



## Revenue and Transportation Interim Committee

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### 62nd Montana Legislature

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JEFF MARTIN, Lead Staff  
JARET COLES, Staff Attorney  
FONG HOM, Secretary

June 3, 2011

TO: Committee Members

FROM: Jaret Coles, Staff Attorney

RE: Overview of Rulemaking and Administrative Rule Activity

## 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Register (MAR), which is a twice-monthly publication containing all proposed new, transferred, amended, and repealed rules as well as adopted rule changes.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 5-5-227, MCA -- specific rulemaking review authority of Revenue and Transportation Interim Committee.
- d. Section 5-11-107, 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 political 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 approx. 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 2 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 and adoptions will be brought to committee's attention at every meeting and sometimes by e-mail between meetings if the situation warrants.
- 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, as individual committee members, to proposed rules and notify the committee presiding officer of the objection, 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 prime sponsor, receive notice from agency, before it writes rules, of its intent to write the rule. The manner and date of notice to the prime sponsor must be stated in the notice of proposed rulemaking (2-4-302, MCA).
- c. Request agency 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 by (2-4-302 and 2-4-305, MCA):
- (1) writing or e-mailing agency, as provided in the 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 delay adoption of rule so committee can review proposed rule (2-4-305(9), MCA).
- g. Request, by motion, that interim committee take any of those actions authorized by law for committee to take (see 4b above).

**Department of Revenue**

*All notices are available on the Internet at:*

*[http://mt.gov/revenue/formsandresources/administrativerules/upcomingevents\\_proposedrulenotices.asp](http://mt.gov/revenue/formsandresources/administrativerules/upcomingevents_proposedrulenotices.asp)*

**Notice of Proposed Rules:**

None as of June 1, 2011.

**Notice of Adopted Rules During Session -- Not Reviewed by Committee:**

Housekeeping -- Rental Vehicle Tax. MAR 42-2-859. Adopted two rules as proposed on March 25, 2011. No public hearing was conducted and no public comments were received. The rules corrected a website address in two places and corrected the name of two forms.

Housekeeping -- Lodging Facility Use Tax. MAR 42-2-860. Adopted two rules as proposed on March 25, 2011. No public hearing was conducted and no public comments were received. The rules corrected a rule reference that was incorrect, eliminated reference to a form that is not used at this time, corrected a website address, and eliminated a provision that a seller of a lodging unit can round the use tax to the nearest dollar.

**Notice of Adopted Rules -- Brought In Front of Committee at November 2010 Meeting:**

Telecommunications Services -- Corporate License Taxes. MAR 42-2-845. Adopted April 15, 2011. A public hearing was held on November 22, 2010. Eleven people appeared at the hearing to testify and written comments were received. Additionally, on November 17, 2010, the Department presented an Economic Impact Statement to this Committee. This Committee adopted a motion filing an objection to MAR 42-2-845, which delayed the adoption of the rules. On April 1, 2011, the Department sent a letter to members of the 2009-2010 Revenue and Transportation Interim Committee regarding adoption of the rules.

The rules were adopted as proposed with the exception of a new rule that makes all the adopted rules applicable for tax years beginning after December 31, 2011. The rules change the method of calculating gross receipts from the sale of telecommunications services in the state. The Department mentions that the rules are based primarily on a Multistate Tax Commission recommendation concerning the apportionment of income from the sale of telecommunications and ancillary services.

Adoption of Appraisal Methods and Standards -- Centrally Assessed Property. MAR 42-2-846. Adopted December 24, 2010. A public hearing was held on October 28, 2010. Oral and written testimony was received at the hearing from approximately 10 individuals. Additionally, on November 17, 2010, the Department presented an Economic Impact Statement to this Committee.

The rules were adopted as initially proposed. The new rule provides that the Department adopts the 2009 WSATA-CCAP (Western States Association of Tax Administrators – Committee on Centrally Assessed Properties) appraisal handbook as the reference and overall appraisal guide and the NCUVS (National Conference of Unit Valuation States) standards. The amended rules provide a definition for “goodwill” and “intangible personal property”. Lastly, the amended rules clarify reporting requirements and the procedure for disputing intangible personal property

deductions that are applied automatically by Department rule (*i.e.*, 10% for airlines, 5% for pipelines, etc.).

Lodging Facility Use Tax and the Lodging Sales Tax. MAR 42-2-848. Adopted November 27, 2010. A public hearing was held on October 26, 2010. Oral and written testimony was received at the hearing from approximately five individuals and a change was made to one amended rule based on the comments received. The Department adopted 2 new rules, amended 10 rules, and repealed 1 rule regarding lodging facility use taxes and lodging sales taxes. The new rules provide that a seller's 5% vendor deduction (15-68-510, MCA) for collecting the 3% lodging sales tax will be applied to the 4% lodging facility tax in situations where less than a full payment of the facility tax was received (*i.e.*, an offset). The amendments include new definitions and set forth the procedures that are used by the Department to administer both the lodging facility use tax and the lodging sales tax. Since both taxes have common elements, the Department merged the rules for both taxes into one set of rules.

Rental Vehicle Sales and Use Tax. MAR 42-2-849. Adopted November 26, 2010. A public hearing was held on October 26, 2010. No one appeared at the hearing to testify and no written comments were received. The Department adopted eleven new rules regarding the 4% rental vehicle sales tax. The new rules set forth the procedures that will be used by the Department to administer the sales tax, including definition of terms used in the rules, registration requirements for sellers (*i.e.*, rental agencies), listing of sellers required to collect the sales tax, requirements for filing a tax return or consolidated returns, audit procedures, and vehicles that are subject to the tax.

