that the rule as proposed will have unintended consequences, including AMC's withdrawing from offering services in

Montana, and making it harder for Montana taxpayers to get mortgages because of potentially unlimited compliance costs due to the lack of a cap on audit expenses and the lack of specificity in the audit rules.

RESPONSE 26: The board concluded the new rule, amended as described below, requires only auditing of records that AMCs are mandated to keep under statute and imposes a reasonable fee as authorized by 37-54-512, MCA. Companies that are licensed in Montana must abide by the statutes, which have not been modified since enactment and consequently are the same as they were at the time any AMC applied for registration in this state.

COMMENT 27: One commenter expressed concern that AMCs will be governed by a board, including some individuals who are licensed appraisers who may have an ongoing or historic business relationship with regulated AMCs or their clients.

RESPONSE 27: Board members understand their responsibilities under state ethics laws and the department's conflict of interest guidance to members. The board expects members to disclose potential conflicts and, if necessary, recuse themselves from taking part in decisions that may relate to their self-interest. In addition, all licensees and persons appearing before the board are entitled to challenge participation by a board member, based on bias, lack of independence, disqualification by law, or another basis as provided by 2-4-611, MCA.

COMMENT 28: One commenter objected that by requiring a member of the board to decide who should pay how much for an audit without limitation, the proposed rule requires a board member to be responsible for both defining how monies are collected and how monies are distributed, and that this creates a conflict of interest.

RESPONSE 28: Board members will not be directly involved in assessing audit fees, as the fees are driven by the expense of the audit. Because board members will not be exercising discretion in determining fees for each audit, board members should not have a conflict of interest.

COMMENT 29: One commenter observed that while the statutes require that some board members are licensed appraisers, they make no provision or requirement for AMCs to be similarly represented. The board members who are appraisers would find themselves forced into the position of deciding how to distribute funds collected from different groups of licensees. The opportunity for a perception of inequality of representation for all of the parties licensed by the board is a likely consequence.

RESPONSE 29: The board notes that this concern must be addressed to the legislature, as the board does not determine its own makeup. Moreover, the commenter's concern should be alleviated, since 37-1-131(1)(a)(ii), MCA, already requires that the board applies its standards and rules in a manner that does not discriminate against any person or company licensed by the board.

COMMENT 30: One commenter asserted that the primary purpose of a board audit should be to review whether an AMC has the necessary and appropriate policies and procedures in place to comply with applicable state law, and whether the AMC is complying with those policies and procedures. The audit process should not serve as an investigation or enforcement tool.

RESPONSE 30: The board recognizes that its audit processes and complaint processes have distinct purposes.

COMMENT 31: Multiple commenters requested that the board ensure that no AMC is unreasonably burdened by audits on a continuous basis. The commenters suggested the board either require that all AMCs be audited at least once before auditing the same AMC a second time, or clarify that an AMC cannot be audited in consecutive years.

RESPONSE 31: The board determined that its audits should be truly random and does not wish to exclude any companies from the pool of licensees to be audited. If the random audits tend to pick up licensees repeatedly and consecutively, the board would consider including this suggestion in a future rules proposal.

COMMENT 32: Multiple commenters questioned whether the proposed new rule applied only to an AMC's Montana operations and appraiser panel.

RESPONSE 32: The board does not review appraisal or appraisal management activity that occurs outside Montana, except that it may issue reciprocal discipline following notice and an opportunity for hearing when another jurisdiction has sanctioned a licensee.

4. The board has adopted NEW RULE I (24.207.1509) with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I AMC AUDIT REQUIREMENTS (1) remains as proposed.

(a) company written policy for quality control examinations and appraisal reviews;

(b) remains as proposed.

(c) company written policy ~~identifying how geographic competency is determined for each appraiser panel member;~~ requiring appraisers completing appraisal assignments, at its request, to comply with the Uniform Standards of Professional Appraisal Practice, including the requirements for geographic and product competence; and

~~(d) the following information regarding reconsiderations of value:~~

~~(i) company written policy to request a reconsideration of value;~~

~~(ii) number of reconsiderations of value that were requested in the 12 months preceding renewal;~~

~~(iii) name of any person who provided additional sales for reconsideration;~~

~~(iv) sources of the sales data provided for every additional sale given to the appraiser to analyze; and~~

- ~~(v) written notification to the appraiser regarding the justification for the reconsideration; and~~
- (e) remains as proposed, but is renumbered (d).
- (i) remains as proposed.
- (ii) reasons for each removal, if not otherwise provided in the written removal notification; and
- (iii) a copy of the written removal notification provided to each appraiser that was removed.
- (2) remains as proposed.
- (a) name of each appraiser on the company's appraiser panel and the number of engagements performed by each appraiser in the 12 months preceding renewal;
- (b) number of engagements performed name of each appraiser who performed an appraisal review for an appraisal in the 12 months preceding renewal, submitted to the company in Montana as part of the company's system or process pursuant to 37-54-511, MCA, and his or her license number; and
- (c) any appraisal review performed for USPAP compliance for each panel member as required by 37-54-511, MCA, and the corresponding appraisal report, including:
 - (i) remains as proposed.
 - (ii) date assigned and date completed; and
 - (iii) name and license number of appraiser who performed the review; and
 - (iv) ~~appraisal report and corresponding appraisal review completed for USPAP compliance in the previous renewal year;~~
 - ~~(v) documentation of any alteration of the appraisal report;~~
 - ~~(vi) listing of any additional sales data provided to the appraiser;~~
 - ~~(vii) name and contact information of the person who selected the additional sales data for the appraiser to respond to or analyze; and~~
 - ~~(viii) amount of fees and date paid to the appraiser.~~
- (3) through (5) remain as proposed.
- ~~(6) For purposes of this rule, a reconsideration of value means any suggestion, request, or demand by the appraisal management company, whether it was originated by the appraisal management company or another source, that the appraiser reconsider a value opinion or consider an alternative value for an appraisal submitted to the appraisal management company. Any such request or a similar request is considered a reconsideration of value, regardless of the nomenclature used by the appraisal management company in making the request.~~

BOARD OF REAL ESTATE APPRAISERS
THOMAS G. STEVENS, CERTIFIED
GENERAL APPRAISER, 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 July 1, 2013