



**State Administration and Veterans' Affairs Interim Committee**  
**62nd Montana Legislature**

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**MEMORANDUM**

**TO:** Members, State Administration and Veterans' Affairs Interim Committee

**FROM:** David S. Niss, Staff Attorney

**RE:** MAR Notice No. 2-59-462

**DATE:** May 30, 2012

**I**

**Introduction**

During the 62rd Legislature, Representative Fitzpatrick introduced HB 543 amending section 2-4-307, MCA, which regulates the use of adoptions by reference in agency rules and rulemaking notices. That section now requires for the first time in subsection (3)(a)(ii) that the material being adopted by reference be available to be read either in the MAR or on the agency's website and is subject to the same comment period as the rule adopting the material by reference and thereby subject to the rulemaking process. The adoptions by reference in the proposed amendments to ARM 2.59.1728 appear not to comply with these requirements.

**II**

**Discussion**

In this case, the material being adopted by reference consists of forms developed by the Nationwide Mortgage Licensing System (NMLS). Despite this fact, the statute described above requires that all material being adopted by reference either be published on the agency's website or be published in the Montana Administrative Register (MAR) during the comment period on the rule. Because the NMLS forms were not published for comment by the public in either place during the comment period, this rulemaking requirement has not been complied with.

Secondly, the language of subsection (3)(a)(iii) clearly indicates that the rule must be subject to change by the agency in the same manner that the proposed rule itself is subject to change. Thus, while the Department of Administration may be able to publish the form in a manner that complies with the subsection (3)(a)(ii) requirements, because the NMLS forms are forms adopted by a national organization, the Department

may not be able to alter the forms even if the public comment indicates that the form should be changed. So the Department would have to interpret the language of the statute to be that the change of the form is not “required” by public comment because of the nonalterable nature of the form.

### III Conclusion

The Department has chosen to renounce the adoptions by reference in order to comply with the notification requirements of the statute. However, if public comments indicate that any of the forms should themselves be changed, the Department will have to respond to the commenter that the material adopted by reference is not “required” to be changed by that comment because the nationally adopted form cannot be changed. The other alternative is for the SAVA to propose a Committee bill to slightly amend the statute to indicate that there is no necessity to change the material being adopted by reference if that material is of a “uniform” nature.

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