September 5th, 2017

Dear Joint Members for the Referendum 301 Ballot Title Committee,

Under Senate Bill 229, which passed on a strict party-line vote, we find ourselves here today engaging in a process which steals from voters the rights otherwise guaranteed to them under Oregon's referendum laws. The statutory ballot title process has been hijacked by handpicked proponents of the challenged bill in a one-time legal circumvention of ballot title neutrality laws to achieve a particular agenda, one which does not serve democracy in this state.

Not only does this committee lack balance in political representation, its six-person membership makeup includes five legislators who voted YES to impose these sweeping tax increases on health care. That vote on House Bill 2391 subjected some taxpayers to new healthcare sales and service taxes, while offering exemptions to large corporations, unions, and even the insurance companies themselves.

Upon review of the Ballot Title Caption, Results of Yes/NO statements, and the Measure summary, it's evident that this unbalance is clearly reflected in the one-sided nature of the ballot title as drafted.

Oregon Supreme Court case law provides guidance on how the ballot title caption, results of a YES or NO vote, and the summary statement must be formulated so as to clearly and accurately present the matter to voters. The proposed ballot title fails on all counts.

Oregon's election laws require all state measure ballot titles to include:

A) a caption which reasonably identifies the subject matter of the measure;

B) a simple and understandable statement that describes the result if the state measure is approved;

C) a simple and understandable statement that describes the result if the state measure is rejected; and,

D) a concise and impartial statement summarizing the measure and its major effect.

Although ballot titles are normally drafted by the Attorney General under word limitations, "emergency" legislation was passed in the waning hours of the last session to remove the normal word limits and assign drafting to this legislative committee. However, this special legislation did not absolve you from following the legal requirements for drafting a neutral ballot title that actually informs voters about what they are voting upon.

To be clear: Referendum 301 refers to voters the tax provisions in House Bill 2391 which includes a 1.5% tax on Public Employees Benefit Board insurance (which required a $12 million dollar cost shift from the

General Fund); a 1.5% tax on managed care organizations (which attempts to "double dip" Medicaid match dollars from the Federal government), and a 0.7% tax on the net revenues of hospitals.

Additionally, Referendum 301 would permit voters to reject a 1.5% tax on the health insurance premiums of individuals, college students, small businesses, non-profits, and churches with 50 or less employees, as well as employers in the large group market. Most notably, the large group market includes Oregon's public K-12 school districts. The tax mandate in House Bill 2391 cost shifts $25 million dollars during the biennium to healthcare using vital education dollars which will be sucked out of classrooms across Oregon.

Further, Referendum 301 allows voters to weigh in on the retail sales tax mechanism connected to the insurance tax, whereby insurance companies can slap an additional 1.5% surcharge on their rates. Through the 1.5% tax cannot be included in 2018 rates which have already been established by the Department of Consumer and Business Services (DCBS), we were informed by DCBS that as part of rate-setting for 2019, insurance companies could request to recoup the cost of the 2018 taxes incurred as part of the basis for which they'll add a 3% surcharge to insurance rates in 2019.

Despite the effort to jerry-rig the ballot titling process by assigning the task of neutral ballot titling to clearly biased parties, the rules governing the ballot titling process still must be followed.

Let's begin with your caption. Oregon's Supreme Court describes the caption as "the cornerstone of the ballot title" that "must identify the subject matter of the proposed measure in terms that will inform potential voters of the sweep of the measure." *Kendoll v Rosenblum*, 358 Or. 282, 286 (2015). That was your baseline requirement and even though you more than doubled the normal word allotment for captions, you failed to meet your threshold responsibility.

This ballot title should be straightforward. The text of the proposed measure contains just seven operative subsections from five sections of House Bill 2391. It totals only nine sentences and fits upon a single page! Your first responsibility was to describe the subject matter of these seven subsections.

Sections 3, 5 and 9 each impose a 1.5% tax assessment on the health insurance premiums of public employees, private sector insurers and managed care organizations that endures for two years. The caption does not describe the imposition of any tax whatsoever, or the dollar amount of that tax which cumulatively results in $330 million in new taxation. Instead, the caption discusses "using temporary assessments" as if the taxes from which the "assessments" were collected had already been imposed. An attached legal opinion from Oregon's Legislative Counsel dated June 26th, 2017 clearly describes the tax on insurance premiums and coordinated care organizations to in fact be a tax, requiring a 3/5 vote of the legislature for the purpose of raising revenue.

Section 27 imposes a 0.7% tax assessment on the net revenues of certain hospitals that would sunset on July 1, 2019. This tax is not specifically identified in the caption despite the fact that it is a major feature of Referendum 301. Yet the committee, not being restrained by any limitation on words, still failed to include this vital piece of information. Further, the 0.7% hospital tax is a new tax which also required a 3/5 vote. Unlike the hospital assessment, it does not have to be returned back to the tax base from which it came.

