



State Administration and Veterans' Affairs Interim Committee
65th Montana Legislature

SENATE MEMBERS

DEE BROWN
DOUG KARY
SUE MALEK
FRANK SMITH

HOUSE MEMBERS

DENISE HAYMAN
FORREST MANDEVILLE
WENDY MCKAMEY
KATHY SWANSON

COMMITTEE STAFF

SHERI SCURR, Lead Staff
K. VIRGINIA ALDRICH, Staff Attorney
KATYA GROVER, Secretary

TO: Committee Members

FROM: K. Virginia Aldrich, Staff Attorney

RE: Overview of Rulemaking and Administrative Rule Activity

DATE: July 9, 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Register](#) (MAR), which is a twice-monthly publication containing all proposed new, transferred, amended, and repealed rules as well as adopted rule changes.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 [5-5-228](#), 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:

Amendment of Rules Pertaining to Actuarial Rates and Assumptions and Service Purchases:

MAR 2-43-562: The Public Employee's Retirement Board (Board) is proposing to amend four rules. The proposed amendments update the current rule that adopts by reference the Board's actuarial rates and assumptions (Board Admin 09 Actuarial Valuation Assumptions and Methods) from a previous version to a version approved on June 8, 2017. Because the actuarial assumptions adopted under this rule do not apply to the Defined Contribution Plan, the Defined Contribution Plan was added to existing exclusionary language within the rule. The proposed amendments also delete a reference to a Board policy (Board Admin 10 Actuarial Equivalence Option Factor Determination) because it has been consolidated with Board Admin 9 Actuarial Valuation Assumptions "for easier reference and to avoid any further unnecessary policy duplication." In addition, the Board adopted demographic and economic assumption revisions to the revised policy. The significant changes include revisions of the universal and system-specific actuarial assumptions, and it includes a significant number of system-specific actuarially equivalent and actuarial cost factors adopted in table format. A redline of the full policy changes incorporated in Board Admin 9 is available online under meeting materials for the upcoming meeting.

Amendments to three additional rules concern purchase of service by inactive, vested members, purchase of full-time service or "one-for-five" service by part-time members, and purchase of "one-for-five" service by employers for reduction in force employees. Previously, the rules set a specific interest rate for employees depending on whether they terminated service or purchased the service before July 1, 2010. The proposed amendments for all three rules specify that interest will now be equal to the actuarially assumed rate of return for the trust fund in effect on the date of the member's termination or, for the purchase of full or "one-for-five" service by a part-time member, on the date of the member's purchase. The Board has adopted an actuarial rate of 7.65% interest effective July 1, 2017, and that rate would be applicable to the aforementioned service purchases. The proposed amendments allow the Board to adopt future rates applicable to service purchases without amending the rule each time the actuarial rate is updated. No hearing is contemplated, and the public comment period ends on July 21, 2017.

Amendment of Rules Concerning Investment Policy Statements for the Defined Contribution Retirement Plan and the 457 Deferred Compensation Plan: MAR 2-43-561: The Public Employee's Retirement Board (Board) is proposing to amend two rules. Both proposed amendments reflect the most current investment policy statements for the Defined Contribution Plan and the 457 Deferred Compensation Plan adopted by reference by the Board. Previously, both investment policy statements allowed investment alternatives that included active or passive fund management for bonds, and large, mid, and small-cap equities. However, the investment statements did not previously specify that international equities, global equities, combined equity and bond investments (balanced), and target date funds were also subject to active or passive management. The amendments clarify that all categories within the investment alternatives may include active or passive management options. In addition to appropriate benchmarks, the proposed amendments require investment funds to meet or exceed the performance of a benchmark or a peer group, rather than only a benchmark. The proposed amendments make further minor changes in style. No hearing is contemplated, and the public comment period ends on July 21, 2017.

Adopted Rules -- Not Reviewed by Committee:

Amendment of Rules Concerning General Provisions, Revocation or Suspension of License, and Prizes: MAR 2-63-548: Amended, effective November 26, 2016, as proposed. The State Lottery Commission amended three rules concerning lottery provisions. The first rule amended a general rule relating to the lottery's ability to provide scratch tickets and terminal-issued lottery games to the public when it is in the best interests of the state. The amendments allow terminal-issued lottery games and promotional coupons to also be provided to the public, and the starting and closing dates of the promotional coupons (in addition to the games) must be publically announced. The amendments require the Commission's concurrence for the Director of the State Lottery's decisions concerning the length of lottery games or promotional coupons and rules concerning promotional coupons. The changes in this rule update the rule's content to match the practice of the Lottery Commission, and they clarify that coupons must be handled in the "same manner as other lottery product offerings." Amendments to the second rule inserted additional provisions allowing for the revocation or suspension of a license, including accepting offers of compensation to claim a lottery prize by means of fraud, deceit, or misrepresentation or the intention to defraud a creditor, and amassing packs of scratch tickets or preprinting multiple terminal-issue draw games or raffle tickets to gain an advantage over other lottery sales locations in conjunction with financial benefit. The amendments allow a licensee who is an owner or partner of a location that is restricted, suspended, or terminated to have the restriction, suspension, or termination apply to all locations in which the owner or partner is associated. Lastly, in lieu of an amount determined by the Commission, the rule allows a retailer to redeem tickets valued up to \$600. Tickets valued greater than \$600 must be redeemed by presenting the ticket to the lottery. The rule specifies that playslip and sales receipts are not valid claim forms, and the rule specifies which methods of identification are sufficient to claim a lottery prize. The State Lottery Commission noted that several of these changes comported with recommendations made by the Legislative Audit Division. A public hearing was not contemplated, and the public comment period ended on October 21, 2016.

