

HOUSE BILL NO. 126

INTRODUCED BY D. BEDEY, J. FITZPATRICK

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS RELATED TO AGENCY ADMINISTRATIVE RULEMAKING; REVISING LAWS RELATED TO LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULES BY PRIMARY SPONSORS; ENCOURAGING ACTIVE PUBLIC INVOLVEMENT DURING RULE HEARINGS; AMENDING SECTIONS 2-3-301, 2-4-302, AND 2-4-305, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 2-3-301, MCA, is amended to read:

"2-3-301. Agency to accept public comment electronically -- dissemination of electronic mail address and documents required -- fees prohibited. (1) An agency that accepts public comment pursuant to a statute, administrative rule, or policy, including an agency adopting rules pursuant to the Montana Administrative Procedure Act or an agency to which 2-3-111 applies, shall provide for the receipt of public comment by the agency by use of an electronic mail system.

(2) As part of the agency action required by subsection (1), an agency shall disseminate by appropriate media its electronic mail address to which public comment may be made, including dissemination in:

- (a) rulemaking notices published pursuant to the Montana Administrative Procedure Act;
(b) the telephone directory of state agencies published by the department of administration;
(c) any notice of agency existence, purpose, and operations published on the internet; or
(d) any combination of the methods of dissemination provided in subsections (2)(a) through (2)(c).

(3) An agency shall, at the request of another agency or person and subject to 2-6-1003, disseminate the electronic documents to that agency or person by electronic mail in place of surface mail. Notification of the availability of an electronic notice of proposed rulemaking may be sent to an interested person as provided in 2-4-302(2)(a)(ii)(b)(ii). An agency may not charge a fee for providing documents by

1 electronic mail in accordance with this subsection.

2 (4) An agency that receives electronic mail pursuant to subsection (1) shall retain the electronic
3 mail as either an electronic or a paper copy to the same extent that other comments are retained.

4 (5) As used in this section, "agency" means a department, division, bureau, office, board,
5 commission, authority, or other agency of the executive branch of state government."
6

7 **Section 2.** Section 2-4-302, MCA, is amended to read:

8 **"2-4-302. Notice, hearing, and submission of views.** (1) (a) Prior to the adoption, amendment, or
9 repeal of any rule, the agency shall give written notice of its proposed action. The proposal notice must include
10 a statement of either the terms or substance of the intended action or a description of the subjects and issues
11 involved, the reasonable necessity for the proposed action, and the time when, place where, and manner in
12 which interested persons may present their views on the proposed action. The reasonable necessity must be
13 written in plain, easily understood language.

14 (b) The agency shall state in the proposal notice the date on which and the manner in which
15 contact was made with the primary sponsor as required in subsection (2)(e). If the notification to the primary
16 sponsor was given by mail, the date stated in the proposal notice must be the date on which the notification
17 was mailed by the agency. If the agency fails to comply with the primary sponsor notification and sponsor
18 publication provisions of subsection (8)(b) or the proposal notice fails to state the date on which and the manner
19 in which the primary sponsor was contacted, the filing of the proposal notice under subsection (2)(a) is
20 ineffective for the purposes of this part and for the purposes of the law that the agency cites in the proposal
21 notice as the authority for the proposed action.

22 (c) If the agency proposes to adopt, increase, or decrease a monetary amount that a person shall
23 pay or will receive, such as a fee, cost, or benefit, the notice must include an estimate, if known, of:

24 (i) the cumulative amount for all persons of the proposed increase, decrease, or new amount; and

25 (ii) the number of persons affected.

26 (2) (a) The proposal notice must be filed with the secretary of state for publication in the register,
27 as provided in 2-4-312. When the agency files the proposal notice with the secretary of state to prepare it for
28 publication in the register, the agency shall concurrently send an electronic copy of the proposal notice to the

1 appropriate administrative rule review committee. If the secretary of state requires formatting changes to the
2 proposal notice before it may be published, the agency is not required to send another copy of the proposal
3 notice to the committee. The requirement to concurrently send a copy of the proposal notice to the committee is
4 fulfilled if the agency sends an electronic copy to each member of the staff of the appropriate rule review
5 committee on the same day that the notice is filed with the secretary of state.

6 (b) (i) Except as provided in subsection (2)(b)(ii), within 3 days of publication, a copy of the
7 published proposal notice must be sent to interested persons who have made timely requests to the agency to
8 be informed of its rulemaking proceedings, and to the office of any professional, trade, or industrial society or
9 organization or member of those entities who has filed a request with the appropriate administrative rule review
10 committee when the request has been forwarded to the agency as provided in subsection (2)(c).

