


# LEGISLATIVE AUDIT DIVISION

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## MEMORANDUM

**TO:** Legislative Audit Committee Members  
**FROM:** Deborah F. Butler, Legal Counsel   
**DATE:** December 2, 2020  
**RE:** Potential Legislative Action Relating to Audit Recommendations

Prior to each legislative session we compile audit recommendations issued since the last session where we recommend legislation or make recommendations to review, revise, or clarify statutory language. For recommendations addressed to agencies, we determine if the agency intends to seek legislation or take corrective action by other means. In this memo we have also included recommendations with which the agency did not concur and/or will not implement, where legislation could be a possible solution for the Legislative Audit Committee (LAC) or individual members to consider.

For recommendations addressed to the legislature, or where an agency has not implemented a recommendation or does not concur with a recommendation to seek legislation, we give the LAC an opportunity to discuss a committee bill. The following table summarizes information from reports where the committee could consider potential legislative actions relating to audit recommendations. For each of the reports/recommendations, the committee could consider the following options:

- A committee bill
- An individual bill
- Remain at status quo

The table on page two also includes disclosure issues we addressed in audit reports where legislative awareness of the specific situations may be important. In addition to consideration of potential legislation by the LAC, at the beginning of the next regular session we will also be providing joint appropriations sub-committees with information on audit recommendations/reports with budgetary impacts.

Report Title	Function	Number	Finding Description
<b>Recommendation to the Legislature or Agency for Statutory Revision – Current Cycle</b>			
Department of Corrections	Financial	18-15	Youth offenders in adult facilities/use of youth facilities
Short-Term Lodging and Rental Vehicle Taxes	Performance	18P-06	Online booking platforms/taxable consumer payment
Community Benefit and Charity Care Obligations at Nonprofit Hospitals	Performance	18P-07	Expectations of detailed reporting/entity responsible
Security and Maintenance of Montana Election Systems	Information Systems	19DP-06	Define election security/mandate assessment
State Employee Settlements: Trends, Transparency, and Administration	Performance	18P-04	Define/require reporting state employee settlement/require balancing test of non-disclosure agreements/centralized review and approval
Montana Board of Public Education	Financial	18-22	Clarify statute to reflect board procedures re: license fees
Department of Public Health and Human Services	Financial	19-14	Remove provider overpayment audit restrictions
Effectiveness of Community Corrections Programs in Reducing Recidivism	Performance	18P-05	Limit terms of community correction contracts
<b>Recommendation to the Legislature or Agency for Statutory Revision – Previous Cycles</b>			
Tax Increment Financing Administration and Impact	Performance	17P-03	Statutory definitions and performance goals for TIF districts
Management of Montana State Parks	Performance	17P-01	Clarify role/authority of State Parks and Recreation Board
Oversight of Discretionary Pay Changes for State Employees	Performance	15P-05	Use and analysis/reporting on discretionary pay raises
University of Montana	Financial	17-12	Eligibility for membership of university fitness centers
State Real Property Management	Performance	14P-07	Authority/responsibility for state real estate transactions
Railroad Safety	Performance	14P-13	Local reporting to state DES on disaster preparedness
Administration of Montana's Drug Courts	Performance	13P-08	Best practices for evaluating drug court effectiveness
State Investment Management and Governance Practices	Performance	12P-10	Governance/composition of the Board of Investments
<b>Recommendation Not Concurred</b>			
Brucellosis Management in the State of Montana	Performance	16P-06	Mitigation of brucellosis risk in the elk population
Department of Public Health and Human Services	Financial	17-14	DPHHS statutory exemptions from procurement laws
<b>Recommendation Not Implemented</b>			
Licensing Real Estate Professionals	Performance	15P-01	Realtor supervisory oversight and consumer protection
<b>Disclosure / Awareness Issues</b>			
Department of Environmental Quality	Financial	18-16	Using internal service funds to pay employee settlement/lack of competitive hiring process/incurred pre-award costs
Judicial Branch	Financial	18-27	Inter-Entity loan from restricted funds
Department of Justice	Financial	18-18	Consumer protection settlement transfers

