



# Children, Families, Health, and Human Services Interim Committee

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68th Montana Legislature

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June 27, 2023

TO: Children, Families, Health, and Human Services Interim Committee  
FROM: Maddie Krezowski, Staff Attorney  
RE: Overview of Administrative Rulemaking and Committee Rule Review

The Children, Families, Health, and Human Services Interim Committee (Committee) is required to review administrative rules promulgated by the Department of Public Health and Human Services (DPHHS or agency) for compliance with the Montana Administrative Procedure Act (MAPA).<sup>1</sup> The rulemaking and rule review processes and the role of the Committee and an individual legislator in these processes are outlined below.

## 1. Administrative Rulemaking -- General

Executive agencies are often authorized by the Legislature to adopt administrative rules, which are defined as an “agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency.”<sup>2</sup> Administrative rules have the force and effect of law.

MAPA governs the rulemaking process for most agencies, including DPHHS. MAPA does not grant agencies authority to adopt rules; rulemaking authority must be granted by the Legislature through a separate authorizing statute. For a rule to be valid, it must be adopted in substantial compliance with the requirements contained in MAPA and must be consistent with statutory authority.<sup>3</sup>

The Administrative Rules of Montana (ARM) are the administrative rules in their entirety and are updated by the Montana Administrative Register (MAR), which publishes all proposed and adopted rules twice a month. The MAR contains notices of proposed, amended, transferred, repealed, and adopted rules, as well as notices of public hearings, Attorney General’s opinions, and notices of vacancies on state boards. The ARMs and MAR are available and searchable online at [www.mtrules.org](http://www.mtrules.org). The ARMs are broken down into Title, chapter, and subchapter (for example, 37.1.101). DPHHS rules are located in Title 37 of the ARMs.

<sup>1</sup> § 5-5-225.

<sup>2</sup> § 2-4-102.

<sup>3</sup> § 2-4-305(3).

## 2. Administrative Rulemaking – MAPA Requirements

Before the agency can adopt, amend, or repeal a rule, the agency must comply with the requirements of MAPA in Title 2, chapter 4. MAPA requires the agency to give written notice of its proposed action (proposal notice) and, upon adoption, amendment, or repeal of a rule, must issue a written statement of its reasons for and against the adoption (adoption notice). MAPA requires that proposal and adoption notices be published in the MAR within a certain timeframe and contain certain information, which are outlined below.

### Requirements for Proposed Rulemaking

#### *Notice to Committee*

When a proposed notice is filed with the Secretary of State, the agency is required to concurrently send an electronic copy of the proposed rule to the Committee. This requirement is satisfied if the rule is sent to each staff member of the Committee.<sup>4</sup>

#### *Notice to Public and Publication*

Notice of proposed rulemaking must be published in the MAR at least 30 days before the date of the proposed action, unless imminent peril to the public health, safety, or welfare requires earlier action.<sup>5</sup> A public hearing is not necessary unless it is required by statute or the proposed rulemaking involves a matter of significant interest to the public. If a public hearing is not scheduled, the proposal notice must state that a public hearing will be scheduled if requested by either 10% or 25, whichever is less, of the persons who will be directly affected by the rulemaking, by a governmental subdivision or agency, by the appropriate rule review committee, or by an association having not less than 25 members who will be directly affected. The agency must provide at least 20 days' notice from the date of publication of the proposal notice of any hearing to be held and must provide at least 28 days from the date of publication of the notice for submission of oral and written comments.<sup>6</sup>

#### *Authority and Necessity*

In general, a proposal notice must include a description of the substance of the intended action or subjects and issues involved,<sup>7</sup> cite to the specific statutory grant of rulemaking authority pursuant to which the rule is adopted and to the specific statutes being implemented,<sup>8</sup> and include a statement of reasonable necessity, which identifies the principal reasons for the intended action and for each adoption, amendment, or repeal and, if alternative approaches are available, explains the rationale behind the particular approach taken.<sup>9</sup>

#### *Notice to Sponsor*

Notice to a primary bill sponsor is required when the agency begins to work on the substantive content of a proposal notice for the first rule implementing legislation. The agency is

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<sup>4</sup> § 2-4-302(2)(a).

