



# Legislative Council

## 64th Montana Legislature

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January 26, 2016

**TO:** Legislative Council

**FROM:** Todd Everts, Chief Legal Counsel

**RE:** Administrative Rulemaking and Separation of Powers

At the November 2015 Legislative Council meeting, the Council requested that I provide information regarding the approximate number of statutory legislative authorizations for the adoption of administrative rules in the Montana Code Annotated (MCA) and examples of broad and specific statutory delegations of rulemaking authority. In addition, the Council requested a very brief review of the constitutional separation of powers issues associated with the Legislature's delegation of rulemaking authority. This memorandum is in response to those requests and does not reflect any action or opinion on behalf of the Legislative Council.

### **Administrative Rules, the Delegation of Legislative Authority, and Separation of Powers**

The Montana Legislature is in session only periodically, and because of the demands of an increasingly complex and technical society, the Legislature over time has found it appropriate to delegate some of its power to another entity. The delegation of legislative authority occurs through legislation that empowers an entity, usually an Executive Branch agency, to implement/administer the statutory provisions set out in the legislation.

The constraints for a valid delegation of legislative authority are based on the separation of powers set out in Article III, section 1, of the Montana Constitution. It provides:

The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The Legislature may provide for Executive Branch discretion in carrying out the law only if it statutorily prescribes with reasonable clarity the limits on the Executive Branch's exercise of that discretion. In re Gate City Savings and Loan Association, 182 Mont. 361, 597 P.2d 84 (1979), and

Grossman v. State, 209 Mont. 427, 682 P.2d 1319 (1984). Section 5-4-103, MCA, provides that a statute delegating rulemaking authority to an agency must contain specific guidelines describing for the agency and the public what the rules may and may not contain. If the Legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, the statute is invalid. In re Gate City S & L Association, 182 Mont. 361, 597 P.2d 84 (1979).

Rules have the force of law (i.e., an enforceable prohibition or mandate of behavior or activity) only if they are:

- (1) adopted under an express grant of legislative authority (2-4-102(14), MCA);
- (2) adopted under statutory guidelines sufficiently specific to satisfy the constitutional separation of powers requirement for a delegation of rulemaking authority;
- (3) adopted in compliance with the procedures outlined in the Montana Administrative Procedures Act (MAPA) (Title 2, chapter 4, part 3, MCA); and
- (4) consistent with and reasonably necessary to effectuate the purpose of the implemented statutes (section 2-4-305(6), MCA).

I would specifically note that MAPA requires that a rule must include a citation to the specific grant of rulemaking authority under which the rule was adopted (2-4-305, MCA). In addition, a proposed or adopted rule must include a citation to the specific section or sections in the MCA that the rule is intended to implement.

The Montana Supreme Court has held that an administrative rule is inconsistent with legislative guidelines if the rule includes additional requirements not contemplated by the Legislature in the enabling statute. Bell v. Department of Licensing, 182 Mont. 21, 594 P.2d 331 (1979).

An existing statute that already includes an express grant of rulemaking authority may only be modified, expanded, or repealed through a bill duly passed by the Legislature and signed by the governor. Repeal of a legislative rule via a resolution of the Legislature has been previously determined to be unconstitutional as a violation of the separation of powers doctrine under the Montana Constitution. Montana Taxpayers' Association v. Department of Revenue, Civil No. 47126, First Judicial District (March 18, 1982).

### **Examples of Statutory Delegations of Rulemaking**

There are approximately 944 specific authorizations for adoption of rules in the MCA. Set out below are existing statutory examples of both specific and general delegations of rulemaking authority.

***Specific Delegations of Rulemaking Authority:***

Secretary of State regarding notaries:

**1-5-628. Rulemaking.** (1) The secretary of state may adopt rules to implement this part.

(2) Rules adopted regarding the performance of notarial acts with respect to electronic records or two-way audio-video communications may not require or accord legal status or effect to the implementation or application of a specific technology or technical specification.

(3) The rules may:

(a) prescribe the manner of performing notarial acts regarding tangible and electronic records;

(b) include provisions to ensure that any change to or tampering with a record bearing a certificate of a notarial act is self-evident;

(c) include provisions to ensure integrity in the creation, transmittal, storage, or authentication of electronic records or signatures;

(d) prescribe the process of granting, renewing, conditioning, denying, suspending, or revoking a notary public commission and ensuring the trustworthiness of an individual holding a commission as notary public;

(e) include provisions to prevent fraud or mistake in the performance of notarial acts;

(f) establish the process for approving and accepting surety bonds and other forms of assurance under 1-5-619; and

(g) provide for the administration of the examination under 1-5-620(1) and the course of study under 1-5-620(2).

(4) In adopting, amending, or repealing rules about notarial acts with respect to electronic records, the secretary of state shall consider, consistent with this part:

(a) the most recent standards regarding electronic records promulgated by national bodies, such as the national association of secretaries of state;

(b) the standards, practices, and customs of other jurisdictions that substantially implement the provisions of this part; and

(c) the views of governmental officials and entities as well as other interested persons.

History: En. Sec. 25, Ch. 391, L. 2015.

