

SENATE BILL NO. 105

INTRODUCED BY

*[Handwritten signature]*

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT AN ADMINISTRATIVE RULE OBJECTED TO BY A MEMBER OF THE ADMINISTRATIVE CODE COMMITTEE MAY NOT BE ADOPTED UNTIL THE END OF THE 6-MONTH PERIOD DURING WHICH THE RULE MUST BE ADOPTED, UNLESS PRIOR TO THAT TIME, THE COMMITTEE MEETS AND DOES NOT MAKE THE SAME OBJECTION; PROVIDING THAT AN ADMINISTRATIVE RULE OBJECTED TO BY THE ADMINISTRATIVE CODE COMMITTEE BEFORE THE RULE IS ADOPTED IS IN SOME CIRCUMSTANCES NOT EFFECTIVE UNTIL AFTER ADJOURNMENT OF THE NEXT REGULAR SESSION OF THE LEGISLATURE; AMENDING SECTIONS 2-4-305 AND 2-4-306, MCA; AND PROVIDING AN APPLICABILITY DATE."

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

Section 1. Section 2-4-305, MCA, is amended to read:

"2-4-305. Requisites for validity -- authority and statement of reasons. (1) The agency shall consider fully written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption. If substantial differences exist between the rule as proposed and as adopted and the differences have not been described or set forth in the adopted rule as that rule is printed in the ~~Montana Administrative Register~~ register, the differences must be described in the statement of reasons for and against agency action. When no written or oral submissions have been received, an agency may omit the statement of reasons.

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

(3) Each proposed and adopted rule ~~shall~~ must include a citation to the specific grant of rulemaking authority pursuant to which it or any part ~~thereof~~ of the rule is adopted. In addition, each proposed and adopted rule ~~shall~~ must include a citation to the specific section or sections in the Montana Code Annotated

1 ~~which~~ that the rule purports to implement.

2 (4) Each rule proposed and adopted by an agency implementing a policy of a governing board or  
3 commission must include a citation to and description of the policy implemented. Each agency rule  
4 implementing a policy, as used in the definition set forth in 2-4-102(10), and the policy itself must be based  
5 on legal authority and otherwise comply with the requisites for validity of rules established by this chapter.

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

8 (6) Whenever by the express or implied terms of any statute a state agency has authority to adopt  
9 rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, no rule  
10 adopted is valid or effective unless:

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

12 (b) reasonably necessary to effectuate the purpose of the statute. ~~Such reasonable~~ Reasonable  
13 necessity must be demonstrated in the agency's notice of proposed rulemaking and in the written and oral  
14 data, views, comments, or testimony submitted by the public or the agency and considered by the agency.

15 (7) No rule is valid unless adopted in substantial compliance with 2-4-302 or 2-4-303 and this  
16 section and unless notice of adoption ~~thereof~~ is published within 6 months of the publishing of notice of  
17 the proposed rule. If an amended or supplemental notice of either proposed or final rulemaking, or both,  
18 is published concerning the same rule, the 6-month limit must be determined with reference to the latest  
19 notice in all cases.

20 (8) If a member of the administrative code committee notifies the agency in writing that the  
21 member objects to a proposal notice and will request the committee to address the objections at a  
22 committee meeting, the proposal notice may not be adopted until publication of the last issue of the register  
23 that is published before expiration of the 6-month period during which the adoption notice must be  
24 published, unless prior to that time, the committee meets and does not make the same objection. A copy  
25 of the member's notification to the agency must be sent by the member to committee staff for filing in the  
26 committee's records."

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

29 **"2-4-306. Filing, format, and effective date -- dissemination of emergency rules.** (1) Each agency  
30 shall file with the secretary of state a copy of each rule adopted by it.

1           (2) The secretary of state may prescribe a format, style, and arrangement for notices and rules  
2 ~~which that~~ are filed pursuant to this chapter and may refuse to accept the filing of any notice or rule that  
3 is not in compliance ~~therewith~~ with this chapter. ~~He~~ The secretary of state shall keep and maintain a  
4 permanent register of all notices and rules filed, including superseded and repealed rules, ~~which shall that~~  
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6 Unless otherwise provided by statute, the secretary of state may require the payment of the cost of  
7 providing ~~such~~ copies.

