



Revenue and Transportation Interim Committee
64th Montana Legislature

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FONG HOM, Secretary

November 10, 2015

RE: Poll of the Legislature pursuant to section 2-4-403, MCA

Dear Member of the Montana Legislature:

I am writing to you as chairman of the Revenue and Transportation Interim Committee (RTIC). Because of the circumstances explained below, RTIC is required by statute to poll all the members of the Legislature for the purpose of determining whether the Department of Revenue's (Department's) proposed new rule I in [MAR 42-2-939](#) (attached as Exhibit A) is consistent with the intent of the Legislature in passing [Senate Bill No. 410](#) (attached as Exhibit B).

THE BALLOT THAT IS ATTACHED TO THESE MATERIALS AS A SEPARATE DOCUMENT MUST BE RECEIVED BY THE LEGISLATIVE SERVICES DIVISION BY NO LATER THAN 5:00 P.M. ON NOVEMBER 24, 2015. PLEASE ALSO NOTE THAT ONCE YOUR BALLOT IS RECEIVED YOU MAY NOT CHANGE THE WAY YOU VOTED.

Poll Request Statute, Legislator Objections, and Department Response

Section [2-4-403](#), MCA, requires the committee that has subject matter jurisdiction over an agency to conduct a poll of the members of the Legislature when 20 or more legislators object to a proposed rule. As of October 31, 2015, the Legislative Services Division had received 20 written objections to the Department's proposed New Rule I in [MAR 42-2-939](#), which falls under the jurisdiction of RTIC. The written objections that were received as of the date of this mailing are located in Exhibit H (NOTE: Exhibits C through H are available online -- see pages 6 and 7 for more information).

The objection letters all appear to be identical, and they state the following:

"I specifically object to the following rules: MAR Notice No. 42-2-939, New Rule 1.

New Rule 1 explicitly prohibits any faith-based, religious, or sectarian entity, or

any individual who would provide education services as an employee of such an entity, from providing education services to children and families who would pay for those services with a tax credit scholarship as established by SB 410 (2015). The language of SB 410 does not contain this prohibition, and sets forth a broad definition of "qualified education provider" that does not limit parents' choice to secular education providers only.

SB 410 was carefully drafted to ensure opportunity to both public and private schools. New Section 7 of SB 410 states that "[T]he legislature finds that the purpose of student scholarship organizations is to provide parental and student choice in education with private contributions through tax replacement programs." During the Senate hearing, Senator Llew Jones, the bill sponsor stated that the purpose of the bill "is to offer students an individualized education that works for them." He also stated that the bill is "to enhance student opportunity... and allow taxpayers to prioritize education."

The intent of the legislature is to provide broad education opportunities to children through use of tax credits, without limitation to secular providers only.

I request that the Revenue and Transportation interim committee formally poll the entire legislature as to the intent of the listed rules upon receipt of twenty objections." (see Exhibit H).

Additionally, pursuant to section [2-4-403\(3\)](#), MCA, the Department's written justification for the proposed rule is attached to this mailing. The full text of section [2-4-403](#), MCA, provides as follows:

2-4-403. Legislative intent -- poll. (1) If the legislature is not in session, the committee may poll all members of the legislature by mail to determine whether a proposed rule is consistent with the intent of the legislature.

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

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

Potential Impact of Poll

If a majority of the members of both houses vote that a proposed rule is contrary to the intent of the Legislature under section [2-4-404](#), MCA, then that rule is conclusively presumed, in any litigation involving the rule, to be contrary to the intent of the Legislature. The full text of section [2-4-404](#), MCA, provides as follows:

2-4-404. Evidentiary value of legislative poll. If the appropriate administrative rule review committee has conducted a poll of the legislature in accordance with [2-4-403](#), the results of the poll must be admissible in any court proceeding involving the validity of the proposed rule or the validity of the adopted rule if the rule was adopted by the agency. If the poll determines that a majority of the members of both houses find that the proposed rule or adopted rule is contrary to the intent of the legislature, the proposed rule or adopted rule must be conclusively presumed to be contrary to the legislative intent in any court proceeding involving its validity.

Publication of the Vote Results by the Secretary of State

This poll and the poll results are a public record. Additionally, pursuant to section [2-4-306\(3\)](#), MCA, the results of the poll must be published with the rule if it is adopted by the Department.