Department of Administration regarding IT systems:

**2-17-518. Rulemaking authority.** (1) The department shall adopt rules to implement this part, including the following:

(a) rules to guide the review and approval process for state agency software and management systems that provide similar functions for multiple state agencies, which must include but are not limited to:

(i) identifying the software and management systems that must be approved;

(ii) establishing the information that state agencies are required to provide to the department;

and

(iii) establishing guidelines for the department's approval decision;

(b) rules to guide the review and approval process for state agency acquisition of information technology resources, which must include but are not limited to processes and requirements for:

(i) agency submissions to gain approval for acquiring information technology resources;

(ii) approving specifications for information technology resources; and  
(iii) approving contracts for information technology resources; and  
(c) rules for granting exceptions from the requirements of this part, which must include but are not limited to:

- (i) a process for applying for an exception; and
- (ii) guidelines for determining the department's approval decision.

(2) The department may adopt rules to guide the development of state agency information technology plans. The rules may include:

- (a) agency plan review procedures;
- (b) agency plan content requirements;
- (c) guidelines for the department's approval decision; and
- (d) dispute resolution processes and procedures.

(3) Adequate rules for the use of any information technology resources must be adopted by the supreme court for judicial branch agencies.

(4) The legislative council shall adopt enterprise principles and technical standards within an enterprise architecture program as a part of the legislative branch information technology plan, as provided for in 5-11-405, that will fulfill the intent of adequate rules for use of information technology resources for the consolidated legislative branch, as provided for in 5-2-504.

History: En. Sec. 12, Ch. 313, L. 2001; amd. Sec. 1, Ch. 72, L. 2007; amd. Sec. 2, Ch. 284, L. 2013.

#### ***General Delegations of Rulemaking Authority:***

Department of Labor and Industry regarding empowerment zones:

**7-21-3715. Rulemaking authority.** The department may adopt rules to implement this part.

History: En. Sec. 9, Ch. 582, L. 2003.

Department of Revenue regarding centrally assessed property:

**15-23-108. Rulemaking authority.** The department of revenue may adopt rules necessary for the taxation of property under this chapter.

History: En. 84-708.1 by Sec. 53, Ch. 405, L. 1973; amd. Sec. 1, Ch. 134, L. 1975; amd. Sec. 1, Ch. 381, L. 1975; amd. Sec. 1, Ch. 465, L. 1975; amd. Sec. 9, Ch. 98, L. 1977; amd. Sec. 53, Ch. 566, L. 1977; R.C.M. 1947, 84-708.1(2).

Department of Public Health and Human Services regarding rights of the terminally ill:

**50-9-110. Authority to adopt rules.** The department may adopt rules to implement this chapter.

History: En. Sec. 4, Ch. 475, L. 1989.

Transportation Commission:

**2-15-2502. Transportation commission.** (1) There is a transportation commission composed of five members. One member must be a resident of and appointed from each of these districts, each composed of the counties named:

(a) District 1. Lincoln, Flathead, Sanders, Lake, Mineral, Missoula, Ravalli, Granite, Powell;  
(b) District 2. Deer Lodge, Silver Bow, Beaverhead, Madison, Gallatin, Meagher,

Broadwater, Jefferson, Park;

(c) District 3. Glacier, Toole, Liberty, Hill, Blaine, Pondera, Teton, Chouteau, Cascade, Lewis and Clark;

(d) District 4. Carter, Powder River, Fallon, Custer, Rosebud, Garfield, Phillips, Valley, McCone, Prairie, Dawson, Wibaux, Richland, Roosevelt, Daniels, Sheridan;

(e) District 5. Golden Valley, Stillwater, Carbon, Big Horn, Yellowstone, Musselshell, Judith Basin, Fergus, Petroleum, Treasure, Wheatland, Sweet Grass.

(2) Of the members appointed from districts 1, 3, 4, and 5, at least one must have specific knowledge of Indian culture and tribal transportation needs. The member provided for under this subsection must be selected by the governor after consultation with the Montana members of the Montana-Wyoming tribal leaders council.

(3) Two members may not be residents of the same district at the time of appointment or during their respective terms of office.

(4) Not more than three members may at the time of appointment or during their respective terms be members of the same political party.

(5) An elective state official or state officer, during the term of office to which elected or appointed, or a state employee may not be a member of the commission.

(6) A resolution, motion, or other decision of the commission may not be adopted or passed without the favorable vote of at least three members.

(7) The commission is allocated to the department of transportation for administrative purposes only as prescribed in 2-15-121.

(8) The commission is designated as a quasi-judicial board for purposes of 2-15-124; however, the provision of 2-15-124(1) that at least one member of a quasi-judicial board be an attorney does not apply to the commission.

**(9) The commission may adopt rules necessary for its government.**

(10) The director of transportation or the director's designee shall act as liaison between the commission and the department.

History: En. Sec. 4-102, Ch. 197, L. 1965; Sec. 32-2402, R.C.M. 1947; amd. and redes. 82A-706.1 by Sec. 72, Ch. 316, L. 1974; amd. Sec. 2, Ch. 186, L. 1977; R.C.M. 1947, 82A-706.1; amd. Sec. 1, Ch. 62, L. 1983; amd. Sec. 5, Ch. 512, L. 1991; amd. Sec. 7, Ch. 87, L. 1993; amd. Sec. 1, Ch. 75, L. 1995; amd. Sec. 1, Ch. 587, L. 1999.