Amendment of Rule Pertaining to Prizes: MAR 2-63-556: Adopted, effective June 10, 2017 as proposed. The State Lottery Commission amended one rule concerning prizes. It amended the changes made in the previous notice, MAR 2-63-548, to ensure that a photo identification is required from the public for prizes over \$600, rather than the previous rule which could be "interpreted as [requiring] all winners [to] provide a photo identification to collect any prize regardless of the amount". The proposed change clarifies that a photo identification is required only for prizes that are valued as \$600 or more." A public hearing was not contemplated, and the public comment period ended on May 12, 2017.

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:

No Proposed Rules

Adopted Rules -- Memo Sent out for Committee Review Prior to Adoption:

Official Versions of the Administrative Rules of Montana and the Montana Administrative Register, MAR 44-2-225: Adopted, effective July 8, 2017, with amendments. The Secretary of State amended one rule and repealed one rule pertaining to the Administrative Rules of Montana (ARM) and the Montana Administrative Register (MAR). The Secretary of State amended one rule to comport with changes made by Chapter 80, L. 2017, which requires the Secretary of State to publish the ARM and MAR in a freely available electronic format and which eliminated the requirement to send the ARM and its supplements to certain entities without charge. The rule change allows the Secretary of State to discontinue the physical publication of the ARM and MAR, but the Secretary of State will continue to publish them online and make them freely available. Originally, the Secretary of State proposed that this be effective July 7, 2017, but

updated the effective date to July 8, 2017 in the adoption notice. The rule specifies that the electronic version is the official version for each publication and specifies the website location of each official online publication. The rule also updates the authority and implementation statutes and makes other minor changes in style. In addition, the Secretary of State published an amended notice stating that the original notice erroneously stated that the bill sponsor contacts did not apply and that the sponsor was contacted in person during April and again by phone on June 12, 2017. The Secretary of State repealed one rule that provided the ARM and MAR Internet locations and provided that the printed versions were the official versions. For more information, please see the memo to the committee dated June 12, 2017. A public hearing was held on June 15, 2017, and the public comment period ended on June 23, 2017.

Adopted Rules -- Not Reviewed by Committee:

Administrative Rules Service Fees, MAR 44-2-224: Adopted, effective May 31, 2017, as proposed. The Secretary of State amended one rule concerning fees for the publication of the Administrative Rules of Montana (ARM) and the Montana Administrative Register (MAR). Previously the rule provided that the Secretary of State would distribute copies of these the ARM and MAR free of charge to certain state entities and that the Secretary of State could make copies available to the public for a fixed price. The revisions, reflecting the changes made by Chapter 80, L. 2017, deleted these provisions and replaced them with a provision allowing the Secretary of State discretion to make both publications available in a printed format for purchase. The Secretary of State noted that while there was no fee change associated with the amendment, 38 entities currently received free yearly print copies of the MAR and ARM updates, and five additional entities currently receive free print copies of the ARM updates. If all of these entities chose to subscribe to print copies, the cumulative cost to the entities would be \$13,300 for the MAR and \$12,900 for the ARM. However, these documents are available online, so the cost to access those copies is \$0.

Fees Charged by the Secretary of State, MAR 44-2-223: Adopted, effective May 31, 2017, as proposed. The Secretary of State amended three rules concerning fees charged by the Records and Information Management Division. The fee for auto exposure was increased from \$.10 to \$.15 for 16 mm microfilm images. The fees for scanning were removed from ARM 44.14.301 and moved into ARM 44.14.312 and increased from \$.10 for 16 mm microfilm images to \$.15 per image. The Secretary of State noted that fee increases were "the result of a year-long cost analysis performed by Records and Information Management that resulted in the adjustment of fees so that the fees charged are commensurate with the overall costs of the office and reasonably reflect the prevailing rates charged in the public and private sectors for similar services." In addition, the Secretary of State inserted a new fee (\$.17/month) for 1/2 cubic foot storage in the state records center. This was "to correct an omission from a previous rule notice and to increase

the fee from \$.15 to \$.17". The Secretary of State also inserted a fee for entering each new box into the record center (\$.40/box). The Secretary of State noted that the cumulative amount of fee increases were approximately \$7,500 and that two state and local government agencies would be affected. A public hearing was held on May 18, 2017, and the public comment period ended on May 26, 2017.

Payment Threshold -- Inflation Adjustments for Lobbyist, MAR 44-2-222: Adopted, effective December 24, 2016, 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. Section 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 23, 2016.

CI0425 7191gafa.