

## 1 SENATE BILL NO. 82

2 INTRODUCED BY S. FITZPATRICK

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING ADMINISTRATIVE RULE REVIEW COMMITTEE  
5 VOTING PROCEDURES; PROVIDING FOR EX OFFICIO LEGISLATOR MEMBERSHIP TO A COMMITTEE  
6 FOR THE PURPOSE OF BREAKING A TIE VOTE; AMENDING SECTIONS 2-4-305, 2-4-306, 2-4-308, 2-4-  
7 314, 2-4-402, 2-4-403, 2-4-405, 2-4-406, 2-4-410, AND 2-4-411, MCA; AND PROVIDING AN IMMEDIATE  
8 EFFECTIVE DATE."

9

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

11

12 NEW SECTION. **Section 1. Administrative rule review committee voting -- objections.** (1) Except  
13 as provided in subsection (2), the speaker of the house and the president of the senate are ex officio voting  
14 members of each administrative rule review committee for the sole purpose of breaking a tie vote on a question  
15 before a committee involving an objection to an administrative rule pursuant to Title 2, chapter 4.

16 (2) If the speaker of the house, the president of the senate, or both, are members of an administrative  
17 rule review committee, the highest ranking officer of the majority party that is not a member of the committee is  
18 an ex officio voting member for the purposes of subsection (1). The ranking order for the:

19 (a) house is speaker pro tempore, majority leader, and majority whip; and

20 (b) senate is president pro tempore, majority leader, and majority whip.

21

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

23 **"2-4-305. Requisites for validity -- authority and statement of reasons.** (1) (a) The agency shall  
24 fully consider written and oral submissions respecting the proposed rule, including comments submitted by the  
25 primary sponsor of the legislation prior to the drafting of the substantive content and wording of a proposed rule  
26 that initially implements legislation.

27 (b) (i) Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons for  
28 and against its adoption, incorporating in the statement the reasons for overruling the considerations urged

1 against its adoption. If substantial differences exist between the rule as proposed and as adopted and the  
2 differences have not been described or set forth in the adopted rule as that rule is published in the register, the  
3 differences must be described in the statement of reasons for and against agency action. When written or oral  
4 submissions have not been received, an agency may omit the statement of reasons.

5 (ii) If an adopted rule that initially implements legislation does not reflect the comments submitted by  
6 the primary sponsor, the agency shall provide a statement explaining why the sponsor's comments were not  
7 incorporated into the adopted rule.

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

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

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

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

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

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

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

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

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

12 (7) A rule is not valid unless notice of it is given and it is adopted in substantial compliance with 2-4-  
13 302, 2-4-303, or 2-4-306 and this section and unless notice of adoption of the rule is published within 6 months  
14 of the publishing of notice of the proposed rule. The measure of whether an agency has adopted a rule in  
15 substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section is not whether the agency has  
16 provided notice of the proposed rule, standing alone, but rather must be based on an analysis of the agency's  
17 substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section. If an amended or supplemental  
18 notice of either proposed or final rulemaking, or both, is published concerning the same rule, the 6-month limit  
19 must be determined with reference to the latest notice in all cases.

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

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

24 (c) If an agency uses an amended proposal notice to amend a statement of reasonable necessity for  
25 reasons other than for corrections in citations of authority, in citations of sections being implemented, or of a  
26 clerical nature, the agency shall allow additional time for oral or written comments from the same interested  
27 persons who were notified of the original proposal notice, including from a primary sponsor, if primary sponsor  
28 notification was required under 2-4-302, and from any other person who offered comments or appeared at a

1 hearing already held on the proposed rule.

2 (9) ~~Subject to [section 1], if a majority of the members of the appropriate administrative rule review~~  
 3 committee notify the committee presiding officer that those members object to all or a portion of a notice of  
 4 proposed rulemaking, the committee shall notify the agency in writing that the committee objects to all or a  
 5 portion of the proposal notice and will address the objections at the next committee meeting. Following notice  
 6 by the committee to the agency, all or a portion of the proposal notice that the committee objects to may not be  
 7 adopted until publication of the last issue of the register that is published before expiration of the 6-month  
 8 period during which the adoption notice must be published, unless prior to that time, the committee meets and  
 9 does not make the same objection. A copy of the committee's notification to the agency must be included in the  
 10 committee's records.

