



Revenue and Transportation Interim Committee

64th Montana Legislature

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TO: Committee Members

FROM: K. Virginia Aldrich, Staff Attorney

RE: Overview of Rulemaking and Administrative Rule Activity

DATE: August 7, 2015

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Register](#) (MAR), which is a twice-monthly publication containing all proposed new, transferred, amended, and repealed rules as well as adopted rule changes.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 [5-5-228](#), 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 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 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 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 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 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 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; 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:

Single Audit Act Reporting Fees for Local Governments, MAR 2-4-527: The Department of Administration proposes to amend one rule that increases the annual filing fees for local government entities based on their annual revenues. The fees under this rule fund costs incurred by the Department of Administration in the administration of the Single Audit Act under Title 2, chapter 7, part 5, MCA. The Department notes that the changes are required because of "[l]egislatively authorized funding changes and the implementation of a new computer application". The Department also notes that the working capital reserves have been depleted because expenditures have exceeded revenues, and the administrative fee is the only funding mechanism besides general fund appropriations to fill the estimated shortfall of \$261,000. The fee increases are estimated to affect 500 entities, generating an estimated \$262,100. No public hearing was contemplated, and the public comment period ended on July 23, 2015. For further information, please see the memo to the committee dated June 26, 2015.

Adopted Rules -- Not Reviewed by Committee:

Establishment of Long-Term Disability Trust Fund, MAR 2-43-525: Adopted June 15, 2015. The Montana Public Employees' Retirement Board amended one rule to allow the investment of Long-Term Disability Trust Funds in equities by the Montana Board of Investments. One public comment was received from Legislative Services legal staff, and the Public Employees' Retirement Administration amended the rule to include 19-2-504, MCA, as an implemented statute.

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**

Proposal and Adoption Notices are available on the Internet at:

<http://sos.mt.gov/ARM/notices/index.asp>

Notice of Proposed Rules:

Commissioner of Political Practices Rule Revisions and Proposals, MAR 44-2-207: The Commissioner of Political Practices has submitted a rule notice for publication that includes 12 new rules, 48 transfers and amendments of old rules, and the repeal of 5 rules. The notice will be published on August 13, 2015. A separate rule review on these proposals will be issued for the Committee as soon as possible.

Fees Charged by the Secretary of State, MAR 44-2-206: The Secretary of State proposes to amend one rule and adopt another rule concerning fees.

The new rule provides that fees charged by the Secretary of State must be collected in advance and are nonrefundable except in specific circumstances. The rule cites 2-15-405, MCA, both as the statute granting the authority for the rule and as the statute implemented by the rule. Section 2-15-405, MCA, lays out requirements for any fees adopted by the Secretary of State, such as requiring fees to be set by administrative rule, prescribing requirements for how to set the fees, requiring records to support the cost of the fees, and specifying that the fees be deposited to an enterprise fund. Section 2-15-405, MCA, does not discuss either the refundability or nonrefundability of fees. The section does require that fees "authorized by law" must be set by administrative rule; however, in this instance, the Secretary of State has not specified any authorization for the rule other than this section, which does not directly address refundability of fees.

The Secretary of State's office did propose amendments to this section in HB 55 (2015) to state that fees are not refundable, but that bill failed on third reading in the House of Representatives in the 2015 Legislative session. Subsequently, HB 123 (Ch. 348, L. 2015) [effective October 1, 2015], which generally revises and reorganizes public records laws, repealed 2-6-103, MCA, and renumbered several of its provisions. That section previously provided that public records filing and copying service fees "must be collected in advance and, when collected by the secretary of state, are not refundable." Notably, after the failure of HB 55, the subcommittee discussing amendments to HB 123 struck the provision concerning the nonrefundability of fees for public records for the Secretary of State from amendments for the bill rather than renumbering the provision. The Supreme Court has stated that "when the Legislature enacts or amends statutes, it is presumed to have acted with deliberation and with full knowledge of all existing laws relating to the subject addressed" (*Ross v. City of Great Falls*, 1998 MT 276, ¶24, 291 Mont. 377, 967 P.2d 1103). Here, the Legislature repealed the provision stating that certain fees charged by the Secretary of State are nonrefundable.

