



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

August 31, 2017

Senator Richard Devlin
900 Court Street NE S213
Salem OR 97301

Re: Questions Relating to Prospective Referendum on House Bill 2391 (2017)

Dear Senator Devlin:

You asked several questions relating to prospective Referendum Petition 301 (2018), which was filed with the Secretary of State on July 5, 2017, and seeks to refer portions of chapter 538, Oregon Laws 2017 (Enrolled House Bill 2391 (2017)), to the ballot. Our responses to your specific questions are below.

Question 1: What is the deadline for the signatures to be gathered?

Article IV, section 1 (3)(b), of the Oregon Constitution, states, in relevant part, that “[a] referendum petition shall be filed not more than 90 days after the end of the session at which the Act is passed.” The 2017 regular session of the Seventy-ninth Legislative Assembly adjourned *sine die* on July 7, 2017. Consequently, the chief petitioners of prospective Referendum Petition 301 must file the required number of signatures with the Secretary of State not later than October 5, 2017.

Question 2: How do the Secretary of State’s proposed administrative rules impact prospective Referendum Petition 301?

On July 13, 2017, the Secretary of State announced proposed administrative rules that would enable the chief petitioners of an initiative petition to continue to gather signatures during the period of time a ballot title for the petition is challenged in court.¹ As these proposed administrative rules are limited to initiative petitions and do not apply to referendum petitions, they do not affect prospective Referendum Petition 301.

Question 3: What is the scope and effect of the referendum if it qualifies for the ballot?

Under Article IV, section 1 (3), of the Oregon Constitution, the people have the right to, *inter alia*, refer either chapter 538, Oregon Laws 2017, or any portion of the Act, to the ballot.² The chief petitioners of prospective Referendum Petition 301 have chosen to attempt to refer portions of the Act to the ballot.

¹ Oregon Newsroom, “Secretary of State Dennis Richardson Launches Grassroots Petitioning Improvement” <http://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=2156> (visited August 29, 2017).

² See also ORS 250.005 (3)(b) (defining “measure” to include “[a]n Act or part of an Act of the Legislative Assembly” that is “submitted to the people for their approval or rejection at an election”).

Pursuant to Article IV, section 1 (4)(d), of the Oregon Constitution, once a referendum petition has received the requisite number of signatures to qualify for the ballot, the portion of the Act that is referred is stayed, pending the outcome of the election, and “becomes effective 30 days after the day on which it is enacted or approved by a majority of the votes cast thereon.” However, this same constitutional provision provides that “[a] referendum ordered by petition on a part of an Act does not delay the remainder of the Act from becoming effective.” As a result, any parts of chapter 538, Oregon Laws 2017, that are not referred will take effect on the dates set forth in the Act itself.

Question 4: What is the scope and effect if the people reject the referred portions of the Act?

The provisions in sections 3, 5, 8 and 9 of the Act that are subject to the referendum create the sources of revenue for the Health System Fund established in section 2 of the Act. Moneys in the Health System Fund pay the costs of administering the Oregon Reinsurance Program and provide additional funding for the medical assistance program, known as the Oregon Health Plan (OHP).

The effect of the voters’ rejection of the referred provisions would be to eliminate the sources of revenue for the Health System Fund that are prescribed in the Act.

Section 27 of the Act amends section 2, chapter 736, Oregon Laws 2003, to limit to 5.3 percent the rate of assessment that the Oregon Health Authority may impose on hospitals under the section and to impose an additional assessment of 0.7 percent. Only the provision establishing the additional assessment is subject to the referendum. The assessments are paid into the Hospital Quality Assurance Fund to pay the costs of administering the assessment, to reimburse hospitals for the cost of providing care to OHP recipients and to pay for services provided in the OHP.³ The amendments to section 2, chapter 736, Oregon Laws 2003, by section 27 become effective on October 6, 2017, 91 days after the Legislative Assembly adjourned sine die.⁴

Section 2, chapter 736, Oregon Laws 2003, as amended by section 27 of the Act, is further amended in section 28 of the Act. The amendments by section 28 become operative on January 1, 2018, subject to necessary approvals by the Centers for Medicare and Medicaid Services.⁵ These amendments include provisions identical to the provisions in section 27 that are subject to the referendum, that is, they impose an additional assessment on hospitals of 0.7 percent. The amendments in section 28 also exclude type A and type B hospitals from the additional assessment.

Section 28 meets the constitutional requirement that an amendment to a section in an Act be set out in full.⁶ Therefore, although there is no case law addressing this issue, a very strong argument could be made that, because petitioners did not include section 28 in the provisions referred, a rejection of the referred provisions would remove the additional 0.7 percent assessment only during the period from October 6, 2017 (the effective date of section 27), until January 1, 2018 (the operative date of the subsequent amendments in section 28). In other words, if “no” votes prevail, the additional 0.7 percent assessment would be removed only from the period of October 6, 2017, until January 1, 2018.

³ Section 9, chapter 736, Oregon Laws 2003.

⁴ Section 51, chapter 538, Oregon Laws 2017 (Enrolled House Bill 2391).

⁵ Section 44 (1)(a), chapter 538, Oregon Laws 2017.

⁶ See Article IV, section 22, Oregon Constitution.

