

## **MEMORANDUM**

TO: Sheila M. Stearns, Commissioner of Higher Education  
FROM: Catherine M. Swift, Chief Legal Counsel  
RE: The addition of the UM Foundation to the MUS Employee Benefits Plan  
DATE: May 10, 2011

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This memo addresses the authority of the Montana University System to allow the UM Foundation to join the MUS Employee Benefits Plan. Several foundations affiliated with campuses of the MUS are already on the plan and the UM Foundation, formerly included on the plan, has now requested to re-join the plan.

### **Background**

University foundations exist for the benefit of our campuses, and foundation operations are closely-aligned to the campuses they were created to serve. The fundraising and endowment management activities engaged in by campus-affiliated foundations are important and integral aspects of the university system. On a national level, university endowments are a measure of the health and vitality of an institution

The UM Foundation is a 501(c)(3) corporation whose primary function is to foster financial assistance to the University of Montana. If the foundation ever dissolved itself, all of its assets would revert to the MUS, either directly or through a trust.

The Board of Regents exercises oversight of campus foundations through BOR Policy 901.9 and through required operating agreements between the foundations and their affiliated campuses, which the BOR approves every two years. BOR policy recognizes that the BOR cannot exercise direct control over campus foundations, as independent governance of the foundations is necessary for their private and independent status. The BOR does, however, “have responsibility for ensuring the public interest is served by any individual or organization established to support a campus of the Montana University System.” In addition, the BOR operating agreements with the foundations incorporate “an appropriate balance of foundation independence and Board of Regents’ oversight.”

The foundations are considered “component units” of reporting campuses for financial accounting purposes, which means the economic resources received or held by these organizations are significant to the reporting campuses and are entirely or virtually

entirely for the direct benefit of the campus, which is entitled to, or has the means to access, a majority of the economic resources received or held by the foundation.

Given both the fact that several campus foundations are already on our benefit plan and the close relationship between the MUS and campus-affiliated foundations, there are good reasons for including the UM Foundation on the MUS Employee Benefits Plan, if there are no impediments in state or federal law.

### **Federal Law Issues:**

Our plan must conform to IRS regulations in order for contributions to the plan to be tax-exempt. IRS regulations allow an exemption from taxes for the plans of qualified organizations. Connie Welsh, plan director, and I have consulted Holly Bander, an attorney with Employee Benefits Resources, regarding this question, as well as Sarah Loble, an attorney with Crowley Fleck, to whom Ms. Bander referred us. Both have advised that federal law does not disqualify, for tax purposes, plans which are made up of employees of different employers. Members of related “flex” plans, however, must be under the common control of the sponsoring employer. We can address this issue by ensuring that the non-MUS organizations included on our plan have separate flex plans for their employees and operate those flex plans separate from our benefit plan.

### **State Law Issues:**

Several state law issues must be addressed. These include the following:

#### **1. Does state law allow for the inclusion of non-state employees on the MUS benefit plan?**

Prior to 1999, group benefits for the Montana University System were statutorily governed solely by MCA § 2-18-702. In pertinent part, this section (both before and after 1999) provides as follows:

“...all counties, cities, towns, school districts and **the board of regents** shall . . . upon approval by two-thirds vote of their respective officers and employees enter in group hospitalization, medical, health, including long-term disability, accident, or group life insurance contracts or plans **for the benefit of their officers and employees and their dependents.**” (MCA § 2-18-702(1)(a). (Emphasis added).

Prior to 1979, this section did not include the board of regents, but it did include all other state agencies. In Chapter 555, Laws of 1979, the board of regents was added and all other state agencies were deleted and given their own authorizing section. (Title 2, Chap. 18, Part 8). The statute appears to contemplate that the covered governmental units may enter into group plans that include the employees of other employers. That is what the phrase “for the benefit of their officers or employees,” implies and that is how it has been interpreted. Certainly when the law was enacted, many of the towns and school districts covered by the legislation were very small and could not have managed a viable group plan without joining with, or including, other entities.

Based on this legislative history and the literal wording of the statute, the MUS has historically assumed it was appropriate to create a group that included employees other than those directly employed by the MUS. It was under this statutory scheme that campus-affiliated organizations such as campus foundations and bookstores and other groups were allowed to join the MUS’ self-insured group benefits plan.

Two significant changes were made during the 1999 legislative session: First, a new paragraph (1)(b) was added to MCA § 2-18-702. This paragraph provides that the “governing body of a county, city, or town may, at its discretion, consider the employees of private, nonprofit economic development organizations to be employees of the county, city, or town solely for the purpose of participation in group hospitalization, medical, health, including long-term disability, accident or group life insurance contracts or plans as provided in subsection (1)(a).” Notably, school districts and the BOR, included in the main section, are not included in the expansive provisions of (1)(b)), however MCA § 2-18-711 allows state agencies to participate with private businesses to provide employee group benefits :

To provide employee group benefits, an agency . . . may participate with other agencies, nonprofit organizations or business entities . . . if the agency determines that cooperative purchasing is in the agency’s . . . best interest.

This statute expresses a legislative intent supporting the partnership of public agencies and nonprofit organizations in the provision of group benefits. These two statutory provisions together indicate the public policy of the state of Montana, which recognizes the value of public-private collaboration in the purchase of insurance.