11 (ii) In lieu of sending a copy of the published proposal notice to an interested person who has
12 requested the notice, the agency may, with the consent of that person, send that person an electronic
13 notification that the proposal notice is available on the agency's website and an electronic link to the part of the
14 agency's website or a description of the means of locating that part of the agency's website where the notice is
15 available.

16 (iii) Each agency shall create and maintain a list of interested persons and the subject or subjects
17 in which each person on the list is interested. A person who submits a written comment or attends a hearing in
18 regard to proposed agency action under this part must be informed of the list by the agency. An agency
19 complies with this subsection (2)(b)(iii) if it includes in the proposal notice an advisement explaining how
20 persons may be placed on the list of interested persons and if it complies with subsection (7).

21 (c) The appropriate administrative rule review committee shall forward a list of all organizations or
22 persons who have submitted a request to be informed of agency actions to the agencies that the committee
23 oversees that publish rulemaking notices in the register. The list must be amended by the agency upon request
24 of any person requesting to be added to or deleted from the list.

25 (d) The proposal notice required by subsection (1) must be published at least 30 days in advance
26 of the agency's proposed action. The agency shall post the proposal notice on a state digital access system or
27 other electronic communications system available to the public.

28 (e) (i) ~~When~~ Before an agency begins to work on the substantive content and the wording of a

1 proposal notice for a rule that initially implements legislation, the agency shall contact, as provided in
2 subsection (8), the legislator who was the primary sponsor of the legislation to:

3 (A) obtain the legislator's comments;

4 (B) inform the legislator of the known dates by which each step of the rulemaking process must be
5 completed; and

6 (C) provide the legislator with information about the time periods during which the legislator may
7 comment on the proposed rules for publishing pursuant to subsection (8)(b)(ii), including the opportunity to
8 provide comment to the appropriate administrative rule review committee.

9 (ii) If the legislation affected more than one program, the primary sponsor must be contacted
10 pursuant to this subsection (2)(e) each time that a rule is being proposed to initially implement the legislation for
11 a program.

12 (iii) Within 3 days after a proposal notice covered under subsection (2)(e)(i) has been published as
13 required in subsection (2)(a), a copy of the published notice must be sent to the primary sponsor contacted
14 under this subsection (2)(e).

15 (3) If a statute provides for a method of publication different from that provided in subsection (2),
16 the affected agency shall comply with the statute in addition to the requirements contained in this section.
17 However, the notice period may not be less than 30 days or more than 6 months.

18 (4) Prior to the adoption, amendment, or repeal of any rule, the agency shall afford interested
19 persons at least 20 days' notice of a hearing and at least 28 days from the day of the original notice to submit
20 data, views, or arguments, orally or in writing. If an amended or supplemental notice is filed, additional time may
21 be allowed for oral or written submissions. In the case of substantive rules, the notice of proposed rulemaking
22 must state that opportunity for oral hearing must be granted if requested by either 10% or 25, whichever is less,
23 of the persons who will be directly affected by the proposed rule, by a governmental subdivision or agency, by
24 the appropriate administrative rule review committee, or by an association having not less than 25 members
25 who will be directly affected. If the proposed rulemaking involves matters of significant interest to the public, the
26 agency shall schedule an oral hearing.

27 (5) An agency may continue a hearing date for cause. In the discretion of the agency, contested
28 case procedures need not be followed in hearings held pursuant to this section. If a hearing is otherwise

1 required by statute, nothing in this section alters that requirement.

2 (6) If an agency fails to publish a notice of adoption within the time required by 2-4-305(7) and the
3 agency again proposes the same rule for adoption, amendment, or repeal, the proposal must be considered a
4 new proposal for purposes of compliance with this chapter.

5 (7) (a) At the commencement of a hearing on the intended action, the person designated by the
6 agency to preside at the hearing shall:

7 (a)(i) read aloud the "Notice of Function of Administrative Rule Review Committee" appearing in the
8 register; and

9 (b)(ii) inform the persons at the hearing of the provisions of subsection (2)(b) and provide them an
10 opportunity to place their names on the list; and

11 (iii) encourage active public participation by verbally presenting the proposed action and requesting
12 that the public present any oral or written testimony at the hearing.

13 (b) Before closing a hearing on the intended action, the agency shall provide a reasonable time for
14 the public to ask the agency questions. The agency shall respond verbally to the questions raised by the public
15 during the hearing.