The caption also fails to identify all the targets of the tax. The targets are: health care insurers, the Public Employees' Benefit Board, hospitals, and managed care organizations. Given the unlimited allotment of words, the caption is capable of naming each target.

Section 8 would authorize health care insurers to increase their premiums by 1.5% to recoup the Section 5 tax for two years but it is not present in the caption. This clearly indicates that 100% of the new tax assessment on health insurers can be passed on to consumers.

This would carve out a new exception in the regulatory scheme that governs health insurance rates in Oregon. It is a primary feature of Referendum 301 and voters deserve to know about it. Given the unlimited allotment of words permitted in the caption there is no basis for neglecting to include this effect.

So far, we've described the necessary items that you were required to include within the caption. The Oregon Supreme Court also advises that certain things do not belong in a caption: "the caption may not obscure measure's effect or make it difficult for voters to understand measure's subject." *Greene v. Kulongoski,* 322 Or. 169, 174–75 (1995). Nevertheless, your caption uses its unlimited word allotment to accomplish exactly that by including inaccurate and speculative language. No part of Referendum 301 "provides funds" for any specified purpose listed in the draft caption. House Bill 2391 will go into partial effect on October 6th, 2017. It established the "Health System Fund" in Section 2 that provides funds for the "Oregon Reinsurance Program" and otherwise transfers other unspecified amounts of money to the Oregon Health Authority to further supplement existing funding the medical assistance programs described in ORS Chapter 414.

Indeed, while the legislature may have attempted to use the taxes in Referendum 301 as part of a package to fund healthcare, other budgeting choices by the legislature, including decisions to fund spending in House Bill 3391 and Senate Bill 558, using general fund dollars that are unmatchable by the Federal government, was a budget choice. Failure to properly curb skyrocketing costs of public employee healthcare, costs which are disproportionate to other neighboring states, was also a budgeting choice. Plainly put, the legislature could have made other budgetary choices to accomplish a goal of funding Medicaid. The legislature could have also made the choice to require insurance companies to self-fund from their profits a program to stabilize premiums without putting that cost disproportionately on some ratepayers while excluding others.

In fact, the petitioners of Referendum 301 are of the belief that because taxes raised in House Bill 2391 are fungible to the General Fund, surplus funds caused by the collection of these taxes will be used to help pay for bills like House Bill 3391 and Senate Bill 558. Specifically on Senate Bill 558, when asked to the carrier of the bill on the House floor during a floor debate how Senate Bill 558 would be paid for, the response of the carrier was that he didn't know. We believe House Bill 2391 was specifically designed to create a budget surplus to fund political priorities for the majority party.

What would cause there to be a surplus in revenue collections under HB 2391?

Recent headlines that 55,000 Oregonians are no longer eligible for Medicaid means $430 per person per month average payment reflects $576 million in state and federal resources we didn't need to raise. Further, the legislature's decision to increase minimum wage over the next five years means many of the working families who receive Medicaid will naturally fall off the Medicaid rolls through income ineligibility attrition, further reducing the funds necessary to manage healthcare for low-income Oregonians. It is clear that most citizens we've encountered since the legislature adjourned believe these tax increases represent nothing more than a bait-and-switch.

The caption does a disservice to voters by understating the actual direct effects of Referendum 301 while overstating its indirect effects on programs that are governed by other statutes. Voters have a right to know too that surplus revenues can be swept into the General Fund – even for non-healthcare spending!

The reason Referendum 301 was filed over sections of House Bill 2391 was because they impose new taxes that will directly increase the cost of purchasing health insurance and paying for hospital care in Oregon. The draft ballot title does not come remotely close to conveying the sweeping effects of the measure, choosing instead to refer to them indirectly in a 36-word run-on sentence that highlights potential uses for the (otherwise unmentioned) tax revenues.

Referendum 301 imposes four new taxes but the word “tax” appears nowhere in the ballot title. Calling them “assessments” is cute, but every member of this referendum committee knows they are really taxes. They fall under the constitutional definition of taxes. If they did not, pro-tax supporters in this legislative assembly would have surely slapped an emergency clause on the House Bill 2391 to cut the voters out entirely.

Out of 375 ballot titles filed since 1999, the word “assessments” has only appeared four times. Each time it involved an initiative about real estate taxes and in all four of those ballot titles the word “assessments” was accompanied by word “tax” or “taxes”.

If the legislature is going to raise taxes on Oregonians at least have the decency to be straight with the citizens of this state!

As bad as the ballot title caption is, the results statements are even worse. Many of the same concerns heretofore addressed about the ballot caption title also apply to the results of a YES/NO vote.

A “YES” vote doesn’t “generate funds”. The people of Oregon are the ones who generate the economic growth of this state. A “YES” vote in plain-speak English is that the legislature will raise taxes on its citizens. The “Result of Yes” should clearly delineate every tax that will be directly imposed by Referendum 301 and the authority for insurance companies to pass the taxes along to the insured. There is no excuse for leaving out necessary information given the unlimited number of words available to the committee.

