



Revenue and Transportation Interim Committee

65th Montana Legislature

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JARET COLES, Staff Attorney
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TO: Committee Members

FROM: Jaret Coles, Staff Attorney

RE: Overview of Rulemaking and Administrative Rule Activity

DATE: June 8, 2017

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Register](#) (MAR), which is a twice-monthly publication containing all proposed new, transferred, amended, and repealed rules as well as adopted rule changes.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.
 - 2017 Legislation: [House Bill No. 16](#) (effective February 13, 2017) reassigned administrative rule review functions regarding administration of the Montana

Alcoholic Beverage Code to the Economic Affairs Interim Committee. Consequently, the Revenue and Transportation Interim Committee will no longer review Department of Revenue administrative rules that pertain to this subject area.

- d. Section [5-11-106](#), 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 the 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) on the following:
 - (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 approximately 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 3g 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 writes 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 to 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 ([2-4-302](#) and [2-4-305](#), MCA) by:
 - (1) writing or e-mailing agency, as provided in 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).

Department of Revenue

Proposal and Adoption Notices are available on the Internet:

Department of Revenue 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 "42" in the "Search by Notice No." box and click on the "Go" icon.

Notice of Proposed Rules:

Retail Telecommunications Excise Tax -- Federal Preemption -- Taxation of Internet Revenue. MAR 42-2-970. No public hearing is contemplated and the public comment period ends July 7, 2017. The Department proposes to repeal two rules. The rules provide for the taxation of internet revenue in the event that no federal law prohibits the taxation of internet revenue. In 2016, the U.S. Congress amended federal law to permanently prohibit state and local taxation on internet access. As such, the Department's reasonable necessity statement states that the rule is no longer necessary.

Adopted After RTIC Adjourned -- Not Reviewed by Committee:

Housekeeping -- Property Tax Administration -- Alternative Business Office Hours in Pondera County Stricken. MAR 42-2-969. Adopted March 13, 2017. No public comments were received and one rule was amended as proposed. The Department's local office in Pondera County is now open full time, as opposed to 8 a.m. to 12 noon Monday through Thursday and 8 a.m. to 5 p.m. Friday. Consequently, the alternative business office hours for Pondera County are no longer required in rule.

Notice of Adopted Rules -- Brought in Front of Committee at November 2016 Meeting:

Property Tax -- Golf Course Valuation. MAR 42-2-959. Adopted November 14, 2016. A public hearing was held and multiple public comments were received. The Department adopted one rule after taking public comment into consideration.

The new rule describes the appraisal methodology that is utilized for valuing golf courses, which includes potential use of the income, sales comparison, and cost approaches depending on the data that is available. Taxpayers that own or operate a golf course are required to submit yearly gross income statements from all aspects of the golf course operation, including but not limited to green fees, cart rentals, and food and beverages. If a taxpayer fails to provide the yearly gross income information, it will be estimated by the Department and the taxpayer will not receive a reduction in the estimated value.

Staff Note: Section 15-6-134, MCA, provides "all golf courses, including land and improvements actually and necessarily used for that purpose, that consist of at least nine holes and not less than 700 lineal yards" are taxed at one-half the tax rate for commercial property (i.e., class four property). *See* section 15-6-134(4), MCA.

Corporate Income Tax -- Senate Bill No. 361 (2013). MAR 42-2-960. Adopted November 14, 2016. A public hearing was held, no one attended the hearing, and written public comments were received from three individuals. The Department amended and repealed the rules as proposed.

Some of the amendments were housekeeping in nature in order to fully implement [Senate Bill No. 361](#) (2013), which changed the name of the "corporate license tax" to the "corporate income tax". Additionally, the Department eliminated outdated language.

The Department also clarified what it refers to as "long-standing" practices of the Department, including amendments: (1) that define what a taxpayer with a change in federal taxable income or in the federal return needs to file regarding a Montana income tax return and the timelines in which the actions need to occur; (2) pertaining to filing requirements for inactive corporations; (3) that detail the requirements for obtaining a certificate of dissolution or withdrawal or a certificate of tax clearance from the Department; (4) regarding refund claims made after the statute of limitations expires; (5) pertaining to how conversion of a corporate entity to a disregarded entity (sole proprietorship, partnership, or S corporation) will affect net operating losses incurred prior to the conversion; (6) describing how to calculate and apply net operating losses when there is a change in reporting method.

