

IN THE SUPREME COURT OF THE STATE OF OREGON

DAN HARMON,

Petitioner,

v.

ELLEN F. ROSENBLUM,
Attorney General, State of Oregon

Respondent.

Case No. 61587

PETITION TO REVIEW BALLOT TITLE
CERTIFIED BY ATTORNEY GENERAL

Initiative Petition 19 (2014)

BALLOT TITLE CERTIFIED
August 13, 2013
Initiative Petition
Chief Petitioner: Patrick Green

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Of Attorneys for Respondent

I. PETITION TO REVIEW BALLOT TITLE

A. Petitioner's Interest

Petitioner Dan Harmon is an elector of this State, a person dissatisfied with the ballot title that is the subject of this action, and adversely affected by Respondent's actions. Because Petitioner submitted written comments concerning the draft ballot title, he has standing to seek review pursuant to ORS 250.085(2).¹

B. Certified Ballot Title

On August 13, 2013, the Attorney General certified the following ballot title:

**Makes corporate excise tax rate on taxable income
the same as personal income tax rate**

Result of "Yes" Vote: "Yes" vote makes the corporate excise tax rate for any amount of taxable corporate income the same as the applicable rate of personal income tax.

Result of "No" Vote: "No" vote retains existing corporate excise tax rate of 6.6% for first \$10 million of taxable income, 7.6% for additional taxable income.

Summary: Current Oregon law provides that, for the tax years beginning on or after January 1, 2013, the rate of tax imposed by and computed under the Corporation Excise Tax Law (ORS Chapter 317) is six and six-tenths percent of the first \$10 million of taxable income (or fraction thereof), and seven and six-tenths percent of any amount of taxable income over \$10 million. Measure eliminates the current corporate excise tax rate brackets. Measure makes the rates of excise tax imposed on corporations' taxable income the same as the rates of personal income tax imposed on the taxable income of every state resident (as provided in ORS Chapter 316). Measure applies to tax years that begin on or after January 1, 2015.

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¹ A copy of IP 19 is attached as Exhibit 1; the draft ballot title is attached as Exhibit 2; Petitioner's comments are attached as Exhibit 3; the Attorney General's explanatory letter is attached as Exhibit 4; and the certified ballot title is attached as Exhibit 5.

II. ARGUMENTS AND AUTHORITIES

A. Introduction

Oregon has two types of corporate taxes: excise and income. *See* ORS 317.005 et seq.; ORS 318.010 et seq. An excise tax is a tax imposed upon businesses for the privilege of carrying on or doing business in the State of Oregon and is based on the business' net income. ORS 317.010(5). Corporations are taxed at a rate of 6.6% on the first \$10 million of taxable income and 7.6% on any taxable income in excess of \$10 million. ORS 317.061. IP 19 seeks to impose Oregon's personal income tax rate upon corporations, so that the corporate excise tax rate would be 5%, 7%, 9% or 9.9%, depending on a corporation's amount of taxable income. *See* ORS 316.037. As such, the measure would decrease the corporate excise tax for some corporations and increase this tax for other corporations.

IP 19 is titled "If Corporations Are People, Let's Tax Them Like It" and is the sixth initiative petition pertaining to corporate taxes filed by Our Oregon for the 2014 election. Exhibit 3, p. 6. Overall, its chief petitioners estimate that IP 19 would generate more than \$370 million in new revenue. *Id.*

B. Standard of Review

On review, this Court must determine whether the title substantially complies with the requirements of ORS 250.035. ORS 250.085(5).

C. The Caption

A ballot title caption must reasonably identify the subject matter of the measure. ORS 250.035(2)(a). For purposes of this Court's review, the "subject matter" of a ballot title is "the actual major effect" or effects of the measure. *Lavey v. Kroger*, 350 Or 559, 563 (2011) (citing *Whitsett v. Kroger*, 348 Or 243, 247 (2010)).

The caption does not meet these statutory requirements because it does not convey to potential signers and voters the effects of IP 19 on corporate excise tax rate, and those effects would be a decreased tax rate for some corporations and an increased tax rate for other corporations. Additionally, the word “makes” is inaccurate because the measure does not propose to “make” the corporate tax rate the same as “personal income tax rate.” Rather, the measure proposes corporate tax rates which are “the same as the *tax* imposed on the taxable income for every resident of this state,” and personal income tax is not calculated by simply applying a certain *tax rate*; it is calculated by applying *set amount plus a certain tax rate*. ORS 317.037.