11 (10) This section applies to the department of labor and industry adopting a rule relating to a  
 12 commercial drug formulary as provided in 39-71-704. This section does not apply to the automatic updating of  
 13 department of labor and industry rules relating to commercial drug formularies as provided in 39-71-704."  
 14

15 **Section 3.** Section 2-4-306, MCA, is amended to read:

16 **"2-4-306. Filing and format -- adoption and effective dates -- dissemination of emergency rules.**

17 (1) Each agency shall file with the secretary of state a copy of each rule adopted by it or a reference to the rule  
 18 as contained in the proposal notice. A rule is adopted on the date that the adoption notice is filed with the  
 19 secretary of state and is effective on the date referred to in subsection (4), except that if the secretary of state  
 20 requests corrections to the adoption notice, the rule is adopted on the date that the revised notice is filed with  
 21 the secretary of state.

22 (2) Pursuant to 2-15-401, the secretary of state may prescribe rules to effectively administer this  
 23 chapter, including rules regarding the printed or electronic format, style, and arrangement for notices and rules  
 24 that are filed pursuant to this chapter, and may refuse to accept the filing of any notice or rule that is not in  
 25 compliance with this chapter and the secretary of state's rules. The secretary of state shall keep and maintain a  
 26 permanent register of all notices and rules filed, including superseded and repealed rules, that must be open to  
 27 public inspection and shall provide copies of any notice or rule upon request of any person. Unless otherwise  
 28 provided by statute, the secretary of state may require the payment of the cost of providing copies.

1           (3) If the appropriate administrative rule review committee has conducted a poll of the legislature in  
2 accordance with 2-4-403, the results of the poll must be published with the rule if the rule is adopted by the  
3 agency.

4           (4) Each rule is effective after publication in the register, as provided in 2-4-312, except that:

5           (a) if a later date is required by statute or specified in the rule, the later date is the effective date;

6           (b) subject to applicable constitutional or statutory provisions:

7           (i) a temporary rule is effective immediately upon filing with the secretary of state or at a stated date  
8 following publication in the register; and

9           (ii) an emergency rule is effective at a stated date following publication in the register or immediately  
10 upon filing with the secretary of state if the agency finds that this effective date is necessary because of  
11 imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of reasons for  
12 the finding must be filed with the rule. The agency shall, in addition to the required publication in the register,  
13 take appropriate and extraordinary measures to make emergency rules known to each person who may be  
14 affected by them.

15           (c) if, following written administrative rule review committee notification to an agency under 2-4-  
16 305(9), the committee meets and under 2-4-406(1) objects to all or some portion of a proposed rule before the  
17 proposed rule is adopted, the proposed rule or portion of the proposed rule objected to is not effective until the  
18 day after final adjournment of the regular session of the legislature that begins after the notice proposing the  
19 rule was published by the secretary of state, unless, following the committee's objection under 2-4-406(1) and  
20 subject to [section 1]:

21           (i) the committee withdraws its objection under 2-4-406 before the proposed rule is adopted; or

22           (ii) the rule or portion of a rule objected to is adopted with changes that in the opinion of a majority of  
23 the committee members, as communicated in writing to the committee presiding officer and staff, make it  
24 comply with the committee's objection and concerns.

25           (5) An agency may not enforce, implement, or otherwise treat as effective a rule proposed or adopted  
26 by the agency until the effective date of the rule as provided in this section. Nothing in this subsection prohibits  
27 an agency from enforcing an established policy or practice of the agency that existed prior to the proposal or  
28 adoption of the rule as long as the policy or practice is within the scope of the agency's lawful authority.

1 (6) 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

5 **Section 4.** Section 2-4-308, MCA, is amended to read:

6 **"2-4-308. Adjective or interpretive rule -- statement of implied authority and legal effect.** (1)  
7 Each adjective or interpretive rule or portion of an adjective or interpretive rule to be adopted under implied  
8 rulemaking authority must contain a statement in the historical notations of the rule that the rule is advisory only  
9 but may be a correct interpretation of the law. The statement must be placed in the ARM when the rule in  
10 question is scheduled for reprinting.

