



KATE BROWN
Governor

September 13, 2017

The Honorable Thomas E. Price, M.D.
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Dear Dr. Price,

As Governor of Oregon, I am writing to express my support for Oregon's 1332 waiver request. The 1332 waiver is essential to Oregon's ability to stabilize the individual market through the Oregon Reinsurance Program. The Reinsurance Program is vital to the success of Oregon's health care system and the overall health of the 210,000 middle-income Oregonians who purchase insurance on their own. With the Reinsurance Program, Oregon has already reduced final 2018 individual market rates by 6 percent, and encouraged insurance companies to offer plans in more rural parts of the state.

In Oregon, we know that access to health care is the foundation of individual success. We have been fully committed to ensuring all Oregonians can access health coverage by expanding Medicaid, transforming the way Medicaid is delivered, and by working collaboratively with Oregon's health insurers to maintain a stable insurance market. These efforts have led to significant gains under the Affordable Care Act, including reducing the state's uninsured rate from 17 percent to just 5 percent, and saving Oregon's health system approximately \$500 million per year in uncompensated hospital care since 2013.

Despite these gains, Oregon's traditionally competitive health insurance market has suffered significant changes as the number of participating carriers has decreased and premiums have increased. With the Reinsurance Program, Oregon's market would become more stable in the short and long term, and would provide greater certainty to Oregon's health care system and households across the state.

I know that there is more work ahead to stabilize health care systems across the country. The U.S. Department of Health and Human Services' prompt approval of Oregon's 1332 waiver request would represent critical step toward improving Oregon's insurance market. We look forward to implementing this new program and continuing to work on other initiatives that provide Oregonians with high-quality and affordable health care.

Sincerely,

Governor Kate Brown

VD: ca



**America's Health
Insurance Plans**

601 Pennsylvania Avenue, NW
South Building
Suite Five Hundred
Washington, DC 20004

202.778.3200
www.ahip.org



October 11, 2017

The Honorable Seema Verma, Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 445-G
200 Independence Avenue, SW
Washington, D.C. 20201

Re: Oregon Section 1332 Waiver Application

Dear Administrator Verma:

America's Health Insurance Plans (AHIP) appreciates the opportunities presented by the 1332 waiver as an approach for states to address their own market needs. Because health insurance markets are inherently local, we support the 1332 waiver option for the development of state-specific solutions to state-specific challenges.

I write you today in support of the 1332 waiver application submitted by the State of Oregon. To mitigate expected rate increases and maintain a robust risk pool in the individual market, Oregon passed legislation to create the Oregon Reinsurance Program. The state drafted a comprehensive proposal for a 1332 waiver, seeking to offset its own funding of the Reinsurance Program with "pass through funding" from the federal government in the way of savings in reduced Premium Tax Credits. Section 1332 waivers should propose solutions to increase consumer choice and coverage while reducing costs; we believe that Oregon's proposal achieves those goals.

We urge you to act quickly to approve Oregon's waiver application, which is similar to those recently approved in Minnesota and Alaska. The state's reinsurance program would stabilize the individual market and provide an opportunity for the Administration to see how innovation and state flexibility can help address the ongoing challenges of health care access.

We appreciate the Administration's work to create a simpler, more robust, and more affordable individual market. We look forward to working with you to ensure consumers have access to quality, affordable coverage and care for years to come.

Sincerely,

A handwritten signature in black ink that reads "Marilyn B. Tavenner". The signature is fluid and cursive, with the first name being the most prominent.

Marilyn B. Tavenner
President and CEO

To: StateInnovationWaivers@cms.hhs.gov

From: Oregon health care advocates

Contact: Jesse Ellis O'Brien, OSPIRG, jesseo@ospirg.org

Date: October 11, 2017

Re: Comments in support of Oregon's proposed 1332 waiver

The undersigned organizations support the Oregon Reinsurance Program and the state's effort to implement this important program through applying for a State Innovation Waiver under section 1332 of the Affordable Care Act.

This proposal will help stabilize Oregon health insurance markets and protect consumers from large rate increases, and represents a win for both consumers and the health insurance industry—all at no net cost to the federal government.

Oregon consumers have faced large double-digit rate hikes in the individual health insurance market in both 2016 and 2017. Some health insurers have also gone out of business, left the state or shrunk their service area during this period, leaving many consumers with fewer options and less robustly competitive health insurance markets.

Oregon has already demonstrated the power of a well-designed and well-executed reinsurance program to contain premium costs. The establishment of the Oregon Reinsurance Program, combined with close scrutiny of health insurance rate filings, led to big reductions in rates for 2018—cutting an estimated [\\$100 million](#) from premiums.

By providing needed immediate relief for consumers, we hope that the Oregon Reinsurance Program will help put Oregon in a stronger position to make progress toward our shared goals of improved care, improved health and reduced cost. By approving Oregon's waiver request and providing the flexibility to implement this program as intended, the federal government can help our state build a health insurance market that delivers better results for Oregonians.

Thank you for the opportunity to provide comment in support of this important proposal.