Because there is a significant difference between a tax and a tax rate, the word “makes” renders the caption inaccurate. Therefore, Petitioner recommends the phrase “to correspond with,” which accurately describes what IP 19 does, which is to impose the personal tax rate plus a set monetary amount. This suggested phrase also clarifies that the corporate tax rate may change in the future if and when the personal tax changes. Because the caption does not comply with statutory requirements, Petitioner proposes the following caption:

**Decreases or increases corporate tax rate on taxable income
to correspond with personal tax rates**

Respondent declined to accept Petitioner’s suggested language, stating “it is not apparent from the text of IP 19 that the measure decreases excise tax for some corporations and increases excise tax for others” and that such effects are “speculation.” Exhibit 4, p. 2. Petitioner disagrees with this statement because for voters who know what the individual tax rates are, it is apparent from the text of IP 19 that it would result in a tax decrease and a tax increase for corporations, and the summary should identify these results for voters who do not know the personal tax rates. It is not speculation that

under IP 19, a corporation that has taxable income of \$2,000 or less would have its tax rate decrease (from a tax rate of 6.6% to 5%). Similarly, it is not speculation that under IP 19 a corporation that has taxable income exceeding \$125,000 would have its taxes increase (from a rate of 6.6% to 9.9% plus \$11,110). Because the caption fails to identify these effects, the caption should be modified.

D. The Result of “Yes” Statement

ORS 250.035(2)(b) requires a ballot title to contain “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” The statement must inform voters of the “outcome that is the most significant and immediate, or that carries the greatest consequence, for the general public.” *Novick v. Myers*, 337 Or 568, 574 (2004).

Respondent modified the draft “Yes” result statement to track the language of the caption; therefore, Petitioner believes that the statement fails to comply with statutory standards for some of the same reasons discussed above regarding the caption. Specifically, the statement does not adequately explain what will happen if IP 19 is approved, which is a decreased excise tax rate for certain corporations and an increased excise tax rate for other corporations, depending on the amount of a corporation’s taxable income. Although IP 19 would decrease the tax rate for corporations with taxable income of \$2,000 or less and increase the tax rate for corporations with taxable income over \$2,000, the result statement does not inform voters of either effect. Indeed, the results of IP 19 that likely have the greatest importance to Oregonians are the actual tax rates and amounts, and these rates are absent from the results statement. Additionally, the word “makes” renders the statement inaccurate because IP 19 does not impose different tax rates; it imposes different taxes which are comprised of a set amount plus a tax rate.

To address these defects, Petitioner suggests the following statement:

Result of “Yes” Vote: “Yes” vote decreases or increases corporate tax rates, currently 6.6% or 7.6%, to correspond with personal income tax rates, currently 5%, 7%, 9% or 9.9%.

E. The Summary

A ballot title's summary must be a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” ORS 250.035(2)(d). The goal of the summary is to “help voters[] understand what will happen if the measure is approved” and the “breadth of [the measure's] impact.” *Mabon v. Myers*, 332 Or 633, 640 (2001) (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or 169,175 (1989)).

The ballot title does not comply with these standards for several reasons. First, the draft summary does not summarize the measure’s major effects, which is to impose corporate excise tax rates of 5%, 7%, 9%, and 9.9%, depending on the amount of corporate taxable income. After reading that the measure changes the corporate tax rate “to be the same as the rate of personal income tax imposed on the taxable income of every state resident,” voters will naturally be wondering what those personal tax rates are, and the summary of the measure should provide that information. Otherwise, voters will not understand “what will happen if the measure is approved” and “the breadth of its impact.” *Id.* Additionally, the summary does not explain that these changes would result in a corporate excise tax rate reduction for some corporations and a tax increase for other corporations.

Respondent disagrees that the summary must inform voters of personal income tax rates because “the actual rates of personal income tax for Oregon residents are governed by various statutes. . . .” Exhibit 4, p. 5. It is correct that various statutes address personal taxes; however, IP 19 only seeks to impose upon corporations “the tax imposed on taxable income for every

resident of this state,” which is only contained in ORS 316.037 (pertaining to the tax imposed on “every resident of this state”). Respondent refers to joint income taxes as another type of personal income tax, but not every resident of Oregon is subject to this tax. Likewise, not every resident of Oregon is not subject to the tax imposed on long-term capital gain from farming. Exhibit 4, p. 5. Because IP 19 only relates to the taxes imposed on every resident in Oregon, which are contained in ORS 316.037, it is possible to import those rates into the summary. Additionally, Respondent’s modification of the summary in the second to last sentence regarding “rates of personal income tax” causes the summary to be inaccurate. The measure does not, as stated in the summary, establish corporate excise tax rates that are the same as “rates of personal income tax.” Rather, IP 19 establishes corporate excise tax rates that are the same as the “tax imposed . . . for every resident of this state.” Every resident of the state is not subject to all of the personal income taxes contained in Oregon law, and the phrase used prior to Respondent’s modification was accurate.

