

IN THE SUPREME COURT OF THE STATE OF OREGON

DAN HARMON,

Case No. 61850

Petitioner,

PETITION TO REVIEW BALLOT TITLE
CERTIFIED BY ATTORNEY GENERAL

v.

ELLEN F. ROSENBLUM,
Attorney General, State of Oregon

Initiative Petition 33 (2014)

Respondent.

BALLOT TITLE CERTIFIED
November 14, 2013
Initiative Petition
Chief Petitioner: Patrick Green

Jill Gibson Odell, OSB #973581
Gibson Law Firm, LLC
10260 SW Greenburg Rd., Ste.1180
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jill@gibsonlawfirm.org
Telephone: 503.686.0486
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Of Attorneys for Petitioner on Review

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Attorney General
Jeff J. Payne, OSB #050102
Assistant Attorney General
Department of Justice
1162 Court St., NE
Salem, OR 97301-4096
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Telephone: 503.378.4402
Fax: 503.378.6306

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 November 14, 2013, the Attorney General certified the following ballot title:

**Modifies annual minimum tax for some corporations,
depending on the amount of corporation's Oregon sales**

Result of "Yes" Vote: "Yes" vote will decrease annual minimum tax for some corporations, increase annual minimum tax for some corporations, depending on amount of corporation's sales in Oregon.

Result of "No" Vote: "No" vote retains current law, does not change amounts of minimum tax for corporations that are based on amount of corporation's sales made in Oregon.

Summary: Currently, each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; minimum tax amount increases based on the level of the corporation's sales in Oregon. Measure decreases the minimum tax for corporations with Oregon sales between \$500,000 and \$9,999,999. Measure increases minimum tax for corporations with Oregon sales over \$100,000,000 by requiring payment of 2% of the excess of Oregon sales over \$100,000,000. Measure does not change minimum tax for corporations with Oregon sales in other amounts. Corporations with taxable income less than \$10,000,000 shall pay minimum tax on sales rather than tax on taxable income. Amendment applies to tax years beginning on/after January 1, 2015. Other provisions.

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¹ A copy of IP 33 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 imposes a tax upon corporations for the privilege of carrying on or doing business in the State of Oregon and such tax is based on the corporation's taxable income. ORS 317.010(5). Corporations that have no taxable income must pay, instead, an annual minimum tax based upon the amount of the corporation's Oregon sales. ORS 317.090. It is this minimum tax that IP 33 seeks to change.

Pursuant to IP 33, corporations that have Oregon sales of less than \$10 million would only pay a minimum tax rather than a tax based on income, regardless of their profitability. The measure also reduces the minimum tax for corporations that have Oregon sales of less than \$10 million and it removes the cap on minimum taxes for corporations that have Oregon sales exceeding \$100 million by retaining the \$100,000 tax and adding a tax of 2% of the excess of sales over \$100 million.

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 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 summary does not comply with these standards because its description of the minimum tax paid by corporations with Oregon sales over \$100 million is misleading. Currently, corporations with Oregon sales of \$100 million or more pay a minimum tax of \$100,000. ORS 317.090(L). IP 33 would increase this by adding to the existing \$100,000 tax

amount an additional tax of 2% of the excess of sales over \$100 million. However, the summary describes the proposed tax in a way that suggests that the tax would only be 2% of the excess over \$100 million. The summary states that the measure “increases minimum tax for corporations with Oregon sales of \$100,000,000 or more by requiring payment of 2% of the excess of Oregon sales over \$100,000,000.” Omitting the additional tax of \$100,000 renders the summary underinclusive and misleading.

The Attorney General states in her explanatory letter that the \$100,000 payment is not mentioned because it is the current minimum tax and the measure does not change that, and also because the specific minimum tax amounts of other sales brackets are not included. Exhibit 4, pp. 3-4. However, this is unpersuasive because the other sales brackets in IP 33 only have one set tax amount, not a set tax amount plus a new tax which is a percentage of sales. Additionally, the summary satisfactorily states that the existing tax amounts for other tax brackets will be decreased and does not undertake to provide details of those tax amounts.