Specifically of concern in the “NO” vote statement is the speculative position that the taxes imposed in Section 27 were impliedly amended by Section 28 in a manner that would keep hospital tax otherwise operable regardless of the vote on it.

This part of the draft ballot title is undermined by legislative counsel’s acknowledgement there is no case law backing this legal theory. Other lawyers have looked at this issue and have come up with different conclusions. Ballot titles are not the appropriate places to engage in legal speculation.

Lastly, all sections of this ballot title reference the “stabilizing” of premium rates charged by insurance companies to ratepayers, referencing what is otherwise known as a reinsurance program. While there is a reinsurance program outlined in the bill, it would be factually inaccurate to declare that stabilizing rates will have an impact – positive or negative – by this referendum.

In order to qualify for a reinsurance program, Oregon has to seek a 1332 waiver from the federal government. Attached is a document that includes comments on why we believe the 1332 waiver to be an untenable goal for the state of Oregon. In fact in March, before the passage of House Bill 2391, DCBS recommended against applying for the waiver. The waiver is based on two key issues that intersect with this measure: the requirement that Oregon have a broad enough tax base from which to successfully implement a reinsurance program, and that the program have the necessary stability to be operable.

The bottom line is sun-setting language in House Bill 2391 doesn’t provide any kind of stability for the program and would take a subsequent vote of the legislature and approval from the governor to renew. Further, given the legislature’s carving out of large corporations, unions, and insurance companies from taxation in House Bill 2391 – some 980,000 Oregonians left out of the tax – we don’t think the legislature has met the requirements for the 1332 waiver. The net result is, the waiver, which won’t be determined for 180 days – long after the election – may fail on its own without a repeal of the taxes, and therefore should not be included as the basis for any of the ballot title caption, results statements, or measure summary statement.

Lastly, there are grave concerns about the transparency of this entire ballot titling process. Given to us ahead of this testimony was an attached email sent by Senator Devlin inviting all major healthcare stakeholders to join him and Senator Winters in a private meeting during the ballot titling process to specifically talk about Referendum 301.

We appreciate that one of the invitees had the integrity to make that invitation known.

Included on this invitation are organizations that due to the rules of their non-profits or government organizations, are precluded from taking a position on this ballot referendum. Yet during this process, these organizations, along with most every major for-profit healthcare entity or lobbyist, will be given exclusive access to two Referendum 301 committee members in what can only be described as a backroom meeting to give input that will not otherwise be heard or known by the general public, nor recorded into the permanent legislative record.

It's this kind of pay-to-play politics that has led a majority of Oregonians to believe our legislature is corrupt and only serves special interests. For what else could it be when a private meeting with special interests is to be held the week after this first public hearing but before the final ballot title is complete? That email invitation taints and undermines this entire process. This behavior casts an incredible amount of doubt about whether the final product of a ballot title crafted by this committee will have been handled in a fair, impartial manner as the statutes governing the referendum process require.

We suggest the members of this committee do their homework with respect to the statutes and case laws that govern the ballot titling process, and take seriously their oath to follow the laws of this state. This initial draft reflects neither, only an unorthodox desire to impose your will, and hundreds of millions of dollars in new tax increases onto a select population of voters. This title assumes voters are so ill-informed that they cannot come to their own conclusion on House Bill 2391, other than the one to which this committee attempts to lead them.

The voters of this state deserve better.