History of SB 410 and the Proposed Rules

In the 2015 legislative session, the Legislature enacted [SB 410](#), which was sponsored by Senator Llew Jones. [SB 410](#) created two new tax credits, one for contributing to a new educational improvement special revenue account for distribution to school districts for new programs and one for making donations to student scholarship organizations that give scholarships to students in private schools. The tax credits are not available until tax year 2016 (the legislation also has a termination date of December 31, 2023). The short title of [SB 410](#) is "provide for tax credits for contributions to public and private schools", and the full title is as follows:

AN ACT GENERALLY REVISING LAWS RELATED TO TAX CREDITS FOR ELEMENTARY AND SECONDARY EDUCATION; ALLOWING INCOME TAX CREDITS FOR DONATIONS TO PUBLIC SCHOOLS AND STUDENT SCHOLARSHIP ORGANIZATIONS; PROVIDING SUPPLEMENTAL FUNDING TO PUBLIC SCHOOLS FOR INNOVATIVE EDUCATION; ESTABLISHING GEOGRAPHIC REGIONS AND DISTRICTS FOR SUPPLEMENTAL FUNDING DISTRIBUTIONS; CREATING A STATE SPECIAL REVENUE ACCOUNT; ESTABLISHING OPERATING REQUIREMENTS, REVIEW PROCESSES, AND TERMINATION PROCEDURES FOR STUDENT SCHOLARSHIP ORGANIZATIONS; PROVIDING THAT THE AMOUNT OF A SCHOLARSHIP IS NOT TAXABLE INCOME; PROVIDING RULEMAKING AUTHORITY; PROVIDING A STATUTORY APPROPRIATION; AMENDING SECTIONS 15-30-2110, 15-30-2618, 15-31-511, 17-7-502, AND 20-9-543, MCA; AND PROVIDING A DELAYED EFFECTIVE DATE, AN APPLICABILITY DATE, AND A TERMINATION DATE.

In order to implement [SB 410](#), the Department proposed three rules pursuant to the Montana Administrative Procedure Act (MAPA). *See* Exhibit A pp. 1-4. However, the objection at issue in this poll pertains to proposed New Rule I, as objections were not raised regarding proposed New Rule II or proposed New Rule III.

PROPOSED NEW RULE I:

Section 14 (codified in section [15-30-3111](#), MCA) of [SB 410](#) (*see* Exhibit B, pp. 9-11) provides for a \$150 nonrefundable tax credit for donations made to a student scholarship organization. Section 8 (codified in section [15-30-3102](#), MCA) of [SB 410](#) (*see* Exhibit B, p. 6) defines a "student scholarship organization", and provides that it allocates revenue for scholarships to eligible students to enroll with "any qualified education provider". Section 8 of [SB 410](#) (*see* Exhibit B, pp. 5-6) defines a "qualified education provider" as follows:

- (7) "Qualified education provider" means an education provider that:
- (a) is not a public school;
 - (b) (i) is accredited, has applied for accreditation, or is provisionally accredited by a state, regional, or national accreditation organization; or
(ii) is a nonaccredited provider or tutor and has informed the child's parents or legal guardian in writing at the time of enrollment that the provider is not accredited and is not seeking accreditation;
 - (c) is not a home school as referred to in [20-5-102\(2\)\(e\)](#);
 - (d) administers a nationally recognized standardized assessment test or criterion-referenced test and:
 - (i) makes the results available to the child's parents or legal guardian; and
 - (ii) administers the test for all 8th grade and 11th grade students and provides the overall scores on a publicly accessible private website or provides the composite results of the test to the office of public instruction for posting on its website;
 - (e) satisfies the health and safety requirements prescribed by law for private schools in this state; and
 - (f) qualifies for an exemption from compulsory enrollment under [20-5-102\(2\)\(e\)](#) and [20-5-109](#).

The Department's [proposed rule](#) (*see* Exhibit A p. 1) further defines a "qualified education provider". The full text of proposed New Rule 1 and the Department's reasonable necessity statement is as follows:

NEW RULE I QUALIFIED EDUCATION PROVIDER (1) A "qualified education provider" has the meaning given in [15-30-3102](#), MCA, and pursuant to [15-30-3101](#), MCA, may not be:

- (a) a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in

whole or in part by any church, religious sect, or denomination; or

(b) an individual who is employed by a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination when providing those services.

(2) For the purposes of (1), "controlled in whole or in part by a church, religious sect, or denomination" includes accreditation by a faith-based organization.

AUTH: [15-1-201](#), [15-30-3114](#), MCA

IMP: Montana Constitution, [Art. V, Section 11](#), Montana Constitution, [Art. X Section 6](#), [15-30-3101](#), MCA

REASON: The department proposes adopting New Rule I based on the passage of [Senate Bill \(SB\) 410](#), L. 2015, which generally revised laws related to tax credits for elementary and secondary education. [SB 410](#), Section 7, was codified at [15-30-3101](#), MCA.

As proposed, New Rule I will conform to the requirements of [15-30-3101](#), MCA, which requires the department to administer the tax credit for taxpayer donations in accordance with [Art. V, Section 11\(5\)](#) and [Art. X, Section 6\(1\)](#) of the Montana Constitution, which prohibits the direct or indirect appropriations or payment from any public fund to any sectarian or religious purpose.

