



## Revenue and Transportation Interim Committee

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### 63rd Montana Legislature

#### SENATE MEMBERS

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#### COMMITTEE STAFF

MEGAN MOORE, Lead Staff  
JARET COLES, Staff Attorney  
FONG HOM, Secretary

TO: Committee Members

FROM: Jaret Coles, Staff Attorney

RE: Overview of Rulemaking and Administrative Rule Activity

DATE: June 5, 2013

## Rulemaking and Powers of Rule Review Committees and Individual Members

### 1. General concepts:

- a. What is a rule? [Montana Administrative Procedure Act](#) (MAPA) defines it as an agency regulation, standard, or statement that implements, interprets, or prescribes law or policy. Most agency rules have the force and effect of law.
- b. Where are Montana's rules located? Administrative Rules of Montana (ARMs) are the administrative rules in their entirety. They are updated by the [Montana Administrative Register](#) (MAR), which is a twice-monthly publication containing all proposed new, transferred, amended, and repealed rules as well as adopted rule changes. The ARMs are also published to the Internet at <http://www.mtrules.org/>.
- c. Why are rules adopted?
  - (1) To "fill in gaps" left by legislation and provide the public with certainty as to what is required.
  - (2) To allow the public input into what the rules will be.

### 2. Citations to statutes concerning rulemaking:

- a. Montana Administrative Procedure Act (MAPA), [Title 2, chapter 4](#), MCA.
- b. Section [5-5-215](#), MCA -- interim committee powers generally.
- c. Section [5-5-227](#), MCA -- specific rulemaking review authority of Revenue and Transportation Interim Committee.

- d. Section [5-11-107](#), MCA -- interim committee investigatory powers generally.
- e. Section [2-4-102](#), MCA -- "rule" is adoption of an entire rule, an amendment to a rule, or repeal of a rule.

**3. Rulemaking generally:**

- a. Rule adoption system -- governs procedure only; generally, MAPA is not authority to adopt rules ([2-4-301](#), MCA).
- b. MAPA is procedure most used by agencies to adopt rules. Some agencies are exempted completely from MAPA; a few agencies have a different statutory system for rule adoption.
- c. Authority to adopt most rules must be express and not implied authority ([2-4-305](#), MCA).
- d. Two notices must be published in Montana Administrative Register (MAR): proposal notice and adoption notice. The notice format is specified by Secretary of State's rules ([2-4-306](#), MCA).
- e. Hearing on rule proposal required in some instances, but an agency can voluntarily hold a hearing ([2-4-302](#), MCA):
  - (1) matter of significant interest to public.
  - (2) request by a rule review committee.
  - (3) request by minimum of 25 or 10% of those affected by proposed rule.
  - (4) request by association.
  - (5) request by agency or governmental subdivision.
- f. Time periods ([2-4-302](#), MCA):
  - (1) minimum 30 days' notice before agency action.
  - (2) minimum 20 days' notice of public hearing (if held).
  - (3) minimum 28 days to submit comments.
  - (4) total minimum time for rule adoption is 30 days' notice, plus approx. 2 weeks to publish adoption notice. This includes:
    - a. time period for hearing and written comments; or
    - b. time for written comment alone if no hearing.
  - (5) 6-month maximum for adoption and publication ([2-4-302](#) and [2-4-305](#), MCA).
  - (6) emergency rules exception ([2-4-303](#), MCA).
- g. Minimum requirements for content of notice of proposed rulemaking ([2-4-305](#), MCA):
  - (1) agency must have and cite in the proposal notice express statutory authority

- for rules (usually not in MAPA, per above).
  - (2) agency must have and cite statute being implemented by proposed rule, which sometimes is the same as authority, though frequently different.
  - (3) agency must state rationale or statement of "reasonable necessity" for proposed rule.
  - (4) foregoing three requirements are where most agency errors occur in the rulemaking process.
- h. Committee work starts with committee staff review, on committee's behalf, for those three items in paragraph 2 above. Committee review is mandatory in accordance with [2-4-402\(1\)](#), MCA.
- (1) Problems with a proposed rule will be brought to committee for resolution only if staff can't resolve the issue with the agency.
  - (2) All proposals and adoptions will be brought to committee's attention at every meeting and sometimes by e-mail between meetings if the situation warrants.
- i. After rule is adopted through publication in the MAR, the rule is published in the Administrative Rules of Montana.