**Recommendation to the Legislature or Agency for Statutory Revision – Current Cycle****Department of Corrections (18-15)****Recommendation #1**

**We recommend the Montana Legislature, in coordination with the Department of Corrections, resolve the compliance issues resulting from:**

- A. Placing youth offenders in a facility used to execute sentences of adults convicted of crimes, and**
- B. Using state youth correctional facilities contrary to the purposed outlined in state law.**

Section 41-5-1522(2), MCA, prohibits the department from placing youth offenders in state adult correctional facilities or any other facility used for the execution of sentences of adults convicted of crimes. The department continues to place both adult and youth offenders in the Pine Hills facility. The department also placed adult offenders in the Riverside youth correctional facility.

We concluded removing youth from the facility and converting it to a female adult correctional facility constitutes the department discontinuing a legislatively established youth correctional facility. § 53-1-202(4), MCA, prohibits a correctional facility from being moved, discontinued, or abandoned without the consent of the legislature.

The department did not implement the recommendation from the prior two audits and continues to be in noncompliance. The department did not concur with the recommendation in the prior audit but did introduce a bill during the 2017 Regular Legislative Session that would have allowed the use of Pine Hills and Riverside for adult populations. The bill did not pass, and department personnel did not pursue similar legislation during the 2019 Legislative Session. Because of the youth correctional facility use limitations established in state law, the department will need the support of the Montana Legislature to resolve these compliance issues. Without resolution, the facilities will continue to be used for unauthorized purposes.

During audit work on prior audit recommendations in our recent Financial-Compliance Audit (20-15) the department indicated they have found a sponsor and a bill draft (LC0158) has been introduced in the 2021 Legislative Session to revise the existing laws and implement this recommendation.

**Short-Term Lodging and Rental Vehicle Taxes: Keeping Pace With an Evolving Marketplace (18P-06)****Recommendation #5**

**We recommend the Montana Legislature amend statute to account for the role of online booking platforms in short-term accommodation industry and to clarify which portion of a consumer payment for short-term accommodation is taxable.**

Montana has two short-term accommodation taxes that were enacted before the widespread proliferation of third-party online booking providers. Montana draws a distinction between the “seller” and the “owner” to apportion the tax. In many other states the tax is owed on the entire

amount paid by the consumer, no matter how that payment is subsequently divided between lodging operators and booking services or platforms.

In 2015 the Montana Supreme Court held online travel companies (OTCs) must collect and remit the 3 percent sales tax on the fees they charge the seller of the accommodation but held the OTCs are exempt from collecting and remitting the 4 percent use tax on their share of the price paid by the consumer. As a result, the state does not receive the same amount of tax if a consumer books a room directly with the hotel versus using an OTC or peer-to-peer booking platform. Several legislative efforts, with the support of the Department of Revenue have been made to alter the statutory language of §§15-65-101 and 15-68-101, MCA to make clearer and more consistent the tax remission responsibility. Montana state law could benefit from updated language that acknowledges the means by which the majority of business in this segment of the economy is conducted. There are two bills being pre-drafted for the 2021 session. LC0325 is from the Revenue Interim Committee. It currently does not have a sponsor. LC0397 is from the Economic Affairs Interim Committee and will be carried by Senator Ellsworth.

### **Community Benefit and Charity Care Obligations at Montana Nonprofit Hospitals (18P-07)**

#### **Recommendation #1**

**We recommend the Legislature enact law defining:**

- A. Expectations regarding detailed reporting of community benefit spending and its impact on community health.**
- B. The state government entity responsible for actively reviewing community benefit spending.**

In Montana there are no laws regarding community benefit spending and reporting and, consequently, there is no regulatory agency responsible for oversight of these issues. There is also no state-level review nor verification of federal tax information regarding community benefit spending hospitals report. Further, there are no reporting requirements in the state related to the taxable benefit hospitals receive in exchange for community benefit spending. Improving oversight of information related of community benefit spending is necessary to increase its transparency to the public and policymakers, as well as ensuring the compilation of accurate and comparable data about impacts of community benefit spending.