<sup>5</sup> **Error! Main Document Only.** § 2-4-302(2)(d); § 2-4-303.

<sup>6</sup> **Error! Main Document Only.** § 2-4-302.

<sup>7</sup> § 2-4-302(1)(a).

<sup>8</sup> § 2-4-305(3).

<sup>9</sup> § 2-4-305(6)(b).

required to document its attempts to reach the primary bill sponsor via the contact information on file with Secretary of State and the date and manner of contact with the sponsor. Failure to contact a sponsor invalidates the rule notice.<sup>10</sup>

#### *Fee Increase or Decrease*

If the agency is proposing a fee increase or decrease, the agency must include an estimate of the cumulative amount of the increase or decrease or new amount and an estimate of the number of persons affected.<sup>11</sup>

#### *Small Business Impact Statement*

Prior to the adoption of a proposed rule, the agency is required to determine if the rule will significantly and directly impact a small business.<sup>12</sup> The determination must be published in the MAR when the proposed rule is published.<sup>13</sup>

#### *Performance-based Rulemaking -- Medicaid Services*

Except for rules implementing rate increases or implementing federal law or regulation, a proposal notice concerning the delivery of Medicaid services by DPHHS must include a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures. If the assessment can be made, DPHHS is required to identify the method it will use to measure whether or not the principal reason and the rationale for the intended rule are successfully achieved, including any data collection methods or metrics if applicable, and must include the period over which the intended outcomes will be measured, including any measurement intervals, if applicable.<sup>14</sup>

#### *Adoptions by Reference*

The agency may adopt by reference a publication if it would be unduly cumbersome, expensive, or otherwise inexpedient and it is reasonable. An adoption by reference must contain a citation to the material adopted by reference and where it may be found, must contain a statement of the general subject matter of the omitted rule, must be in existence at the time the proposed rule is published, may not be altered between the time of publication of the proposed rule and the adoption of the rule except to respond to comments received in the rulemaking record, and must be available to the public for comment through publication in the register or in an electronic format while the rule is subject to public comment. Any alteration to the material adopted by reference may not be made without being subject to the rulemaking process.<sup>15</sup>

#### *Emergency Rules*

MAPA provides specific requirements for emergency rule adoption if the agency finds there is an imminent peril to public health, safety, or welfare.<sup>16</sup> Prior to adoption of the

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<sup>10</sup> § 2-4-302.

<sup>11</sup> § 2-4-302(1)(c).

<sup>12</sup> **Error! Main Document Only.**A "small business" means a business entity, including its affiliates, that is independently owned and operated and that employs fewer than 50 full-time employees. (§ 2-4-102(13).)

<sup>13</sup> **Error! Main Document Only.**§ 2-4-111.

<sup>14</sup> **Error! Main Document Only.**Chapter 453, Laws 2015.

<sup>15</sup> **Error! Main Document Only.**§ 2-4-307.

<sup>16</sup> § 2-4-303.

emergency rule the agency must make a good faith effort to provide written notice to each member and staffer of the Committee.<sup>17</sup>

### Requirements for Adopted Rulemaking

#### *Timeline for Adoption*

MAPA contains additional requirements particular to adoption notices. The time between publication of the proposal notice and publication of the adoption notice may not be more than 6 months. Failure to publish an adoption notice within 6 months after the date of publication of the proposal notice invalidates the proposal and makes it necessary to publish a new proposal notice, unless the time limit was extended by the publication of an amended or supplemental notice of proposed or final rulemaking before the time limit expired.<sup>18</sup> The agency's rulemaking is adopted upon filing the adoption notice with the secretary of state and effective upon publication in the MAR.<sup>19</sup>