11 (2) ~~The Subject to [section 1], the~~ appropriate administrative rule review committee may file with the  
12 secretary of state, for publication with any rule or portion of a rule that it considers to be adjective or  
13 interpretive, a statement indicating that it is the opinion of the appropriate administrative rule review committee  
14 that the rule or portion of a rule is adjective or interpretive and therefore advisory only. If the committee  
15 requests the statement to be published for an adopted rule not scheduled for reprinting in the ARM, the cost of  
16 publishing the statement in the ARM must be paid by the committee."  
17

18 **Section 5.** Section 2-4-314, MCA, is amended to read:

19 **"2-4-314. Biennial review by agencies -- recommendations by committee.** (1) Each agency shall  
20 at least biennially review its rules to determine if any new rule should be adopted or any existing rule should be  
21 modified or repealed.

22 (2) ~~The Subject to [section 1], the~~ committee may recommend to the legislature those modifications,  
23 additions, or deletions of agency rulemaking authority which the committee considers necessary."  
24

25 **Section 6.** Section 2-4-402, MCA, is amended to read:

26 **"2-4-402. Powers of committees -- duty to review rules.** (1) The administrative rule review  
27 committees shall review all proposed rules filed with the secretary of state.

28 (2) ~~The Subject to [section 1], the~~ appropriate administrative rule review committee may:

- 1 (a) request and obtain an agency's rulemaking records for the purpose of reviewing compliance with  
 2 2-4-305;
- 3 (b) prepare written recommendations for the adoption, amendment, or rejection of a rule and submit  
 4 those recommendations to the department proposing the rule and submit oral or written testimony at a  
 5 rulemaking hearing;
- 6 (c) require that a rulemaking hearing be held in accordance with the provisions of 2-4-302 through 2-  
 7 4-305;
- 8 (d) institute, intervene in, or otherwise participate in proceedings involving this chapter in the state  
 9 and federal courts and administrative agencies;
- 10 (e) review the incidence and conduct of administrative proceedings under this chapter."  
 11

12 **Section 7.** Section 2-4-403, MCA, is amended to read:

13 **"2-4-403. Legislative intent -- poll.** (1) ~~Subject to [section 1], if the legislature is not in session, the~~  
 14 committee may poll all members of the legislature by mail to determine whether a proposed rule is consistent  
 15 with the intent of the legislature.

16 (2) If 20 or more legislators object to a proposed rule, the committee shall poll the members of the  
 17 legislature.

18 (3) The poll must include an opportunity for the agency to present a written justification for the  
 19 proposed rule to the members of the legislature."  
 20

21 **Section 8.** Section 2-4-405, MCA, is amended to read:

22 **"2-4-405. Economic impact statement.** (1) ~~Upon~~ Subject to [section 1], on written request of the  
 23 appropriate administrative rule review committee based upon the affirmative request of a majority of the  
 24 members of the committee at an open meeting, an agency shall prepare a statement of the economic impact of  
 25 the adoption, amendment, or repeal of a rule as proposed. The agency shall also prepare a statement upon  
 26 receipt by the agency or the committee of a written request for a statement made by at least 15 legislators. If  
 27 the request is received by the committee, the committee shall give the agency a copy of the request, and if the  
 28 request is received by the agency, the agency shall give the committee a copy of the request. As an alternative,

1 the committee may, by contract, prepare the estimate.

2 (2) Except to the extent that the request expressly waives any one or more of the following, the  
3 requested statement must include and the statement prepared by the committee may include:

4 (a) a description of the classes of persons who will be affected by the proposed rule, including classes  
5 that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

6 (b) a description of the probable economic impact of the proposed rule upon affected classes of  
7 persons, including but not limited to providers of services under contracts with the state and affected small  
8 businesses, and quantifying, to the extent practicable, that impact;

9 (c) the probable costs to the agency and to any other agency of the implementation and enforcement  
10 of the proposed rule and any anticipated effect on state revenue;

11 (d) an analysis comparing the costs and benefits of the proposed rule to the costs and benefits of  
12 inaction;

13 (e) an analysis that determines whether there are less costly or less intrusive methods for achieving  
14 the purpose of the proposed rule;

15 (f) an analysis of any alternative methods for achieving the purpose of the proposed rule that were  
16 seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

17 (g) a determination as to whether the proposed rule represents an efficient allocation of public and  
18 private resources; and

19 (h) a quantification or description of the data upon which subsections (2)(a) through (2)(g) are based  
20 and an explanation of how the data was gathered.

