

## 1 SENATE BILL NO. 201

2 INTRODUCED BY E. WALKER

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4 A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THAT A SMALL BUSINESS IMPACT ANALYSIS BE  
5 CONDUCTED PRIOR TO THE ADOPTION OF AN ADMINISTRATIVE RULE; DEFINING "SMALL BUSINESS";  
6 REQUIRING THAT SMALL BUSINESS IMPACT ANALYSES BE MADE AVAILABLE TO THE PUBLIC;  
7 REQUIRING AGENCIES TO PROVIDE A COPY OF EACH SMALL BUSINESS IMPACT ANALYSIS TO THE  
8 APPROPRIATE RULE REVIEW COMMITTEE; REVISING CERTAIN PROCESSES FOR JUDICIAL REVIEW  
9 OF ADMINISTRATIVE RULES; AMENDING SECTIONS 2-4-102, 2-4-103, 2-4-110, 2-4-406, AND 2-4-506, MCA;  
10 AND PROVIDING AN EFFECTIVE DATE."

11

12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

13

14 NEW SECTION. **Section 1. Small business impact analysis -- assistance.** (1) Prior to the adoption  
15 of a proposed rule, the agency that has proposed the rule shall determine if the rule will adversely impact small  
16 businesses. If the agency determines that the proposed rule will not adversely impact small businesses, the  
17 determination must be published in the register when the proposed rule is published. If the agency determines  
18 that the proposed rule may have an adverse impact on small businesses, the agency shall prepare a small  
19 business impact analysis that, at a minimum, must:

20 (a) identify small businesses probably affected by the proposed rule;

21 (b) include a statement of the probable adverse effects of the proposed rule on the small businesses  
22 identified in subsection (1)(a); and23 (c) include a description of any alternative methods that may be reasonably implemented to minimize  
24 or eliminate adverse effects described in subsection (1)(b), while still achieving the purpose of the proposed rule.25 (2) The agency shall provide documentation for the estimates, statements, and descriptions required  
26 under subsection (1).

27

28 NEW SECTION. **Section 2. Notification -- small business impact analysis -- assistance.** (1) After  
29 completing the small business impact analysis required by [section 1] and before adopting a proposed rule that  
30 the agency has concluded may have an adverse impact on a small business, the agency shall notify the

1 appropriate administrative rule review committee of the agency's intent to adopt the proposed rule and provide  
2 to the committee a copy of the small business impact analysis required by [section 1].

3 (2) The office of economic development, established in 2-15-218, shall advise and assist agencies in  
4 complying with [section 1] and this section.

5

6 **Section 3.** Section 2-4-102, MCA, is amended to read:

7 **"2-4-102. Definitions.** For purposes of this chapter, the following definitions apply:

8 (1) "Administrative rule review committee" or "committee" means the appropriate committee assigned  
9 subject matter jurisdiction in Title 5, chapter 5, part 2.

10 (2) (a) "Agency" means an agency, as defined in 2-3-102, of state government, except that the provisions  
11 of this chapter do not apply to the following:

12 (i) the state board of pardons and parole, except that the board is subject to the requirements of 2-4-103,  
13 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the ARM and the register;

14 (ii) the supervision and administration of a penal institution with regard to the institutional supervision,  
15 custody, control, care, or treatment of youth or prisoners;

16 (iii) the board of regents and the Montana university system;

17 (iv) the financing, construction, and maintenance of public works;

18 (v) the public service commission when conducting arbitration proceedings pursuant to 47 U.S.C. 252  
19 and 69-3-837.

20 (b) The term does not include a school district, a unit of local government, or any other political  
21 subdivision of the state.

22 (3) "ARM" means the Administrative Rules of Montana.

23 (4) "Contested case" means a proceeding before an agency in which a determination of legal rights,  
24 duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes  
25 but is not restricted to ratemaking, price fixing, and licensing.

26 (5) (a) "Interested person" means a person who has expressed to the agency an interest concerning  
27 agency actions under this chapter and has requested to be placed on the agency's list of interested persons as  
28 to matters of which the person desires to be given notice.

29 (b) The term does not extend to contested cases.

30 (6) "License" includes the whole or part of an agency permit, certificate, approval, registration, charter,

1 or other form of permission required by law but does not include a license required solely for revenue purposes.