The second significant change made during the 1999 legislative session involved the addition of a new statutory part to the university system chapter in Title 20 addressing

the development of group benefit plans for the employees of the MUS. As noted above, the language in MCA § 2-18-702 provides that the Board of Regents shall enter into group benefit plans “for the benefit of their officers, employees and dependents.” The new Title 20 provisions were worded slightly differently. Rather than discussing benefit plans that would be *for the benefit of* employees, etc., these provisions established benefit plans that would be developed “for employees of the Montana university system and their dependents.” (MCA § 20-25-1301; *see also* MCA § 20-25-1302(2): “Group Benefits’ means...other related group benefits provided to employees and dependents of the Montana university system.”)

These changes raise questions as to whether the legislature meant to limit the university system benefit plans to only employees and dependents. Arguably, if the legislature intended to allow the MUS to add other groups “for the benefit “ of its employees, it would have included the board of regents under MCA § 2-18-702(1)(b), or it would have stated so explicitly in Title 20, Chapter 25, Part 13 (University System Group Benefits).

On the other hand, there may be no significance to the slight change in wording, as the specific purpose of the new sections was not to change the eligibility for the plan (otherwise the language of Title 2 should have been changed as well), but rather to address the university’s system’s unique process for setting benefits through use of an inter-unit benefits committee and to authorize a university system self-funded plan. Furthermore, if we read MCA § 20-25-1301 and § 20-25-1302 literally to apply solely to employees and dependents, it might be argued that we could not include non-employee retirees on our plan. Retirees are on the plan due to an express mandatory provision set forth in Title 2, and clearly the Title 2 wording still applies. This fact, as well as the other arguments made above, leads me to conclude that the legislature did not intend to change plan eligibility when it enacted the new provisions in Title 20.

Nevertheless, the facts remain that the 1999 language is more restrictive than the Title 2 language, and the Legislative Audit Division has, on at least two occasions, questioned the university system’s practice of allowing non-employee groups to participate in the plan. An earlier review led to the “grandfathering” of the groups currently on the plan, including (at that time) the UM Foundation. During the most recent review, we assured the LAD that we were no longer adding non-university groups to our plan. My understanding is that neither LAD review led to an audit exception.

Ultimately all of these statutes must be considered together, giving them an interpretation that makes them compatible. Reading them as a whole leads me to the conclusion that Montana law does not preclude the inclusion of nonprofit organizations such as the UM Foundation to the plan if determined to be in the best interests of the MUS. When one considers as well the long-term practice of including closely-affiliated campus organizations on the plan and the Board of Regents' clear authority to manage and control the Montana University System pursuant to the Montana Constitution and *Board of Regents v. Judge*, 168 Mont. 433 (1975), I feel confident that this conclusion is correct. If it is determined to add the UM Foundation, I recommend a Board of Regents' policy to allow for this. As an added protection, I recommend the UM Foundation be admitted to the Plan subject to an agreement between the commissioner and the foundation setting forth the terms and conditions of that membership.

**2. Can the Montana University System Employee Benefits Plan allow nongovernmental employees to participate in the plan without the plan becoming subject to the provisions of the state insurance code?**

While this may have been a legitimate question at one time, House Bill 53, recently enacted by the Montana Legislature and signed into law by Governor Schweitzer on March 25, 2011, removes any doubt as to whether the state insurance code, found in Title 33 of the Montana Code Annotated, governs the Montana University System Employee Benefits Plan. That law places in Title 33, at § 33-1-102(7) an express exemption from its provisions for the Montana University System:

This code does not apply to the . . . Montana university system group benefit plans established in Title 20, chapter 25, part 13.

This section is supported by MCA § 20-25-1303(2), addressing MUS group benefits, which provides that "the provisions of Title 33 do not apply to the commissioner when exercising the duties provided for in this part."

**3. Does the addition of non-MUS entities on the plan result in the state's unlawful subsidization of private organizations or private employees?**

We have carefully considered this question. The fact that Montana law expressly allows public and private entities to join together to purchase group insurance (see discussion above) would appear to be dispositive of this question. Furthermore, the pooling of risk among many employees renders a cost benefit which minimizes specific plan use by

individuals or groups of employees. Certainly we have long-term experience with the inclusion of campus-affiliated organizations on our plan and this has not been a problem.

In addition, state statute enabling creation of the MUS self-insured plan requires that it must be operated in an actuarially-sound manner. MCA § 20-25-1310. Lastly, our plan director has reviewed the plan history of the UM Foundation and foresees no problems of cost subsidization by the inclusion of this group in the near term. As this arrangement is for the pooling of risk, any of the individuals or entities within the MUS plan may experience costs which exceed their contributions at some point in the future and at other times such individuals or entities will subsidize the remainder of the pool. Over the long term, the costs within the pool must be covered by all participants in an actuarially sound manner, as required by law, and that is how our plan will continue to be operated.

### **Conclusion**

It is my conclusion, based on the above analysis, that there are no state or federal law impediments at this time precluding the inclusion of the UM Foundation on the MUS employee benefits plan. I recommend a regents' policy authorizing such inclusion, if determined to be in the MUS' best interest, and I further recommend that the inclusion be governed by a written agreement between the commissioner of higher education and any participating foundation.