Sincerely,

Representative Cedric Hayden

Representative Julie Parrish

## Attachment #1 – Senator Devlin Email Invite – Referendum 301 Stakeholders Meeting

**From:** Richard Devlin <senrichardevlin@gmail.com>
**Date:** Thursday, August 31, 2017 at 4:11 PM
**To:** Courtni Dresser <courtni@theoma.org>, "trevor@theoma.org" <trevor@theoma.org>, "aeaston@oahhs.org" <aeaston@oahhs.org>, "skolmer@oahhs.org" <skolmer@oahhs.org>, "jessica.adamson@providence.org" <jessica.adamson@providence.org>, "dalep@cfmpdx.com" <dalep@cfmpdx.com>, "gecole@lhs.org" <gecole@lhs.org>, "pcosgrove@lindsayhart.com" <pcosgrove@lindsayhart.com>, "bshipley@peacehealth.org" <bshipley@peacehealth.org>, "doug@lobbyoregon.com" <doug@lobbyoregon.com>, "hannaju@ohsu.edu" <hannaju@ohsu.edu>, "tibbs@ohsu.edu" <tibbs@ohsu.edu>, "brake@ohsu.edu" <brake@ohsu.edu>, "amy.k.fauver@kp.org" <amy.k.fauver@kp.org>, Jeff Heatherington <JeffH@familycareinc.org>, "johnston@pacwestcom.com" <johnston@pacwestcom.com>, "newgard@pacwestcom.com" <newgard@pacwestcom.com>, Melissa Unger <ungerm@seiu503.org>, "matt.swanson@seiuoregon.org" <matt.swanson@seiuoregon.org>, "felisah@seiu49.org" <felisah@seiu49.org>, "jack@dempseypublicaffairs.com" <jack@dempseypublicaffairs.com>, "joe@oregonafscme.org" <joe@oregonafscme.org>, "fbarrie@legadv.com" <fbarrie@legadv.com>, "mdewey@legadv.com" <mdewey@legadv.com>, "angi@eames.consulting" <angi@eames.consulting>, "jon@eames.consulting" <jon@eames.consulting>, "cassie@eames.consulting" <cassie@eames.consulting>, "lyndagard@live.com" <lyndagard@live.com>, "jgardner@gardnerandgardner.com" <jgardner@gardnerandgardner.com>, "thomas@markee.org" <thomas@markee.org>, "matt@markee.org" <matt@markee.org>, "jbartholomew@aarp.org" <jbartholomew@aarp.org>, "pbentley@ohca.com" <pbentley@ohca.com>, "courtney@grahamadvocacy.com" <courtney@grahamadvocacy.com>, "ashlen@healthshareoregon.org" <ashlen@healthshareoregon.org>, "jobell18@gmail.com" <jobell18@gmail.com>, "Rachel.Post@ccconcern.org" <Rachel.Post@ccconcern.org>, "mdmasonesq@comcast.net" <mdmasonesq@comcast.net>, "rigsbyj@careoregon.org" <rigsbyj@careoregon.org>, "geoffrey.knapp@pacificsource.com" <geoffrey.knapp@pacificsource.com>, "leavitt.nwadvocacy@gmail.com" <leavitt.nwadvocacy@gmail.com>, "marcwinters@comcast.net" <marcwinters@comcast.net>, "betsy@betsyjohnson.com" <betsy@betsyjohnson.com>, "johnchelm@msn.com" <johnchelm@msn.com>
**Subject:** Meeting on Referendum 301 - Please RSVP

Dear Healthcare Stakeholders,

Senators Winters, Johnson and myself would like to invite you to a roundtable discussion about Referendum 301. The purpose of the discussion is to get an update on the potential referendum and to talk about the implications should it appear on the ballot in January 2018.

**When:** September 12th at 10:00am
**Where:** Oregon Medical Association (11740 SW 68th Parkway, Portland 97223)
**Please reply to this email with your RSPV. No need to "reply all".**
Thank you in advance for your participation. We realize this is fairly short notice, but we believe it is imperative to get everyone in the same room to have this conversation as soon as possible.

Sincerely,

Senators Devlin, Johnson, and Winters

**Attachment #2 – Reps. Hayden and Parrish Comments on Oregon's 1332 Waiver**

August 24th, 2017

Interim Director Patrick Allen
Oregon Health Authority
2600 Center Street NE
Salem, OR 97301

Dear Interim Director Allen,

The following letter constitutes our concerns about Oregon's application for a 1332 State Innovation Waiver which is currently being sought from the Center for Medicare and Medicaid Services (CMS), a division of the United States Department of Health and Human Services (HHS).

In 2013, the Oregon Legislature created what was to be a temporary reinsurance program while the Oregon Health Exchange (formerly known as Cover Oregon) was ramping up to enroll lives into the Exchange under the Patient Protection and Affordable Care Act (ACA). It was estimated that the reinsurance program would be a temporary measure until such a time that the Exchange was operating at a break-even capacity, some 285,000 lives to be covered. The reinsurance program ended in 2016, leaving a $50 million dollar balance in the program. The Oregon Legislature opted to renew the program, sweeping the $50 million dollar "windfall" back into the program while seeking additional funds to shore up the renewed reinsurance program. As part of that effort, the state was directed through House Bill 2391 to seek this 1332 waiver.

Oregon's waiver draft rightly states the problem our state is having in maintaining a robust insurance market with consumer choices. However, the draft wrongly identifies a reinsurance program as the solution to a volatile insurance market that has left Oregon consumers with dwindling choices both in and out of the Exchange, while simultaneously facing double-digit rate increases. In fact, early in 2017, the Department of Consumer and Business services put forth a document that expressed concerns whether a 1332 waiver was the correct course of action for Oregon and made a recommendation that we NOT pursue a 1332 waiver. We agree with the original recommendation to not pursue a waiver. Indeed, as we see it, the solution to fixing these problems doesn't lie in taxing consumers to subsidize the marketplace with a reinsurance program as a mechanism to decrease rates. We also believe the tax mechanisms proposed by House Bill 2391 are not broad-based enough to even qualify for such a waiver.