As provided in the Montana Administrative Procedure Act, "[t]o be effective, each substantive rule adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law", and an adoption of a rule "is not valid or effective unless it is . . . consistent and not in conflict with the statute; and . . . reasonably necessary to effectuate the purpose of the statute" (2-4-305, MCA). In the rule notice, the Secretary of State notes that the office has an enterprise fund structure, and the "rule is reasonably necessary based on the fact that the Secretary of State's office operates like a business and is funded by the fees it collects for the services it provides." However, because the statutes cited by the Secretary of State are silent on the nonrefundability of fees for purposes of authorizing the rule or for implementation purposes, it is not clear whether the rule sufficiently fulfills the mandates of 2-4-305, MCA.

In the same notice, the Secretary of State also proposes to amend one rule concerning fees for manual and online searches. The Secretary of State proposes to standardize all fees for principal and individual manual and online searches, and the proposed amendment exempts members of the Legislature or public officers for searches relative to the member's office. The provision relating to legislators and other public officers stems from a section previously codified at 2-6-103, MCA; the provision was recently moved to a new section of law by HB 123 (Ch. 348, L. 2015). The notice does not provide certain requirements for notices of fee increases or decreases. Specifically, a notice increasing or decreasing fees "must include an estimate, if known, of . . . the cumulative amount for all persons of the proposed increase, decrease, or new amount; and . . . the number of persons affected." Staff has been in contact with the Secretary of State's office concerning this issue, and the Secretary of State's office is working on a response.

Voting Accessibility for Electors With Disabilities - Montana Absent Uniformed Services and Overseas Voter Act, MAR 44-2-204: The Secretary of State proposes to amend two rules and adopt a new rule concerning voting accessibility for electors with disabilities and the Montana Absent Uniformed Services and Overseas Voter Act. For consistency with the requirements of Chapter 247, Laws of 2015, which allows electors with disabilities to electronically request a ballot, and to update certain procedures to ensure secrecy of uniformed service or overseas voter ballots, the proposed rule amendments update current rules concerning the procedures for alternative means of casting a ballot and electronic transmission of voting materials. In addition, the Secretary of State proposes to adopt a new rule concerning the electronic transmission of voting materials to electors with disabilities and providing procedures. A public hearing will be held on August 7, 2015, and the public comment period ends on August 14, 2015. For further information, please see the memo to the committee dated July 16, 2015.

Retention of Local Government Electronic Long-Term Records, MAR 44-2-205: The Secretary of State, after a recommendation by the Local Government Records Committee, proposes to amend one rule concerning storage requirements for electronically stored documents that are to be retained for more than 10 years. The proposed rule eliminates this requirement and adopts by reference the Association of Records Managers & Administrators International's Generally Accepted Recordkeeping Principles®. A public hearing will be held on August 6, 2015, and the public comment period ends on August 14, 2015. For further information, please see the memo to the committee dated July 16, 2015.

Secretary of State's Electronic Filing System - Filing of a Title 71 Lien - Requirements for Filing UC Amendments With the Business Services Division, MAR 44-2-202: The Secretary of State proposes to adopt a new rule concerning the Secretary of State's existing online statewide electronic filing system and proposes to amend four existing rules, including one that updates the filing requirements for a Title 71 lien if the lien is to appear on the farm bill master list to comply with federal law requirements; a rule that provides certain definitions and clarifies processes when using the existing SIMS filing system; amendments that clarify the effective date and time of filings delivered by mail, by hand, electronically, or by express service; and a rule that updates and consolidates many of the requirements for Uniform Commercial Code-specific amendments. A public hearing was held on July 9, 2015, and the public comment period ended on July 16, 2015. For further information, please see the memo to the committee dated June 26, 2015.

Adopted Rules -- Not Reviewed by Committee:

Payment Threshold -- Inflation Adjustments for Lobbyist, MAR 44-2-203: Adopted December 22, 2014, as proposed. The Commissioner of Political Practices adopted one rule that amended the adjusted payment threshold for lobbying-related expenses. No testimony or comments were received. Note: Statute (5-7-112, MCA) instructs the Commissioner to routinely adjust the threshold amount following a general election. No public hearing was contemplated, and the public comment period ended on December 18, 2014. For further information, please see the memo to the committee dated December 5, 2014.

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