To address the problems identified, we suggest the following summary:

Summary: Current Oregon law provides that, for the tax years beginning on or after January 1, 2013, the rate of tax imposed by and computed under the Corporation Excise Tax Law (ORS chapter 317) is 6.6% of the first \$10 million of taxable income (or fraction thereof), and 7.6% of any amount of taxable income in excess of \$10 million. Measure eliminates the current incremental corporate excise tax rates. Measure imposes personal income tax rates on corporate taxable income. Measure decreases or increases the rate of excise tax imposed on corporations’ taxable income, of any amount, to be 5%, 7%, 9%, or 9.9%, depending on amount of corporate taxable income. Measure applies to tax years beginning on or after January 1, 2015.

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III. CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court declare that the certified ballot title does not substantially comply with ORS 250.035 and refer the ballot title back to the Attorney General for modification.

DATED this 23rd day of August, 2013.

Respectfully submitted,



Jill Gibson Odell, OSB #973581
GIBSON LAW FIRM, LLC

Of Attorneys for Petitioner

OFFICE OF THE SECRETARY OF STATE

KATE BROWN
SECRETARY OF STATE



ELECTIONS DIVISION

STEPHEN N. TROUT
DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722
(503) 986-1518

July 8, 2013

To All Interested Parties:

Secretary of State Kate Brown is responsible for the pre-election review of proposed initiative petitions for compliance with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. This review will be completed before approving the form of the cover and signature sheets for the purpose of circulating the proposed initiative petition to gather signatures.

The Secretary of State is seeking public input on whether proposed initiative petition (#19), satisfies the procedural constitutional requirements for circulation as a proposed initiative petition. Petition #18 was filed in our office on July 5, 2013, by Patrick Green, for the General Election of November 4, 2014.

A copy of the text of this proposed initiative petition is on the second page of the letter. If you are interested in providing comments on whether the proposed initiative petition meets the procedural constitutional requirements, please write to the secretary at the Elections Division. Your comments, if any, must be received by the Elections Division no later than July 29, 2013, in order for them to be considered in the review.

KATE BROWN
Secretary of State

BY:

Lydia Plukchi
Compliance Specialist

Section 1. ORS 317.061 is amended to read:

317.061. The rate of the tax imposed by and computed under this chapter ~~is~~ shall be the same as the tax imposed on taxable income for every resident of this state.

~~(1) Six and six-tenths percent of the first \$10 million of taxable income, or fraction thereof; and~~

~~(2) Seven and six-tenths percent of any amount of taxable income in excess of \$10 million.~~

Section 2. The amendments to ORS 317.061 by Section 1 of this 2014 Act apply to tax years beginning on or after January 1, 2015.

RECEIVED
2013 APR 26 AM 11 34
KATE BROWN
SECRETARY OF THE STATE

DRAFT BALLOT TITLE

**Makes corporate excise tax rate on taxable income the same
as personal income tax rate**

Result of “Yes” Vote: “Yes” vote modifies the Oregon corporate excise rate of tax for any amount of taxable income from incremental rate to rate of personal income tax.

Result of “No” Vote: “No” vote retains existing Oregon corporate excise tax rate of seven and sixth-tenths percent for any amount of taxable income exceeding \$10 million.

Summary: Current Oregon law provides that, for the tax years beginning on or after January 1, 2013, the rate of tax imposed by and computed under the Corporation Excise Tax Law (ORS chapter 317) is six and six-tenths percent of the first \$10 million of taxable income (or fraction thereof), and seven and six-tenths percent of any amount of taxable income in excess of \$10 million. Measure eliminates the current incremental corporate excise tax rates. Measure changes the rate of excise tax imposed on corporations’ taxable income, of any amount, to be the same as the rate of personal income tax imposed on the taxable income of every state resident. Measure applies to tax years beginning on or after January 1, 2015.

2013 JUL 15 PM 2 08

RECEIVED



July 29, 2013

Via Facsimile - (503)373-7414

The Honorable Kate Brown
Secretary of State
Elections Division
255 Capitol Street NE, Ste 501
Salem, OR 97310-0722

Re: Public Comment on Initiative Petition #19 (2014)

Dear Secretary Brown,

I represent Dan Harmon, who is an elector in the State of Oregon and wishes to comment on the draft ballot title for IP 19 (2014). The Attorney General has proposed the following ballot title for IP 19:

**Makes corporate excise tax rate on taxable income
the same as personal income tax rate**

Result of "Yes" Vote: "Yes" vote modifies the Oregon corporate excise rate of tax for any amount of taxable income from incremental rate to rate of personal income tax.