The fact is Oregon failed to enroll enough lives into the Exchange to spread the risk pool in such a manner so that the insurance market would stabilize on its own without an additional infusion of state or federal tax dollars. We pinpoint the failure of the Exchange to House Bill 2128 (2013) when the legislature repealed portions of a negotiated compromise in House Bill 4164 (2012), the business plan for the Cover Oregon. In House Bill 4164, Oregon's school districts would have been granted the opportunity to buy insurance for their employees via the Exchange beginning in School Year 2015. Besides an estimated $400 million in annual K-12 budget school savings had House Bill 4164 been implemented, the net result of

adding 150,000 lives from school districts, coupled with the existing 135,000 lives currently in the Exchange, would have leveled out risk pool. Subsequently, it would have held down rates for all ratepayers in the Exchange without the need for a costly, taxpayer-funded reinsurance program as proposed by this waiver. Had we followed through with the policy in House Bill 4164, Oregon would have achieved the 285,000 lives needed to make the Exchange function as originally planned.

We dispute projections of insurance rate decreases estimated by this waiver request will manifest at the levels proposed by the agency. This year, rate requests from the remaining insurers in Oregon ranged upwards to an eye-popping 21%. The state granted rate requests as high a 14% for some carriers, while granting only 2% rate increases for others. These variances have caused some insurers to exit markets, and in rural Oregon, leave ratepayers with only one carrier choice. In subsequent biennia, as these insurers bear the brunt of healthcare costs for some of Oregon's highest risk patients who buy their coverage via the Exchange, without expanding the risk pool itself, we believe it will be impossible to create the kinds of rate savings this waiver purports to potentially yield. The reinsurance program created by the 2013 legislation did little to offset repeated, annual double-digit rate increases or exits from the marketplace. In fact, Moda, because of poor rate planning and the amount of high-risk patients entering the marketplace, required a $50 million dollar loan from Oregon Health Sciences University to stabilize their presence in Oregon.

The projected increase in people buying insurance in the marketplace is not enough to bring the overall risk down. Of concern are the number of people who have bronze and silver plans who are unable to afford associated premiums. Hospitals in Oregon self-report seeing an increase in charity care of people with ACA coverage who cannot afford co-pays associated with these plans. This uptick in charity care occurred with a reinsurance program in place. Given the continued volatility of the insurance marketplace in Oregon, we dispute the cost savings renewing the reinsurance program is purported to save the federal government.

The 1332 waiver request by Oregon to CMS is also predicated on the passage of taxes in House Bill 2391. Currently, there is a referendum effort to repeal the taxes in Sections 3, 5, 9 and 27. Even if voters are not successful in repealing the tax mechanisms in House Bill 2391, we also do not believe that these taxes constitute a broad enough base to even qualify for a 1332 waiver.

The following takes a look at the tax mechanisms the state is looking to use as the basis for its waiver request. These dollars were also warranted as a potential revenue stream for additional Medicaid match dollars from the federal government:

**Section 3:** This 1.5% tax is on the insurance for Oregon's Public Employee Benefit Board (PEBB). Given healthcare for public workers come from state tax resources, the tax on PEBB plans constitutes a tax on tax dollars. It does not generate net-new revenue for the state from which to constitute a broad-base for a 1332 waiver request or new resources for Medicaid matching.

**Section 5:** The 1.5% tax on insurance markets will impact about 1.2 million Oregonians who through their own purchasing power or via an employer, will see a rate increase as a result of the tax. Separately, nearly one million Oregonians who receive employer-sponsored benefits via self-insurance will not be subject to this tax. This unfair tax burden being leveraged to generate both a 1332 waiver and potentially Medicaid match dollars, disproportionately impacts just over half of the healthcare-purchasing market while leaving the other half of remaining Oregonians free from taxation. We believe this tax does not meet the requirements for a 1332 waiver.

**Section 9:** This 1.5% tax on Medicaid Coordinated Care Organizations (CCOs, MCOs) is incredibly problematic. The state currently leverages a Medicaid match from the federal government via hospital and long-term care bed tax assessments. Under Oregon's laws, these dollars are assessed to the hospital or

long-term care facility, matched with federal funds, and then redeployed to Medicaid providers. The taxation provision in Section 9 of House Bill 2391 proposes to tax the gross revenues of MCOs for the purpose of attempting a second bite at a Medicaid match. However a legal opinion from Oregon's legislative counsel states that the taxes in Sections 5 and 9 of House Bill 2391 are essentially fungible to Oregon's General Fund. We find the "double dip" element of the MCO tax to be at odds with the intent of the match programs allowed by CMS for Medicaid, and would not be able to be used as consideration for a 1332 waiver. In fact, we believe that this particular provision in House Bill 2391, if found to be in violation of federal Medicaid policy, has the potential to put our entire Medicaid program as it's currently delivered in jeopardy.

Additionally, the state has presented a timeline for a 1332 waiver which does not align with that tax-raising mechanisms in House Bill 2391 to fund the reinsurance program. Should the taxation components in House Bill 2391 stand up to a referendum of Oregon voters, the bill itself has language that without another vote of the legislature, would render the taxes in the Section 3 PEBB tax and the Section 9 MCO tax sunsetted. This would only leave the taxation of insurance premiums in Section 5 moving forward, which would not constitute a broad enough base for a long-term reinsurance plan as presented to CMS in the request by Oregon for the 1332 waiver.

