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President & Executive Director  
[dlindholm@cost.org](mailto:dlindholm@cost.org)

January 12, 2021

Montana State Legislature  
Senate Taxation Committee

**VIA EMAIL**

**Re: Comments on S.B. 12 and Montana’s Tax Haven Provisions**

Dear Chair Hoven, Co-Vice Chairs Cohenour and Hertz, and Committee Members:

On behalf of the Council On State Taxation (COST), I am writing to express concerns with Senate Bill No. 12 (S.B. 12). The bill fails to fully repeal Montana’s tax haven provision and merely replaces the current legislatively created blacklist of purported “tax haven” countries with a blacklist determined by the Montana Department of Revenue. COST has a long-standing policy position in opposition to state tax haven legislation. The tax haven blacklist approach is arbitrary and misleading and fraught with Constitutional infirmities. In 2018, the State of Oregon fully repealed its tax haven provisions (including a blacklist), leaving Montana as the only state in the country to maintain such a list. In light of the rejection of a blacklist approach by the U.S. and other nations, and Oregon’s recent move away from its tax haven provisions, it is time for Montana to fully repeal and not restructure its “tax haven” provisions.

**About COST**

COST is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce, and today COST has an independent membership of over 500 major corporations engaged in interstate and international business representing every industry doing business in every state. COST’s objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities—a mission it has steadfastly maintained since its creation. Many COST members do business in Montana and are negatively impacted by the State’s tax haven provisions.

**Misguided Tax Policy**

The COST Board of Directors has approved a policy position opposed to all state “tax haven” provisions which provides in part:

*State “tax haven” designations are arbitrary and overly broad, reflect a discarded “worldwide” approach to state taxation, and are inappropriate to address income shifting or other tax avoidance concerns. Punitive treatment of multinational businesses with affiliates in countries designated by states as “tax havens” interferes with the U.S. Government’s ability to “speak with one voice” on foreign affairs and is*

*constitutionally suspect. States should limit their income tax base to the domestic “water’s-edge” and not tax foreign income with little or no connection with the United States.<sup>1</sup>*

In addition to the policy position, the State Tax Research Institute (STRI), a 501(c)(3) research organization founded by COST, undertook a significant research project relating to state tax haven legislation. In 2016, STRI published its report, entitled “State Tax Haven Legislation: A Misguided Approach to a Global Issue,” that provides a detailed analysis of why states should not adopt tax haven legislation.<sup>2</sup>

### **Detrimental Impact on the State’s Economy**

The blacklisting of foreign countries as “tax havens” and inclusion in the state tax base of income from businesses operating in these countries contravenes the approach taken by virtually all other U.S. states and nations in the world.<sup>3</sup> S.B. 12 does not repeal Montana’s “blacklist” approach, but merely shifts the authority for determining which nations are included in the blacklist from the Legislature to the Department of Revenue. Branding foreign nations as “tax havens” has been widely rejected as an arbitrary and illegitimate means for dealing with tax avoidance. The U.S. federal government has never adopted the “tax haven” list approach as a means for defining its income tax base. Neither state legislatures nor state revenue departments are equipped to make determinations the U.S. Government has declined to exercise. A “tax haven” provision will clearly deter international businesses from operating in Montana, undermining the State’s ability to attract jobs and capital investment that would improve the State’s overall economy. The negative economic impact of COVID-19 on the State should further highlight concerns with Montana’s outlier status as the only state that utilizes the “blacklist” approach to the inclusion of foreign income in the corporate income tax base.

Further, when a state arbitrarily penalizes taxpayers for doing business in specific countries—which is the effect of S.B. 12’s requirement that the Department of Revenue create a “blacklist” based on subjective “tax haven” criteria—that state also violates the Foreign Commerce Clause. The constitutional standard set forth in *Japan Line, LTD v. County of Los Angeles*, 441 U.S. 434 (1979) is clear: state tax measures may not impose a risk of multiple taxation at the international level and may not prevent the federal government from “speaking with one voice” on international policy matters.

### **S.B. 12 is Out-of-Step with the Trends for Taxing Foreign Source Income**

Prior to 2018, Oregon imposed a “blacklist” approach similar to Montana’s for determining foreign income included in its corporate income tax base. However, during its 2018 legislative session, Oregon repealed its tax haven “blacklist” provision and created a credit for taxpayers previously subject to tax haven provisions.<sup>4</sup> Oregon realized that the passage of the federal Tax Cuts and Jobs Act (TCJA) in December 2017 provided an opportunity to abandon its tax haven provisions and align itself more closely with the approach taken by the federal government. The TCJA forced the Oregon Legislature to deal with

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<sup>1</sup> COST’s policy position on this issue is available on the COST website at: <https://cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/cost-state-tax-haven-policy-statement-final-4-16-15.pdf>

<sup>2</sup> <https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-studies-articles-reports/state-tax-haven-legislation--a-misguided-approach-to-a-global-issue.pdf>

<sup>3</sup> COST recognizes that five other states (including Alaska, Connecticut, Kentucky, Rhode Island and West Virginia) (in addition to Montana) continue to maintain tax haven provisions in their state tax laws. Each of those states, however, have rejected the blacklist approach and instead utilize a criteria approach.

<sup>4</sup> See Oregon S.B. 1529 (enrolled) here:

<https://olis.leg.state.or.us/liz/2018R1/Downloads/MeasureDocument/SB1529/Enrolled>.

the potential of double taxation of income previously taxed under its tax haven provisions that would now be included in Oregon taxable income pursuant to the TCJA, including both the repatriation transition tax (for tax years prior to 2018) and global low-taxed intangible income (GILTI) (for tax years 2018 and forward). To avoid double taxation, the Legislature opted to fully repeal its tax haven provisions in light of the complexities and potential litigation that would result from retaining the provisions.

Montana is in a strikingly similar position to Oregon. Montana has also conformed in part to the TCJA, changing how it taxes foreign source income by including the repatriation transition tax (for tax years prior to 2018) and GILTI (for tax years 2018 and forward) in its corporate income tax base (for water's edge filers), subject to the 80% dividends received deduction.<sup>5</sup> This is the same portion of foreign source income that Oregon currently includes in its tax base. We strongly urge Montana to take the additional step and follow the Oregon model by amending S.B. 12 to remove the tax haven "blacklist" entirely from the Montana statute. This policy shift would enable Montana to tax foreign source income without relying on the arbitrary and constitutionally infirm "blacklist" approach that it alone utilizes among all the states.

### Conclusion

COST urges Montana to take this opportunity to re-evaluate the need for the tax haven legislation and amend S.B. 12 to fully repeal the State's tax haven provisions.

Respectfully,



Douglas L. Lindholm

cc: COST Board of Directors

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<sup>5</sup> *Montana Corporate Income Tax Treatment of International Tax Provisions under Tax Cuts and Jobs Act of 2017*, Mont. Dept. of Rev. (10/19).