On the other hand, the summary attempts to provide details of the minimum tax for corporations with sales above \$100 million, but does so in a way that suggests that the proposed tax of 2% would be the only tax imposed by IP 33 on such corporations. This suggestion is reinforced by the previous statement that the “[m]easure eliminates current corporate minimum tax cap of \$100,000.” This will likely cause voters to believe that the \$100,000 tax amount - which is also the tax cap - is eliminated and replaced with a tax equal to 2% of the excess of sales over \$100 million. To accurately explain the measure and its effect on the minimum tax for corporations with sales above \$100 million, the summary must make it clear that such tax would be \$100,000 plus 2% of the excess over \$100 million.

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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 27th of November, 2013.

Respectfully submitted,

/s/ Jill Gibson Odell

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

Of Attorneys for Petitioner

CERTIFICATE OF FILING

I hereby certify that I electronically filed the PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 33) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on November 27, 2013.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 33) upon the following individuals on November 27, 2013, by delivering a true, full and exact copy thereof via U.S. Mail to:

Jeff J. Payne
Assistant Attorney General
Department of Justice
1162 Court St., NE
Salem, OR 97301-4096
Attorneys for Respondent

Patrick Green, Chief Petitioner
813 SW Alder Street
Portland, OR 97205

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 27th day of November, 2013.

GIBSON LAW FIRM, LLC

/s/ Jill Gibson Odell
Jill Gibson Odell, OSB # 973581
Of Attorneys for Petitioner

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KATE BROWN
SECRETARY OF THE STATE

Section 1. ORS 317.090 is amended to read:

(1) As used in this section:

(a) "Oregon sales" means:

(A) If the corporation apportions business income under ORS 314.650 to 314.665 for Oregon tax purposes, the total sales of the taxpayer in this state during the tax year, as determined for purposes of ORS 314.665;

(B) If the corporation does not apportion business income for Oregon tax purposes, the total sales in this state that the taxpayer would have had, as determined for purposes of ORS 314.665, if the taxpayer were required to apportion business income for Oregon tax purposes; or

(C) If the corporation apportions business income using a method different from the method prescribed by ORS 314.650 to 314.665, Oregon sales as defined by the Department of Revenue by rule.

(b) If the corporation is an agricultural cooperative that is a cooperative organization described in section 1381 of the Internal Revenue Code, "Oregon sales" does not include sales representing business done with or for members of the agricultural cooperative.

(2) Each corporation or affiliated group of corporations filing a return under ORS 317.710 shall pay annually to the state, for the privilege of carrying on or doing business by it within this state, a minimum tax as follows:

(a) If Oregon sales properly reported on a return are:

(A) Less than \$500,000, the minimum tax is \$150.

(B) \$500,000 or more, but less than \$1 million, the minimum tax is ~~\$500~~ \$250.

(C) \$1 million or more, but less than \$2 million, the minimum tax is ~~\$1,000~~ \$500.

(D) \$2 million or more, but less than \$3 million, the minimum tax is ~~\$1,500~~ \$750.

(E) \$3 million or more, but less than \$5 million, the minimum tax is ~~\$2,000~~ \$1,000.

(F) \$5 million or more, but less than \$7 million, the minimum tax is ~~\$4,000~~ \$2,000.

(G) \$7 million or more, but less than \$10 million, the minimum tax is ~~\$7,500~~ \$3,750.

(H) \$10 million or more, but less than \$25 million, the minimum tax is \$15,000.

(I) \$25 million or more, but less than \$50 million, the minimum tax is \$30,000.

(J) \$50 million or more, but less than \$75 million, the minimum tax is \$50,000.

(K) \$75 million or more, but less than \$100 million, the minimum tax is \$75,000.

(L) \$100 million or more, the minimum tax is \$100,000 plus 2% of the excess of Oregon sales over \$100 million.

(b) If a corporation is an S corporation, the minimum tax is \$150.

(3) The minimum tax is not apportionable (except in the case of a change of accounting periods), and is payable in full for any part of the year during which a corporation is subject to tax.

(4) Notwithstanding ORS 317.061 or any other provision of this chapter, if a corporation or affiliated group of corporations filing a return under ORS 317.710 properly reports Oregon sales on the return of less than \$10 million, the corporation or affiliated group of corporations shall pay the minimum tax set forth in ORS 317.090(2)(a)(A)-(G) and is not required to pay the tax on taxable income set forth in ORS 317.061.

Section 2. The amendments to ORS 317.090 by Section 1 of this 2014 Act apply to tax years beginning on or after January 1, 2015.