16 (8) (a) For purposes of contacting primary sponsors under subsection (2)(e), a current or former
17 legislator who wishes to receive notice shall keep the current or former legislator's name, address, e-mail
18 address, and telephone number on file with the secretary of state. The secretary of state may also use
19 legislator contact information provided by the legislative services division for the purposes of the register. The
20 secretary of state shall update the contact information whenever the secretary of state receives corrected
21 information from the legislator or the legislative services division. An agency proposing rules shall consult the
22 register when providing sponsor contact.

23 (b) (i) An agency has complied with the primary bill sponsor contact requirements of this section
24 when the agency has attempted to reach the primary bill sponsor at the legislator's address, e-mail address,
25 and telephone number on file with the secretary of state pursuant to subsection (8)(a) at least 30 days in
26 advance of the publishing of the agency's proposal notice. If the agency is able to contact the primary sponsor
27 by using less than all of these three methods of contact, the other methods need not be used.

28 (ii) If the primary sponsor submits comments pursuant to subsection (2)(e) for an agency proposal

1 and the agency disagrees with the primary sponsor, the agency shall publish the primary sponsor's unredacted
2 comment in the proposal notice and provide a statement explaining why the sponsor's comments were not
3 incorporated into the proposed rule.

4 (iii) The primary sponsor may expressly waive the sponsor notification requirement in subsection
5 (8)(b)(i) or the sponsor publication requirement in subsection (8)(b)(ii).

6 (9) This section applies to the department of labor and industry adopting a rule relating to a
7 commercial drug formulary as provided in 39-71-704. This section does not apply to the automatic updating of
8 department of labor and industry rules relating to commercial drug formularies as provided in 39-71-704."

9

10 **Section 3.** Section 2-4-305, MCA, is amended to read:

11 **"2-4-305. Requisites for validity -- authority and statement of reasons.** (1) (a) The agency shall
12 fully consider written and oral submissions respecting the proposed rule, including comments submitted by the
13 primary sponsor of the legislation prior to the drafting of the substantive content and wording of a proposed rule
14 that initially implements legislation.

15 (b) (i) Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons
16 for and against its adoption, incorporating in the statement the reasons for overruling the considerations urged
17 against its adoption. If substantial differences exist between the rule as proposed and as adopted and the
18 differences have not been described or set forth in the adopted rule as that rule is published in the register, the
19 differences must be described in the statement of reasons for and against agency action. When written or oral
20 submissions have not been received, an agency may omit the statement of reasons.

21 (ii) If an adopted rule that initially implements legislation does not reflect the comments submitted
22 by the primary sponsor, the agency shall publish the sponsor's unredacted comments in the adoption notice
23 and provide a statement explaining why the sponsor's comments were not incorporated into the adopted rule.
24 The sponsor may waive this requirement in writing.

25 (2) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to
26 statutory language in order to convey the meaning of a rule interpreting the language, the reference must
27 clearly indicate the portion of the language that is statutory and the portion that is an amplification of the
28 language.

1 (3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking
2 authority pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and adopted
3 rule must include a citation to the specific section or sections in the Montana Code Annotated that the rule
4 purports to implement. A substantive rule may not be proposed or adopted unless:

5 (a) a statute granting the agency authority to adopt rules clearly and specifically lists the subject
6 matter of the rule as a subject upon which the agency shall or may adopt rules; or

7 (b) the rule implements and relates to a subject matter or an agency function that is clearly and
8 specifically included in a statute to which the grant of rulemaking authority extends.

9 (4) Each rule that is proposed and adopted by an agency and that implements a policy of a
10 governing board or commission must include a citation to and description of the policy implemented. Each
11 agency rule implementing a policy and the policy itself must be based on legal authority and otherwise comply
12 with the requisites for validity of rules established by this chapter.

13 (5) To be effective, each substantive rule adopted must be within the scope of authority conferred
14 and in accordance with standards prescribed by other provisions of law.

15 (6) Whenever by the express or implied terms of any statute a state agency has authority to adopt
16 rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, an adoption,
17 amendment, or repeal of a rule is not valid or effective unless it is:

18 (a) consistent and not in conflict with the statute; and

19 (b) reasonably necessary to effectuate the purpose of the statute. A statute mandating that the
20 agency adopt rules establishes the necessity for rules but does not, standing alone, constitute reasonable
21 necessity for a rule. The agency shall also address the reasonableness component of the reasonable necessity
22 requirement by, as indicated in 2-4-302(1) and subsection (1) of this section, stating the principal reasons and
23 the rationale for its intended action and for the particular approach that it takes in complying with the mandate
24 to adopt rules. Subject to the provisions of subsection (8), reasonable necessity must be clearly and thoroughly
25 demonstrated for each adoption, amendment, or repeal of a rule in the agency's notice of proposed rulemaking
26 and in the written and oral data, views, comments, or testimony submitted by the public or the agency and
27 considered by the agency. A statement that merely explains what the rule provides is not a statement of the
28 reasonable necessity for the rule.

