

## Constitutional Basis and Authority

### Legislative Post-Audit Functions

Almost all of the constitutional basis and authority for the legislature's audit function can be found in one short sentence, in section 10, subpart 4 of the Legislative Article:

- Article V, Section 10 (4): The legislature **may** establish a legislative council and other interim committees. **The legislature shall establish a legislative post-audit committee which shall supervise post-auditing duties provided by law.**

Although this sentence appears short and relatively straightforward, examination of the transcripts of the constitutional convention reveal a depth of meaning that may not be immediately obvious. In fact, the inclusion of this sentence in the Legislative Article only came after lengthy substantive and procedural debate. Overall, three main themes emerge from review of the transcripts:

1. Establishing the audit function as an exclusively LEGISLATIVE POWER
2. Asserting the permanency and status of the LEGISLATIVE AUDIT COMMITTEE
3. Protecting the INDEPENDENCE of the audit function

### **Audit as a Legislative Power**

The language in Section 10(4) was originally an executive branch function of the State Auditor, an elected official. During the 1972 Constitutional Convention delegates mandated post-audit<sup>1</sup> as a function of the legislature and placed it in Article V, giving permanency to the audit function and a committee immune from a constitutional challenge. (*Const. Con. Trans. pgs. 626, 918, 995, 2797*) Despite several efforts to designate auditing as an executive branch power, the debate was finally settled as originally described by Delegate Warden, who said "I have talked to Francis Bardanouve who is one of the people who was interested in this and who started the Legislative post-audit. He agrees with me. He said this is a Legislative Department function". (*Const. Con. Trans. pg. 919*)

The delegates wanted the legislature to provide for an "office to assure that the executive departments they set up and fund are doing an adequate job...within the separation of powers...carrying out the functions of the Legislature in assuring that the executive offices are doing the job in the way that the Legislature...hopes it will be done." (*Const. Con. Trans. pg. 704*) They wanted an outside (external to the executive or judicial functions) independent source, guaranteed by the Constitution, to see things are done correctly; someone to protect the people. (*Const. Con. Trans. pg. 918*) The language of Article V, Section 10(4) protects how the

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<sup>1</sup> A term used by Constitutional Convention delegates and in the Montana Code Annotated to mean external auditing as opposed to pre-audit or internal auditing. (*Const. Con. Trans. pgs. 915-997*)

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legislature assures their enactments are carried out in the way they were intended; exercising legislative power beyond the mechanics of appropriating funds.

As an enumerated legislative power, the audit function cannot be delegated to or assumed by any other branch of government. All audit activity must, therefore, be under the specific supervision of the Legislative Audit Committee.

### **The Legislative Audit Committee**

Article V, Section 10(4) establishes the Legislative Audit Committee as the only legislative committee that must exist as a constitutional requirement. The legislature can, at its discretion, choose whether or not to establish other committees (administrative, standing, or interim), but it cannot shirk its responsibility to provide for the Legislative Audit Committee. Furthermore, the proceedings of the constitutional convention make clear that the delegates also intended this permanency to extend to the audit function. As expressed by Delegate Schiltz: "...the legislative post-audit is such a fine institution that it – we should make sure somehow it's retained and, in order to do that, retain it by constitutional provision rather than let the Legislature wily-nilly abandon it at some time." (*Const. Con. Trans. pg. 2797*) This was reinforced by Chairman Graybill saying: "What we've said now is the Legislature must have some kind of legislative post-audit." (*Const. Con. Trans. pg. 2803*)

### **Independence of the Audit Function**

The delegates gave the power to appoint the post-auditor to the committee, with the intent to insulate the post-auditor from the direct control of the entire legislative body and keeping politics out of the audit function. (*Const. Con. Trans. pgs. 2796, 2797*) Chairman Graybill brought clarity to the debate when he said: "we did not give the Legislature the power to appoint a post-auditor; rather, we gave them the power to establish a post-audit committee which would supervise the post-auditor. And the reason is to keep it out of politics." (*Const. Con. Trans. pg. 2793*) They believed there was a need for a "watchdog." (*Const. Con. Trans. pgs. 2793, 2794, 2796*) Delegate Jacobsen summed up the feelings of several delegates when he said: "I think the legislative auditor is one of the finest things our Legislature in the past few years has put into effect, and we should have this office and keep it out of politics if we can." (*Const. Con. Trans. pg. 2800*)