**4. Committee powers:**

- a. Mostly in MAPA - some in other statutes ([5-5-215](#) and [5-11-107](#), MCA, mentioned earlier).
- b. Committee powers
  - (1) request and obtain agency rulemaking record for review ([2-4-402](#), MCA).
  - (2) recommend to the appropriate agency adoption, amendment, rejection, or repeal of any rule ([2-4-402](#), [2-4-411](#), and [2-4-412](#), MCA).
  - (3) request rulemaking hearing be held ([2-4-402](#), MCA).
  - (4) bring or participate in litigation involving MAPA ([2-4-402](#), MCA).
  - (5) review "incidence and conduct" of proceedings under MAPA ([2-4-402](#), MCA).
  - (6) object to proposed rules in order to delay adoption of the rule by an agency ([2-4-305\(9\)](#), MCA).
  - (7) submit oral or written comments to agency rulemaking record ([2-4-402](#), MCA).
  - (8) conduct poll of Legislature to see if rules follow legislative intent:
    - a. discretionary poll or mandatory poll ([2-4-403](#), MCA).
    - b. effect of poll ([2-4-404](#), MCA).
    - c. publication of results of poll ([2-4-306](#), MCA).
  - (9) request or have prepared an economic impact statement regarding a proposed rule ([2-4-405](#), MCA).
  - (10) object to a proposed rule for purposes of shifting the burden of showing legality of adoption ([2-4-306](#) and [2-4-406](#), MCA.)

- (11) hold hearings and conduct investigations involving agency compliance with MAPA and other statutes ([5-11-107](#), MCA).
- (12) recommend amendments to MAPA or other state laws ([2-4-411](#), MCA).
- (13) request publication of material adopted by reference in a rule ([2-4-307](#), MCA).
- (14) request publication of statement on adjective or interpretive rules ([2-4-308](#), MCA).
- (15) request and receive copies of documents in litigation involving judicial construction of rule or MAPA ([2-4-410](#), MCA).
- (16) monitor operations of agency within committee's jurisdiction ([5-5-215](#), MCA).

**5. Powers of individual members of committee or Legislature:**

- a. As member of Legislature, petition for adoption, amendment, or repeal of a rule ([2-4-315](#), MCA).
- b. As primary sponsor, receive notice from agency, before it write a rule, of its intent to write the rule. The manner and date of notice to the primary sponsor must be stated in the notice of proposed rulemaking ([2-4-302](#), MCA).
- c. Request agency form informal conference or committee to develop proposed rule before agency publishes notice ([2-4-304](#), MCA).
- d. Join agency's list of interested persons for purposes of rulemaking ([2-4-302](#), MCA).
- e. Contribute to agency rulemaking record by ([2-4-302](#) and [2-4-305](#), MCA):
  - (1) writing or e-mailing agency, as provided in the agency's proposal notice, before the rulemaking record closes.
  - (2) testifying at any agency rulemaking hearing.
- f. Object to committee presiding officer regarding proposed rule in order to potentially delay adoption of rule so committee can review proposed rule ([2-4-305](#)(9), MCA). If a majority of the committee notifies the presiding officer of the objection, then the committee notifies the agency in writing of the objection and the agency must delay adoption of the proposal notice.
- g. Request, by motion, that interim committee take any of those actions authorized by law for committee to take (see 4b above).

**6. Legislative Action During the 2013 Session Regarding MAPA:**

- a. [Senate Bill No. 139](#) was enacted as Chapter 318, Laws of 2013, becomes effective July 1, 2013, and is set to terminate on July 1, 2015. [Senate Bill No. 139](#) requires a small business impact analysis to be conducted in certain instances. A small business is defined as a "business entity, including its affiliates, that is independently owned and operated and that employs fewer than 50 full-time employees". Section 1 of the

bill provides as follows:

**Small business impact analysis -- assistance.** (1) Prior to the adoption of a proposed rule, the agency that has proposed the rule shall determine if the rule will significantly and directly impact small businesses. If the agency determines that the proposed rule will impact small businesses, the determination must be published in the register when the proposed rule is published. If the agency determines that the proposed rule may have a significant and direct impact on small businesses and if subsection (4) does not apply, the agency shall prepare a small business impact analysis that, at a minimum, must:

(a) identify by class or group the small businesses probably affected by the proposed rule;

(b) include a statement of the probable significant and direct effects of the proposed rule on the small businesses identified in subsection (1)(a); and

(c) include a description of any alternative methods that may be reasonably implemented to minimize or eliminate any potential adverse effects of adopting the proposed rule, while still achieving the purpose of the proposed rule.