Sincerely,

Health Care for All Oregon
Oregon Foundation for Reproductive Health
Oregon Law Center
Oregon Nurses Association
Oregon State Public Interest Research Group (OSPIRG)
Project Access NOW
SEIU Local 49
We Can Do Better



September 20, 2017

The Honorable Seema Verma
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

RE: Oregon 1332 Waiver Application

Dear Administrator Verma:

Thank you for the opportunity to submit comments regarding the Oregon application for a 1332 waiver. Cambia Health Solutions (Cambia), headquartered in Portland, provides health insurance in the Oregon market through two plans, Regence Blue Cross Blue Shield of Oregon and BridgeSpan Health. These plans combined currently service approximately 30,000 persons. More broadly, Cambia reaches more than 70 million Americans nationwide, including more than two million people in the Pacific Northwest who are enrolled in our regional health plans.

A stable individual market is a necessary component of a viable healthcare industry. The 1332 waiver program is an important tool for Oregonians to support affordability and diverse risk pools in their individual market while preserving federal funding levels.

Cambia is an active participant in Oregon's development of the 1332 Waiver Application. It is our firm belief that the plan submitted by the State will function as anticipated. Success of this plan will result in reduced rates to the subscriber and an overall increase in the stability and predictability of the Individual market. We encourage the rapid approval of the Waiver Application and look forward to a more stable, competitive market upon implementation.

Sincerely,

Chris Blanton
President of Consumer Health & Life Insurance
Cambia Health Solutions

Providence Health Plans
P.O. Box 4327
Portland, OR 97208-4327



September 18, 2017

VIA ELECTRONIC MAIL: StateInnovationWaivers@cms.hhs.gov

Mr. Randy Pate
Director, Center for Consumer Information & Insurance Oversight
Deputy Administrator Center for Medicare & Medicaid Services
Department of Health & Human Services
Center for Medicare and Medicaid Services
200 Independence Avenue SW
Washington, DC 2021

RE: Oregon Section 1332 Waiver Comments

Dear Mr. Pate,

On behalf of Providence Health Plans, I write today to urge the approval of Oregon's application for a State Innovation Waiver under Section 1332 of the Patient Protection and Affordable Care Act.

Providence Health Plans is a part of Providence St. Joseph Health, an organization committed to providing for the needs of the communities we serve, with a special focus on those who are poor and vulnerable. Providence St. Joseph Health includes a diverse family of organizations. Together, we employ more than 111,000 people who serve in 50 hospitals, 829 clinics, two health plans and hundreds of programs and services in Alaska, California, Montana, New Mexico, Oregon, Texas and Washington. Our unique not-for-profit organization is transforming health care for the future through digital innovation, population health, mental health, specialty institutes and clinical quality. Each year we work to provide care and services where they are needed most, including investments in community benefit that in 2016 totaled more than \$1.6 billion.

Providence Health Plans has been an active and engaged carrier providing statewide access to insurance on the individual market. Today, Providence covers more than 96,000 Oregonians on the individual market, including over 62,000 individual lives on the exchange. With over 50 percent of the individual market, Providence is the largest carrier for individual lives in Oregon and in 2018 we will be the only statewide carrier in all 36 counties in Oregon.

The Oregon Reinsurance Program is an important factor in our decision to continue to offer plans in every county in Oregon. The program has already reduced individual market rates by six percent for 2018. We believe that this will help make insurance more affordable for all Oregonians who need to access the individual market - spreading the risk profile of this market and offering some needed stability to this market. Without this program, costs in the individual market will continue to rise, creating more barriers for consumers who need access to quality insurance and health care.

Providence Health Plans urges the expedient approval of Oregon's 1332 Waiver Request in order to ensure the ready implementation of the Oregon Reinsurance Program on Jan. 1, 2018. Thank you for your consideration of this request.

Sincerely,



Michael L. Cotton
Chief Executive Officer
Providence Health Plans

cc: Nik Blosser, Chief of Staff, Governor Kate Brown
Jeremy Vandehey, Director of Health Policy and Analytics, Oregon Health Authority
Chiqui Flowers, Administrator, Oregon Health Insurance Marketplace
Anthony Behrens, Carrier Liaison, Oregon Health Insurance Marketplace
Jessica Adamson, Director of Government Affairs, Providence Health & Services - Oregon



October 10th, 2017

Dr. Don Wright, Acting Secretary
U.S. Department of Health and Human Services
200 Independence Ave SW
Washington, DC 20201

RE: State of Oregon Section 1332 State Innovation Waiver Proposal

Dear Secretary Wright,

As members of Oregon's House of Representatives, we're writing to express our concerns about Oregon's application for a 1332 State Innovation Waiver. Since the time we submitted our original comments to the State of Oregon as outlined in Attachment #1, our concerns have increased. We continue to maintain Oregon's plan for a 1332 waiver is not only poorly strategized, but that under the previous reinsurance program, the state was unable to contain rates or expand affordability. Frankly, things have gotten worse.