8           (3) In the event that the administrative code committee has conducted a poll of the legislature in  
9 accordance with 2-4-403 or the revenue oversight committee has conducted a poll in accordance with  
10 5-18-109, the results of the poll ~~shall~~ must be published with the rule.

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

13           (a) if a later date is required by statute or specified in the rule, the later date ~~shall be~~ is the effective  
14 date;

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

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

18           (ii) an emergency rule ~~shall become~~ is effective immediately upon filing with the secretary of state  
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25 1 following final adjournment of the regular session of the legislature that begins after the notice proposing  
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STATE OF MONTANA - FISCAL NOTE


Fiscal Note for SB0105, as introduced

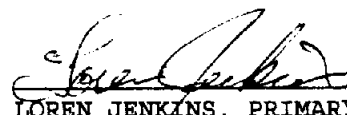
DESCRIPTION OF PROPOSED LEGISLATION:

An act providing that an administrative rule objected to by a member of the administrative code committee may not be adopted until the end of the 6-month period during which the rule must be adopted.

FISCAL IMPACT:

Passage of SB0105 has no fiscal impact on state government.

 1-16-95  
DAVE LEWIS, BUDGET DIRECTOR      DATE  
Office of Budget and Program Planning

 1-17-95  
LOREN JENKINS, PRIMARY SPONSOR      DATE  
Fiscal Note for SB0105, as introduced

SB 105

## 1 SENATE BILL NO. 105

2 INTRODUCED BY JENKINS

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6 BE ADOPTED UNTIL THE END OF THE 6-MONTH PERIOD DURING WHICH THE RULE MUST BE ADOPTED,  
7 UNLESS PRIOR TO THAT TIME, THE COMMITTEE MEETS AND DOES NOT MAKE THE SAME OBJECTION;  
8 PROVIDING THAT AN ADMINISTRATIVE RULE OBJECTED TO BY THE ADMINISTRATIVE CODE  
9 COMMITTEE BEFORE THE RULE IS ADOPTED IS IN SOME CIRCUMSTANCES NOT EFFECTIVE UNTIL  
10 AFTER ADJOURNMENT OF THE NEXT REGULAR SESSION OF THE LEGISLATURE; AMENDING SECTIONS  
11 2-4-305 AND 2-4-306, MCA; AND PROVIDING AN APPLICABILITY DATE."

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5 NEW SECTION. Section 3. Applicability. [This act] applies to rules objected to under [this act]  
6 after [the effective date of this act].

7

-END-

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-END-



## HOUSE STANDING COMMITTEE REPORT

March 2, 1995

Page 1 of 1

Mr. Speaker: We, the committee on State Administration report that Senate Bill 105 (third reading copy -- blue) be concurred in as amended.

Signed: *Dick Simpkins*  
Dick Simpkins, Chair

And, that such amendments read:

Carried by: Rep. Brainard

1. Title, line 5.

Strike: "ONE-HALF"

Insert: "A MAJORITY"

2. Page 2, line 20.

Strike: "ONE-HALF"

Insert: "a majority"

3. Page 4.

Following: line 3

Insert:

"NEW SECTION. Section 3. Coordination instruction. If Senate Bill No. 398 is passed and approved and if it amends 2-4-306 in a manner that strikes references to the administrative code committee and inserts references to the legislative council, then references to the administrative code committee in [section 1(8) of this act], amending 2-4-305, and [section 2(3) and (4) of this act], amending 2-4-306, must be changed to references to the legislative council."

Renumber: subsequent section

-END-

Committee Vote:

Yes 0, No 8.

**SB 105**

HOUSE

491130SC.Hdh

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2 INTRODUCED BY JENKINS

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30



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

2           **"2-4-306. Filing, format, and effective date -- dissemination of emergency rules.** (1) Each agency  
3 shall file with the secretary of state a copy of each rule adopted by it.

