



State Administration and Veterans' Affairs Interim Committee

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67th Montana Legislature

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TO: Committee Members

FROM: K. Virginia Aldrich, Staff Attorney

RE: Overview of Rulemaking and Administrative Rule Activity

DATE: June 14, 2021

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Register](#) (MAR), which is a twice-monthly publication containing all proposed new, transferred, amended, and repealed rules as well as adopted rule changes.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 [5-5-228](#), MCA -- specific rulemaking review authority of State Administration and Veterans' Affairs Interim Committee.

- 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 a 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 the Montana Administrative Register (MAR): proposal notice and adoption notice. The notice format is specified by the Secretary of State's rules ([2-4-306](#), MCA). At the time the proposal notice is sent for preparation for publication to the Secretary of State for publication in the register, the agency must concurrently send the proposal notice to each member of the staff of the appropriate rule review committee ([Ch. 519, L. 2021](#)).
- 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 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) -- notice to committee required ([Ch. 199, L. 2021](#)).
 - (7) rules cannot be adopted between October 1 and the end of the year in the year preceding the year in which the Legislature meets in regular session -- exceptions ([Ch. 519, L. 2021](#)).
- 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 will be brought to committee's attention at every meeting and sometimes by e-mail between meetings if the situation warrants. Adoptions will be noted on the committee website.
- i. After a 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. Tiebreaking votes -- the Speaker of the House and the President of the Senate are ex officio voting members of each administrative rule review committee for the sole purpose of breaking a tie vote on a question before a committee involving an objection to an administrative rule ([Ch. 102, L. 2021](#)).
- c. 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 (may object to all or a portion of a notice of proposed rulemaking) 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 4c earlier).

Department of Administration and administratively attached entities, including public employee retirement plans*

Proposal and Adoption Notices are available on the Internet at:

<https://doa.mt.gov/AdministrativeRules>

*SAVA reviews rules for the Department of Administration except for (1) the State Compensation Insurance Fund provided for in [39-71-2313](#), MCA; (2) the Office of the State Public Defender; and (3) the Division of Banking and Financial Institutions. Oversight for those entities is statutorily delegated to other interim committees.

Notice of Proposed Rules:

[Adoption of a State Plan of Operation for Federal Surplus Property, MAR 2-11-614](#): The Department of Administration ("department") proposes to amend one rule to adopt the most recent revisions to the "Federal Surplus Property Program Montana State Plan of Operation" ("Plan of Operation"). The current rules adopted the previous version of the Plan of Operation by reference, and any revisions to the document require the updated document to also be adopted by reference. The proposed revisions remove certain appendixes from the plan containing certain applications for the surplus property program that require the department to seek federal General Services Administration (GSA) approval. According to the notice, GSA recommended the change, and the department states that leaving the current forms in place would "increase the administrative burden on both GSA and the department" if the department needed to amend the application forms. The proposed revisions also update citations, modify terminology to match statutory terminology, and make minor clarifications in grammar and style. No hearing is contemplated, and the public comment period ended May 17, 2021.

Adopted Rules – Reviewed by Committee Prior to Adoption:

[Next Generation 9-1-1 Technology Standards and Baseline Principles, MAR 2-13-605](#): The Department of Administration adopted one new rule relating to next generation 9-1-1 technology standards and baseline principles. The rule adopted two documents by reference. The first document adopted by reference establishes standards to be used in the design and transition to next generation 9-1-1. This document adopts standards and information documents issued by working groups through the National Emergency Number Association (NENA), including, in some cases, documents developed in collaboration with the Association of Public-Safety Communications Officials (APCO) International Standards Development Committee. The second document adopted by reference provides principles to help guide development and implementation of a next generation "core services system (NGCS) and a statewide emergency services Internet protocol (IP) network (ESInet) that is compliant with the National Emergency Numbers Association's (NENA) Detailed Functional and Interface Standards for the NENA i3 Solution." Due to technical errors with retrieving the links, the Department re-noticed the proposal with updated links on October 23, 2020, and extended the public comment period to November 20, 2020. A public hearing was held; no comments or testimony were received. The department adopted the proposal on December 11, 2020.

Adopted Rules – Not Reviewed by Committee Prior to Adoption:

[Investment Policy Statements for the Defined Contribution Retirement Plan, the Montana Fixed Fund, and the 457\(b\) Deferred Compensation Plan, MAR 2-43-611](#): The Public Employees' Retirement Board ("board") adopted two rules updating the investment policy statements for the defined contribution plan and the Montana 457 plan and the fixed fund investment policy statement. The original documents were adopted by reference, and any revisions to the documents must be adopted by reference as well. The board reviews and updates these policies annually. In the revisions to the investment policy statement for both the 401(a) Defined Contribution Retirement Plan and the 457(b) Deferred Compensation Plan, the changes delete superfluous information, combine the small and mid-cap investment categories, and separate the quantitative measure criteria for actively managed investment

alternatives and passively managed investment alternatives. Changes to the Fixed Fund Investment Policy Statement provide a stated investment objective, provide additional details concerning performance evaluations of funds, clarify that the selection of a Stable Value Manager must be consistent with the investment selection guidelines detailed in the investment policy statements of the plans, and reorder the document provisions for clarity. Redlines of the documents' changes are available [here](#). A public hearing was not contemplated. The public comment period ended March 29, 2021. No comments or testimony were received. The board adopted the proposal on April 30, 2021.

Department of Military Affairs

Department of Military Affairs 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 "34" in the "Search by Notice No." box and click on the "Go" icon.

No Proposed Rules or Amended Rules

Office of the Secretary of State and administratively attached entities, including Commissioner of Political Practices

Secretary of State notices can be found on the Secretary of State's website at <https://sosmt.gov/arm/secretary-of-state-administrative-rules/>

Notice of Proposed Rules:

[Clarification of Business Services Division Filings and Fees, MAR 44-2-242](#): The Secretary of State proposes to amend two rules setting certain fees for corporations and limited liability companies. The proposed changes raise the additional fee for each year of a business entity's delinquent annual filings to \$35 from \$30. The Secretary of State notes that separate administrative rules set the fee for an annual report filed after the filing date of April 15 at \$35, and the change will "correct the internal inconsistencies within the rules." Because fees filed after April 15 are currently charged \$35, the Secretary of State notes that "the proposed changes will not have a fiscal impact." A public hearing was held on June 4, 2021, and the public comment period ended on June 11, 2021.

[Records and Information Management Fees, MAR 44-2-243](#): The Secretary of State proposes to repeal six rules related to fees concerning microfilm. After the passage and approval of Senate Bill 276, statute no longer requires the Secretary of State to operate a central microfilming unit or approve microfilm projects. Thus, "all fees listed and received by the Secretary of State's Office related to microfilming services and supplies are no longer relevant or required." The Secretary of State has determined that repeal of the microfilm fees "will not have a fiscal impact and no persons will be affected." The Secretary of State will hold a hearing on June 18, 2021, and the public comment period ends on June 25, 2021.

Adopted Rules – Reviewed by Committee Prior to Adoption:

[Payment Threshold -- Inflation Adjustment for Lobbyists, MAR 44-2-241](#): The Commissioner of Political Practices adopted one rule that amended the adjusted payment threshold for lobbying-related expenses. No testimony or comments were received. Section [5-7-112](#), MCA, instructs the Commissioner to routinely adjust the threshold amount following a general election. A public hearing was not contemplated, and the public comment period ended on December 18, 2020. No comments or testimony were received. The Commissioner adopted the rule as proposed on January 15, 2021.