2 (7) "Licensing" includes an agency process respecting the grant, denial, renewal, revocation,  
3 suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.

4 (8) "Party" means a person named or admitted as a party or properly seeking and entitled as of right to  
5 be admitted as a party, but this chapter may not be construed to prevent an agency from admitting any person  
6 as a party for limited purposes.

7 (9) "Person" means an individual, partnership, corporation, association, governmental subdivision,  
8 agency, or public organization of any character.

9 (10) "Register" means the Montana Administrative Register.

10 (11) (a) "Rule" means each agency regulation, standard, or statement of general applicability that  
11 implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice  
12 requirements of an agency. The term includes the amendment or repeal of a prior rule.

13 (b) The term does not include:

14 (i) statements concerning only the internal management of an agency or state government and not  
15 affecting private rights or procedures available to the public, including rules implementing the state personnel  
16 classification plan, the state wage and salary plan, or the statewide accounting, budgeting, and human resource  
17 system;

18 (ii) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;

19 (iii) rules relating to the use of public works, facilities, streets, and highways when the substance of the  
20 rules is indicated to the public by means of signs or signals;

21 (iv) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when there is  
22 a statutory requirement for the publication of the rules and rules adopted annually or biennially relating to the  
23 seasonal recreational use of lands and waters owned or controlled by the state when the substance of the rules  
24 is indicated to the public by means of signs or signals; or

25 (v) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in  
26 accordance with 2-4-306 and must be published in the ARM.

27 (12) (a) "Significant interest to the public" means agency actions under this chapter regarding matters  
28 that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial  
29 fiscal impact to or controversy involving a particular class or group of individuals.

30 (b) The term does not extend to contested cases.

1           (13) "Small business" means a business entity, including its affiliates, that is independently owned and  
 2 operated and that employs fewer than 50 full-time employees.

3           ~~(13)~~(14) "Substantive rules" are either:

4           (a) legislative rules, which if adopted in accordance with this chapter and under expressly delegated  
 5 authority to promulgate rules to implement a statute have the force of law and when not so adopted are invalid;  
 6 or

7           (b) adjective or interpretive rules, which may be adopted in accordance with this chapter and under  
 8 express or implied authority to codify an interpretation of a statute. The interpretation lacks the force of law."  
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10           **Section 4.** Section 2-4-103, MCA, is amended to read:

11           **"2-4-103. Rules, and statements, and information to be made available to public.** (1) Each agency  
 12 shall:

13           (a) make available for public inspection all rules, all small business impact analyses, and all other written  
 14 statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its  
 15 functions;

16           (b) upon request of any person, provide a copy of any rule.

17           (2) Unless otherwise provided by statute, an agency may require the payment of the cost of providing  
 18 ~~such~~ copies.

19           (3) ~~No~~ An agency rule is not valid or effective against any person or party whose rights have been  
 20 substantially prejudiced by an agency's failure to comply with the public inspection requirement ~~herein~~ provided  
 21 in this section."  
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23           **Section 5.** Section 2-4-110, MCA, is amended to read:

24           **"2-4-110. Departmental review of rule notices and small business impact analyses.** (1) The head  
 25 of each department of the executive branch shall appoint an existing attorney, paralegal, or other qualified person  
 26 from that department to review each departmental rule proposal notice, adoption notice, or other notice and each  
 27 small business impact analysis relating to administrative rulemaking. Notice of the name of the person appointed  
 28 under this subsection and of any successor must be given to the secretary of state and the appropriate  
 29 administrative rule review committee within 10 days of the appointment.

30           (2) The person appointed under subsection (1) shall review each notice and small business impact

1 analysis by any division, bureau, or other unit of the department, including units attached to the department for  
 2 administrative purposes only under 2-15-121, for compliance with this chapter before the notice is filed with the  
 3 secretary of state or before the small business impact analysis is provided to the appropriate administrative rule  
 4 review committee. The reviewer shall pay particular attention to 2-4-302 and 2-4-305. The review must include  
 5 but is not limited to consideration of:

6 (a) the adequacy of the statement of reasonable necessity for the intended action and whether the  
 7 intended action is reasonably necessary to effectuate the purpose of the code section or sections implemented;

8 (b) whether the proper statutory authority for the rule is cited;

9 (c) whether the citation of the code section or sections implemented is correct;

10 (d) whether the intended action is contrary to the code section or sections implemented or to other law;

11 **and**

12 (e) for a rule that initially implements legislation, whether the intended action is contrary to any comments  
 13 submitted to the department by the primary sponsor of the legislation for the purposes of 2-4-302; and

14 (f) the adequacy of the small business impact analysis.