4           (2) The secretary of state may prescribe a format, style, and arrangement for notices and rules  
5 ~~which that~~ are filed pursuant to this chapter and may refuse to accept the filing of any notice or rule that  
6 is not in compliance ~~therewith~~ with this chapter. ~~He~~ The secretary of state shall keep and maintain a  
7 permanent register of all notices and rules filed, including superseded and repealed rules, ~~which shall that~~  
8 must be open to public inspection and shall provide copies of any notice or rule upon request of any person.  
9 Unless otherwise provided by statute, the secretary of state may require the payment of the cost of  
10 providing ~~such~~ copies.

11           (3) In the event that the administrative code committee has conducted a poll of the legislature in  
12 accordance with 2-4-403 or the revenue oversight committee has conducted a poll in accordance with  
13 5-18-109, the results of the poll ~~shall~~ must be published with the rule.

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

16           (a) if a later date is required by statute or specified in the rule, the later date ~~shall be~~ is the effective  
17 date;

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

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

21           (ii) an emergency rule ~~shall become~~ is effective immediately upon filing with the secretary of state  
22 or at a stated date following publication in the register if the agency finds that this effective date is  
23 necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a  
24 brief statement of reasons ~~therefor shall~~ must be filed with the rule. The agency shall take appropriate  
25 measures to make emergency rules known to ~~every~~ each person who may be affected by them.

26           (c) if the administrative code committee objects under 2-4-406(1) to all or some portion of a  
27 proposed rule before the rule is adopted, the rule or portion of the rule objected to is not effective until May  
28 1 following final adjournment of the regular session of the legislature that begins after the notice proposing  
29 the rule was published by the secretary of state, unless:

30           (i) the committee withdraws or substantially modifies its objection under 2-4-406(3) before the rule

1 is adopted; or

2 (ii) the rule or portion of a rule objected to is adopted with changes that make it comply with the  
3 committee's objection and concerns."

4

5 NEW SECTION. SECTION 3. COORDINATION INSTRUCTION. IF SENATE BILL NO. 398 IS PASSED  
6 AND APPROVED AND IF IT AMENDS 2-4-306 IN A MANNER THAT STRIKES REFERENCES TO THE  
7 ADMINISTRATIVE CODE COMMITTEE AND INSERTS REFERENCES TO THE LEGISLATIVE COUNCIL, THEN  
8 REFERENCES TO THE ADMINISTRATIVE CODE COMMITTEE IN [SECTION 1(8) OF THIS ACT], AMENDING  
9 2-4-305, AND [SECTION 2(3) AND (4) OF THIS ACT], AMENDING 2-4-306, MUST BE CHANGED TO  
10 REFERENCES TO THE LEGISLATIVE COUNCIL.

11

12 NEW SECTION. Section 4. Applicability. [This act] applies to rules objected to under [this act]  
13 after [the effective date of this act].

14

-END-

# OFFICE OF THE GOVERNOR

STATE OF MONTANA



MARC RACICOT  
GOVERNOR

STATE CAPITOL  
HELENA, MONTANA 59620-0801

March 21, 1995

The Honorable Bob Brown  
President of the Senate  
State Capitol  
Helena MT 59620

The Honorable John Mercer  
Speaker of the House  
State Capitol  
Helena MT 59620

Dear President Brown and Speaker Mercer:

In accordance with the power vested in me as Governor by the Constitution and laws of the State of Montana, I hereby veto Senate Bill 105, "AN ACT PROVIDING THAT AN ADMINISTRATIVE RULE OBJECTED TO BY A MAJORITY OF THE MEMBERS OF THE ADMINISTRATIVE CODE COMMITTEE MAY NOT BE ADOPTED UNTIL THE END OF THE 6-MONTH PERIOD DURING WHICH THE RULE MUST BE ADOPTED, UNLESS PRIOR TO THAT TIME, THE COMMITTEE MEETS AND DOES NOT MAKE THE SAME OBJECTION; PROVIDING THAT AN ADMINISTRATIVE RULE OBJECTED TO BY THE ADMINISTRATIVE CODE COMMITTEE BEFORE THE RULE IS ADOPTED IS IN SOME CIRCUMSTANCES NOT EFFECTIVE UNTIL AFTER ADJOURNMENT OF THE NEXT REGULAR SESSION OF THE LEGISLATURE; AMENDING SECTIONS 2-4-305 AND 2-4-206, MCA; AND PROVIDING AN APPLICABILITY DATE" for the following reasons.