(2) The agency shall provide documentation for the estimates, statements, and descriptions required under subsection (1).

(3) The office of economic development, established in 2-15-218, shall advise and assist agencies in complying with this section.

(4) An agency is not required to prepare a separate small business impact analysis under this section if the agency pursuant to 2-4-405 is preparing or has prepared an economic impact statement regarding adoption, amendment, or repeal of a rule.

(5) The final adoption, amendment, or repeal of a rule is not subject to challenge in any court as a result of the inaccuracy or inadequacy of a small business impact analysis required under this section.

## Department of Revenue

*Proposal and Adoption Notices are available on the Internet at:*

[http://www.revenue.mt.gov/formsandresources/administrative\\_rules/default.mcp](http://www.revenue.mt.gov/formsandresources/administrative_rules/default.mcp)

### **Notice of Proposed Rules:**

Property Tax -- Residential Property Tax Credit. MAR 42-2-893. A public hearing will be held on July 8, 2013, at 11 a.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on July 12, 2013. The Department proposes to amend one rule regarding the Elderly Homeowner Tax Credit. The amendment allows a qualifying homeowner with more than 1 acre of land to use the higher of 80% of the property taxes paid when calculating the credit or the result of the property taxes paid divided by total acreage.

### **Adopted After RTIC Adjourned -- Not Reviewed by Committee:**

Liquor Administration -- Liquor Stores, Vendors, Licensees, and Distilleries. MAR 42-2-887. Adopted January 31, 2013. A public hearing was held on December 17, 2012. No one appeared at the hearing to testify, and no written comments were received. The Department amended six rules regarding advertising, inventory policy, and reporting.

Income Tax -- Definitions, Language Cleanup, Net Operating Loss Election. MAR 42-2-888. Adopted January 31, 2013. A public hearing was held on December 17, 2012. No one appeared at the hearing to testify, and two written comments were received. The Department amended 12 rules as proposed. The amendments revise the definitions related to resident status and strike outdated language. Additionally, the election to waive a carryback of a net operating loss on the federal return does not result in an automatic waiver for Montana purposes and a separate election is required.

Income Tax -- Tax Credits. MAR 42-2-889. Adopted February 14, 2013. A public hearing was held on December 17, 2012. Two people appeared at the hearing to testify, and two people submitted written comments. The Department adopted 2 rules, amended 21 rules, and repealed 1 rule. The new rules pertain to the calculation for determining whether a business qualifies for the Health Insurance for Uninsured Montanans tax credit by having 20 or fewer employees who each work at least 20 hours a week. The amended rules generally pertain to alternative energy systems, energy conservation, the credit for income taxes paid to another state or country by an estate or trust, the qualified endowment credit, movie and TV credits, and general capitalization and punctuation revisions. The repealed rule pertained to the qualified endowment credit.

Natural Resource Taxes. MAR 42-2-890. Adopted January 31, 2013. A public hearing was held on December 17, 2013. One person appeared at the hearing to testify, and no written comments were received. The Department amended seven rules and transferred seven rules as proposed. The amendments pertain to coal gross proceeds taxation and oil and natural gas production taxes. The transfers pertain to the tax on mineral production. Generally, the amendments clean up outdated language and the transfers place all rules regarding natural resource taxation in the same chapter.

Income Tax -- Pass-Through Entities. MAR 42-2-891. Adopted March 28, 2013. A public hearing was held on January 14, 2013. One person appeared at the hearing to testify, and two people submitted written comments. The Department amended 11 rules as proposed. The amendments pertain to changes in forms, revision of citations based on recodification, withholding and reporting requirements for passthrough entities, and capitalization and style.

Electronic Payment and Return Filing. MAR 42-2-892. Adopted February 14, 2013. A public hearing was held on January 15, 2013. No one appeared at the hearing to testify, and no written comments were received. The Department amended three rules as proposed. The amended rules generally update the Department's website address, inform taxpayers on where to locate information about electronic filing options, and make stylistic changes.

**Notice of Adopted Rules -- Brought in Front of Committee at November 2012 Meeting:**

Agency Liquor Stores -- Negotiated Rulemaking. MAR 42-2-882. Adopted December 20, 2012. A public hearing was held on November 15, 2012. One person appeared at the hearing to testify, one person submitted written comments, and changes were made based on the comments received. The Department amended six rules and repealed one rule regarding operation of agency liquor stores. The rules are a result of the work of a negotiated rulemaking committee consisting of agency liquor store owners and Department staff. The amendments provide explanations and examples, add definitions, clarify the number of agency liquor stores that may be in a community, and explain the process regarding commission percentage discount rate reviews that occur every 3 years.

