



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

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### 66th Montana Legislature

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ALEXIS SANDRU, Staff Attorney  
FONG HOM, Secretary

July 27, 2020

Director Sheila Hogan  
Department of Public Health and Human Services  
111 North Sanders, Suite 301  
Helena, Montana 59601

Dear Director Hogan:

Under the Montana Administrative Procedure Act, when the Legislature is not in session, an appropriate committee assigned subject matter jurisdiction under Title 5, chapter 5, part 2, MCA, is required to conduct a poll of the members of the Legislature by mail when 20 or more legislators object to a proposed rule. (2-4-403, MCA.) The purpose of a poll is to determine whether the proposed rulemaking objected to is consistent with the intent of the Legislature. The results of the poll are admissible in any court proceeding challenging the validity of the rulemaking. In addition, if "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." (2-4-404, MCA.)

As you are aware, the Children, Families, Health, and Human Services Interim Committee (Committee) is tasked under 5-5-225, MCA, with administrative rule review of rules proposed and adopted by the Department of Public Health and Human Services (Department). **The purpose of this letter is to notify the Department that, as of July 27, 2020, the Committee has received 20 objections to MAR Notice No. 37-923, pertaining to flavored electronic smoking devices. The objections specifically object to New Rule I, New Rule II, and New Rule III of the proposed rulemaking. Therefore, the Committee is required to poll the Legislature.**

Under 2-4-403(3), MCA, "[the] poll must include an opportunity for the agency to present a written justification for the proposed rule to the members of the legislature." In the coming weeks, the Committee will be preparing to conduct the poll. It is my understanding that previous polls, with the committee's approval, have included the agency's written justification in the poll materials sent by Legislative Services Division. However, the statute does not require an agency to present a written justification for the proposed rule. The agency could also provide written justification directly to members of the Legislature, rather than including the justification with the polling materials sent by the Legislative Services Division. If the Department intends to

provide a written justification for the purposes of this poll and would like the Committee to include the justification in the poll materials sent by Legislative Services Division, please email me the Department's written justification by no later than 5 p.m. on Friday, July 31, 2020.

Please do not hesitate to contact me if you have any questions regarding this matter.

Sincerely,

Alexis Sandru  
Staff Attorney  
Children, Families, Health, and Human Services Interim Committee

cc: Peter Bovindgon, Chief Legal Counsel, DPHHS Office of Legal Affairs