

Date: January 5, 2023

To: Amber Long-Thorvilson, Chief Finance Officer

From: Andrew Cziok, Legal Counsel

Re: Legal Risks to Supplemental Appropriation Request for Montana Reinsurance Association

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Pursuant to the Legislative Fiscal Division's request for more information regarding the State Auditor's Office (SAO) and Montana Reinsurance Association's (MRA) obligations under the Section 1332 Waiver, and the potential effect of moving spending authority from Montana FY25 to FY24, this memorandum is provided to clarify the legal effects that such a move may have on compliance with federal grant conditions and state law. This memorandum is intended to supplement memoranda from the Legislative Fiscal Division's legal department and fiscal analyst (both attached).

The Montana Reinsurance Program was created in 2019 when the Legislature passed SB 125, the Montana Reinsurance Association Act (the Act), codified at MCA § 33-22-1301 *et seq.* The Act created the MRA and directed it, along with the Governor and State Auditor, to seek a State Innovation Waiver under section 1332 of the Patient Protection and Affordable Care Act (PPACA) that would allow Montana to opt out of certain provisions of the PPACA, and instead establish a reinsurance program that sought to defray costs of high-dollar claims to reduce the cost of insurance premiums for consumers shopping on the state insurance exchanges. The program is funded in part through assessments on premiums paid to insurers within the state, and partially through federal pass-through funds allocated to the program based on the amount of Premium Tax Credits (PTCs) would have been available to purchasers in the absence of the waiver program.

The waiver was approved on August 16, 2019, and the program went into effect January 1, 2020. The waiver came with Specific Terms and Conditions (STCs) for MRA and the SAO to follow. These STCs are listed on the Centers for Medicare and Medicaid Services' website, and are linked to through the MRA's website as well. They can be viewed here: <https://www.cms.gov/ccio/programs-and-initiatives/state-innovation-waivers/downloads/1332-mt-approval-stcspdf.pdf>

SAO requested a transfer of appropriation authority of \$2.43 million from FY25 to FY 24 to make reinsurance payments to participating insurers. To be clear, the program has sufficient *funding*, but it lacks the appropriation authority to spend funds the MRA has allocated for payment of reinsurance claims.

The Legislative Fiscal Division opined that not granting additional appropriation authority when funds are available in the account may violate state law, based on the negative implications of MCA § 33-22-1316(2), which requires that claims payable from the state special revenue fund for the reinsurance program be reduced proportionally if the funds in the account are insufficient to pay all program expenses, claims for reimbursement, and other disbursements allocable to that benefit year. The implication of this provision is that where funds are sufficient, they should be paid in full according to the parameters set by the MRA. This is a plausible reading of the statute, and it is a possible argument insurers could make if they believe they are due additional reinsurance payments available in the state special revenue fund for the program.

As of now, this should be considered a risk but not a certainty, due to the unknowns surrounding reinsurance claims in calendar year 2024. Further, to the extent failure to pay all available but not appropriated funds is a compliance risk, it would be a risk in FY24 as much as it would be in FY25, if the request to transfer appropriation authority from FY25 to FY24 is not approved. In light of this, the transfer will allow SAO and MRA more time to resolve any potential legal issues presented by MCA § 33-22-1316(2).

The larger concern can be found at MCA § 33-22-1316(5), which requires that “by December 31 of the year following the applicable benefit year, the board shall disburse all applicable reinsurance payments payable to an eligible health insurer.” Claims are made and processed “in the year following the applicable benefit year,” so claims accruing in calendar year 2023 would have to be paid by December 31, 2024. If claims payable according to MRA’s payment parameters exceed federal grant funds and appropriated amounts in the state special revenue fund, MRA could violate this statute by failing to disburse the payments on time. This is not guaranteed, since MRA could explore potential solutions involving changes to payment parameters, and also favors the movement of spending authority from FY25 to FY24 to allow time for such a solution, if necessary.

Finally, the Legislative Fiscal Division was not able to find and review the STCs and requested a legal opinion from SAO on whether failure to pay available funds would violate the STCs. Having reviewed the STCs, it does not appear that a lack of appropriation authority to spend funds accumulated in the state special revenue fund would necessarily violate the STCs. They require SAO and MRA to “ensure sufficient funds...for the Montana reinsurance program to operate as described in the State’s waiver application.” STCs, page 2. The State’s waiver application is also available online at the MRA’s website at [https://mtreinsurance.org/wp-content/uploads/2020/11/MT-1332-Waiver-Application\\_FINAL2.pdf](https://mtreinsurance.org/wp-content/uploads/2020/11/MT-1332-Waiver-Application_FINAL2.pdf)

The application does not commit to specific spending outside of what the Act requires, i.e. payments within the parameters set by the MRA according to MCA § 33-22-1314. However, to the extent the MRA or SAO did not follow the payment parameters, or failed to make payments as required by statute, such as MCA § 33-22-1316(5), this could be considered a violation of the STCs. As described above, to the extent that this is a risk, transferring authority would still be beneficial, as this would allow SAO and MRA more time to explore avenues to avoid potential statutory or STC term violations.