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DRAFT BALLOT TITLE

Modifies annual minimum tax for some corporations, depending on the amount of corporation's Oregon sales

Result of "Yes" Vote: "Yes" vote will decrease annual minimum tax for some corporations, increase annual minimum tax for some corporations, depending on amount of corporation's sales in Oregon.

Result of "No" Vote: "No" vote retains current law, does not change amounts of minimum tax for corporations that are based on amount of corporation's sales made in Oregon.

Summary: Currently, each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; minimum tax amount increases based on the level of the corporation's sales in Oregon. Measure decreases the minimum tax for corporations with Oregon sales between \$500,000 and \$9,999,999. Measure increases minimum tax for corporations with Oregon sales over \$100,000,000 by requiring payment of 2% of the excess of Oregon sales over \$100,000,000. Measure does not change minimum tax for corporations with Oregon sales in other amounts. Corporations with taxable income less than \$10,000,000 shall pay minimum tax on sales rather than tax on taxable income. Amendment applies to tax years beginning on/after January 1, 2015. Other provisions.

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KATE BROWN
SECRETARY OF THE STATE



October 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

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2013 OCT 29 PM 3 46
KATE BROWN
SECRETARY OF THE STATE

Re: Public Comment on Initiative Petition 33 (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 33 (2014).

The Attorney General has proposed the following ballot title for IP 33:

**Modifies annual minimum tax for some corporations,
depending on the amount of corporation's Oregon sales**

Result of "Yes" Vote: "Yes" vote will decrease annual minimum tax for some corporations, increase annual minimum tax for some corporations, depending on amount of corporation's sales in Oregon.

Result of "No" Vote: "No" vote retains current law, does not change amounts of minimum tax for corporations that are based on amount of corporation's sales made in Oregon.

Summary: Currently, each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; minimum tax amount increases based on the level of the corporation's sales in Oregon. Measure decreases the minimum tax for corporations with Oregon sales between \$500,000 and \$9,999,999. Measure increases minimum tax for corporations with Oregon sales over \$100,000,000 by requiring payment of 2% of the excess of Oregon sales over \$100,000,000. Measure does not change minimum tax for corporations with Oregon sales in other amounts. Corporations with taxable income less than \$10,000,000 shall pay minimum tax on sales rather

than tax on taxable income. Amendment applies to tax years beginning on/after January 1, 2015. Other provisions.

I. INTRODUCTION

Oregon imposes a tax upon corporations for the privilege of carrying on or doing business in the state of Oregon and such tax is based on the corporation's taxable income. ORS 317.010(5). Corporations that have no taxable income must pay, instead, an annual minimum tax based upon the amount of the corporation's Oregon sales. ORS 317.090. It is this minimum tax that IP 33 seeks to change.

Pursuant to IP 33, corporations that have Oregon sales of less than \$10 million would only pay a minimum tax rather than a tax based on income, regardless of their profitability. The measure also reduces the minimum tax for corporations that have Oregon sales of less than \$10 million and it removes caps on minimum taxes for corporations that have Oregon sales exceeding \$100 million, replacing it with a tax of \$100,000 plus 2% of any excess over \$100 million.

II. SUMMARY

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 one sentence ("Measure increases minimum tax for corporations with Oregon sales over \$100,000,000 by requiring payment of 2% of the excess of Oregon sales over \$100,000,000.") is incorrect and underinclusive. Specifically, the first reference to "Oregon sales over \$100,000" is incorrect because the measure increases minimum taxes for corporations with sales of \$1,000,000 or more, not for corporations with sales over \$1,000,000. Under the measure, a corporation with sales of \$1,000,000 would be subject to increased minimum taxes, yet the summary states that such corporation would not be affected by the measure.

Additionally, the summary is underinclusive when describing the proposed tax increase because it only mentions payment of 2% of the excess of sales over \$1,000,000 and omits the additional payment of \$100,000. Therefore, as currently drafted, potential signers and voters could mistakenly believe that the only tax on such corporations is the 2% amount.

To address these issues, we suggest the following summary:

Elections Division
October 29, 2013
Comments on IP 33
Page 3 of 3

Summary: Currently, each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; minimum tax amount increases based on the amount of the corporation's sales in Oregon. Measure decreases the minimum tax for corporations with Oregon sales between \$500,000 and \$9,999,999. Measure increases minimum tax for corporations with Oregon sales of \$100,000,000 or more by requiring payment \$100,000 plus 2% of the excess of Oregon sales over \$100,000,000. Measure does not change minimum tax for corporations with Oregon sales in other amounts. Corporations with taxable income less than \$10,000,000 shall pay minimum tax on sales rather than tax on taxable income. Amendment applies to tax years beginning on/after January 1, 2015. Other provisions.