Result of "No" Vote: "No" vote retains existing Oregon corporate excise tax rate of seven and sixth-tenths percent for any amount of taxable income exceeding \$10 million.

Summary: Current Oregon law provides that, for the tax years beginning on or after January 1, 2013, the rate of tax imposed by and computed under the Corporation Excise Tax Law (ORS chapter 317) is six and six-tenths percent of the first \$10 million of taxable income (or fraction thereof), and seven and six-tenths percent of any amount of taxable income in excess of \$10 million. Measure eliminates the current incremental corporate excise tax rates. Measure changes the rate of excise tax imposed on corporations' taxable income, of any amount, to be the same as the rate of personal income tax imposed on the taxable income of every state resident. Measure applies to tax years beginning on or after January 1, 2015.

I. INTRODUCTION

Oregon has two types of corporate taxes: excise and income. See ORS 317.005 et seq.; ORS 318.010 et seq. An excise tax is a tax imposed upon businesses for the privilege of carrying on or doing business in the State of Oregon and is based on the business' net income. ORS 317.010(5). Corporations are taxed at a rate of 6.6% on the first \$10 million of taxable income and 7.6% on any taxable income in excess of \$10 million. IP 19 seeks to impose Oregon's

Exhibit 3
Page 1 of 6

personal income tax rate upon corporations, so that the corporate excise tax rate would be 5%, 7%, 9% or 9.9%, depending on a corporation's amount of taxable income. As such, the measure would decrease the corporate excise tax for some corporations and increase this tax for other corporations.

IP 19 is the sixth initiative petition pertaining to corporate taxes filed by Our Oregon for the 2014 election. Overall, its chief petitioners estimate that IP 19 would generate more than \$370 million in new revenue.¹

II. CAPTION

ORS 250.035(2)(a) requires a ballot title to contain "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." To comply with this standard, case law requires that the caption identify the proposal's subject matter in terms that will not "confuse or mislead potential signers and voters." *Kain/Waller v. Myers*, 337 Or 36, 40 (2004). The Oregon Supreme Court recently emphasized that the "subject matter" is the "actual major effect" of the measure. *Lavey v. Kroger*, 350 Or 559 563 (2011). If a draft ballot title is challenged for failure to comply with these requirements, upon review the Oregon Supreme Court's "initial task is to determine whether the title prepared by the Attorney General is unfair or insufficient." *Remington v. Paulus*, 296 Or 317, 320 (1984).

The draft caption does not meet these statutory requirements because it does not convey to potential signers and voters what the corporate excise tax rate would be if IP 19 passed. While the draft caption does state one of the major effects of the measure - that the corporate excise tax rate would be the same as the personal income tax rate - the caption must also state the other major effect - that the corporate excise tax would decrease for some corporations and increase for other corporations.

Because the draft ballot title does not comply with statutory requirements, we propose the following caption:

**Decreases or increases corporate tax rate on taxable income
to correspond with personal tax rates**

This proposed caption conveys both actual major effects of IP 19 and the phrase "to correspond with" clarifies that the corporate tax rate may change in the future if and when the personal tax rate changes. As currently drafted, the word "Makes" is likely to create the false impression that the measure establishes set tax rates that would not change in the future even if personal income tax rates change.

¹ <http://ouroregon.org/20#15Initiatives> See Exhibit 1.

III. RESULT OF "YES" VOTE

The Attorney General issued the following draft "yes" statement:

Result of "Yes" Vote: "Yes" vote modifies the Oregon corporate excise rate of tax for any amount of taxable income from incremental rate to rate of personal income tax.

250.035(2)(b) requires that a ballot title contain a "simple and understandable statement," 25 words long, explaining what will happen if the measure is approved. The purpose of this portion of the ballot title is to "notify petition signers and voters of the results of enactment that would have the greatest importance to the people of Oregon. *Novick v. Myers*, 337 Or 568, 574 (2004).

The draft "yes" statement does not meet this requirement because the word "modifies" does not reasonably explain what will happen if IP 19 is approved, which is a decreased excise tax rate for certain corporations and an increased excise tax rate for other corporations, depending on the amount of a corporation's taxable income. More specifically, IP 19 would decrease the tax rate for corporations with taxable income of \$2,000 or less and increase the tax rate for corporations with taxable income over \$2,000. As written, the result statement does not inform voters of either effect. Indeed, the results of IP 19 that likely have the greatest importance to Oregonians are the actual tax rates, and these rates are absent from the results statement.