### **Security and Maintenance of Montana Election Systems (19DP-06)**

#### **Recommendation #1**

**We recommend the Montana Legislature:**

- A. Clearly defining the scope of election security using federal election security best practices and National Institute of Standards and Technology security controls to ensure all aspects of elections are secure, and**
- B. Mandate the assessment of election security using defined security standards at the local and state levels.**

Audit work found Montana law describes approvals and certifications of voting machines, but there is no clear outline of the types of the security needed for other important technology assets and their security outside of election day. If security risks are not addressed, tampering and interference in elections becomes easier, which ultimately undermines the public trust in the election process. Law can ensure there are clear definition of election security scope based on industry standards and election security guidance. It can also provide requirements ensuring the

most critical form of election security protocols are in place and mandate a consistent assessment of these protocols to mitigate high risks at all levels of elections in Montana.

### **State Employee Settlements: Trends, Transparency, and Administration (18P-04)**

#### **Recommendation #1**

**We recommend the Montana Legislature enact legislation:**

- A. Defining what constitutes a state employee settlement and what should be considered when determining the cost of a state employee settlement, and**
- B. Requiring reporting of state employee settlements in the State Accounting, Budgeting, and Human Resources System, including defining what information should be reported.**

For settlements to be accurately recorded, agencies must know what constitutes a settlement and its terms and how to report this information. Montana relies on agencies self-reporting and does not define settlements or reporting requirements in statute.

#### **Recommendation #3**

**We recommend the Montana Legislature enact legislation requiring agencies to conduct a documented balancing test of the public's right to know and the individual's privacy before including non-disclosure, confidentiality, or similar terms as part of a state employee settlement.**

Non-disclosure, confidentiality, and other similar terms in settlements are a tool to protect the privacy of an individual who would be harmed by the release of settlement information. Governor's Executive Order No. 6-2019 says that an employee settlement is a public information, except where individual privacy clearly exceeds the merits of public disclosure. However, there is no balancing test included to determine when privacy outweighs the public's right to know related to the release of the settlement documents. Audit work found other states have statutory guidance related to the public nature of employee settlements. A bill draft (LC0925) has been introduced in the 2021 Legislative Session to implement this recommendation.

#### **Recommendation #4**

**We recommend the Governor's Office pursue statute to establish and require a centralized review and approval of all state employee settlements.**

Audit work found inconsistencies in, among other areas, how agencies documented and payed for employee settlements. We found other states have a centralized review for all settlement decisions. A centralized review can improve employee settlement reporting, decrease inconsistent support for settlements, and reduce inappropriate use of non-disclosure, confidentiality, and similar terms in settlements.

Representative Mercer has indicated that he will be proposing a bill in the 2021 Session to address these recommendations. The bill will be modeled after HB0532 from the 2019 Regular Session which was passed by the legislature but vetoed by the governor.

**Montana Board of Public Education (18-22)****Recommendation #2(B)**

**We recommend the Board of Public Education: B. Seek a change in legislation to more accurately reflect the board's current operating procedures.**

Section 20-4-109, MCA states that for every \$6 of teacher licensing fee collected, \$4 shall be for the expenses of the Certification Standards and Practices Advisory Council (CSPAC) and \$2 shall be used to support the activities of both CSPAC and the board. The board lacks procedures to allocate expenditures to the proper funding stream, resulting in each of the funding streams supporting operations of both the CSPAC and the board, which is contrary to state law. In the board's response to the audit, they indicated they were intent on seeking legislation to change §20-4-109, MCA to accurately reflect the current funding for the board and CSPAC.