21 (3) A request to an agency for a statement or a decision to contract for the preparation of a statement  
22 must be made prior to the final agency action on the rule. The statement must be filed with the appropriate  
23 administrative rule review committee within 3 months of the request or decision. A request or decision for an  
24 economic impact statement may be withdrawn at any time.

25 (4) ~~Upon~~ Subject to [section 1], on receipt of an impact statement, the committee shall determine the  
26 sufficiency of the statement. If the committee determines that the statement is insufficient, the committee may  
27 return it to the agency or other person who prepared the statement and request that corrections or amendments  
28 be made. If the committee determines that the statement is sufficient, a notice, including a summary of the



1 statement and indicating where a copy of the statement may be obtained, must be filed with the secretary of  
 2 state for publication in the register by the agency preparing the statement or by the committee, if the statement  
 3 is prepared under contract by the committee, and must be mailed to persons who have registered advance  
 4 notice of the agency's rulemaking proceedings.

5 (5) This section does not apply to rulemaking pursuant to 2-4-303.

6 (6) The final adoption, amendment, or repeal of a rule is not subject to challenge in any court as a  
 7 result of the inaccuracy or inadequacy of a statement required under this section.

8 (7) An environmental impact statement prepared pursuant to 75-1-201 that includes an analysis of the  
 9 factors listed in this section satisfies the provisions of this section."

10

11 **Section 9.** Section 2-4-406, MCA, is amended to read:

12 **"2-4-406. Committee objection to violation of authority for rule -- effect.** (1) ~~If Subject to [section~~  
 13 1], if the appropriate administrative rule review committee objects to all or some portion of a proposed or  
 14 adopted rule because the committee considers it not to have been proposed or adopted in substantial  
 15 compliance with 2-4-302, 2-4-303, and 2-4-305, the committee shall send a written objection to the agency that  
 16 promulgated the rule. The objection must contain a concise statement of the committee's reasons for its action.

17 (2) Within 14 days after the mailing of a committee objection to a rule, the agency promulgating the  
 18 rule shall respond in writing to the committee. After receipt of the response, the committee may withdraw or  
 19 modify its objection.

20 (3) ~~If Subject to [section 1], if the committee fails to withdraw or substantially modify its objection to a~~  
 21 rule, it may vote to send the objection to the secretary of state, who shall, upon receipt of the objection, publish  
 22 the objection in the register adjacent to any notice of adoption of the rule and in the ARM adjacent to the rule,  
 23 provided an agency response must also be published if requested by the agency. Costs of publication of the  
 24 objection and the agency response must be paid by the committee.

25 (4) If an objection to all or a portion of a rule has been published pursuant to subsection (3), the  
 26 agency bears the burden, in any action challenging the legality of the rule or portion of a rule objected to by the  
 27 committee, of proving that the rule or portion of the rule objected to was adopted in substantial compliance with  
 28 2-4-302, 2-4-303, and 2-4-305. If a rule is invalidated by court judgment because the agency failed to meet its

1 burden of proof imposed by this subsection and the court finds that the rule was adopted in arbitrary and  
2 capricious disregard for the purposes of the authorizing statute, the court may award costs and reasonable  
3 attorney fees against the agency."  
4

5 **Section 10.** Section 2-4-410, MCA, is amended to read:

6 **"2-4-410. Report of litigation.** Each agency shall report to the appropriate administrative rule review  
7 committee any judicial proceedings in which the construction or interpretation of any provision of this chapter is  
8 in issue and may report to the committee any proceeding in which the construction or interpretation of any rule  
9 of the agency is in issue. ~~Upon~~ Subject to [section 1], on request of the committee, copies of documents filed in  
10 any proceeding in which the construction or interpretation of either this chapter or an agency rule is in issue  
11 must be made available to the committee by the agency involved."  
12

13 **Section 11.** Section 2-4-411, MCA, is amended to read:

14 **"2-4-411. Report.** ~~The~~ Subject to [section 1], the committee may recommend amendments to the  
15 Montana Administrative Procedure Act or the repeal, amendment, or adoption of a rule as provided in 2-4-412  
16 and make other recommendations and reports as it considers advisable."  
17

18 NEW SECTION. **Section 12. Codification instruction.** [Section 1] is intended to be codified as an  
19 integral part of Title 2, chapter 4, part 1, and the provisions of Title 2, chapter 4, part 1, apply to [section 1].  
20

21 NEW SECTION. **Section 13. Effective date.** [This act] is effective on passage and approval.  
22

- END -