To address this defect, we suggest the following statement:

Result of "Yes" Vote: "Yes" vote decreases or increases corporate tax rates, currently 6.6% or 7.6%, to correspond with personal income tax rates, currently 5%, 7%, 9% or 9.9%.

IV. RESULT OF "NO" VOTE

The Attorney General issued the following draft "no" statement:

Result of "No" Vote: "No" vote retains existing Oregon corporate excise tax rate of seven and sixth-tenths percent for any amount of taxable income exceeding \$10 million.

ORS 250.035(2)(c) requires that a ballot title contain a "simple and understandable statement," 25 words long, explaining what will happen if voters reject the measure. This means that the statement must explain to voters "the state of affairs" that will exist if the initiative is rejected, i.e., the status quo. It is essential that the "no" vote result statement relate to the subject matter of the proposed measure to avoid misleading petition signers or voters about the effect of their signature or vote. *Nesbitt v. Myers*, 335 Or 219 (2003), (original review) 335 Or 424, 431 (2003) (review of modified ballot title).

The draft "No" statement does not comply with these requirements primarily because it is incomplete in that it omits the other tax rate which would be retained if voters reject IP 19 – the 6.6% tax rate currently applied to the first \$10 million of corporate taxable income. The failure to mention the 6.6% tax rate is at best misleading and confusing, and at worst a misstatement of law, and therefore the result statement should be revised to include both current tax rates. *See Dale v. Kulongoski*, 321 Or 108, 113 (1995) (ballot title should not misstate existing law, even by implication.)

To cure these defects, we suggest the following "No" statement:

Result of "No" Vote: "No" vote retains existing corporate excise tax rates of 6.6% for first \$10 million of taxable income and 7.6% for taxable income above \$10 million.

V. SUMMARY

The Attorney General has issued the following draft summary:

Summary: Current Oregon law provides that, for the tax years beginning on or after January 1, 2013, the rate of tax imposed by and computed under the Corporation Excise Tax Law (ORS chapter 317) is six and six-tenths percent of the first \$10 million of taxable income (or fraction thereof), and seven and six-tenths percent of any amount of taxable income in excess of \$10 million. Measure eliminates the current incremental corporate excise tax rates. Measure changes the rate of excise tax imposed on corporations' taxable income, of any amount, to be the same as the rate of personal income tax imposed on the taxable income of every state resident. Measure applies to tax years beginning on or after January 1, 2015.

ORS 250.035(2)(d) requires that a ballot contain a "concise and impartial statement of not more than 125 words summarizing the measure and its major effects." "[T]he purpose of the summary is to 'help voters understand what will happen if the measure is approved' and 'the breadth of its impact.'" *Mabon*, 322 Or at 640 (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175 (1989)).

The draft summary does not comply with these standards because it does not summarize the measure's major effects, which is to impose corporate excise tax rates of 5%, 7%, 9%, and 9.9%, depending on the amount of corporate taxable income. After reading that the measure changes the corporate tax rate "to be the same as the rate of personal income tax imposed on the taxable income of every state resident," voters will naturally be wondering what those personal tax rates are, and the summary of the measure must provide that information. Otherwise, voters will not understand "what will happen if the measure is approved" and "the breadth of its impact." *Id.* Additionally, the summary does not explain that these changes would result in a corporate excise tax rate reduction for some corporations and a tax increase for other corporations.

To address the problems identified, we suggest the following summary:

Summary: Current Oregon law provides that, for the tax years beginning on or after January 1, 2013, the rate of tax imposed by and computed under the Corporation Excise Tax Law (ORS chapter 317) is 6.6% of the first \$10 million of taxable income (or fraction thereof), and 7.6% of any amount of taxable income in excess of \$10 million. Measure eliminates the current incremental corporate excise tax rates. Measure imposes personal income tax rates on corporate taxable income. Measure decreases or increases the rate of excise tax imposed on corporations' taxable income, of any amount, to be 5%, 7%, 9%, or 9.9%, depending on amount of corporate taxable income. Measure applies to tax years beginning on or after January 1, 2015.

Thank you for considering our comments to the draft ballot title.

Very truly yours,

/_____
Jill Gibson Odell
Gibson Law Firm

Attachments



A better Oregon.
There's an app for that.