Section 10(4) establishes a bipartisan bicameral committee which supervises the post-auditing duties of the auditor, who in turn manages the division. Thus, allowing the audit division to do the work overseen by the post-auditor. Delegate Joyce clarified the delegates intent for the role of the committee as the supervisor of the post-auditor they appoint: "the committee does not do the post-auditing..." (*Const. Con. Trans. pg. 2791*)

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The delegates concern for protecting audit independence runs through many of the debates relating to the legislative audit function. The ultimate construction they settled on was one where the first step in establishing and maintaining audit independence was a bipartisan committee, which would supervise an appointed official. The second step was ensuring this appointed official would be responsible for acting independently of the committee and of the parties subject to an audit. The role of the committee relative to the independent auditor was neatly summarized by Delegate Martin, who said: “The Legislative Audit has no executive or administrative authority. The only thing he does is call it as it is, turn it over to his committee, and then the committee turns and asks the institutions which are audited to make a report back. And on the basis of that, they try to get compliance with the law.” (*Const. Con. Trans. pg. 2124*)

The use of “duties provided by law” is an acknowledgement by the delegates of changes made by the post-auditor to the auditing functions and their anticipation of more changes in the future. Thus, allowing audit functions to develop over time and allowing flexibility through legislation in fluctuating fields such as technology and experience. (*Const. Con. Trans. pgs. 844, 845*)

**Other Direct Constitutional References:**

- Article X, Section 9 (2)(d): (2) (a) The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law. **(d) The funds and appropriations under the control of the board of regents are subject to the same audit provisions as are all other state funds.**

During the 1972 Constitutional Convention delegates saw the need for a strong Board of Regents “to make long range plans which are appropriate to the needs of higher education and free from short-term political whims.” (*Const. Con. Trans. pg. 2055*) However, they knew full disclosure in reporting of their financial operations was fundamental to achieving full accountability. The delegates gave the Board of Regents enough autonomy and authority to carry on the work of the University System and other educational institutions, but “the University system – or the system of higher education would be subjected to the Legislative Audit.” (*Const. Con. Trans. pg. 2116*)

- Article VIII, Section 13(1): (1) The legislature shall provide for a unified investment program for public funds...Each fund forming a part of the unified investment program shall be separately identified. Except as provided in subsections (3) and (4), no public funds shall be invested in private corporate capital stock. **The investment program shall be audited at least annually and a report thereof submitted to the governor and legislature.**

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The delegates wanted a unified investment program but felt “the importance of unity, professional treatment and supervision of all public fund investments should be stressed at the constitutional level. Because public money is such an important trust for the people of Montana, the investment program should be audited at least annually.” (*Const. Con. Trans. pgs. 1517-1518*)

### *Statutory Basis and Authority*

In 1967 the Legislative Audit Act established the Legislative Audit Committee and required the appointment of the Legislative Auditor. By 1972 Montana was the 32<sup>nd</sup> state to establish the independent post-audit function within the Legislative Branch. Several states followed suit. (*Const. Con. Trans. pg. 917*) The auditing functions of the Act were discussed at length during the 1972 Constitutional Convention. The delegates considered post-auditing a purely legislative function, not to be delegated to any other branch of government. Delegate Martin said it most eloquently: “Auditing is as much a part of an integrated control system in a state as budgeting. It cannot be separated from the basic pattern of responsibility inherent in the American system of state government.” (*Const. Con. Trans. pg. 917*)

### Legislative Audit Act

The legislature’s intent related to its audit function is clear from this purpose statement.

- Because the legislature is responsible for authorizing the expenditure of public money, designating the sources from which money may be collected, and shaping the administration to perform the work of state government and is held finally accountable for fiscal policy, the legislature should also be responsible for the audit of books, accounts, activities, and records so that it may be assured that its directives have been carried out. It is the intent of this chapter that each agency of state government be audited for the purpose of furnishing the legislature with factual information vital to the discharge of its legislative duties. (§5-13-101, MCA)

The Legislative Audit Committee (LAC) is a permanent joint (bicameral), bipartisan committee of the legislature grounded in the Constitution. The LAC is required to meet as often as may be necessary to advise and consult with the legislative auditor and review, make findings, conclusions, and recommendations related to privatization plans pursuant to the provisions of 2-8-302. (§5-13-203, MCA) The LAC appoints the legislative auditor for a term of two years beginning with July 1 of each even-numbered year. The legislative auditor is responsible solely to the legislature. (§5-13-302, 303)

The legislative auditor manages the Legislative Audit Division (LAD) in the performance of its duties imposed by the Act. (§5-13-301) As the manager of the independent external (post-) audit function the legislative auditor must maintain their independence and that of LAD as an

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organization, so the work can be done and reported in an objective and impartial manner. Thus, creating the firewall intended by the statutes and the Constitution.