Property Tax -- Trend Tables for Valuing Property. MAR 42-2-883. Adopted December 6, 2012. A public hearing was held on November 14, 2012. No one appeared at the hearing to testify, and no written comments were received. The Department amended 14 rules regarding various tables that are updated on an annual basis through Department rules. The tables generally show how the Department arrives at market value when valuing personal property, including rental equipment, farm machinery and equipment, heavy equipment, seismograph units and allied equipment, oil

and gas field machinery and equipment, work-over and service rigs, oil drilling rigs, television cable systems, ski lift equipment, and industrial machinery and equipment.

Income Tax -- Withholding and Estimated Tax Payments. MAR 42-2-884. Adopted December 20, 2012. A public hearing was held on November 19, 2012. No one appeared at the hearing to testify, and no written comments were received. The Department amended eight rules regarding withholding and estimated tax payments related to a nonmilitary spouse of a military service person, to North Dakota residents, and to mineral royalty income.

Property Tax -- Montana Reappraisal Plan for the 2015 Cycle. MAR 42-2-885. Adopted December 20, 2012. A public hearing was held on November 19, 2012. Two people appeared at the hearing to testify, and one person submitted written comments. The Department adopted seven new rules, amended five rules, and repealed five rules regarding the Montana reappraisal plan. Generally, the new rules pertain to the purpose, objectives, and methods used in valuing residential, commercial, agricultural, and forest land that will be used during the 2015 reappraisal cycle. The amended rules implement the proposed new rules by defining terms and striking outdated reference to prior reappraisal cycles. The repeals strike rules that were specific to the 2003 reappraisal cycle.

Liquor Administration -- Product Approval for Beer, Wine, and Hard Cider Products. MAR 42-2-886. Adopted December 20, 2012. A public hearing was held on November 15, 2012. Two people appeared at the hearing to testify, one person submitted written comments, and changes were made based on the comments received. The Department adopted one new rule and amended three rules regarding product label and packaging requirements for beer, wine, and hard cider products. The new rule relates to the label approval process for wineries and wine importers. The amendments relate to brewers, beer importers, wineries, and wine importers.

## **Department of Transportation**

*Proposal and Adoption Notices are available on the Internet:*

The Department of Transportation does not maintain an administrative rules website, but notices can be found on the Secretary of State's website at <http://www.mtrules.org/>. Under the Montana Administrative Register heading, type the number "18" in the "Search by Notice No." box and click on the "Go" icon.

### **Notice of Proposed Rules:**

Motor Carrier Services. MAR 18-142. No public hearing is contemplated, and the public



comment period ended on June 6, 2013. The Department of Transportation proposes to amend five rules. The proposed amendments clarify the procedure for obtaining a fee credit for weight or classification changes, provide that a wide-base tire may be used to move mobile homes, and provide updated website addresses for material that was previously incorporated by reference.

**Adopted After RTIC Adjourned -- Not Reviewed by Committee:**

Wrecker and Tow Vehicle Requirements. MAR 18-139. Adopted April 11, 2013. No public hearing was held, and written public comments were received. The Department of Transportation amended one rule regarding the distance that a towed power unit combination may be towed, time of day and weather restrictions, and reporting of violations to the Department of Justice.

Motor Carrier Services. MAR 18-140. Adopted May 23, 2013. No public hearing was held, and written public comments were received. The Department of Transportation amended one rule. The amendment pertains to use of a service or mechanical truck as a flag vehicle and the removal of flag vehicle signs.

Motor Carrier Services. MAR 18-141. Adopted June 6, 2013. A public hearing was held on April 29, 2013, and the public comment period ended on the same day. No one appeared at the hearing to testify, and no written comments were received. The Department of Transportation amended one rule. The amendment pertains to height restrictions on divisible loads, nondivisible loads, and hay loads.

**Notice of Adopted Rules -- Brought in Front of Committee at November 2012 Meeting:**

Motorist Information Signs. MAR 18-137. Adopted December 6, 2012. No public hearing was held and written public comments were received. The Department of Transportation adopted 1 new rule, amended 19 rules, and repealed 1 rule regarding motorist operation signs. The new rule and the amendments implement federal regulations as found in the Federal Highway Administration Manual on Uniform Traffic Control Devices (MUTCD), which is specifically adopted as the standard in the Montana Code Annotated. The repeal deletes repetitions language.

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