#### *Consideration of Comments*

Before adoption of a rule, the agency must consider all oral and written submissions from the public regarding the proposed rule.<sup>20</sup> If the agency received public comment or comments from the primary sponsor, the agency must include in the adoption notice a statement of reasons, including reasons for overruling (or accepting) considerations submitted via public comment or comment from the primary sponsor.<sup>21</sup>

#### *Restrictions on Adoption after October 1 in Even Years*

In a year preceding a legislative session, a rule may not be adopted between October 1 and the end of the year unless: (1) the rule is an emergency rule; (2) the rule is adopted to implement a program or policy and the unavailability of information, guidance, or notice prevented the adoption of the rule prior to October 1; or (3) the rule is adopted after providing notice and an explanation to the Committee and staff and the Committee does not object.<sup>22</sup>

**\*\*Note:** the third exception was passed during the 2023 session. If the Committee objects under this exception, the rulemaking may not be adopted before the end of the year.

### **3. Committee Rule Review and Involvement**

Committee legal staff reviews each proposal and adoption notice for conformance with the MAPA requirements described above. If a potential issue is noted, staff contacts the agency rule reviewer to address the issue. If staff cannot resolve the issue with the agency, the issue will be brought to the Committee's attention for further direction. The Committee may become involved in the rulemaking process by taking one or more of the following actions:

- request the agency's rulemaking records to check for compliance with MAPA;<sup>23</sup>

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<sup>17</sup> § 2-4-303(1)(c).

<sup>18</sup> **Error! Main Document Only.** § 2-4-302; § 2-4-305.

<sup>19</sup> § 2-4-306.

<sup>20</sup> § 2-4-305.

<sup>21</sup> **Error! Main Document Only.** § 2-4-305.

<sup>22</sup> § 2-4-305(11); Chapter 282, Laws of 2023.

<sup>23</sup> **Error! Main Document Only.** § 2-4-402(2)(a).

- prepare and submit to the agency written recommendations for the adoption, amendment, or rejection of a rule and submit oral or written testimony at a rulemaking hearing;<sup>24</sup>
- require that a rulemaking hearing be held;<sup>25</sup>
- participate in litigation involving MAPA;<sup>26</sup>
- review the incidence and conduct of administrative proceedings under MAPA;<sup>27</sup>
- poll the Legislature by mail to determine if a proposed rule is consistent with legislative intent. The results of the poll are admissible in any court proceeding involving the validity of the rule.<sup>28</sup>
- require an economic impact statement relating to the adoption of a rule;<sup>29</sup>
- request publication of material adopted by reference in a rule;<sup>30</sup>
- publish a statement with the Secretary of State concerning the advisory nature of an adjective or interpretive rule;<sup>31</sup>
- receive reports on litigation and request documents in litigation involving judicial construction of a rule or MAPA;<sup>32</sup>
- recommend the Legislature amend MAPA or recommend the Legislature either by joint resolution advise or by bill direct the adoption, repeal, or amendment of a rule;<sup>33</sup> or
- object to all or a portion of a proposed or adopted rule, as described in part 4 below.

#### 4. Objecting to a Rule – Procedure – Effect

MAPA provides separate processes for objecting to proposed rules and adopted rules. For the purposes of this memorandum, one process is referred to as an informal objection and the other process if referred to as a formal objection. Failure of the Committee to object to the adoption, amendment, or repeal of a rule is inadmissible in court to prove the validity of the rule.<sup>34</sup> \*\*Note: The Speaker of the House and the President of the Senate are ex officio members

<sup>24</sup> **Error! Main Document Only.** § 2-4-402(2)(b).

<sup>25</sup> **Error! Main Document Only.** § 2-4-402(2)(c).

<sup>26</sup> **Error! Main Document Only.** § 2-4-402(2)(d).

<sup>27</sup> **Error! Main Document Only.** § 2-4-402(2)(e).