Get the Our Oregon
Mobile App



SOME BIG IDEAS TO FUND

submit form

SOME BIG IDEAS TO FUND OREGON'S PRIORITIES

We're exploring ways to fund Oregon's schools and other critical priorities. Will you join us?

Email*

Zip/Postal Code*

On April 26, we filed numerous initiative petitions with the Secretary of State's office for the 2014 election.

These initiatives would raise hundreds of millions of dollars to more than \$1 billion in funding for Oregon's classrooms and critical services by raising tax rates on large corporations. Most of these corporations are headquartered out of state, but make a lot of money here—and are essentially getting a free ride.

There's not yet been any one magic solution proposed that can solve the problem, so we're filing many different initiatives as a way of keeping multiple ideas on the table in case we need to pursue them. It's very early in the process, and we won't have a decision about what initiatives we move forward on for several months.

Right now, Oregon is tied for the lowest business taxes in the nation. Our business taxes are far below our closest neighbors, including Washington. It should be no wonder, then, that we have the third largest class sizes in the country and one of the shortest school years.

It's no secret that our schools are hurting, classrooms are overcrowded, and senior services continue to be threatened. It's also no secret that Oregonians believe that large corporations should pay their fair share.

Our Oregon has been on the front lines of the fight for a fairer tax system and more funding for the state's critical priorities, like our schools and senior health care. By filing these initiatives, we're continuing to take the lead in making sure that Oregon remains a great place to live for everyone.

Here's what we filed:



Title	Estimated Revenue*	Notes
Large Corporations Should Pay Their Fair Share I	\$1 billion	Lift the existing \$100,000 corp minimum cap on corps with more than \$100 million; tax revenue above \$100 million at 2%
Large Corporations Should Pay Their Fair Share II	\$500 million	Lift the existing \$100,000 corp minimum cap on corps with more than \$100 million; tax revenue above \$100 million at 1%
Invest in Oregon's Future I	\$1.189 billion	Replace current corporate minimum tax for C-corps with more than \$10 million in sales with a gross receipts tax of 0.25%
Invest in Oregon's Future II	\$2+ billion	Replace current corporate minimum tax for C-corps with more than \$10 million in sales with a graduated gross receipts tax of 0.25% to 1% (for corps with more than \$100 million in sales)
Fund Oregon's Priorities	\$150 million	Increase corporate income tax rate on profits above \$10 million to 10%
If Corporations Are People, Let's Tax Them Like It	\$370+ million	Change the corporate income tax structure to mirror personal income tax rates

ELLEN F. ROSENBLUM
Attorney General



MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

August 13, 2013

Stephen N. Trout
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

RECEIVED
2013 AUG 13 PM 2:15
KATE BROWN
SECRETARY OF THE STATE

Re: Proposed Initiative Petition — Makes Corporate Excise Tax Rate On Taxable Income
The Same As Personal Income Tax Rate
DOJ File #BT-19-13; Elections Division #19

Dear Mr. Trout:

We have received the comments submitted in response to the draft ballot title for the prospective Initiative Petition # 19 (2014). Comments were submitted by Steven Berman, on behalf of chief petitioner Patrick Green; and by Jill Gibson Odell, on behalf of Dan Harmon. We provide the enclosed certified ballot title.

This letter summarizes the comments we received, our response to those comments, and the reasons we made or declined to make the changes proposed by the commenters. This letter must be included in the record in the event the Oregon Supreme Court is asked to review this ballot title. ORAP 11.30(7).

The measure provides, in its entirety:

Section 1. ORS 317.061 is amended to read:

317.061. The rate of the tax imposed by and computed under this chapter is: shall be the same as the tax imposed on taxable income for every resident of this state.

~~(1) Six and six-tenths percent of the first \$10 million of taxable income, or fraction thereof; and~~

~~(2) Seven and six-tenths of any amount of taxable income in excess of \$10 million.~~

Section 2. The amendments to ORS 317.061 by section 1 of this 2014 Act apply to tax years beginning on or after January 1, 2015.

A. The caption

The caption must “inform potential petition signers and voters of the sweep of the measure.” *Terhune v. Myers*, 342 Or 475, 479, 154 P3d 1284 (2007). It must identify the “principal effect” or “actual major effect” of the proposed measure, *Terhune*, 342 Or at 479, without being inaccurate or underinclusive, *Hunnicut v. Myers*, 342 Or 491, 495, 155 P3d 870 (2007). The caption must use terms that reasonably identify the proposed measure’s subject matter and do not understate or overstate the scope of the legal changes that the proposed measure would enact. *Kain/Waller v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004). To determine the subject matter of a proposed measure, the court first examines its words and the changes, if any, that the proposed measure would enact in the context of existing law. *Kain/Waller*, 337 Or at 41.

