

# Committee Oversight of Agency Rulemaking



# What's covered in this presentation?

- A basic introduction to administrative rules
- A basic introduction to the Montana Administrative Procedures Act (MAPA) as it relates to rulemaking
- A basic introduction to the interim committee's role in rulemaking under MAPA

# When may an agency make administrative rules?

- Agencies may make rules only if the Legislature authorizes the agency to make rules to implement a statute
- An authorizing statute states that the agency has rulemaking authority, such as “The department shall adopt rules necessary to carry out the purposes of this Title/chapter/part/section”
- Rules must be consistent with the statute they implement

# Where are the rules? (And where are the statutes?)

- Bills passed by the Legislature become statutes and are published in the Montana Code Annotated (MCA)
  - The MCA is maintained by the Code Commissioner and the Legal Services Division of Legislative Services
- Rules adopted by agencies are published in the Administrative Rules of Montana (ARM)
  - The ARM is maintained by the Montana Secretary of State and is available online at <https://rules.mt.gov>
- Notices of proposed rules and notices of adoption are published in the Montana Administrative Register (MAR)
  - The MAR is published twice a month by the Secretary of State and is also available online at <https://rules.mt.gov>

# How does an agency adopt a rule?

- The Montana Administrative Procedures Act (MAPA) provides the required process for agency rulemaking
- Rules must go through the multi-step process outlined in MAPA, Title 2, chapter 4, parts 1 through 4

# Basic Outline of MAPA Process

- Agency contacts primary bill sponsor and drafts a proposed rule
- Agency publishes the proposed rule with a proposal notice in the MAR that complies with MAPA requirements
- Agency allows for public comment and may hold a public hearing on the proposed rule
- Agency publishes the adoption notice that complies with MAPA requirements to adopt the rule no less than 30 days or more than six months after the proposal notice is published
- The rule is incorporated into the ARM

# Interim Committee Role in Rulemaking

- CFHHS has administrative rule review for DPHHS
- The committee does not “approve” rulemaking
- MAPA allows the committee to:
  - Request rulemaking records from the agency
  - Submit written recommendations to the agency
  - Require that the agency hold a public hearing on a proposed rulemaking
  - Request a poll of the legislature to determine whether proposed rule is consistent with legislative intent
  - Require the agency to complete an economic impact statement
  - Object to a rule

# Steps in the Objection Process

1. Committee makes an informal objection under 2-4-406(1), MCA
2. Committee makes a formal objection under 2-4-406(2), MCA
3. Agency responds under 2-4-406(3), MCA
4. Committee may withdraw, modify, vote to send the objection to the secretary of state, or do nothing under 2-4-406(4), MCA



# Step 1: Informal Objection under 2-4-406(1), MCA

- Committee Action
  - Committee votes to object to all or a portion of a proposed administrative rule
  - Committee sends letter to agency that it objects
  - Informal objection expires if Committee meets and does not vote to renew objection
- Effect
  - Informal objection prevents agency from adopting a proposed rule until the objection expires or the end of the 6-month period during which an adoption notice must be published

# Step 2: Formal Objection under 2-4-406(2), MCA

- Committee Action
  - Committee determines by majority vote that it believes the rule was not proposed or adopted in substantial compliance with 2-4-302, 2-4-303, or 2-4-305
  - Committee sends written objection to the agency with a “concise statement of the committee’s reasons for its action”
- Effect
  - If lodged after an informal objection and before adoption of the rule, a formal objection prevents the rule from going into effect until the day after sine die of the next regular session of the legislature under 2-4-306(4)(c), MCA

# What's in 2-4-302, 2-4-303, and 2-4-305, MCA?

- 2-4-302 includes requirements for notice, hearing, and submission of views
- 2-4-303 provides requirements for emergency adoption of rules
- 2-4-305 provides requirements for validity and for the agency to provide authority for the rulemaking and a statement of reasons

# Step 3: Agency responds under 2-4-406(3), MCA

- Within 14 days after the mailing of the formal objection, the agency is required to provide a response to the committee

# Step 4: Committee action under 2-4-406(4), MCA

- After receipt of the agency response, the committee may:
  - Withdraw its objection;
  - Modify its objection;
  - Vote to send the objection to the secretary of state for publication in the ARM; or
  - Do nothing
- Effect of publishing objection:
  - The burden of proof is shifted to the agency in any subsequent court case challenging the legality of the rule;
  - The court may award attorney fees against the agency if the agency loses
- NOTE: The committee must pay for the costs of publication

# Step 5: Rescinding a formal objection

- 2 ways for committee to rescind a formal objection:
  - Before adoption of the rule:
    - By a majority vote at a committee meeting after receiving the response from the agency under 2-4-406(4), MCA;
  - After adoption of the rule:
    - By a majority of the committee informing the presiding officer that the agency adopted the rule with changes that make it comply with the committee's objections and concerns under 2-4-305(4)(c)(ii), MCA.

# Questions?