Question 5: Will the reinsurance program remain in effect if the people reject the referred portions of the Act?

The Oregon Reinsurance Program is created by sections 18 to 22 of the Act and by amendments to ORS 731.509 and section 2, chapter 26, Oregon Laws 2016, by sections 23 to 25 of the Act. None of these provisions are subject to the referendum. Therefore, if the United States Department of Health and Human Services approves a waiver for state innovation, the condition necessary for the program to go into effect, the program will remain in effect but without its primary source of funding.

Question 6: What are the steps and timeline leading up to the special election?

Section 55 (1)(a), chapter 749, Oregon Laws 2017 (Enrolled Senate Bill 229 (2017)), establishes that if any part of chapter 538, Oregon Laws 2017, is referred to the ballot, “[i]t shall be submitted to the people for their approval or rejection at a special election held throughout this state on January 23, 2018[.]” Prior to the special election, a number of steps must be taken, including: the chief petitioners must gather enough signatures for the measure to qualify for the ballot; the joint legislative committee created pursuant to section 60, chapter 749, Oregon Laws 2017, must prepare a ballot title and explanatory statement for the measure;⁷ electors must be provided with an opportunity to challenge the ballot title and explanatory statement by filing a petition with the Supreme Court;⁸ the Supreme Court must review and rule upon these challenges;⁹ the final ballot title and explanatory statement must be certified;¹⁰ arguments that are for or against the measure and that are intended to be printed in the voters’ pamphlet must be filed with the Secretary of State;¹¹ the financial estimate committee must meet and file the financial estimate;¹² a voters’ pamphlet containing the number, ballot title, text of the referral, financial estimate, explanatory statement and arguments relating to the measure must be printed and mailed¹³ and the final ballot must be certified and mailed to electors.

With a few exceptions,¹⁴ sections 55 to 61, chapter 749, Oregon Laws 2017, grant the Secretary of State rulemaking authority to establish the timeline for these steps. On August 25, 2017, the secretary issued, by temporary administrative rule, the final timeline for the special election.¹⁵

Question 7: Explain the differences between a “yes” and “no” vote on prospective Referendum Petition 301.

Article IV, section 1 (3)(a), of the Oregon Constitution, grants the people the right “to approve or reject at an election any Act, or part thereof, of the Legislative Assembly that does not become effective earlier than 90 days after the end of the session at which the Act is passed.” As the people will be voting at the special election on whether to approve the Act passed by the Legislative Assembly, a “yes” vote would indicate support for the Act passed by the Legislative Assembly and a “no” vote would indicate a rejection of the Act passed by the Legislative Assembly.

⁷ Section 60, chapter 749, Oregon Laws 2017 (Enrolled Senate Bill 229).

⁸ Sections 58 and 59, chapter 749, Oregon Laws 2017.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Section 55 (6)(a), chapter 749, Oregon Laws 2017.

¹² Section 55 (7), chapter 749, Oregon Laws 2017.

¹³ Section 56 (1) and (2)(b), chapter 749, Oregon Laws 2017.

¹⁴ See, e.g., ORS 253.065 (establishing date for mailing ballots to military, overseas and other absent electors).

¹⁵ “Timelines for the January 23, 2018, Special Election,” OAR 165-007-2018 <http://sos.oregon.gov/voting-elections/Documents/165-007-2018-temporary-rule.pdf> (visited August 29, 2017).

Question 8: If the portions of the Act that are contained in prospective Referendum Petition 301 are referred to the ballot, but the people approve the referred provisions at the special election, what are the implications for the implementation of the Act?

As detailed above in response to Question 3, if prospective Referendum Petition 301 qualifies for the ballot, the portions of chapter 538, Oregon Laws 2017, that are referred will take effect 30 days after they are approved by the electors. The rest of the bill will take effect on the dates set forth in the Act itself.

As detailed above in response to Question 4, the portions of the Act that may be referred relate to the sources of revenue for the Health System Fund that are prescribed in the Act and to the rate of assessment that the authority may impose on hospitals. If prospective Referendum Petition 301 qualifies for the ballot but the people approve the referred provisions, these assessments could not be collected until at least February 22, 2018 (i.e., 30 days after the date of the special election). However, the wording of the relevant sections of chapter 538, Oregon Laws 2017, makes it clear that the assessments would cover, *inter alia*, the entire calendar year of 2018.¹⁶ As a result, the total amount of moneys provided to the Health System Fund during the 2018 calendar year should be the same. In this way, the Act is similar to Ballot Measures 66 and 67 (2010), which were based on bills passed during the 2009 regular session of the Seventy-fifth Legislative Assembly, approved by the people during an election held in January 2010 and still applied to all revenues earned during both the 2009 and 2010 calendar years.¹⁷

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Very truly yours,

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¹⁶ See sections 4, 8 (1), 12, 44 (1)(a) and 51, chapter 538, Oregon Laws 2017.

¹⁷ See November 2009 "Legislative Revenue Office Research Report #6-09 Revised" on Ballot Measures 66 and 67, at 1 and 2 <https://www.oregonlegislature.gov/lro/Documents/11-19-09%20RR%206-09%20Measures%2066-67.pdf> (visited August 29, 2017).