Waiver requirements specially ask states to demonstrate a 10-year budget showing the waiver will not increase the federal deficit and show how the waiver will not decrease coverage or affordability. We do not believe the state can adequately prove to CMS a 10-year budget plan with a broad enough tax base given two of the tax provisions in House Bill 2391 sunset in 2019, and given nearly half of Oregonians who have private-pay health coverage are not subject to the taxes in House Bill 2391.

Additionally, if the legislature chooses in the next biennium to sunset the tax provisions in Sections 3 and 9, the resulting cost increases demonstrated in Oregon's draft budget to fund the growth of the reinsurance program will disproportionately fall to only one category of insured. The net result will likely manifest in decreased coverage as insurers continue to drop out of the marketplace and increased costs to ratepayers when insurance companies pass additional costs to consumers. We believe this does little to stabilize the market and puts Oregon back in the position of having to negotiate with the federal government for increased budget allocations or additional waiver options to keep citizens covered.

This bait-and-switch type tactic should raise red flags for CMS about the long-term sustainability of the reinsurance program proposed by Oregon. Indeed, as the potential for the PEBB and MCO taxes disappear with a sunset, and the cost of the reinsurance program to the state is slated to rise, we have concerns about the state's ability to fund its share of a reinsurance program long term.

Lastly, we have concerns about future "windfalls" and how funds remaining in the reinsurance program are handled. With the close of the reinsurance program that ended in 2016, the state was left with a $50 million dollar balance that had been generated by ratepayers. We believe keeping those funds and redistributing them back to insurance companies, and not to the ratepayers from whom the funds were generated, violated the public's trust in a state-run reinsurance program. The $50 million overdraw from ratepayers, and the subsequent redistribution to insurance companies proposed by this new reinsurance request, we maintain, amounts to a taking from individuals who may no longer be participating in the insurance marketplace.

We believe the federal government should be concerned as we are by a reinsurance program that lends itself to profiteering by insurance companies at the expense of ratepayers. House Bill 2391 was pitched as a bill that "taxes big insurance companies" yet insurance companies themselves are twice-exempted: once as an employer because they self-insure, and secondarily, because Section 8 of House Bill 2391 gives statutory authority for insurance companies to pass the new taxes directly to ratepayers. If the taxation

under House Bill 2391 is passed directly to ratepayers, then a reinsurance program in which a positive fund balance is created by that taxation should be restored to those who actually incurred the tax liability. House Bill 2391 has no such provision to protect ratepayers.

Interim Director Allen, we understand the responsibility for management of the health and welfare of millions of lives in Oregon is a weight bigger than one agency director, one governor, or 90 legislators can possibly comprehend. However, we've watched mistake after mistake in how Oregon has implemented the components of the Affordable Care Act. From a failed Cover Oregon web portal that wasted over $300 million dollars, to policy decisions that neutered the participation and financial efficacy of the Exchange, to a Medicaid backlog which has cost the state hundreds of millions in additional healthcare IT software challenges, not to mention hundreds of millions in Medicaid overpayments to Coordinated Care Organizations, our handling of the ACA has been ineffective and has cost Oregon taxpayers and the federal government dearly.

We would ask that you go back and revisit your original recommendation that the state NOT participate in a 1332 waiver request. We have much work to do to bring down insurance rates and healthcare costs for Oregonians, but the solution doesn't lie in more costly gimmicks like a reinsurance program. It would stand to reason that taxing healthcare is not the way to make it more affordable. We're further concerned that recent announcements of layoffs and hiring freezes at hospitals across Oregon due to tax increases in House Bill 2391 and hospital payment capping in Senate Bill 1067 (2017) will contribute to a sharp increase in healthcare costs and a decrease in healthcare access for Oregon citizens that this 1332 waiver request won't address.

We would like during your time as interim director of Oregon's Health Authority for you take the opportunity to provide sound policy recommendations to Governor Brown and the legislature for how to implement what we all originally understood would bring down rates long term – and that's getting more lives into the risk pool to stabilize the market. We must revisit moving public employee lives onto the Exchange as a way to boost participation and bring down the overall risk, which in turn, would help bring down insurance rates for ratepayers and reduce pressure on all taxpayers who contribute to the healthcare benefit costs of public employees. Anything else is just a continuation of failed policy decisions which have ruined the chance of cost savings voters were promised with the passage of the Affordable Care Act.

Next year, many Oregonians will forced to change insurance providers and doctors while simultaneously experiencing double digit rate increases. The state should take care to avoid policies that will continue to increase consumer insurance costs for some, while giving tax carve-outs to nearly half of Oregon's healthcare purchasers. What we're doing in Oregon's insurance market is unsustainable.

We appreciate your consideration of our comments on Oregon's request for a 1332 waiver and would urge the state and CMS to avoid this expensive and wrong choice. We believe Oregon's proposal doesn't fit the requirements for a waiver, and that ultimately, a costly reinsurance program will do more harm than good. It's time to come back to the table to find a better path to bring down long-term healthcare costs, and we're ready to work towards that end.