Senate Bill 105 proposes a scheme that I believe raises several constitutional questions and is undesirable on public policy grounds. The bill would allow, using the worst case scenario, five members of the Legislature to prevent the executive branch of government from promulgating lawful rules (apparently including emergency rules). If a rule were proposed the day after the 1995 legislative session began, and the following legislative session did not adjourn until after May 1, 1997, Senate Bill 105 would cause a delay of the rule until May of 1999, a period of over four years from the time of proposal to implementation. Even if the 1995 session adjourned before May 1, 1995, a rule proposed in 1995 could still not become effective until May of 1997.

In the absence of a constitutional provision expressly authorizing such action, suspension of agency rulemaking by a legislative committee is impermissible. It encroaches upon executive authority, authorizes action that is inconsistent with the separation of powers principle, and is an undue delegation of legislative law-making authority to a committee.

The relevant constitutional provisions are instructive. Article III, section 1 of the Montana Constitution states:

No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Article VI, section 4(1) places the power to faithfully execute laws in the Governor, not in the Legislature.

Article V, section 11 (1) provides that no bill may become law "except by a vote of the majority of all members present and voting." And each bill passed, with several express exceptions which are not relevant to this discussion, must be submitted to the Governor for signature or veto under Article VI, section 10(1).

In applying these provisions of the Montana Constitution to Senate Bill 105, it is important to note that the suspension of an executive agency decision is an exercise of legislative power. Administrative rules attain the force and effect of law. They are an integral part of the statute that authorizes them. If a legislative committee can suspend the effect of a rule, then it has the power to effectively repeal any statute which delegates rulemaking powers, without passing a law and without the Governor's approval or veto.

A legislative committee may comment on administrative rules, as existing law allows. But when it exercises absolute power to change agency rules or suspend them, it must do so while acting as a legislature. It may not grant itself the power to act as an agency. It must act as a whole body, with its actions subject to the veto of the executive, and because Senate Bill 105 does not do so, it impinges on the Governor's authority to veto legislative action, in violation of Article VI, section 10(1) of the state constitution. It also empowers a part of the legislative branch to perform an executive function. Indeed, giving a legislative committee the authority to delay rules it may believe are not in conformity with a statute or inconsistent with legislative intent may also invade the role of the judiciary. The separation of powers doctrine found in Article III, section 1, prohibits such an invasion of the executive and judicial branches of government.

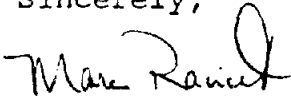
Moreover, because Senate Bill 105 vests in a legislative committee the authority to do that which can only be done by the Legislature acting as a whole, it is an undue delegation of power to a legislative committee, as was the case in State ex rel. Judge v. Legislative Finance Committee, 168 Mont. 470 (1975). The Montana Constitution provides for the exercise of legislative power only by a vote of the majority of both houses; thus, a suspension of an

administrative rule by as few as five legislators is improper under Article V, section 11(1) of the Montana Constitution.

Aside from the constitutional problems Senate Bill 105 raises, I believe it is unwise from a public policy standpoint. Authorizing a committee to exercise suspension powers over agency rules creates the likelihood that a small number of legislators may effectively subvert the will of the entire legislative body. The action of the more representative full legislative body would be subject to displacement by the wishes of but a handful of legislators.

Finally, Senate Bill 105 is over-involvement by the Legislature in the day-to-day administration of the programs it creates by statute. Under currently existing law, the Administrative Code Committee may lodge objections to any agency rule. It may poll all legislators to determine if a rule is objectionable. Such objections are not taken lightly, and agencies strive to address the Committee's concerns by amendment to the rule or even withdrawal of the rule. And, of course, the Legislature may repeal any rule by statute, pursuant to section 2-4-412, MCA. The existing procedure for addressing allegedly unlawful rules should be continued, allowing reversal or modification by judicial review or by corrective legislation, and thereby keeping the constitutional protections of the separation of powers intact.

Sincerely,

A handwritten signature in cursive script that reads "Marc Racicot".

MARC RACICOT  
Governor