**Department of Public Health and Human Services (19-14)****Recommendation #3(B)**

**We recommend the Department of Public Health and Human Services implement changes in department policy and seek changes in legislation to remove restrictions on provider overpayment audits.**

Chapter 82, Laws of 2017 Regular Legislative Session established restrictions on Medicaid program overpayment audits including limiting records request to a six-month period within three previous years, restricting follow-up audits to the same billing codes associated with the initial audit, requiring audits be completed in 90 days, and prohibiting projection of overpayments identified in the sample to a larger set of claims. These changes hinder the department's ability to identify and fully investigate provider fraud. The federal grantor agency has not yet issued its management decision on this finding. During the 2019 Legislative Session and in response to our performance audit (17P-02), Senate Bill 235 proposed such changes, but the bill failed. In the department's response to this recommendation they indicated the responsibility for change lies with the legislature and would not be prudent for the department to seek changes in legislation when that activity is outside the control of the department.

**Effectiveness of Contracted Community Corrections Programs in Reducing Recidivism (18P-05)****Recommendation #3(B)**

**We recommend the Department of Corrections seek legislation to limit the terms of community corrections contracts.**

Our audit found lengthy (20 years) community corrections contracts limits the ability of the department to make changes to the community corrections services. The reasoning for the 20-year contracts was to allow contractors to secure financing to build their facilities, but these contracts are either fully paid or will be complete by 2026. In 2016, the Commission on Sentencing considered legislation to review the limit on contract terms to seven years, in line with most other state contracts, unless the contract funded construction bonds. That legislation was never introduced during the 2017 Legislative Session. In its response to the audit, the department did not concur with this part of the recommendation. They indicated they do not intend to enter into 20-year contracts in the future but does not intend to seek legislation to revise the statutes.

**Recommendation to the Legislature or Agency for Statutory Revision – Previous Cycle****Tax Increment Financing Administration and Impact (17P-03)****Recommendation #6**

**We recommend the Montana Legislature:**

- A. Define what criteria the Department of Revenue should review to approve qualified tax increment provisions as described in §7-15-4285, MCA, and**
- B. Clarify tax increment financing laws, including statutory goals, state and local administration, monitoring, and how TIF should be evaluated.”**

The audit found no statutes or administrative rules that provide impact or performance requirements for Tax Increment Financing (TIF), even though there are statutory goals for development districts.

Section 7-15-4285, MCA states: “The department of revenue shall, upon receipt of a *qualified* tax increment provision and each succeeding year, calculate and report to the local government and to any other affected taxing body in accordance with Title 15, chapter 10, part 2, the base, actual, and incremental taxable values of the property.” (emphasis added). There is a lack of guidance on what constitutes a “qualified” tax increment provision as required by this statute and no statute or administrative rule defining any criteria that should be considered in determining qualification.

Additionally, there is a lack of clear state goals for performance measures for TIF. To better oversee the TIF provisions clarification of TIF responsibilities, expectations, and processes at both the state and local level are needed.

**Management of Montana State Parks (17P-01)****Recommendation #1**

**We recommend the Department of Fish, Wildlife, and Parks work in consultation with the State Parks and Recreation Board to clarify and document the role, duties, and powers of the State Parks and Recreation Board to ensure a clear delineation of authority between the board and the department, seeking legislation if necessary to better define the board’s authority.**

Audit work identified concerns that the State Parks and Recreation Board may be over-stepping its authority, or that its authority was ill-defined, or perhaps overlapped with the role of the department. Unlike the Fish and Wildlife Commission, the board’s governance statute is broad and does not establish, with any specificity, the powers and duties of the board. This lack of specificity can lead to confusion and challenges in authority. The department concurred with this recommendation.

**Oversight of Discretionary Pay Changes for State Employees (15P-05)****Recommendation #5**

**We recommend legislation be enacted requiring the Department of Administration to:**

- C. Conduct a biennial investigation of the operation and effect of the application of discretionary pay adjustments under the broadband pay plan, and**

**D. Report results of this analysis prior to the commencement of each regular legislative session.**

Our original audit found that limited information was available to the legislature regarding discretionary pay adjustments. More information about pay adjustments would help legislators consider the effects of agency personal services budget requests and have more complete information when considering statutory pay adjustments.

