

MEMORANDUM

DATE: June 27, 2014

TO: Jesse Laslovich, Chief Legal Counsel

FROM: Lucas Hamilton

RE: Proposed amendment to move State Fund fraud prosecutions under CSI

A number of sections of Montana Code would need to be changed to move the duties associated with prosecuting insurance fraud involving the Montana State Fund (MSF) from the Department of Justice (DOJ) to the Office of the Commissioner of Securities and Insurance (CSI). The current state of each section and the necessary amendments are explained below.

1) Mont. Code Ann. § 2-15-2015 Workers' compensation fraud investigation and prosecution office.

Mont. Code Ann. § 2-15-2015 establishes the workers' compensation fraud investigation and prosecution office at DOJ. Specifically, § 2-15-2015(1) and (2) allow the DOJ to hire investigators and attorneys to handle the MSF's insurance fraud referrals. The budget for the office is to be prepared by both the DOJ and the MSF per § 2-15-2015(3).

If the CSI began fielding the MSF's fraud referrals, this office at the DOJ would be irrelevant, and Mont. Code Ann. § 2-15-2015 could be repealed in its entirety.

2) Mont. Code Ann. § 39-71-206 Legal advisers of department and state fund — investigative and prosecution services.

Mont. Code Ann. § 39-71-206(1) states that the attorney general is the legal adviser to the MSF and shall represent it in all proceedings, if requested. Mont. Code Ann. § 39-71-206(2) reads as follows:

As provided in 2-15-2015, the attorney general shall provide investigative and prosecution services to the state fund with respect to violations of this chapter.

Because Mont. Code Ann. § 2-1-2015 should be repealed, Mont. Code Ann. § 39-71-206(2) should be stricken. Mont. Code Ann. § 39-71-206(1) could remain, as the commissioner would not be responsible for representing the MSF in any official capacity.

3) Mont. Code Ann. § 44-2-115 Powers and duties of agents.

Among the various roles the attorney general's investigators serve, Mont. Code Ann. § 44-2-115(5) tasks said investigators with handling "apparent violations of penal statutes referred by the state workers' compensation insurance fund . . . [.]"

Mont. Code Ann. § 44-2-115(5) should be stricken, since CSI investigators would be handling MSF referrals. The remaining sections of the statute would remain the same.

4) Mont. Code Ann. § 39-71-221 Fraud detection and prevention unit – expenditure accounting.

The MSF has its own fraud investigators in the unit established by Mont. Code Ann. § 39-71-221. By law, this unit must refer all suspected fraud to the investigation and prosecution office established at the DOJ under Mont. Code Ann. § 2-15-2015.

As noted above, Mont. Code Ann. § 2-15-2015 should be repealed in its entirety. As such, Mont. Code Ann. § 39-71-221 should be amended to remove the reference to that office. Instead, the statute should direct the MSF investigative to refer cases to the CSI.

5) Mont. Code Ann. § 33-1-1205 Duties of authorized insurers, adjuster, administrators, consultants, and producers – notice exception.

Mont. Code Ann. § 33-1-1205 requires virtually every insurance professional to refer suspected insurance fraud to the CSI and cooperate fully with the agency's investigations. As an exception, the last subsection of this statute requires suspected fraud involving MSF to be submitted directly to the fraud detection and prevention unit at MSF created by Mont. Code Ann. § 39-71-221.

Every private insurer in the state must report fraud to the CSI within the timeline prescribed by Mont. Code Ann. § 33-1-1205. Given the bill's broader attempt to regulate the MSF like other insurers, the exemption for the MSF in Mont. Code Ann. § 33-1-1205(4) should be removed.

As a practical matter, it is still common practice for insurers to investigate reported fraud first and refer substantiated cases to the CSI. Every private insurer does this without a statute mandating that fraud be reported to the insurer rather than the CSI. If the CSI receives a report directly from an informant, the CSI typically forwards the complaint to the insurer for an initial investigation. Thus, removing the exception in Mont. Code Ann. § 33-1-1205(4) is not likely to shift any investigative load from the MSF fraud detection and prevention unit to the CSI.

6) Mont. Code Ann. § 45-7-501 Employer misconduct.

Mont. Code Ann. § 45-7-501 makes it a crime for an employer to avoid providing workers' compensation insurance, misrepresent or falsify employment records, or refuse to pay premiums for workers' compensation insurance.

The CSI is charged with enforcing applicable provisions of Montana law by Mont. Code Ann. § 33-1-311. To make it clear that the CSI can enforce Mont. Code Ann. § 45-7-501, that section should be codified or cross-referenced in Title 33 under the commissioner's general powers and duties, or wherever else it is deemed appropriate.

7) Mont. Code Ann. § 39-71-316 Filing true claim – obtaining benefits through deception or other fraudulent means.

Mont. Code Ann. § 39-71-316 allows the Department of Labor and Industry to require a person convicted of theft under Mont. Code Ann. § 45-6-301(5) to pay DLI "an amount equal to 10 times the amount paid by an insurer on the false claim, provided that the amount does not exceed \$50,000." Mont. Code Ann. § 39-71-316(3)(b)(ii) requires the Department of Labor and Industry (DLI) to forward

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any surplus collections to the DOJ to investigate and prosecute fraud through the office created by Mont. Code Ann. § 2-15-2015.

Since Mont. Code Ann. § 2-15-2015 is repealed, the subsection forwarding money to the DOJ should be stricken. Rather than redirecting it to the CSI, any surplus funding collected under this statute should be left with the DLI or forwarded to the general fund.

8) Mont. Code Ann. § 45-6-301 Theft.

Theft by insurance fraud is defined in Mont. Code Ann. § 45-6-301(6). Mont. Code Ann. § 45-6-301(5), however, addresses theft by collecting a benefit from any of the plans authorized under Title 39, chapter 71.

With the MSF treated like a private insurer, the distinction between insurance fraud under subsection 6 and theft from a worker's compensation plan under subsection 5 becomes less important. Subsection 5 should be referenced as a subsection in Mont. Code Ann. § 33-1-1211 to make clear that it falls under the CSI's general enforcement authority.

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