



Montana Legislative Services Division
Legal Services Office

TO: State Administration and Veterans' Affairs Interim Committee

FROM: K. Virginia Aldrich

DATE: April 9, 2020

RE: Legislative Administrative Rule Review Report

Pursuant to 5-5-228, MCA, the State Administration and Veterans' Affairs Interim Committee is responsible for reviewing administrative rules within its jurisdiction. Staff for the State Administration and Veterans' Affairs Interim Committee has prepared this report for informational purposes only. This report does not represent any action or opinion of the State Administration and Veterans' Affairs Interim Committee and does not preclude additional action that may be taken by the State Administration and Veterans' Affairs Interim Committee pursuant to its authority under the Montana Administrative Procedure Act (Title 2, chapter 4, MCA).

MAR NOTICE NUMBER: 44-2-238

AGENCY/BOARD: Secretary of State

RULE CLASSIFICATION: (e.g. substantive/interpretive/emergency/temporary): Emergency

SUBJECT: Electronic Notary Stamps

NOTICE DESCRIPTION: (e.g. proposal notice/adoption notice): Notice of Adoption of Emergency Rule

SUMMARY OF RULE(S): The Secretary of State has adopted an emergency rule pertaining to electronic notary stamps. In the adoption notice, the Secretary of State noted that the COVID-19 pandemic may prevent in-person notarization due to social distancing and noted that it was important to ensure public access to notarization. In addition, the Secretary of State provided the following rationale:

The Secretary of State is adopting the following emergency rule because of the sudden and unexpected need for remote online notarizations (RON) due to the COVID-19 crisis. Unprecedented demand has been placed on the approved providers of RON platforms to onboard qualified Montana notary applicants for technology-based notarial services as quickly as possible. Montana has unique requirements for the electronic notary seal/stamp that impose significant developmental time on the part of the platform providers. This will significantly delay the ability of the RON notary applicants to begin offering remote notary services to the people of Montana. RON is an excellent and appropriate way to provide legal and safe notarial services without endangering the health and safety of either the principal or the notary since the required personal appearance is

achieved through communication technology as described in 1-5-602(2)(b), MCA.

Under section 2-4-303, MCA, an agency may adopt an emergency rule if the agency finds that "an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 30 days' notice", and it must state its reasons in writing. It may proceed "without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable." *Id.* The Secretary of State's notice states the emergency rule is effective April 8, 2020, and it is dated April 8, 2020. As provided by statute, a rule is adopted "on the date that the adoption notice is filed with the secretary of state and is effective . . . immediately upon filing with the secretary of state if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare." Section 2-4-306, MCA. Nevertheless, an emergency rule may only be adopted "upon special notice filed with the committee." It does not appear that Committee leadership or staff were made aware of the emergency rule until the morning of April 9, 2020.

The notice states that the rule is an emergency rule and provides that it is effective April 8, 2020. Emergency rules may not be effective for a period of longer than 120 days, although an agency may adopt a duplicate, substantive rule using the regular Montana Administrative Procedure Act (MAPA) procedures to extend the rule's authority. *See* section 2-4-303, MCA.

The emergency rule procedure outlined in MAPA allows an agency to adopt a rule without following the normal notice and public comment procedures. However, the emergency rule procedure does not alter or suspend other statutory requirements. MAPA specifically requires that each adopted, substantive rule must be "consistent and not in conflict with the statute". Section 2-4-305, MCA.

The text of the newly adopted rule provides:

NEW RULE I OFFICIAL STAMP (1) An electronic image of the official stamp of a notary public authorized to perform remote or remote online notarizations **may be different in size, format, content, or border design** as long as it is reasonably consistent with the official notary stamp requirements of ARM 44.15.107 and the Secretary of State's office has been notified of the discrepancy.

AUTH: 1-5-628, MCA

IMP: 1-5-616(2), MCA

Emphasis added.

The statute implemented by the rule provides that:

The official stamp of a notary public must:

...

(c) if an electronic image, **be the same format**, color, **content**, and approximate size **as the tangible official stamp** and capable of being copied together with the record to which the official stamp is affixed or attached or with which the official stamp is logically associated.

The wording of the implemented statute and the emergency rule directly conflict. In the notice, the Secretary of State has not identified any authority allowing the Secretary of State to override statute by rule, emergency or otherwise. While there are situations where certain statutes may be overridden in times of emergency (see, e.g. the Governor's authority under 10-3-104(2)(a)), the Secretary of State has not cited any authority providing that the provisions of Section 1-5-616, MCA, have been suspended due to the current COVID-19 pandemic.

The consolidated timeline of emergency rules do not present a committee with the same opportunities to object to an adopted rule as it has with a proposed rule. However, a committee may object to an adopted rule under the procedure outlined in section 2-4-406, MCA, if it is not adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, MCA. The end result of the objection procedure outlined in section 2-4-406, MCA, is that the agency would bear the burden in any legal actions challenging the legality of the rule of proving that the rule or portion of the rule objected to was adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, MCA.

NOTES: A public hearing will not be held. There is no public comment period.

FULL TEXT OF NOTICE: The full text of the notice may be found online at <https://sosmt.gov/download/620/2020/41817/emergency-rule-44-2-238.pdf>.

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