Broadband pay plan legislation passed during the 2017 session did not address this recommendation. Senate Bill (SB) 294 bill includes language that requires pay increases that are above an employee's occupational wage range in the broadband pay plan to be reviewed and approved by the Office of Budget and Program Planning. The legislation did not, however, mandate a biennial investigation by the Department of Administration (DOA) of discretionary pay adjustments, nor did it mandate a report of this information to the legislature prior to each session. As in the initial audit, we continue to believe that legislation mandating these two actions would assure the legislature has more complete information regarding the use of discretionary pay adjustments and would ensure the broadband pay plan is achieving its intended goals. As a result of our original audit, DOA has taken steps to develop pay change reporting tools, and we continue to encourage the legislature to enact statute to assure such information reaches legislators prior to each session.

**Recommendation #6**

**We recommend legislation be enacted to clarify state laws regarding the use of statutory and discretionary pay adjustments under the broadband pay plan.**

The intent of the broadband pay plan is to give agency management greater latitude in the establishment and execution of their pay plans. During the original audit, staff found that pay adjustments were given in across-the-board statutory pay adjustments to all state employees. This limited the discretion of agency management to distribute pay adjustments according to their agency pay plans, particularly for agencies whose budget constraints mean they could not afford pay adjustments beyond those mandated in statute. We recommended legislation clarifying the intended balance between statutory and discretionary changes.

Broadband pay plan legislation passed during the 2017 session did not address this recommendation. Statute speaks directly to across-the-board adjustments without specifically addressing an agency's ability to use discretionary pay adjustments. However, neither SB 294, which was passed, nor HB 464, which was not enacted, provided clarity regarding an agency's ability to use the discretionary pay adjustment tools in their agency pay plans. The continued use of across-the-board adjustments by the legislature leaves in question an agency's ability to use discretionary pay tools in their agency pay plan. We continue to see value in legislation clarifying the intended balance between statutory and discretionary pay changes.

**University of Montana (17-12)**

**Recommendation #4**

**We recommend that the University of Montana comply with state law by selling memberships for the fitness center only to eligible individuals.**

State law prohibits the university from selling memberships to their fitness centers for the general public if a for-profit fitness center operates in the community where the university fitness center operates. The sale of university fitness center memberships is limited to students, employees, the



immediate family members of a student or an employee of a university, or alumni. The university offers memberships to affiliates, retirees, and their spouses. The university defines an affiliate as someone who is not employed by the university but is associated through some contractual or collaborative relationship.

The university concurred with the recommendation but believes it has not violated the law by meeting the intent of the law by not competing with for-profit fitness centers. The university indicated that they intend to work with the Office of Commissioner of Higher Education and/or Board of Regents to repeal the statute.

### **Railroad Safety (14P-13)**

#### **Recommendation #4**

**We recommend Department of Military Affairs:**

**B. Seek statutory authority that supports a system whereby local governments report local jurisdiction capability to Disaster and Emergency Services on an annual basis.**

The department established a work group under the SERC referred to as the HazMat committee. The committee is comprised of local and state preparedness and response partners who can best determine local capability limitations. However, in its initial response the department partially concurred with the recommendation based on the interpretation that the recommendation exceeds the authority of the department. Therefore, while the department agrees it has a coordinating role and obtaining an understanding of local response capabilities would be beneficial, it is limited to the information provided by local jurisdictions. Additionally, they did not and do not plan on seeking statutory authority that would support a system where local governments report local jurisdiction capability.