The draft caption reads:

**Makes corporate excise tax rate on taxable income
the same as personal income tax rate**

Commenter Harmon first asserts that the caption must state “the other major effect” of the measure: “that the corporate excise tax would decrease for some corporations and increase for other corporations.” We disagree. It is not apparent from the text of IP #19 that the measure decreases excise tax for some corporations and increases excise tax for others. Harmon’s proposed language appears to be speculation, which we decline to engage in.

Second, Harmon comments that the draft caption “is likely to create the false impression that the measure establishes set tax rates that would not change in the future even if personal income tax rates change.” He suggests an alternative caption using the phrase “to correspond with personal tax rates” in place of “[m]akes * * * the same as personal income tax rate.” We disagree that the draft caption suggests the measure sets immutable tax rates. In addition, we find no significant difference between “makes the same as” and “to correspond with,” in this context. Therefore, we do not accept Harmon’s suggested changes to the draft caption.

Commenter Green does not comment on the draft caption.

B. The “Yes” and “No” result statements

ORS 250.035(2)(b) requires the ballot title to include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” ORS 250.035(2)(c) requires a ballot title to contain “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected.”

1. The draft “Yes” result statement

The draft “Yes” result statement provides:

Result of "Yes" Vote: "Yes" vote modifies the Oregon corporate excise rate of tax for any amount of taxable income from incremental rate to rate of personal income tax.

Commenter Harmon objects that the draft "Yes" statement does not explain that the measure decreases the excise tax rate for some corporations and increases it for others. As discussed above, we reject Harmon's proposed change as speculative. Harmon also asserts that the "Yes" statement must inform voters of "the actual tax rates" that apply to corporations under the measure. Again, we disagree. The measure does not address the applicable personal income tax rate or rates. Therefore, it is unclear what actual tax rate or rates the measure imposes on corporations. We believe the "Yes" statement correctly and appropriately informs voters that the measure ties the rate or rates of corporate tax to the rate or rates of personal income tax.

Commenter Green finds three deficiencies in the draft "Yes" statement. First, Green comments that "incremental" does not accurately describe the existing corporate profits rates, because, under current ORS 317.061, there are only two tax rates. We agree. Second, Green comments that the draft "Yes" statement incorrectly suggests that there is only one personal income tax rate, whereas, in fact, there are multiple rates depending on the taxpayer's income. We do not believe the draft "Yes" statement is misleading in that way, because it specifically refers to the tax rate for "any amount of taxable income." We believe voters will understand that phrasing to mean the tax rate that applies to a particular amount of taxable income—especially with the addition of "applicable" in front of "rate of personal income tax." Third, Green comments that the word "[m]odifies" understates what the measure does. We agree with that comment. We have modified the "Yes" statement accordingly, as follows:

Result of "Yes" Vote: "Yes" vote makes the corporate excise tax rate for any amount of taxable corporate income the same as the applicable rate of personal income tax.

2. The draft "No" result statement

The draft "No" result statement provides:

Result of "No" Vote: "No" vote retains existing Oregon corporate excise tax rate of seven and sixth-tenths percent for any amount of taxable income exceeding \$10 million.

Commenter Harmon comments that the draft "No" statement is incomplete because it "omits the other tax rate which would be retained" if the measure is rejected. Commenter Green makes the same point. We agree, and we have modified the "No" statement accordingly.

Commenter Green also objects that the draft "No" statement "fails to explain how, under current law, the personal and corporate tax rates differ." Green asserts that voters must be provided with that information. We disagree, because the actual differences between the two tax rates is beyond the scope of the ballot title. That is, providing that information would require us to go far beyond ORS 317.061—indeed, beyond ORS Chapter 371, which governs excise taxes.

We believe the apparent objective of the measure—to equalize corporate and personal income tax rates—is the information voters need, rather than the differences between the current actual rates.

Therefore, we certify the following “No” result statement:

Result of “No” Vote: “No” vote retains existing corporate excise tax rate of 6.6% for first \$10 million of taxable income, 7.6% for additional taxable income.

C. The summary

Harmon comments that the draft summary fails to specify that the measure “impose[s] corporate excise tax rates of 5%, 7%, 9%, and 9.9%, depending on the amount of corporate taxable income.” He asserts that voters “will naturally be wondering” what the rates of personal income tax are, which they need to know in order to understand “what will happen if the measure is approved” and “the breadth of its impact.” *See Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175 (1989) (stating those requirements). In addition, Harmon objects that the draft summary does not explain that the measure reduces the corporate excise tax rate for some corporations and increases the rate for others. As explained above, we do not agree with the latter comment.