Sincerely,

Rep. Cedric Hayden
Falls Creek

Rep. Julie Parrish
West Linn

## Attachment #3 – LC Opinion about taxation in HB 2391 – June 26, 2017

Dexter A. Johnson
LEGISLATIVE COUNSEL

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SALEM, OREGON 97301-4065
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www.oregonlegislature.gov/lc

STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

June 26, 2017

Representative Cedric Hayden
900 Court Street NE H492
Salem OR 97301

Re: Bills for Raising Revenue

Dear Representative Hayden:

You asked whether a bill embodying any of these provisions would be a bill for raising revenue that would be required to receive a three-fifths majority vote in each chamber under Article IV, section 25 (2), of the Oregon Constitution (supermajority clause):[1]

1. The hospital assessment.
2. Adding type A hospitals and type B hospitals to the hospital assessment.
3. Increasing the hospital assessment to six percent.
4. Removing the sunset on the hospital assessment.
5. Imposing a tax on insurers' premium revenue and on the revenue of coordinated care organizations.

The short answers are:

1. Yes, but only to the extent that the assessments paid are not returned to the payers in the form of increased reimbursement.
2. No.
3. Yes, but only to the extent that the assessments paid are not returned to the payers in the form of increased reimbursement.
4. No.
5. Yes.

Case law

In *Dale v. Kulongoski*, 322 Or. 240 (1995), and *Bobo v. Kulongoski*, 338 Or. 111 (2005), the Oregon Supreme Court held that the phrase "bills for raising revenue" has the same meaning for the supermajority clause as for the origination clause.[2] The opinions in *Dale* and *Bobo* thus make the body of origination clause doctrine, including federal

[1] Article IV, section 18, of the Oregon Constitution (origination clause), is an original provision of the Constitution as it went into effect in 1859, and Article IV, section 25 (2), was proposed by House Joint Resolution 14 in 1995 and adopted by the people as Ballot Measure 25 on May 21, 1996.
[2] *See Dale*, 322 Or. at 242-243; *Bobo*, 338 Or. at 122-123.

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origination clause doctrine adopted by Oregon courts, applicable to supermajority clause analysis.

The leading case in Oregon for origination clause purposes is *Northern Counties Trust v. Sears*, 30 Or. 388 (1895). In that case, the Oregon Supreme Court applied the main points of origination clause doctrine as developed nationally up to that time in upholding an Act imposing certain court fees to assist the state and counties in defraying expenses incurred in the administration of the judicial system.[3] The main points of the doctrine include the following:

> Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly, or lay duties, imposts or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens of the benefit of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizen, they give no direct equivalent in return.[4]

The most extensive discussion of what constitutes a bill for raising revenue appears in *City of Seattle v. Dep't of Revenue*, 357 Or. 718 (2015), which addressed a challenge under the origination clause to Enrolled Senate Bill 495 (2009). As introduced, SB 495 amended ORS 307.090 by granting a property tax exemption for property interests of Oregon utilities in the Pacific Northwest AC Intertie (Intertie). This amendment put these utilities on the same footing as certain out-of-state cities and public entities that enjoyed a property tax exemption for their property interests in the Intertie. The Senate amended the bill to scale back the scope of the new exemption to property interests in the Intertie of electric cooperatives organized under ORS chapter 62. The House significantly altered the bill through gut-and-stuff amendments that put all the entities on the same footing by repealing the existing exemption for the out-of-state entities' property interests in the Intertie. The House version of the bill was the version that ultimately passed both chambers and became law.

In determining whether SB 495 was a bill for raising revenue, the Oregon Supreme Court held that the question must be answered according to the analytical framework adopted by the court in *Bobo*:

> Considering the wording of Article IV, section 18, its history, and the case law surrounding it, we conclude that the question whether a bill is a "bill for raising revenue" entails two issues. The first is whether the bill collects or brings money into the treasury. If it does not, that is the end of the inquiry. If a bill does bring money into the treasury, the remaining question is whether the bill possesses the essential features of a bill levying a tax. *See Northern Counties Trust*, 30 Or. at 402

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[3] *Northern Counties Trust*, 30 Or. at 403.
[4] *U.S. ex rel Michels v. James*, 26 F. Cas. 577, 578 (C.C.S.D. N.Y. 1875, upholding against federal origination clause challenge a congressional bill increasing the rate of postage on third-class matter). This passage is cited in part by the court in *Northern Counties Trust*, 30 Or. at 401-402.