### **Administration of Montana's Drug Courts (13P-08)**

#### **Recommendation #11**

**We recommend the Montana State Legislature consider enacting legislation that requires data collection, program evaluation, and reporting requirements as part of the Drug Offender Accountability and Treatment Act and the Mental Health Treatment Court Act.**

Presently, the statutory framework for drug courts in Montana differs to that of surrounding states in that state law in Montana does not require data collection, program evaluation, or reporting requirements. As reported in the original audit, drug courts in Montana began in the state in 1996 and have since expanded to exist in many parts of the state to include 26 drug courts, with the monetary resources devoted to drug courts continuing to grow. The ongoing existence of drug courts is dependent in part on measured success. We continue to believe that a standardized system of data collection and reporting would allow for improved and broader understanding of drug court operations in the state and provide a mechanism for accountability with respect to public funds.

In the 2017 Legislature SB45 was enacted which modified §46-1-1104, MCA. This section sets forth the drug treatment court structure, but the modifications did not address recommendation #11.

**State Investment Management and Governance Practices (12P-10)****Recommendation #1**

**We recommend the Montana Legislature revise the professional and experience requirements for the composition of the Board of Investments to increase the board's collective knowledge and understanding of institutional investing.**

While the board's composition requirements have not changed since the mid-1980's, there has been an increase in complexity of investment vehicles. The audit found that the current qualifications for the board did not provide a level of investment expertise comparable to some similar institutions. The Board of Investment's response to the recommendation was: "...not on a concur/non-concur basis, but as an interested and knowledgeable party," indicating that they believed that the current law regarding the Board's composition is appropriate to allow the Board to fulfill all of its responsibilities.

During the 2015 Legislature HB347 was introduced but tabled in committee. It would have required that 3 of the 9 members "have at least 10 years of professional investment experience as an investment professional." Additionally, LC0876, while never drafted, was entitled "Generally revise lase regarding the Montana board of investments." During the June 2015 LAC meeting a follow-up of this audit was presented to the committee. There was some general discussion about an Audit Committee bill for the 2017 legislative session. During the 2017 Legislature HB533 was introduced and passed both houses but was vetoed by the Governor and the veto override failed.

**Recommendation not Concurred**

**Brucellosis Management in the State of Montana (16P-06)****Recommendation #5**

**We recommend the Department of Fish, Wildlife, and Parks seek legislation and adopt administrative rules that:**

- A. Clearly define the responsibilities of the department for providing brucellosis mitigation assistance to landowners and the eligibility criteria landowners must meet to receive assistance.**
- B. Define and implement specific program policies that provide guidance on consistently carrying out and documenting brucellosis response actions."**

This recommendation focuses on the role of the Department in responding to the presence of brucellosis in elk populations within the state. Currently, there is not specific delineation of brucellosis prevention in livestock as a responsibility of the Department. The Department's focus is largely on maintaining suitable populations of wildlife and administering hunting regulations. Disease management has been to manage the threat of diseases to wildlife populations. Audit work found that elk brucellosis lacks a major impact on the elk population, so management of brucellosis lies outside of the scope of typical wildlife disease management activities of the department. Rather, the concern is that elk will transmit the disease to cattle and how does the department mitigate that risk.

The Department partially concurred with the recommendation, indicating that legislative change was not required, and that guidance could be implemented through administrative rule changes. The Department has no plans to request legislation. The Department has made some minor

changes to their administrative rules, but those changes do not implement the audit recommendation.

### **Department of Public Health and Human Services (17-14)**

#### **Recommendation #3**

**We recommend the Department of Public Health and Human Services comply with state law and federal regulations by following state procurement policies to obtain services for the Temporary Assistance for Needy Families and Foster Care programs.**

During the audit, department staff disclosed approximately \$2.7 million in payments to 91 vendors were paid using state and federal sources without an underlying service contract. We reviewed the information related to the three top paid vendors and found the department used general fund moneys to pay nearly \$700,000 in services where a contract did not exist. These services, as well as an additional \$1.2 million paid to the remaining 88 vendors whose activity we did not review, were also obtained without following the state's procurement laws and policies.

The department did not concur with this recommendation. The department cited §18-4-132(3)(f)(ii), MCA, which exempts services of "health care providers" from the Procurement Act. We determined that the services the department paid for were for one-on-one supervision of youth, chemical dependency evaluations, urine analysis, and support services for child in placement for the Foster Care program, which did not fall under the exception for health care providers. The Federal Administration for Children & Families sustained this finding.

