



## Children, Families, Health, and Human Services Interim Committee

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### 65th Montana Legislature

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March 20, 2018

To: Children, Families, Health, and Human Services Interim Committee  
From: Julie Johnson, Staff Attorney  
Re: MAR Notice No. 37-820

On March 16, 2018, CFHHS received a letter from the Revenue and Transportation Interim Committee (RTIC) regarding the implementation of administrative rules for the medical marijuana program that were proposed in Montana Administrative Register (MAR) Notice No. 37-820. RTIC has requested that CFHHS make a formal objection to these rules pursuant to 2-4-406, MCA. Section 2-4-406, MCA, is found at the end of this memo. The purpose of this brief memo is to outline the process to file a formal objection pursuant to 2-4-406, MCA.

First off, the rules in MAR Notice No. 37-820 have already been adopted, and therefore an informal objection to those rules is no longer available.

CFHHS, however, may still make a formal objection to the rules and lodge the objection with the Secretary of State pursuant to 2-4-406, MCA. The effect of this objection will not delay the effective date of the rules because the rules have already been adopted. 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.

Under the formal objection process, 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.

Section 2-4-406, MCA, also provides that if a committee fails to withdraw or substantially modify its objection to a rule, it may vote to send the objection to the Secretary of State. The Secretary of State shall then publish the objection in the register adjacent to any notice of adoption of the rule and in the ARM adjacent to the rule, provided an agency response must also be published if requested by the agency. Please note that costs of publication of the objection and the agency response must be paid by the committee.

In deciding how to proceed with a formal objection, the Committee may want to consider the following actions at its March meeting:

1. Take no action;
2. Vote to direct staff to draft a formal objection letter for the Committee's consideration at the May meeting and to research costs of publishing;
3. Vote to direct staff to draft a formal objection letter for the Committee's consideration at the March meeting and consider what action to take after receipt of the department's response.

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

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

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

(4) If an objection to all or a portion of a rule has been published pursuant to subsection (3), the agency bears the burden, in any action challenging the legality of the rule or portion of a rule objected to by the committee, of proving that the rule or portion of the rule objected to was adopted in substantial compliance with 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 burden of proof imposed by this subsection and the court finds that the rule was adopted in arbitrary and capricious disregard for the purposes of the authorizing statute, the court may award costs and reasonable attorney fees against the agency.