



Montana Legislative Services Division
Legal Services Office

TO: State Administration and Veterans' Affairs Interim Committee

FROM: David S. Niss, Staff Attorney

RE: MAR Notice No. 44-2-147 (Amended Statement of Reasonable Necessity)

DATE: June 23, 2008

I
INTRODUCTION

On March 13, 2008, the Commissioner of Political Practices published a notice of proposed rulemaking, MAR Notice No. 44-2-143, proposing rules to implement the provisions of House Bill 462, concerning constituent services accounts. As a result of the regular staff review of the proposed rules, the staff concluded that the statement of reasonable necessity required by 2-4-305, MCA, was deficient and so informed the Commissioner of Political Practices and the HB 462 primary sponsor, Rep. Diane Sands. Rep. Sands subsequently asked the Commission not to adopt the rules with the deficient statement of reasonable necessity. Commissioner Unsworth has now published an amended notice of proposed rulemaking, MAR Notice No. 44-2-147, containing supplemented statements of reasonable necessity (attached).

II
DISCUSSION

a. Reason for the statement of reasonable necessity

The purpose of the requirement in MAPA for an agency to include a statement of reasonable necessity in its rulemaking notice is twofold: to demonstrate why the rules are "reasonably necessary" and to inform persons affected by the rules why the agency is taking the approach that it is in proposing the rules. The thinking behind the requirement is that if the public understands why an agency is proposing a rule, it will help the public in understanding the rule itself.

The statement of reasonable necessity is required to be published with the proposed rule itself in order to give the public an opportunity to comment on the necessity for the rule and the agency's thinking in its approach, as well as to comment on the text of the rule itself. If the statement of reasonable necessity were required to be published only after the agency rulemaking record has closed, any comments by the public at that time would not have to be considered by the agency and an agency could then simply "decree" that a rule was necessary and that its approach was the best approach without considering the public's view on those two issues.

b. What the Commissioner of Political Practices has done

The Commissioner of Political Practices has now responded to the original staff comment that the statement of reasonable necessity was deficient by publishing, in MAR Notice No. 44-2-1 47, amended statements of reasonable necessity for the previously proposed rules. While it's forthright of the Commissioner to, in a sense, admit that the staff's original criticism was correct, the publication of the supplemented statements of reasonable necessity is unhelpful to the public and the members of the Legislature regulated by the proposed rules because the Commissioner's rulemaking record closed on May 5, 2008. Because that record is now closed, any disagreement that the public has with the supplemented statements of reasonable necessity cannot be considered by the Commissioner. The Commissioner's action, in terms of helping the public to understand the rule while the public could still comment on the rule, was a useless act.

c. How this was allowed to happen

The section of law governing the amendment of statements of reasonable necessity, 2-4-305(8), MCA, provides as follows:

(8) An agency may use an amended proposal notice or the adoption notice to correct deficiencies in citations of authority for rules and in citations of sections implemented by rules. An agency may use an amended proposal notice but, except for clerical corrections, may not use the adoption notice to correct deficiencies in a statement of reasonable necessity [emphasis added].

This subsection authorizes the use of an amended notice of proposed rulemaking (proposal notice), assuming, without stating, that the amended notice will be published by the agency before and not after the rulemaking record closes. That's an assumption made in the statute because it's clear from the rulemaking timetable prescribed by MAPA if the amended notice is published after the record closes, the amended notice serves no purpose as far as the public's ability to comment is concerned. But, technically, what the Commissioner has done is not expressly prohibited by statute. Therefore, it can be said that what the Commissioner has done violates the spirit and intent of MAPA but not the express terms of MAPA.

d. Should any action be taken by SAVA in response?

Committee staff believes that the action by the Commissioner shows a statutory weakness in 2-4-305, MCA, that was heretofore unknown. This weakness impinges on the public's ability to have input into the agency rulemaking process. For this reason, the staff recommends that the Committee request and sponsor legislation to amend section 2-4-305(8) in the following manner:

(8) An agency may use an amended proposal notice or the adoption notice to correct deficiencies in citations of authority for rules and in citations of sections implemented by rules. An agency may use an amended proposal notice before the rulemaking record closes but, except for clerical corrections, may not use the adoption notice to correct deficiencies in a statement of reasonable necessity.

If this legislation is enacted, it will in the future prevent what the Commissioner has done in MAR Notice No. 44-2-147: to technically comply with the requirement for a clear and thorough statement of reasonable necessity but that, in terms of the public's understanding of a proposed rule at a time when the public can have input on the rule, accomplishes exactly nothing.

III CONCLUSION

The Commissioner of Political Practices has published an amended notice of proposed rulemaking in order to respond to the concerns of the staff and the primary sponsor that the original statement of reasonable necessity did not comply with statute. The use of an amended notice, while technically not prohibited by MAPA, is not a good practice for an agency to follow because it prevents public comment on the rulemaking record regarding the complete (and legally sufficient) statement of reasonable necessity. The staff has therefore recommended that legislation be requested and sponsored by the SAVA Committee to prevent use of amended notices of proposed rulemaking in this manner in the future.

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