### **Recommendation not Implemented**

### **Licensing Real Estate Professionals (15-01)**

#### **Recommendation #6**

**We recommend the Board of Realty Regulation:**

- A. Establish, in administrative rule, a limit for the number of salespersons a broker with a supervising broker endorsement may supervise.**

Follow up work found this recommendation was partially implemented. Although the Board of Realty Regulation (BRR) concurred with this recommendation in its written response to the audit report, it ultimately decided to not implement this part of the recommendation. Instead, BRR has changed ARM 24.210.641(5) dealing with unprofessional conduct. This new rule defines unprofessional conduct as consisting of "failing as a supervising broker to adequately supervise his or her salespeople. "A supervising broker endorsement may be limited or revoked as a consequence of violating this subsection." BRR stated this will hold supervising brokers more accountable for salesperson actions through the complaint process. However, "adequately" is not defined and an interview with a BRR board member found they could not define what "adequately" means.

In a memo given to the LAC from the Department of Labor and Industry's (DLI) Business Standards Division administrator at the April 2018 meeting, the administrator stated this recommendation was discussed at the March 14, 2018, BRR board meeting. According to the letter, "The BRR heard from the industry association that they do not agree that there should be a

limit on the number of salespersons supervising brokers can supervise. The BRR discussed ideas for addressing how to train and require brokers to better supervise and supervise properly rather than setting a number limit. They stand on their original position to not set a limit. Rather they would like to continue to discuss the supervising broker topic to propose and implement possible tools, guidelines, procedures, and policies to achieve better supervision by brokers.” The memo further stated the BRR will discuss language for better defining “adequate supervision” in ARM 24.210.641 and implement new methods of proper salesperson supervision. In December 2018, DLI released potential rule changes in Montana Administrative Register (MAR) Notice 24-210.44. Although there were proposed edits to ARM 24.210.641 in this notice, the clarification of “adequate supervision” was not addressed. HB572 was presented to the legislature in 2019 which would have required the BRR to establish a limit in Rule. HB572 died in process. A bill draft (LC0356) has been requested for the 2021 Legislative Session to address this recommendation.

### **Recommendation #8**

#### **We recommend the Board of Realty Regulation:**

##### **B. Eliminate the requirement for course providers to upload course roster information.**

BRR did not concur with this recommendation. According to the previously mentioned DLI memo, at a January 18, 2018, BRR board meeting, the BRR “moved to discontinue approving courses, instructors, and providers for continuing education and adopt a new Rule with criteria and providers that would be acceptable for licensees to get their continuing education (CE) credits. Because CE credits will be able to be obtained by multiple sources of providers, the requirement for instructors and providers to upload their rosters into the MI (Montana Interactive) system will be eliminated. At the 3/14/18 meeting, it was confirmed that the new proposal for continuing education courses would eliminate the requirement for instructors and providers to upload course rosters.” The memo further stated the BRR needs to adopt ARM changes for acceptable continuing education courses, removing the Board course, instructor, and provider approval process. As of the date of this memo, no such changes in ARM involving continuing education have been found in the Montana Administrative Register.

### **Recommendation #9**

#### **We recommend the Board of Realty Regulation:**

##### **A. Include an assessment of the relationship between regulatory activity and administrative costs when reviewing revenues and expenditures in the last five licensing renewal years.**

Follow up work found this recommendation was not implemented. During follow up work it was found BRR’s executive officer gives a financial report to the BRR board members at every meeting. According to DLI staff, at the beginning of the fiscal year the executive officers look at past board expenditures and revenues and determine a projection of what the costs will be for the upcoming fiscal year. A review of BRR agendas found fees are not an agenda item. As a result, it does not appear the board actually reviews all their revenues and expenditures for the purpose of adjusting their fees. An interview with a BRR board member found they did not think the fees were reviewed since the audit was released.