> (stating test). As *Northern Counties Trust* makes clear, bills that assess a fee for a specific purpose are not "bills raising revenue" even though they collect or bring money into the treasury.[5]

Applying the *Bobo* test, the court stated that "[w]ithout question, by eliminating the 2005 tax exemption, SB 495 will 'bring[ ] money into the treasury,' thus satisfying the first prong of the analysis that Bobo adopted."[6] To determine "whether the bill possesses the essential features of a bill levying a tax" under the second prong of the *Bobo* test, the court looked to the examination in *Northern Counties Trust* of federal cases establishing a "trend" in favor of a narrow interpretation of the origination clause:

> In *The Nashville* the court [stated]: "It is certain that the practical construction of the provision by congress has been to confine its operation to bills, the direct and principal object of which has been to raise revenue, and not as including bills out of which money may incidentally go into the treasury, or revenue incidentally arise." Deady, J., in *Investment Co. v. Parrish*, [stated]: "A bill for raising revenue, or a 'money bill,' as it was technically called at common law, is a bill levying a tax on all or some of the persons, property, or business of the country, for a public purpose; . . . and all laws regulating the same, are merely measures to secure what may be deemed a just or expedient basis for the levying of a tax or raising a revenue thereon."[7]

The law at issue in *Dundee Mortgage Trust* was a statute that changed where mortgage taxes were owed, shifting them from the county where the lender lived to the county where the property securing the debt was located. Thus, taxable mortgages were placed on the tax rolls of the latter counties. As noted, that change was viewed as a measure "to secure what may be deemed a just or expedient basis for the levying of a tax or raising revenue thereon" rather than as a direct levy of a tax.[8] In so holding, the court drew a distinction between bills that actually levy taxes and the laws that collaterally provide for an assessment or the regulation of such levies.[9]

With that case law in mind, we turn to whether each of the provisions listed above possesses the essential features of a bill levying a tax.[10] Each of the provisions will bring money into the treasury, satisfying the first prong of the *Bobo* test. Therefore, the question for each provision is whether it contains the essential features of a bill levying a tax.

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[5] *Bobo*, 338 Or. at 122.
[6] *City of Seattle*, 357 Or. at 732.
[7] *Northern Counties Trust*, 30 Or. at 402-403, *quoting The Nashville*, 17 F. Cas. 1176, (1868); *Dundee Mortgage Trust Investment Co. v. Parrish*, 24 F. 197 (1885).
[8] *Dundee Mortgage Trust*, 24 F. at 201.
[9] *See also Mumford v. Sewall*, 11 Or. 67, 4 P. 585 (1883) ("[i]t is not sufficiently clear that a law which merely declares that certain property heretofore exempt from taxation shall thereafter be subject to taxation is strictly a law for raising revenue. We do not feel warranted, therefore, as at present advised, in declaring the law unconstitutional on this ground.").
[10] *Bobo*, 338 Or. at 122.

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The hospital assessment and increasing the hospital assessment to six percent

The current hospital assessment imposed by section 2, chapter 736, Oregon Laws 2003, is collected by the Oregon Health Authority and used to increase the aggregate reimbursement paid to hospitals for the cost of care provided to medical assistance recipients. Because the revenue generated by the assessment is not used for general governmental purposes but benefits only the persons paying the assessment, it does not have the essential features of a bill for raising revenue under the analysis applied by the Oregon Supreme Court in *Northern Counties Trust*. Therefore bills creating the hospital assessment or increasing the rate of the hospital assessment would not be bills for raising revenue or require a three-fifths majority vote in each chamber. However, House Bill 2391 (2017) proposes to amend the hospital assessment to add a 0.7 percent assessment on the net revenue of hospitals. This portion of assessment is not subject to the aggregate limits in section 2 (3), chapter 736, Oregon Laws 2003, and therefore is not paid back to the hospitals in the form of increased reimbursement. Therefore, HB 2391, adding this new assessment, is a bill for raising revenue that would require a three-fifths majority vote in each chamber under the supermajority clause of the Oregon Constitution.

Adding type A hospitals and type B hospitals to the hospital provider tax and removing the sunset on the hospital provider tax

A bill removing the exemption of type A hospitals and type B hospitals from the hospital assessment or removing the sunset on the assessment would not have the essential features of a bill levying a tax. As in *Dundee Mortgage Trust*, the purpose of such a bill would be "to secure what may be deemed a just or expedient basis for the levying of a tax or raising revenue" rather than a direct levy of a tax.[11] The provisions are similar to the bill expanding the scope of an existing tax in *City of Seattle*, which the Oregon Supreme Court determined was not a bill for raising revenue.

Imposing a tax on insurers' premium revenue and on coordinated care organizations' revenue

A bill imposing a new tax on premium revenues earned by insurers and on the revenue of coordinated care organizations would have the essential features of levying a tax and would be a bill for raising revenue that would be required to receive a three-fifths majority vote in each chamber under the supermajority clause of the Oregon Constitution. These provisions "impose taxes upon the people, either directly or indirectly, or lay duties, imposts, or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens, of the benefit of good government."[12]

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[11] *Dundee Mortgage Trust*, 24 F. at 201.
[12] *Northern Counties Trust*, 30 Or. at 403, *quoting U.S. ex rel Michels v. James*, 26 F. Cas. at 578.

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employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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