Section 5-13-304, MCA requires the legislative auditor to conduct audits to meet the standards and accomplish the objectives required by §5-13-308, MCA, whenever the legislative auditor determines it necessary, and to advise the LAC.

The objectives of financial compliance, performance, and information system audits of state agencies or their programs conducted by the legislative auditor are formulated, defined, and conducted in accordance with industry standards established for auditing. (§5-13-308, MCA) To ensure the work is done and reported as objectively and impartial as possible, thus, maintaining independence, the Act requires agencies to provide access to LAD to all (confidential or otherwise) of their books, accounts, activities, and records. (§ 5-13-309, MCA) LAD's access to the information protects the legislative power of audit so the rest of state government cannot evade the scrutiny of the audit function.

When selecting and prioritizing agencies or programs for performance audits, the legislative auditor gathers information from many sources including LAD staff, agencies, legislators, and legislative committees. (§5-13-313, MCA) The LAC ranks the topics in order of importance to ensuring the effectiveness of the functions of government, setting aside politics or political ideology.

Further evidence of the importance of the independent external audit function is no contract for an audit of a state agency may be entered into without the approval of the legislative auditor. (§5-13-411, MCA)

### Reporting Requirements

The legislative auditor is required, under certain circumstances, to report findings to other entities of state government. The legislative auditor must report immediately in writing to the attorney general and the governor any apparent violation of penal statutes disclosed by the audit of a state agency and furnish the attorney general with all information available relative to the violation. (§5-13-304(4), MCA) They must report immediately in writing to the governor any instances of misfeasance, malfeasance, or nonfeasance by a state officer or employee disclosed by the audit of a state agency. (§5-13-304(5), MCA) Additionally, they must report immediately to the commissioner of political practices any instances of apparent violations of the state code of ethics provided for in Title 2, chapter 2, part 1. (§5-13-304(6), MCA)

### Fraud, Waste, and Abuse Hotline

Another important function rooted in the audit division was established in 1993. The legislative audit fraud, waste, and abuse hotline is a mechanism for citizens, including state employees, to report fraud, waste, and abuse in state government. Over time, the methods for reporting have expanded from a toll-free phone number to include dedicated United States Postal Service address, email, online form, and text. The legislative auditor is also required to maintain a

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record of all submissions; analyze and verify the information received; or refer the information for appropriate action to the agency that is or appears to be the subject of the call. The legislative auditor reports to the LAC on the use of the hotline; the results of the reviews, verifications, and referrals; and any corrective action taken by the appropriate agencies. (§5-13-311, MCA) The placement of this function in the Audit Act is additional evidence of the value the legislature places on an independent external audit function.

The law also provides employment protection to employees of the state or authorized contractor for providing information to the LAC or the legislative auditor. (§5-13-314, MCA)

## Collateral References

The protection of the legislative power of the audit function is evidenced by its references throughout the Montana Code Annotated (MCA). Money may not be spent by a state agency under a contract with a nonstate entity unless the contract contains a provision that allows the legislative auditor sufficient access to the records of the nonstate entity to determine whether the parties have complied with the terms of the contract. The access to records is necessary to carry out the functions provided for in Title 5, chapter 13. (§18-1-118, MCA)

Some of the other references from the MCA are as follows:

- The department of administration is not required to preaudit a liquidated claim (specific amount of money) against the state. The agency with the claim shall retain the original supporting documentation. These documents are subject to post-audit by the legislative auditor. (§17-8-202, MCA)
- Agency budget preparation and submission requires inclusion of estimated audit costs (§5-13-402, §17-7-111, §17-7-141, MCA)
- References to specific audits:
  - Facility Finance Authority (§90-7-121, MCA)
  - Group benefit plans for state employees (§§2-18-814, 816, MCA)
  - Board of Investments (§§17-5-1529, 1649 and 17-6-321, MCA)
  - Judicial Standards Commission (§3-1-1125, MCA)
  - Lottery (§23-7-410, MCA)
  - Performance audit of termination of agency or program (§2-8-111, MCA)
  - State charge for services funds (§17-2-302, MCA)