DLI’s memo stated “Even though the financials are reviewed at each board meeting with cash balances being provided and reviewed, and fees have been discussed and reviewed when doing Administrative Rule review and changes, the auditor feels it still does not appear the board reviews their revenues and expenditures for the purpose of adjusting their fees. The Board is only required to set fees at a level to cover the "usual" operations of the board. Cash status is

monitored by the DLI (Business Standards Division) and reviewed at each board meeting.” The memo further stated the DLI staff discussed this recommendation with board staff at the March 14, 2018 BRR board meeting. In addition, the memo stated fund balances and board fees are reviewed annually at a meeting.

A review of the fee schedule found that fees have remained the same since the audit, except for one fee (change of supervising broker fees). Currently, under § 37-51-207, MCA, “The board shall adopt a schedule of fees to be charged by the department and to be paid into the state special revenue fund for the use of the board. The fees charged must be reasonably related to the cost incurred in regulating the real estate industry.”

### **Recommendation #10**

#### **We recommend the Board of Realty Regulation:**

- A. Align the current parameters for funding the Real Estate Recovery Account with resource needs**
- B. Determine whether existing uses of the Real Estate Recovery Account funds should be expanded to increase protections for consumers**

Follow up work found that both parts of this recommendation were not implemented. The BRR initially partially concurred with this recommendation. However, in July 2016 BRR decided not to make any changes to Real Estate Recovery Account (RERA) laws. As a result, no changes in law from BRR were presented to the 2017 legislature. According to its written response, BRR stated it will review the resource needs of the RERA, which totaled nearly \$400,000 at the time of the audit, annually.

BRR also made a determination at a July 2016 board meeting that although they want to provide protections for consumers, they believe the marketing of the RERA to consumers would be hard to determine (i.e., they don’t know who their target audience is) and costly. Therefore, BRR plans on taking no further action. It is still our opinion that this will continue to bring the level of consumer protections into question because this fund will likely not be used to enhance efforts to combat fraudulent or deceptive practices that could occur within the real estate industry.

Currently, under § 37-51-501, MCA, “(1) There is established in the state special revenue fund for the use of the board a real estate recovery account. The account is used to provide payment of claims based on unsatisfied judgments against persons licensed under the provisions of this chapter. The real estate recovery account is statutorily appropriated as provided in 17-7-502. (2) The board shall maintain a minimum balance of \$100,000 in the account. The board may in its discretion transfer any money in excess of that amount from the account to the state special revenue fund for the use of the board in accordance with the purposes provided in 37-51-204.” No changes in law from BRR were presented to the 2019 legislature.

### **Disclosure / Awareness Issues**

#### **Department of Justice (18-18)**

This report included discussion relating to the department’s statutory responsibility to deposit all civil fines, costs, and fees received or recovered in consumer propection actions in a separate special revenue account. After reserving the department’s costs in discharging its administrative and regulatory powers and duties related to consumer protection statutes, the Remainder must be

transferred to the General Fund. Statute does not provide a method for determining what constitutes excess fund equity or set a date for measuring the excess. The 2019 Legislature considered clarification of excess calculation and measurement date in HB262. This bill passed the legislature but was vetoed by the Governor and the override of the veto failed.

### **Judicial Branch (18-27)**

State policy requires inter-entity loans must be taken from the agency's own unrestricted funds, when administratively feasible, prior to requesting a loan from the General Fund. However, state law does not define unrestricted funds, so it is not clear if funds with available cash, but a committed fund balance could be lent to other funds.

### **Department of Environmental Quality (18-16)**

This audit found an issue that may warrant some legislative action. This matter relates to the transfer of an employee to a higher paying position without a competitive recruitment thereby not affording other employees an equal opportunity for advancement. Department management stated they were not required to use the competitive recruitment because the employee who was transferred was going to be subjected to a reduction in force due to the elimination of their position during a minor department reorganization. While policy guidelines allow for this approach, we question whether this approach meets the intent of ARM and MOM policy.