



Children, Families, Health, and Human Services Interim Committee

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65th Montana Legislature

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August 29, 2017

TO: CFHHS Interim Committee Members
FROM: Alexis Sandru, Staff Attorney
RE: MAPA Objection Process -- Pending Objection to MAR Notice Nos. 37-788, 801, 802, and 805 -- Options Moving Forward

The Montana Administrative Procedure Act (MAPA) provides two processes for objecting to a proposed administrative rule, which for the purposes of this memorandum are referred to as an informal objection and a formal objection. This memorandum summarizes the two objection processes, describes the objection to MAR notice numbers 37-788, 801, 802, and 805 that is currently pending before the CFHHS Committee, and sets forth the Committee's options for objecting moving forward.

INFORMAL OBJECTION

An informal objection is lodged pursuant to 2-4-305(9), MCA, when a majority of the Committee notifies the chair that they object to a proposed administrative rule. The effect of this objection is that it can delay the adoption of a proposed rule for up to approximately 6 months from the date of the publication of the proposed rule IF, every time that the Committee meets in the 6-month period, the Committee decides to sustain the objection. Under the informal objection, the Committee is not required to set forth in writing its reasons for the objection.

FORMAL OBJECTION

A formal objection is lodged pursuant to 2-4-406, MCA. The effect of this objection is that the effective date of a rule is delayed up until the end of the next legislative session unless the Committee withdraws the objection before the rule is adopted or unless the rule is adopted with changes that make it comply with the Committee's objection and concerns. Under the formal objection, the Committee may object only if the rule violates specific provisions of MAPA, such as 2-4-302, MCA (dealing with proper procedures for notice and filing of rules), 2-4-303, MCA (dealing with emergency and temporary rules), and 2-4-305, MCA (specifying multiple requirements for proposed rules, including time requirements for adopting rules, citations required for each rule, and requirements for the statement of reasonable necessity), and is required to give the Department written notice of its objections. The Department is required to respond in writing to the objection within 14 days. If the Committee files the objection with the Secretary of State, the burden of proving the validity of the rule shifts to the Department if there is ever a lawsuit challenging the validity of the rule.

PENDING OBJECTION & OPTIONS MOVING FORWARD

On July 26, 2017, the Committee used the informal objection process to object to MAR notice numbers 37-788, 801, 802, and 805. This objection may delay the adoption of the rules up until publication of the last issue of the Montana Administrative Register that is within the 6-month period: the adoption of MAR notice numbers 37-788, 801, and 802 (published July 7, 2017) can be delayed up until December 22, 2017, and the adoption of MAR notice number 37-805 (published on July 21, 2017) can be delayed up until January 12, 2018¹. **This objection is only maintained if, every time that the Committee meets, the Committee votes to continue the objection.** If the Committee meets in September and does not continue the objection, the Department could file the rules with the Secretary of State that day. If the Committee votes to continue the objection in September, the rules would be delayed until the Committee next meets in November. If the Committee votes to continue the objection at its November meeting, the Department can adopt the notice numbers 37-788, 801, and 802 on December 22, 2017, and notice number 37-805 on January 12, 2018, unless the Committee proceeds with a formal objection.

If Committee wishes to delay the rules from going into effect beyond the 6-month period, the Committee will need to consider formally objecting.

In deciding how to proceed with the objection that is currently pending, the Committee may want to consider the following actions at its September meeting:

1. Take no action, which would allow the Department to proceed with adopting the rules as proposed, and the rules would be effective October 1, 2017;
2. Vote to continue the objection until the Committee's November meeting, which would delay the adoption of the rules until that meeting; or
3. Vote to continue the objection until the Committee's November meeting, which would delay the adoption of the rules until that meeting, and request that staff draft a formal objection letter for the Committee's consideration at the November meeting.

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¹Dates are based on the anticipated 2018 MAR publication schedule. The finalized publication dates were not available as of August 31, 2017, but should be available by the Committee's September meeting.