<sup>28</sup> **Error! Main Document Only.** § 2-4-403; § 2-4-404.

<sup>29</sup> **Error! Main Document Only.** § 2-4-405.

<sup>30</sup> **Error! Main Document Only.** § 2-4-307.

<sup>31</sup> **Error! Main Document Only.** § 2-4-308.

<sup>32</sup> **Error! Main Document Only.** § 2-4-410.

<sup>33</sup> **Error! Main Document Only.** § 2-4-411.

<sup>34</sup> § 2-4-412(4).

of the Committee for the purpose of breaking a tie vote on a question before the Committee involving an objection to an administrative rule.<sup>35</sup>

### Informal Objection

*Procedure:* If a majority of the Committee members notify the chair in writing that they object to a *proposed* rule, the Committee must notify the agency of the objection (the Committee is not required to set forth its reasons for the objection) and that the Committee intends to address the objection at the next meeting of the Committee. **\*\*Note:** The Committee may not informally object to a rule once it has been adopted.

*Effect:* An informal objection prevents the agency from adopting a proposed rule until the publication of the last issue of the MAR published within the six-month window after the publication of the proposal notice **unless** the Committee meets during that time and does not sustain the objection.<sup>36</sup>

### Formal Objection

*Procedure:* If a majority of the Committee believes that all or a portion of a *proposed* rule is not in substantial compliance with 2-4-302 (notice, hearing, and submission of views requirements), 2-4-303 (emergency or temporary rules requirements), or 2-4-305 (authority and reasonable necessity requirements), the Committee may formally object to the proposed rule. The objection must be in writing and describe the Committee's reasons for the objection. The agency is required to respond in writing to the objection within 14 days of the mailing of the objection.

*Effect:* Unless the Committee withdraws its objection before the proposed rule is adopted or determines, as communicated in writing by a majority of the Committee members to the chair and staff, that the rule has been adopted with changes that make the rule comply with the Committee's objections and concerns, the rule is not effective until the day after final adjournment of the next regular session of the Legislature.<sup>37</sup>

The Committee may also formally object to an *adopted* rule for failure to substantially comply with 2-4-302, 2-4-303, or 2-4-305. The objection process is the same as is described above; however, the effect is different. If the Committee votes to send the formal objection to the Secretary of State for publication, at the Committee's expense, the agency bears the burden in any action challenging the legality of the rule of proving that the rule was adopted in substantial compliance with 2-4-302, 2-4-303, or 2-4-305. If the rule is invalidated by the court because the agency failed to meet its burden of proof, and the court finds that the agency acted in arbitrary and capricious disregard of the authorizing statute, the court may award costs and attorney fees against the agency.<sup>38</sup>

## **5. Additional Opportunities for Individual Involvement**

Members of the Committee may individually engage in the rulemaking process by taking one or more of the following actions:

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<sup>35</sup> § 2-4-112.

<sup>36</sup> **Error! Main Document Only.** § 2-4-305(9).

<sup>37</sup> **Error! Main Document Only.** § 2-4-306(4)(c); § 2-4-406.

<sup>38</sup> **Error! Main Document Only.** § 2-4-406.

- petition for the adoption, amendment, or repeal of a rule;<sup>39</sup>
- if a rule initially implements legislation of which the individual was a primary sponsor, provide comments and receive notice;<sup>40</sup>
- request an agency to hold an informal conference or appoint a committee to develop a proposed rule before the agency publishes notice;<sup>41</sup>
- join an agency's list of interested persons for purposes of rulemaking;<sup>42</sup> or
- contribute to the rulemaking process by submitting oral or written testimony on a proposed rule.

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<sup>39</sup> **Error! Main Document Only.**§ 2-4-315.

<sup>40</sup> **Error! Main Document Only.**§ 2-4-302.

<sup>41</sup> **Error! Main Document Only.**§ 2-4-304.

<sup>42</sup> **Error! Main Document Only.**§ 2-4-302.