



Law and Justice Interim Committee

66th Montana Legislature

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TO: Committee Members

FROM: Julianne Burkhardt, Staff Attorney

RE: Overview of Rulemaking and Administrative Rule Activity

DATE: June 26, 2019

Rulemaking and Powers of Rule Review Committees and Individual Members

1. General concepts:

- a. What is a rule? The [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? The 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Register](#) (MAR), which is a twice-monthly publication containing all proposed new, transferred, amended, and repealed rules as well as adopted rule changes.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 Interim Committee.
 - 2019 Legislation: [Senate Bill No. 226](#) split the former Revenue and

Transportation Interim Committee into the Revenue Interim Committee and the Transportation Interim Committee. Consequently, the unlike the former Revenue and Transportation Interim Committee, the Revenue Interim Committee does not review Montana Department of Transportation rules.

- 2017 Legislation: [House Bill No. 16](#) reassigned administrative rule review functions regarding administration of the Montana Alcoholic Beverage Code to the Economic Affairs Interim Committee. Consequently, the Revenue Interim Committee does not 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 or a portion of the proposed rules in order to delay adoption of all or a portion of the rule by an agency (2-4-305(9), MCA -- amended by [Senate Bill No. 72](#) (2019)).
 - (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 all or a portion of the proposed rule in order to potentially delay adoption of all or a portion of the 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 objected portion 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).

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