



Law and Justice Interim Committee

69th Montana Legislature

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July 10, 2021

TO: Law and Justice Interim Committee
FROM: Julianne Burkhardt, Staff Attorney
RE: Overview of Administrative Rulemaking and Rule Review

The Law and Justice Interim Committee (Committee) is required to review administrative rules promulgated primarily by the Department of Justice (DOJ), the Department of Corrections (DOC), the Public Safety Officers Standards and Training Council (POST), and the Board of Pardons and Parole (BOPP) for compliance with the Montana Administrative Procedure Act (MAPA). The rulemaking and rule review processes and the Committee's and an individual legislator's roles 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."¹ Administrative rules have the force and effect of law.

MAPA governs the rulemaking process for most agencies, including Revenue. 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 process and requirements contained in MAPA and must be consistent with statutory authority granted by the Legislature for that agency to adopt rules.²

The Administrative Rules of Montana (ARM) is a collection of all the administrative rules currently in effect from all agencies, similar to how the Montana Code Annotated (MCA) is a collection of all the statutes in effect that have been passed by the Legislature. The ARMs are broken down into Title, chapter, and subchapter (for example, 42.1.101).

Notices about new rules or amendments to rules are published in the Montana Administrative Register (MAR). The MAR is published twice a month. The MAR contains notices of proposed, amended, transferred, repealed, and adopted rules, as well as notices of

¹ § 2-4-102.

² § 2-4-305(3).

public hearings, Attorney General's opinions, and notices of vacancies on state boards. The ARMs and MAR are available and searchable online at <https://rules.mt.gov>. Notices published in the MAR have a MAR number that begins with the year that it was proposed followed by a unique identifier (for example, 2025-42.1).

To adopt rules the agency publishes a notice of proposed rulemaking in the MAR. After allowing time for public comment and a public hearing, an agency publishes an adoption notice in the MAR. The rule is then incorporated into the ARM. Notices published in the MAR must meet the requirements in MAPA, discussed below.

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, parts 1 through 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

The agency is required to send an electronic copy of published proposal notices to the Committee.³

Notice to Public and Publication

Notice of proposed rulemaking are 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.⁴ A public hearing is not necessary unless it is required by a specific 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.⁵ 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.⁶

Authority and Necessity

³ § 2-4-302(2).

⁴ § 2-4-303.

⁵ § 2-4-302(1)(b).

⁶ § 2-4-302(5)(a).

In general, a proposal notice must include a description of the substance of the intended action or subjects and issues involved,⁷ cite to the specific statutory grant of rulemaking authority pursuant to which the rule is adopted and to the specific statutes being implemented,⁸ 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.⁹

Notice to Sponsor

An agency is required to contact a primary bill sponsor when the agency begins to work on the substantive content of a proposal notice for the first rule implementing legislation.¹⁰ The agency will contact the sponsor at the sponsor's legislative e-mail address. Failure to contact a sponsor invalidates the rule notice.¹¹ If the primary sponsor submits comments to the agency and the agency disagrees, the agency must publish the sponsor's unredacted comments in the proposal notice and a statement explaining why the comments were not incorporated into the proposed rule.¹²

Small Business Impact Statement

A proposal notice must include a small business impact analysis.¹³ The analysis must identify by class or group the small businesses probably affected by the proposed rule and include a statement of the probable significant and direct effects of the proposed rule on the small businesses identified.¹⁴ 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.¹⁵

Adoptions by Reference

The agency may adopt material into rule by reference if it would be unduly cumbersome, expensive, or otherwise inexpedient to publish the full material and it is reasonable to do so. 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 material, 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.¹⁶

⁷ § 2-4-302(1)(a).

⁸ § 2-4-305(3).

⁹ § 2-4-305(6)(b).

¹⁰ HB 592, sec. 1(1) (2025).

¹¹ HB 592, sec. 1(1) (2025).

¹² HB 592, sec. 1(1) (2025).

¹³ § 2-4-111(1)(a). 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).)

¹⁴ § 2-4-111(1)(a).

¹⁵ § 2-4-111(1)(b).

¹⁶ § 2-4-307.