The stated purpose of Oregon's waiver request is to bring rates down for ratepayers. In fact, the state has touted a six-percent rate decrease for 2018 if the reinsurance program is approved by the Department of Health and Human Services. However, most insurance companies even with the proposed reinsurance program are going to enjoy double digit rate increases in 2018. Those that didn't get rates approved to their satisfaction such as Regence Blue Cross, have pulled out of the marketplace. In fact, Regence's decision to pull out of 15 of Oregon's 36 counties for 2018 has left ratepayers with nothing but a monopolistically controlled insurance market. The double-digit rate increases will be applied before proposed taxes on insurance premiums of 1.5% passed by Oregon's legislature as part of the proposal for a reinsurance program, as well as the state's attempt to draw down more federal Medicaid match dollars using taxes from individual premiums as the funding basis for the Medicaid match.

On October 5th, 2017, petitioners of Referendum 301 successfully submitted 84,367 signatures to repeal the sections of House Bill 2391 that would increase taxes on public employee healthcare plans, Medicaid managed care organizations, hospitals, and insurance companies. Under Oregon's referendum law, the taxes in House Bill 2391 will be suspended from going into effect until voters cast ballots on January 23rd, 2018. We understand the 1332 waiver requirements to read that a state must be able to demonstrate before the end of 2017 it has enacted legislation to facilitate the waiver request. Not only were the taxes in House Bill 2391 not based broadly enough to merit consideration by the Department of Health and Human Services, the taxes are currently set to expire in 2019 even without a voter veto on the referendum next January.

We feel it is also important for your consideration to understand that as crafted, the healthcare premium and hospital net revenue taxes in House Bill 2391 will likely overfund our state's Medicaid program in the 2017-19 biennium. A June 2017 legislative legal opinion (Attachment 2) outlines how these taxes are

fungible to Oregon's general fund, meaning they can be used for non-healthcare related expenditures. We believe the intentional choice by the legislature to pass a hard tax on hospitals rather than increase the DRG hospital assessment from 5.3% to the federally-allowed cap was for the purpose of cost-shifting excess funds to Oregon's non-healthcare budget obligations. An increase in the DRG assessment would have required the funding and federally matched dollars stay in the Medicaid program for low-income recipients.

Additionally, Oregon is experiencing tumultuous leadership changes in our state healthcare programs. Oregon's executive leadership has shown time and again its inability to manage federally-funded healthcare projects such as \$300 million for Cover Oregon, the state health insurance exchange website that never worked. We've also just seen a years-long Medicaid eligibility backlog that resulted hundreds of millions in Medicaid provider overpayments for 55,000 people who were neither income nor residency eligible. And as aforementioned, the previous reinsurance program did not stave off double-digit rate increases for every day Oregonians who pay full freight for their own health coverage. Regardless of a promise of a rate decrease if the federal government approves a 1332 innovation waiver, we believe Oregon's insurance rates will continue to increase and insurance provider monopolies will only get worse.

Like other states that have failed to properly enroll an adequate amount of lives into Affordable Care Act health exchanges to cover the risk pool, Oregon has done an abysmal job of meeting exchange enrollment projections. Our failure to enroll lives into the exchange and ensure a balanced risk pool is what's driving Oregon to seek a waiver. Our problem delivering affordable and accessible healthcare to our citizens is a systemic problem that a 1332 waiver won't solve.

We respectfully request you read the letter we shared with the State of Oregon during its 1332 waiver comment period as attached to this letter and take those comments under serious consideration.

Subsequently, we request you consider that Oregon has failed to meet the requirements for an innovation waiver. Due to the referendum, the state has not met the obligation to have enacted legislation before the end of 2017 to create the necessary state funding to run a reinsurance program. However, even without a citizen's referendum, which could result in voters vetoing the taxes, the existing sun-setting provisions in House Bill 2391 which will sunset the taxes used as the basis for the waiver, don't comport with the requirement that states demonstrate a sustainable, long-range plan needed for waiver approval.

Secretary Wright, Oregon needs systemic healthcare reform. Granting Oregon a 1332 waiver is nothing more than a Band-Aid fix that will fail to stem recurring health insurance premium increases, quell market volatility, or prevent monopolistic control by insurance providers that leave our citizens with only one choice.

Since the inception of the Affordable Care Act, Oregon has experienced failure after failure in the ACA's implementation, costing taxpayers hundreds of millions in wasted state and federal tax dollars. It's time the federal government says no to another half-baked healthcare concept from Oregon.

Sincerely,



Rep. Cedric Hayden
Falls Creek



Rep. Julie Parrish
West Linn

Attachment #1

1332 State Innovation Waiver comments submitted during Oregon's open comment period

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 as 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 be 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.

Attachment #2 – LC Opinion about taxation in HB 2391 – June 26, 2017

Dexter A. Johnson
LEGISLATIVE COUNSEL



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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.

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

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.

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.

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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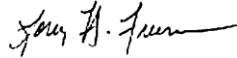
¹¹ *Dundee Mortgage Trust*, 24 F. at 201.

¹² *Northern Counties Trust*, 30 Or. at 403, quoting *U.S. ex rel Michels v. James*, 26 F. Cas. at 578.

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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