1 (7) A rule is not valid unless notice of it is given and it is adopted in substantial compliance with 2-
2 4-302, 2-4-303, or 2-4-306 and this section, unless notice of adoption of the rule is published within 6 months of
3 the publishing of notice of the proposed rule, and unless the adoption is in compliance with the prohibitions of
4 subsection (11). The measure of whether an agency has adopted a rule in substantial compliance with 2-4-302,
5 2-4-303, or 2-4-306 and this section is not whether the agency has provided notice of the proposed rule,
6 standing alone, but rather must be based on an analysis of the agency's substantial compliance with 2-4-302,
7 2-4-303, or 2-4-306 and this section. If an amended or supplemental notice of either proposed or final
8 rulemaking, or both, is published concerning the same rule, the 6-month limit must be determined with
9 reference to the latest notice in all cases.

10 (8) (a) An agency may use an amended proposal notice or the adoption notice to correct
11 deficiencies in citations of authority for rules and in citations of sections implemented by rules.

12 (b) An agency may use an amended proposal notice but, except for clerical corrections, may not
13 use the adoption notice to correct deficiencies in a statement of reasonable necessity.

14 (c) If an agency uses an amended proposal notice to amend a statement of reasonable necessity
15 for reasons other than for corrections in citations of authority, in citations of sections being implemented, or of a
16 clerical nature, the agency shall allow additional time for oral or written comments from the same interested
17 persons who were notified of the original proposal notice, including from a primary sponsor, if primary sponsor
18 notification was required under 2-4-302, and from any other person who offered comments or appeared at a
19 hearing already held on the proposed rule.

20 (9) Subject to 2-4-112, if a majority of the members of the appropriate administrative rule review
21 committee notify the committee presiding officer that those members object to all or a portion of a notice of
22 proposed rulemaking, the committee shall notify the agency in writing that the committee objects to all or a
23 portion of the proposal notice and will address the objections at the next committee meeting. Following notice
24 by the committee to the agency, all or a portion of the proposal notice that the committee objects to may not be
25 adopted until publication of the last issue of the register that is published before expiration of the 6-month
26 period during which the adoption notice must be published, unless prior to that time, the committee meets and
27 does not make the same objection. A copy of the committee's notification to the agency must be included in the
28 committee's records.

1 (10) This section applies to the department of labor and industry adopting a rule relating to a
2 commercial drug formulary as provided in 39-71-704. This section does not apply to the automatic updating of
3 department of labor and industry rules relating to commercial drug formularies as provided in 39-71-704.

4 (11) (a) In the year preceding the year in which the legislature meets in regular session, an agency
5 may not adopt a rule between October 1 through the end of the year.

6 (b) This subsection (11) does not apply to:

7 (i) an emergency rule adopted under 2-4-303;

8 (ii) subject to subsection (11)(c)(i), a rule adopted for implementation of a program or policy if the
9 unavailability of information, guidance, or notice precluded adoption of the rule before October 1; or

10 (iii) subject to subsection (11)(c)(ii), a rule adopted by providing the proposal notice and statement
11 of reasoning with an opportunity to object to the appropriate administrative rule review committee.

12 (c) (i) A rule may only be exempted under subsection (11)(b)(ii) if the notice required under 2-4-
13 302(1)(a) provides a statement explaining why the unavailability of information, guidance, or notice precluded
14 adoption of the rule before October 1.

15 (ii) A rule may be exempted under subsection (11)(b)(iii) only if the agency provides a copy of the
16 proposal notice and an explanation of the reason why the rule must be adopted before the end of the year by
17 electronic mail to each member of the committee and the committee staff. If the committee does not object to
18 the proposal within 10 business days after the electronic mail of the proposal and explanation has been sent to
19 the committee, the agency may proceed with adoption of the proposed rule. If, during the 10-day review period,
20 a majority of the members notify the committee presiding officer that those members object to the proposed
21 rulemaking, the presiding officer shall notify the agency by electronic mail that the committee objects. Following
22 notice of the objection, a rule may not be adopted before the end of the year."

23

24 NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

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26 NEW SECTION. **Section 5. Applicability.** [This act] applies to rule proposals published on or after
27 [the effective date of this act].

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