

Testimony of Assistant Attorney General Melisse S. Cunningham
Regarding –A17 Amendment to HB 3317A
Public Safety Subcommittee, Ways and Means Committee
June 24, 2013

Co-chairs Winters and Williamson and members of the subcommittee, my name is Melisse Cunningham, and I am an Assistant Attorney General in the Tax & Finance Section of the Department of Justice. I have been asked to testify before the subcommittee today regarding potential legal issues that could arise under the –A17 amendment to HB 3317A.

While this proposed amendment would add language making the 9-1-1 tax in ORS 403.200 explicitly applicable to prepaid wireless telecommunications, there are several legal issues that may hamper the implementation of the –A17 provisions.

--On page 2, lines 11-13, the amendment provides a definition of “prepaid wireless telecommunication services” that limits the definition in part to services that are sold in “predetermined units or dollars” but this definition is not completely consistent with the definition of prepaid telecommunications services in the federal Mobile Telecommunications Sourcing Act (MTSA). If the intent is that the bill encompass all of those prepaid telecom services that are not covered by the MTSA, Oregon’s definition should be very consistent with the federal definition in the MTSA.

--On page 3, lines 1-2, the amendment contains a definition of “seller” as a person who sells prepaid wireless telecommunications services, and “wireless telecommunications service” is in turn defined (at lines 16-17) as “commercial mobile radio service, as defined in 47 CFR 20.3.” In turn “mobile service” is generally defined in the federal regulation as a “radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves.”

Under this definition of “seller,” the entity subject to the new requirement to collect the 9-1-1 tax at the point of sale, at least arguably, must be the person that is providing the telecommunications services. An argument could be made that a retail store that sells only prepaid telephone cards, for example, is not selling the telecommunications services, because a prepaid phone card, by itself, does not qualify as commercial mobile radio service under federal law. In which case, the retail store would not be required to collect the 9-1-1 tax under this amendment.

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--On page 4, lines 22-23, the amendment would impose the 9-1-1 tax at a rate of 75 cents per "retail transaction." However, for all other land-line and wireless telecommunications services the tax would remain one imposed at a rate of 75cents per month. This difference could raise potential Equal Protection Clause violation arguments under the US Constitution along with issues under Article 1, sections 20 and 32 of the Oregon Constitution, because of the lack of tax parity between wireless telecommunications "subscribers" (who have long term contracts and pay monthly) versus prepaid wireless telecommunications "consumers" (who receive the same services but just pay up front for them). For example, a cell phone "subscriber" who has a contract with a company and pays 75 cents every month would potentially pay much more over the course of a year than a prepaid "customer" who buys a single prepaid card that grants the customer a certain number of minutes of access that may be used over the course of a year but who only pays 75 cents in 9-1-1 tax for that one "retail transaction." In that case, the "subscriber" would pay up to twelve times as much 9-1-1 tax as the prepaid "consumer" for the same privilege, i.e., a year's worth of access to the 9-1-1 system.

In addition, there is no limitation in the proposed amendment on how many prepaid card or minutes may be purchased in one "retail transaction." Thus, a prepaid "consumer" could potentially pay only 75 cents in 9-1-1 tax, but purchase a huge amount of access time, as long as it was done in one "retail transaction."

--On page 5, lines 11-30, the amendment requires the tax to be collected by the seller "with respect to each retail transaction occurring in this state." While these provisions may not present significant issues for sales that are made by retail sellers who have a physical presence in Oregon, they do not address the potential dormant Commerce Clause issues that arise under the US Constitution with regard to the state's ability to require out of state entities to collect and remit the 9-1-1 tax on retail transactions that may occur over the Internet and where the seller has no physical presence in the state. *See Quill v. North Dakota*, 504 US 298, 112 S Ct 1904, 119 L Ed 2d 91 (1992). One way that states deal with this problem is to have a collection mechanism for direct collection from the consumer, but there is no current mechanism in the 9-1-1 tax statutes that explicitly provides for reporting or direct collection from the consumers of prepaid wireless telecommunications services.

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--On page 6, lines 28-30, the amendment grants sellers of prepaid telecom services compensation for expenses incurred in collection of the 9-1-1 tax, in the amount of three percent of the taxes collected. However, there is no similar compensation under the 9-1-1 tax statutes for other wireless telecom service providers who are also required to, and presumably incur expense in, collecting and remitting the 9-1-1 tax. Thus, this provision may also lead to arguments of unequal treatment of taxpayers under the Equal Protection Clause of the US Constitution along with issues under Article 1, section 20 of the Oregon Constitution.

These are a few of the issues that we have preliminarily identified in a very short review of the –A17 amendments. The Department of Justice has not undertaken a more in-depth analysis of the risks associated with any of these issues, but offers this summary of issues as information for the subcommittee's consideration.