SB 851 A Testimony
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Robert O'Neill, CPA

As CPAs practicing in Oregon for over 100 years, we have concerns regarding the retroactivity of the provisions in Section 2, which under Section (6)(1) of the bill apply to tax years beginning on or after January 1, 2017. The primary concern is that the retroactivity will change the law for a time period for which liability for tax has already legally attached. Individual taxpayers were required to pay their 2017 Oregon personal income taxes and file either their personal income tax return or an extension by April 17, 2018. Any extended returns were due October 15, 2018. This change - coming as it does over thirteen months after individuals were required to compute and pay their Oregon tax, and over seven months after they were required to file any extended Oregon returns - is poor tax policy and raises questions about the fairness and reliability of our tax system and creditability of our State. This is especially the case as the target for this change in law is Oregon individual income taxpayers.

Individual taxpayers subject to this law would be required to add back a federal deduction under IRC section 965(c)(1) for Oregon purposes. This would result in taxpayers having to amend 2017 returns to report additional income to Oregon or respond to notices from the state, and pay additional tax, despite the fact that they were in full compliance with the law as it has stood until this date. Taxpayers have already made financial decisions based on the current law for tax year 2017, and this legislation would undermine those decisions by increasing tax liabilities after the fact. Individuals are not corporations, they make decisions differently and spend money and resources differently. The retroactive law change impacts decisions they made many months ago including decisions to donate monies to charity before December 31, 2017.

Further, this change comes after the Oregon legislature addressed IRC § 965 for corporations in 2018, amending a corporate statute to require an addback of the IRC § 965(c) deduction. See ORS § 317.267(1). The Oregon legislature had the opportunity to make amendments to personal income tax statutes at that time, but purposely did not do so - either by amending ORS chapter 316 or by amending the general income tax statutes in ORS chapter 314 to address IRC § 965 as applicable to individual taxpayers.

Also note that corporate taxpayers are allowed an 80% Oregon DRD on the gross deemed repatriation amount under IRC § 965 after the Oregon addback so that only 20% of the gross inclusion is subject to tax. Oregon individual taxpayers are not allowed an Oregon DRD, so the full addback of the IRC § 965(c)(1) deduction would be subject to tax.

We are aware that the Department of Revenue issued a "Revenews" publication on March 19, 2018 related to personal income taxpayers, which provided that "an addition on the Oregon return is required for the amount that was deducted under IRC 965(c) from the repatriation income to arrive at the amount included on Line 21 of the federal return." We are also aware that the DOR believes ORS § 316.737 provides the authority for the addback. We believe that the DOR's reliance on ORS § 316.737 is misplaced and does not provide a basis for an IRC § 965(c) income modification. The attached article from the Journal of Multistate Taxation and Incentives, written by a prominent Portland attorney, reflects the view of many Oregon legal and accounting practitioners that the DOR's reliance on ORS § 316.737 is erroneous and lack any legal basis for modification of taxable income. The best evidence of this is that fact that the DOR believes there needs to be a statutory change to address issue. Accordingly, the retroactivity provision in this bill would result in a change in law, not merely a clarification of current law.

We strongly encourage Section 6(1) be updated to remove the retroactivity of the bill, and instead provide that Section 2 applies to tax years beginning on or after January 1, 2018 or January 1, 2019.

Sincerely,

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Partner, State and Local Tax