Ballot Explanation

There is no provision in the state statutes governing the poll of the Legislature for members casting their ballots to object to anything but a "rule". Thus, if you object to any part of proposed New Rule I, the objection must be made to the entire rule.

Poll Materials Enclosed

The following materials are enclosed in this mailing to assist you in making your determination whether the proposed New Rule I is consistent or inconsistent with the intent of the Legislature and to cast your ballot:

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|----------------------|--|
| EXHIBIT A: | A copy of DOR's MAR Notice No. 42-2-939 proposing the rules; |
| EXHIBIT B: | The enrolled copy of SB 410 ; |
| DEPARTMENT RESPONSE: | The Department of Revenue's written justification for the proposed rule; and |
| BALLOT: | The ballot where you indicate whether you believe |

proposed New Rule I is or is not consistent with the intent of the Legislature.

Additional Poll Materials Available by Request or Online

Additional poll materials are available in hardcopy format by contacting the Legislative Services Division and are posted in the "[Committee Topics](#)" section of the Revenue and Transportation website, under the hyperlink "SB 410 Poll Documents", available at:

<http://leg.mt.gov/css/Committees/Interim/2015-2016/Revenue-and-Transportation/>

The additional materials are as follows:

EXHIBIT C: Senate Finance and Claims Meeting Materials (pp. 1-26):

- Minutes* from Hearing (pp. 1-3);
- Exhibit from Sponsor (p. 4);
- Additional Documents from Hearing (pp. 5-8);
- Minutes* from Executive Action (pp. 9-11);
- Executive Action Exhibit 9 (p. 12);
- Executive Action Exhibit 10 (pp. 13-15);
- Executive Action Exhibit 11 (p. 16);
- Additional Documents from Executive Action (pp. 17-26)

EXHIBIT D: House Education Meeting Materials (pp. 1-23):

- Combined Minutes* from Hearing and Executive Action (pp. 1-3);
- Exhibit from Sponsor -- Exhibit 1 (p. 4);
- Exhibit from Opponent -- Exhibit 2 (pp. 5-6);
- Executive Action Exhibit 8 (pp. 7-16);
- Additional Documents from Hearing and Executive Action (pp. 17-23);

EXHIBIT E: House Appropriations Meeting Materials (pp. 1-32):

- Combined Minutes* from Hearing and Executive Action (pp. 1-5);
- Exhibit from Sponsor -- Exhibit 3 (p. 6);
- Executive Action Exhibit 10 (pp. 7-16);
- Misc. Documents from Hearing and Executive Action (pp. 17-32);

EXHIBIT F: Free Conference Meeting Materials (pp. 1-24):

- Free Conference Minutes* (pp. 1-3);
- Executive Action Exhibit 1 (pp. 4-14);
- Misc. Documents and Free Conference Report (pp. 15-24);

EXHIBIT G: LAWS Bill Report and Committee of the Whole Votes (pp. 1-14):

- LAWS Report (pp. 1-4);
- Senate Second Reading -- March 30, 2015 (p. 5);
- Senate Third Reading -- March 31, 2015 (p. 6);
- House Second Reading before Appropriations -- April 16, 2015 (p. 7);
- House Second Reading after Appropriations -- April 18, 2015 (p. 8);
- House Third Reading before Free Conference -- April 20, 2015 (pp. 9-10);
- Senate Second Reading on Free Conference Report -- April 23, 2015 (p. 11);
- Senate Third Reading on Free Conference Report -- April 24, 2015 (p. 12);
- House Second Reading on Free Conference Report -- April 23, 2014 (p. 13)
- House Third Reading on Free Conference Report -- April 24, 2015 (p. 14); and

EXHIBIT H: Legislator Objections to MAR 42-2-939, as of the date of this mailing.

* NOTE: The committee minutes are in outline form. Consequently, hyperlinks to the audio/video of the committee hearings for SB 410 are posted in the "SB 410 Poll Documents" section of the Revenue and Transportation website in the event you desire to listen to any of the hearings.

Please read the enclosed material, mark your ballot to show whether you believe proposed new rule I in [MAR 42-2-939](#) is consistent with or contrary to the intent of the Legislature under [SB 410](#), sign your ballot, and mail the ballot as soon as possible to the Legislative Services Division in the envelope provided. Alternatively, you may submit your ballot in person, via facsimile, or via e-mail by following the instructions on the attached ballot.

Written notice on the results of the poll will be communicated to all members through the Legislative Services Division web page and newsletter [The Interim](#).

Sincerely,



Senator Fred Thomas

Chairman of the Revenue and Transportation Interim Committee