We also disagree that the summary must inform voters what the rates of personal income tax are. As already discussed, we believe the major effect of the measure is to make corporations pay tax on taxable income at the same rate—whatever it is—that applies to personal taxable income. The tax rate brackets for taxable personal income are set out in a table in ORS 316.037:

If taxable income is:	The tax is:
Not over \$2,000	5% of taxable income
Over \$2,000 but not over \$5,000	\$100 plus 7% of the excess over \$2,000
Over \$5,000 but not over \$125,000	\$310 plus 9% of the excess over \$5,000
Over \$125,000	\$11,110 plus 9.9% of the excess over \$125,000

In addition, ORS 316.042 provides the following variation for joint income tax returns: "In the case of a joint return of husband and wife, * * * the tax imposed by ORS 316.037 shall be twice the tax which would be imposed if the taxable income were cut in half." Another variation is found in ORS 316.045(2), which provides a different tax rate for "certain long-term capital gain from farming."

In sum, the actual rates of personal income tax for Oregon residents are governed by various statutes in ORS Chapter 316. Importing an adequate summary of those statutes into the ballot title for IP #19 is neither possible nor necessary to voters' understanding of the measure. Nevertheless, we have added a reference to ORS Chapter 316 (personal income tax laws), consistently with the summary's existing reference to ORS Chapter 317 (corporate excise tax laws).

Finally, commenter Green renews his objections to the draft result statements in commenting on the draft summary: current corporate profit rates are not incremental; there is more than one personal income tax rate; the measure does more than "modify" current rates; the measure displaces both current rates on corporate taxable income; and the measure ties corporate taxable income rates to personal income tax rates. Our responses to Green's comments are as above.

Accordingly, we certify the following summary:

Current Oregon law provides that, for the tax years beginning on or after January 1, 2013, the rate of tax imposed by and computed under the Corporation Excise Tax Law (ORS Chapter 317) is six and six-tenths percent of the first \$10 million of taxable income (or fraction thereof), and seven and six-tenths percent of any amount of taxable income over \$10 million. Measure eliminates the current corporate excise tax rate brackets. Measure makes the rates of excise tax imposed on corporations' taxable income the same as the rates of personal income tax imposed on the taxable income of every state resident (as provided in ORS Chapter 316). Measure applies to tax years that begin on or after January 1, 2015.

We certify the attached ballot title.

JCL:chc/4509052

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August 13, 2013
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BALLOT TITLE

**Makes corporate excise tax rate on taxable income
the same as personal income tax rate**

Result of "Yes" Vote: "Yes" vote makes the corporate excise tax rate for any amount of taxable corporate income the same as the applicable rate of personal income tax.

Result of "No" Vote: "No" vote retains existing corporate excise tax rate of 6.6% for first \$10 million of taxable income, 7.6% for additional taxable income.

Summary: Current Oregon law provides that, for the tax years beginning on or after January 1, 2013, the rate of tax imposed by and computed under the Corporation Excise Tax Law (ORS Chapter 317) is six and six-tenths percent of the first \$10 million of taxable income (or fraction thereof), and seven and six-tenths percent of any amount of taxable income over \$10 million. Measure eliminates the current corporate excise tax rate brackets. Measure makes the rates of excise tax imposed on corporations' taxable income the same as the rates of personal income tax imposed on the taxable income of every state resident (as provided in ORS Chapter 316). Measure applies to tax years that begin on or after January 1, 2015.

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CERTIFICATE OF FILING

I hereby certify that I electronically filed the PETITION TO REVIEW BALLOT TITLE CERTIFIED BY ATTORNEY GENERAL (Initiative Petition 19) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on August 23, 2013.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY ATTORNEY GENERAL (Initiative Petition 19) upon the following individuals on August 23, 2013, by delivering a true, full and exact copy thereof via U.S. Mail to:

Judy C. Lucas, OSB # 903285
Department of Justice
1162 Court St. NE
Salem, OR 97301-4096
Telephone: (503) 378-4402
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Attorneys for Respondent

Patrick Green, Chief Petitioner
813 SW Alder Street, Ste. 800A
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And upon the following individual via facsimile transmission:

Kate Brown, Secretary of State
Elections Division
255 Capitol St. NE, Ste. 501
Salem, OR 97310-0722
Fax: (503) 373-7414

DATED this 23rd day of August, 2013.

GIBSON LAW FIRM, LLC

Jill Gibson Odell, OSB # 915581

Of Attorneys for Petitioner