15 (3) The person appointed under subsection (1) shall sign each notice for which this section requires a  
 16 review. The act of signing is an affirmation that the review required by this section has been performed to the best  
 17 of the reviewer's ability. The secretary of state may not accept for filing a notice that does not have the signature  
 18 required by this section."

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20 **Section 6.** Section 2-4-406, MCA, is amended to read:

21 **"2-4-406. Committee objection to violation of authority for rule -- effect.** (1) If the appropriate  
 22 administrative rule review committee objects to all or some portion of a proposed or adopted rule because the  
 23 committee considers it not to have been proposed or adopted in substantial compliance with [section 1], 2-4-302,  
 24 2-4-303, and 2-4-305, the committee shall send a written objection to the agency that promulgated the rule. The  
 25 objection must contain a concise statement of the committee's reasons for its action.

26 (2) Within 14 days after the mailing of a committee objection to a rule, the agency promulgating the rule  
 27 shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify  
 28 its objection.

29 (3) If the committee fails to withdraw or substantially modify its objection to a rule, it may vote to send  
 30 the objection to the secretary of state, who shall, upon receipt of the objection, publish the objection in the register

1 adjacent to any notice of adoption of the rule and in the ARM adjacent to the rule, provided an agency response  
 2 must also be published if requested by the agency. Costs of publication of the objection and the agency response  
 3 must be paid by the committee.

4 (4) If an objection to all or a portion of a rule has been published pursuant to subsection (3), the agency  
 5 bears the burden, in any action challenging the legality of the rule or portion of a rule objected to by the  
 6 committee, of proving that the rule or portion of the rule objected to was adopted in substantial compliance with  
 7 [section 1], 2-4-302, 2-4-303, and 2-4-305. If a rule is invalidated by court judgment because the agency failed  
 8 to meet its burden of proof imposed by this subsection and the court finds that the rule was adopted in arbitrary  
 9 and capricious disregard for the purposes of the authorizing statute, the court may award costs and reasonable  
 10 attorney fees against the agency."

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12 **Section 7.** Section 2-4-506, MCA, is amended to read:

13 **"2-4-506. Declaratory judgments on validity or application of rules.** (1) A rule may be declared  
 14 invalid or inapplicable in an action filed in district court for declaratory judgment if ~~it is found~~ the court finds that  
 15 the rule or its threatened application interferes with or impairs or threatens to interfere with or impair the legal  
 16 rights or privileges of the plaintiff.

17 (2) A rule may also be declared invalid in the declaratory judgment action on the grounds that the rule  
 18 was adopted:

19 (a) with an arbitrary or capricious disregard for the purpose of the authorizing statute as evidenced by  
 20 documented legislative intent; or

21 (b) in violation of [section 1].

22 (3) An action filed for an alleged violation of [section 1] must be filed within 1 year after the adoption of  
 23 the rule that is the basis of the allegation.

24 ~~(3)~~(4) A declaratory judgment may be rendered whether or not the plaintiff has requested the agency  
 25 to pass upon the validity or applicability of the rule in question.

26 ~~(4)~~(5) The action may be brought in the district court for the county in which the plaintiff resides or has  
 27 a principal place of business or in which the agency maintains its principal office. The agency must be made a  
 28 party to the action."

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30 NEW SECTION. **Section 8. Saving clause.** [This act] does not affect rights and duties that matured,

1 penalties that were incurred, or proceedings that were begun before [the effective date of this act].

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3 NEW SECTION. **Section 9. Codification instruction.** [Sections 1 and 2] are intended to be codified  
4 as an integral part of Title 2, chapter 4, part 1, and the provisions of Title 2, chapter 4, part 1, apply to [sections  
5 1 and 2].

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7 NEW SECTION. **Section 10. Effective date.** [This act] is effective July 1, 2011.

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