Housekeeping -- Hospital Facility Utilization Fee. MAR 42-2-850. Adopted December 10, 2010. A public hearing was held on November 4. No one appeared at the hearing to testify and no written comments were received. The Department amended one rule regarding payment of the hospital utilization fee. The proposed amendment simply provides citation to the statute (15-66-102, MCA) for the calculation of the tax.

Liquor License Transfers, Suspension, and Revocation. MAR 42-2-851. Adopted February 11, 2011. A public hearing was held on November 8, 2010. No one appeared at the hearing but written comments were received. The Department adopted one new rule, amended five existing rules, and made changes to a proposed amendment based on the comments. The rules generally implement statutory changes by the 2007 and 2009 Legislatures pertaining to fairground beer and wine licenses that are owned by political subdivisions and the security interest loan standards that are used by the Department.

Office of Taxpayer Assistance. MAR 42-2-852. Adopted November 27, 2011. A public hearing was held on November 3, 2010. No one appeared at the hearing to testify and no written

comments were received. The Department adopted three new rules to provide information to taxpayers regarding the Department's Office of Taxpayer Assistance (OTA). The rules outline the primary functions of the OTA, the procedures that are used, and the various monitoring efforts of the Department. Lastly, the rules distinguish the difference between the OTA and the Office of Dispute Resolution.

Property Tax -- Revised Trend and Depreciation Tables for Valuing Property. MAR 42-2-853. Adopted December 24, 2010. A public hearing was held on November 4, 2010. No one appeared at the hearing to testify and no written comments were received. The Department amended 13 rules regarding various tables that are updated on an annual basis through Department rules. The tables generally show how the Department arrives at market value when valuing personal property, including rental equipment, farm machinery and equipment, heavy equipment, seismograph units and allied equipment, oil and gas field machinery and equipment, work-over and service rigs, oil drilling rigs, television cable systems, ski lift equipment, and industrial machinery and equipment.

Valuation Methods For Commercial Properties. MAR 42-2-854. Adopted March 11, 2011. A public hearing was held on November 17, 2010. One person appeared at the hearing to testify. The Department amended one rule as proposed regarding the valuation of commercial property. The amendment states that the International Association of Assessing Officers' (IAAO) standards for choice of method guide the Department's appraisal decisions.

Property Tax Assistance Programs for Disabled Veterans and Elderly Homeowners. MAR 42-2-855. Adopted March 11, 2011. A public hearing was held on November 17, 2010. No one appeared at the hearing to testify, but written comments were received and changes were made based on the written comments. The Department amended three rules regarding the property tax assistance program, the extended property tax assistance program, and the property tax exemption for qualified disabled veterans.

Livestock Reporting, Oil Drilling Rigs Pricing Information, and Class Eight Personal Property Reporting. MAR 42-2-856. Adopted March 11, 2011. A public hearing was held on November 17, 2010. Two people appeared to testify and written comments were received. Based on the comments received, the Department made changes to all three of the proposed rules. The first rule clarifies that taxpayers are required to file livestock reporting information by February 15. The second rule amends a rule pertaining to oil drilling rigs and clarifies that the Department seeks replacement cost information from manufactures as opposed to soliciting bids from manufacturers. The third rule amends a rule pertaining to class eight personal property (*i.e.*, 15-6-138, MCA, property) and provides that the Department will require biennial reporting of class eight property starting in tax year 2011 and that statements postmarked after February 15 will be assessed a penalty absent demonstrated physical or mental hardships.

Housekeeping Rules -- Interest to Taxpayers When There is Department Delay, Correction of Statutory Reference for Dependent Exemption, and Conforming Rule to Language Used in New Law. MAR 42-2-857. Adopted December 24, 2010. A public hearing was held on November 18, 2010 . No one appeared at the hearing to testify. The Department amended three rules as proposed. Two of the rules implement statutory changes to the law (Senate Bill 418 from the 2009 session). Another rule corrects an incorrect statute reference in a rule.

Amendment of Rules Relating to Liquor Vendors. MAR 42-2-858. Adopted March 25, 2011. A public hearing was held on November 23, 2010. Four people appeared to testify and written comments were received. Based on comments received, the Department further amended four of the rules. The rules primarily address wholesale pricing, inventory management, sample product restrictions, products that will not be accepted by the state liquor warehouse, and the pricing of regular and special products.

## **Department of Transportation**

### **Notice of Proposed Rules:**

None as of June 1, 2011.

### **Notice of Adopted Rules During Session -- Not Reviewed by Committee:**

None.

### **Notice of Adopted Rules -- Brought In Front of Committee at November 2010 Meeting:**

Ethanol-Blended Gasoline -- Housekeeping. MAR 18-129. Adopted December 10, 2010. No testimony or written comments were received. The Department amended 12 rules relating to ethanol-blended gasoline. The rules change "gasohol" to "ethanol-blended gasoline" to implement the name change made in Ch. 100, Laws of 2007.

Licensed Distributors and Users of Special Fuels -- Housekeeping. MAR 18-126. Adopted December 9, 2010. No testimony or written comments were received. The Department amended 13 rules and repealed 3 rules relating to the administration of licensed distributors and users of special fuels. The rules relate to administration of special fuel users and distributors to conform rules to legislative changes, some made as long ago as 1993.