



Economic Affairs Interim Committee
63rd Montana Legislature

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June 10, 2013

TO: Economic Affairs Interim Committee Members
FROM: Bart Campbell, Staff Attorney *BTC*
RE: Overview of Rulemaking and Administrative Rule Activity

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Register (MAR), which is a twice-monthly publication containing all proposed new, transferred, amended, and repealed rules as well as adopted rule changes.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.

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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 and EAIC Rules:

- 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.

- b. The Economic Affairs Committee's rule review oversight was expanded by House Bill No. 41, which was enacted as Chapter 19, Laws of 2013, and became effective Feb. 18, 2013. House Bill No. 41 includes the Division of Banking and Financial Institutions provided for in 32-1-211, MCA, under the monitoring responsibilities of the Economic Affairs Committee. The Division of Banking and Financial Institutions is within the Department of Administration, which is monitored by the State Administration and Veterans' Affairs Committee, so until House Bill No. 41 was enacted, the Division of Banking and Financial Institutions was by default monitored by the State Administration and Veterans' Affairs Committee.

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