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.¹⁷ Prior to adoption of the emergency rule the agency must make a good faith effort to provide written notice to each member and staffer of the Committee.¹⁸

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.¹⁹ The agency's rulemaking is adopted upon filing the adoption notice with the secretary of state and is generally effective upon publication in the MAR with exceptions, such as when a committee formally objects.²⁰

Consideration of Comments

Before adoption of a rule, the agency must consider all oral and written submissions from the public regarding the proposed rule.²¹ If the adopted rule does not reflect the comments from the primary sponsor by the means set forth in the proposal notice, the agency shall publish the sponsor's unredacted comments in the adoption notice and provide a statement why the sponsor's comments were not incorporated into the adopted rule.²²

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.²³

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:

¹⁷ § 2-4-303.

¹⁸ § 2-4-303(1)(c).

¹⁹ § 2-4-302; § 2-4-305(7).

²⁰ § 2-4-306.

²¹ § 2-4-305(1)(b)(i).

²² § 2-4-305(1)(b)(ii).

²³ § 2-4-305(10).

- request the agency's rulemaking records to check for compliance with MAPA;²⁴
- 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;²⁵
- require that a rulemaking hearing be held;²⁶
- participate in litigation involving MAPA;²⁷
- review the incidence and conduct of administrative proceedings under MAPA;²⁸
- 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.²⁹
- require an economic impact statement relating to the adoption of a rule;³⁰
- request publication of material adopted by reference in a rule by three-fourths vote of the committee;³¹
- publish a statement with the Secretary of State concerning the advisory nature of an adjective or interpretive rule;³²
- receive reports on litigation and request documents in litigation involving judicial construction of a rule or MAPA;³³
- 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;³⁴ 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

Under MAPA, the Committee may object to agency rules. One process is referred to as an informal objection and the other process is referred to as a formal objection. Failure of the

²⁴ § 2-4-402(2)(a).

²⁵ § 2-4-402(2)(b).

²⁶ § 2-4-402(2)(c).

²⁷ § 2-4-402(2)(d).

²⁸ § 2-4-402(2)(e).

²⁹ § 2-4-403; § 2-4-404.

³⁰ § 2-4-405.

³¹ § 2-4-307(5).

³² § 2-4-308(2).

³³ § 2-4-410.

³⁴ § 2-4-411.

Committee to object to the adoption, amendment, or repeal of a rule is inadmissible in court to prove the validity of the rule.³⁵ **Note: The Speaker of the House and the President of the Senate are *ex officio* members of the Committee for the purpose of breaking a tie vote on a question before the Committee involving an objection to an administrative rule.³⁶

Informal Objection

Procedure: If a majority of the Committee members notify the chair 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). The Committee must address the objection at its next meeting. **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.³⁷

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: If the Committee lodged an informal objection before lodging the formal objection, the rule is not effective until the day after final adjournment of the next regular session of the Legislature.³⁸ The Committee may withdraw a formal objection before the proposed rule is adopted by a majority vote at a committee meeting. After the rule is adopted, the Committees may withdraw its formal objection if a majority of the Committee informs the presiding officer in writing that the rule has been adopted with changes that make the rule comply with the Committee's objections and concerns.

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 legal 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.³⁹

³⁵ § 2-4-412(4).

³⁶ § 2-4-112.

³⁷ § 2-4-406(1).

³⁸ § 2-4-306(4)(c); § 2-4-406(2).

³⁹ § 2-4-406(4) and (5).

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 and may send the formal objection to the Secretary of State for publication, as provided above.

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:

- petition for the adoption, amendment, or repeal of a rule;⁴⁰
- if a rule initially implements legislation of which the individual was a primary sponsor, provide comments and receive notice;⁴¹
- request an agency to hold an informal conference or appoint a committee to develop a proposed rule before the agency publishes notice;⁴²
- join an agency's list of interested persons for purposes of rulemaking;⁴³ or
- contribute to the rulemaking process by submitting oral or written testimony on a proposed rule.

Public Safety Officers Training Council (POST)

MAR 2025 Issue No. 10, (May 26, 2025): The POST Council issued a Notice of Proposed Rulemaking concerning the amendment of ARM 23.13.207, 23.13.208 and 23.13.801 pertaining to the certification of public safety officers. No public hearing is contemplated. The proposed amendments are necessary for clarity and to correct a numbering error that was found after the previous amendments were adopted in January of 2025.

⁴⁰ § 2-4-315.

⁴¹ HB 592 (2025).

⁴² § 2-4-304.

⁴³ § 2-4-302(3).