



**Montana Legislative Services Division**  
**Legal Services Office**

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

**FROM:** K. Virginia Aldrich

**DATE:** May 23, 2014

**RE:** Legislative Administrative Rule Review Report

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Pursuant to 5-5-228, MCA, the State Administration and Veterans' Affairs Interim Committee is responsible for reviewing administrative rules within its jurisdiction. Staff for the State Administration and Veterans' Affairs Interim Committee has prepared this report for informational purposes only. This report does not represent any action or opinion of the State Administration and Veterans' Affairs Interim Committee and does not preclude additional action that may be taken by the State Administration and Veterans' Affairs Interim Committee pursuant to its authority under the Montana Administrative Procedure Act (Title 2, chapter 4, MCA).

**MAR NOTICE NUMBER:** 44-2-196

**AGENCY/BOARD:** Secretary of State

**RULE CLASSIFICATION:** (e.g. substantive/interpretative/emergency/temporary):  
Substantive

**SUBJECT:** Miscellaneous Fees Charged By the Business Services Division

**NOTICE DESCRIPTION:** (e.g. proposal notice/adoption notice): Notice of proposed amendment

**SUMMARY OF RULE(S):**

The Secretary of State proposes to amend their miscellaneous fees to include fees for surety bonds, cashier's checks, or certificates of deposit required to be filed with the Business Services Division. The Secretary of State also proposes to amend the same rule to allow a fee for the designation of a registered agent for a pesticide license.

Under 2-15-405, MCA, the Secretary of State is required to adopt fees by administrative rule. In addition, the Legislature has specified that the Secretary of State may only charge a fee "authorized by law." Section 2-15-405(1), MCA. For instance, the addition under this rule proposal of a fee for the designation of a registered [resident] agent for a pesticide license is authorized under 80-8-210 in which the Secretary of State "shall be allowed such fees" for "designating resident agents." Section 80-8-210, MCA.

However, although the Secretary of State is required to receive filings of surety bonds, cash, certificates of deposit, or other instruments prior to the performance of seismic exploration by a person, firm, or corporation (and is also required to issue a certificate of deposit upon receipt of the instrument and keep the instrument on file for 5 years after the cessation of the exploration activities), the code does not affirmatively state that a fee may be charged for these services. See 82-1-104, MCA. The Secretary of State also cites section 20-7-604, MCA, which requires the Secretary of State to accept surety bonds filed by textbook dealers. However, again, the code does not explicitly authorize a fee to be collected for these services.

The Secretary of State notes in the statement of reasonable necessity that its office is an "enterprise fund" which requires it to operate as a proprietary fund agency, being "financed and operated similar to a private business where it is the Legislature's intent to finance or recover all costs primarily through user charges." MAR Notice No. 44-2-196. The Secretary of State points to section 2-15-405, MCA, for the authority to collect the surety bonds, cashier's checks, or certificates of deposit relating to seismic exploration or textbook dealers. That section reads:

- (1) The secretary of state shall, for fees charged by the secretary of state, set by administrative rule each fee **authorized by law**.
- (2) Unless otherwise specified by law, fees:
  - (a) must be commensurate with the overall costs of the office of the secretary of state; and
  - (b) must reasonably reflect the prevailing rates charged in the public and private sectors for similar services.
- (3) The secretary of state shall maintain records sufficient to support the fees established pursuant to this section.
- (4) Except as otherwise provided by law, fees collected by the secretary of state must be deposited to an account in the enterprise fund type to the credit of the secretary of state. All income and interest earned on money in the account must be credited to the account.

Section 2-15-405(1), MCA (emphasis added).

The Secretary of State "believes 2-15-405, MCA, is the requirement in law that a fee be charged for the services provided." Nevertheless, although the Secretary of State "has always" collected these fees in the past and is attempting to comply with the Legislature's requirement that all such fees be set out in rule, section 2-15-405, MCA, appears to require a further affirmative authorization in law for any fee collected by the Secretary of State. Absent an affirmative authorization in statute, it is not apparent that the Secretary of State has the authority to collect these fees.

**NOTES:** (e.g. hearing dates)

A public hearing is scheduled on the above-referenced rules on June 13, 2014, at 9:30 a.m. in

Room 260, Secretary of State's Conference Room, State Capitol Building, Helena, Montana. The public comment period ends on June 20, 2014.

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