The amendments add definitions for "costs of performance" and "income-producing activity" that according to the Department are effectively the definitions proposed by the Multistate Tax Commission. These definitions are used in the sales apportionment factor calculation, and therefore affect multistate corporations. According to the Department's reasonable necessity statement, the purpose of the definitions is "to provide additional guidance for corporate taxpayers who are reporting sales other than sales of tangible personal property in the sales apportionment factor".

Three of the amendments relate to the water's edge election. These amendments: (1) provide that a corporation cannot choose to file as a water's edge corporation retroactively; (2) provide corporations that are part of a group and that are doing business in Montana are included in the water's edge group; (3) clarifies what happens when a non-water's edge taxpayer is acquired by an entity not previously taxable in Montana and also clarifies what happens in the acquisition of a foreign entity by a Montana taxpayer that has not previously owned foreign entities.

One of the amendments removes the shipment of goods into Montana as a condition for taxable nexus (*i.e.*, when a multistate corporation's income is taxable in Montana), which, according to the reasonable necessity statement, makes the language "consistent with that used by the Multistate Tax Commission in its uniformity guidelines."

Property Tax -- Property Reappraisal -- Senate Bill No. 157 (2015). MAR 42-2-964. Adopted November 28, 2016. A public hearing was held, no one appeared at the hearing, and one written statement in support of an amendment was received. The Department adopted one new rule, amended four rules, and repealed one rule pertaining to property reappraisal. The new rule is similar to an existing rule, but agricultural property is separated from forest lands based on changes that were made by [Senate Bill No. 157 \(2015\)](#). With agricultural property now on a two-year cycle, the new rule provides a high-level overview of the agricultural appraisal process. One of the amended rules corresponds with the new rule by eliminating language regarding the agricultural appraisal process from a rule that provides a high-level overview of the forest lands appraisal process. Additionally, the proposed amendments adopt the reappraisal plan and manuals that are utilized in the next cycle for residential, commercial, industrial, and agricultural property.

Property Tax -- Trended Depreciation Schedules for Valuing Property. MAR 42-2-965. Adopted November 28, 2016. A public hearing was held and no testimony or comments were received. The Department amended 11 rules regarding various tables that are updated on an annual basis through Department rules as proposed. 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, locally assessed cable television systems, ski lift equipment, and industrial machinery and equipment (including the recent addition of solar energy generating equipment).

Property Tax -- Agricultural Land Valuation. MAR 42-2-966. Adopted November 28, 2016. A public hearing was held and no testimony or comments were received. The Department amended six rules as proposed. Five of the amendments were housekeeping in nature, as the proposals eliminated language regarding the 2015 agricultural reappraisal cycle. The sixth amendment updated: (1) commodity prices with the most current agricultural statistics; (2) the minimum value of irrigated land based on the new commodity price; (3) the highest productivity of nonirrigated continuously cropped farmland; and (4) the minimum carrying capacity for grazing land to be eligible for agricultural land and determined by the Montana State University College of Agriculture.

Department of Transportation

Proposal and Adoption Notices are available on the Internet:

Department of Transportation 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 Safety Requirements. MAR 18-162. No public hearing is contemplated and the public comment period ends June 9, 2017. The Department of Transportation proposes to amend three rules. The rules update incorporation by reference dates to federal motor carrier safety regulations and federal hazardous materials regulations from the 2015 versions to the 2017 versions. Additionally, incorporation by reference dates to the CVSA North American out-of-service criteria is updated by referencing material in the 2017 manual, as opposed to the 2016 manual. The CVSA North American out-of-service criteria is a standard used by a safety inspectors in the U.S., Canada, and Mexico to inspect commercial vehicles and drivers.

Adopted After RTIC Adjourned -- Not Reviewed by Committee:

None.

Notice of Adopted Rules -- Brought in Front of Committee at November 2016 Meeting:

None.

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