

# COMMISSIONER OF SECURITIES & INSURANCE

MONICA J. LINDEEN  
COMMISSIONER



OFFICE OF THE MONTANA  
STATE AUDITOR

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## ADVISORY MEMORANDUM

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**To:** All Insurance Carriers  
**From:** Monica J. Lindeen, Commissioner of Securities and Insurance  
Office of the Montana State Auditor  
**Date:** November 4, 2016

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### INSURANCE POLICY PROVISIONS ESTABLISHING ARBITRATION TERMS

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Some insurers have utilized policy forms, including endorsements, addressing specific aspects of arbitration. These forms do not require the insured to enter into arbitration in the event of a controversy; instead, they incorporate language establishing substantive terms of any future arbitration, if arbitration is agreed to in the future by the insured and the insurer. For example, some forms set forth the process by which the arbitrator would be selected, the parties' responsibilities for incurred expenses, the venue of the arbitration, and whether the arbitration would be binding or non-binding.

The Uniform Arbitration Act, Mont. Code Ann. Title 27, Chapter 5, governs the use of arbitration language in insurance contracts:

(2) A written agreement to submit to arbitration any controversy arising between the parties after the agreement is valid and enforceable except upon grounds that exist at law or in equity for the revocation of a contract. Except as permitted under subsection (3), this subsection does not apply to:

...

(c) any agreement concerning or relating to insurance policies or annuity contracts except for those contracts between insurance companies[.]

Mont. Code Ann. § 27-5-114(2) (emphasis added).

It is the interpretation of the Office of the Montana State Auditor, Commissioner of Securities and Insurance (CSI), that insurance policy provisions establishing terms of a future arbitration do not comply with § 27-5-114(2)(c). Even if the parties retain the option to not participate in future arbitration, such policy language nonetheless constitutes an arbitration-related agreement “concerning or relating to insurance policies or annuity contracts.”

Additionally, § 33-1-502(2) prohibits any form containing inconsistent, ambiguous, or misleading terms, which potentially includes policy language establishing future arbitration terms. The provisions in question typically incorporate an agreement between the parties that they may agree to enter into arbitration in the future. Since Montana law prohibits arbitration clauses in insurance contracts, the inclusion of an endorsement in which parties “agree that they may agree” to arbitration is potentially misleading or ambiguous. As Montana law already permits arbitration agreements after an occurrence, this language establishes no new rights or obligations, and thus serves no legal purpose. See § 27-5-114(1). Ultimately, the language potentially creates the impression that the insured is committing to arbitrate a future matter.

Insurers are advised that the CSI will not approve policy forms containing provisions establishing terms of a future arbitration.

For any questions regarding this advisory memorandum, call the CSI Legal Bureau at (406) 444-2040.