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

Very truly yours,

J/1 Gibson Odell
Gibson Law Firm

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KATE BROWN
SECRETARY OF THE STATE

ELLEN F. ROSENBLUM
Attorney General



MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

November 14, 2013

Gina Zejdlik
Acting Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

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KATE BROWN
SECRETARY OF THE STATE

Re: Proposed Initiative Petition — Modifies Annual Minimum Tax for Some Corporations,
Depending on the Amount of Corporation's Oregon Sales
DOJ File #BT-33-13; Elections Division #33

Dear Ms. Zejdlik:

We received comments from (1) Steven Berman on behalf of elector Elspeth McCann, and (2) Jill Gibson Odell on behalf of elector Dan Harmon. This letter summarizes those comments, our responses to the comments and the reasons why we altered or declined to alter the draft ballot title in response to the comments. ORAP 11.30(7) requires this letter to be included in the record if the Oregon Supreme Court is asked to review the ballot title.

A. The caption

The caption of a ballot title must "reasonably identif[y] the subject matter of the state measure." ORS 250.035(2)(a). The draft ballot title contains the following caption:

**Modifies annual minimum tax for some corporations, depending on the
amount of corporation's Oregon sales**

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, *id.*, without being inaccurate or underinclusive. *Hunnicut v. Myers*, 342 Or 491, 495, 155 P3d 870 (2007).

Currently, under ORS 317.090(2), each corporation or affiliated group of corporations that files a tax return under ORS 317.710 must pay an annual minimum tax in Oregon. The amount of taxes to be paid is based upon the amount of Oregon sales reported by the corporation on the filed return.

IP # 33 amends ORS 317.090 to change the tax rates in seven of the twelve tax brackets. For corporations with reported sales less than \$500,000, the tax rate remains the same. For corporations with reported sales in the brackets between \$500,000 and less than \$10,000,000, the

minimum tax is reduced by 50%. For corporations with reported sales between \$10,000,000 and less than \$100,000,000, the tax rates remain the same. The initiative eliminates the current tax cap on corporations with sales of \$100,000,000 or more; they would now pay "2% of the excess of Oregon sales over \$100 million" in addition to the current minimum tax. As a result, minimum tax rates for corporations would either be lowered, remain the same, or rise depending upon the corporation's tax bracket. Additionally, IP # 33 allows corporations with less than \$10,000,000 in taxable income to pay the minimum tax, but exempts them from paying the tax on taxable income under ORS 317.061.

Harmon does not challenge the draft caption. McCann contends that the caption is misleading because it "incorrectly implies that the Initiative modifies the corporate minimum tax for a sub-group of corporations subject to the corporate minimum tax." In McCann's view "[i]t is the tax *rates* in the corporate minimum tax that are revised." Concomitantly, McCann also contends that the word "modifies" is "underinclusive and impermissibly vague."

We reject McCann's contentions. As detailed, IP # 33 lowers the minimum tax for some corporations, leaves it as is for others, and raises it for others depending upon the amount of the corporation's Oregon sales. Within the word limit, the caption makes that clear. "Modifies" adequately captures the various effects that would result if the initiative is enacted, and thus adequately conveys the subject matter of the measure, which is all that the caption must do.

We certify the following caption:

**Modifies annual minimum tax for some corporations, depending on the
amount of corporation's Oregon sales**

D. The result statements

ORS 250.035(2)(b) and (c) require 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 or rejected. The draft ballot title contains the following result statements:

Result of "Yes" Vote: "Yes" vote will decrease annual minimum tax for some corporations, increase annual minimum tax for some corporations, depending on amount of corporation's sales in Oregon.

Result of "No" Vote: "No" vote retains current law, does not change amounts of minimum tax for corporations that are based on amount of corporation's sales made in Oregon.

Harmon does not challenge either of the result statements. McCann challenges the result statements for the same reasons she challenges the caption. That is, McCann contends that "modifies" is vague and that, to meet the statutory requirement, the "yes" statement must inform voters that, if passed, IP # 33 will increase the minimum tax on corporations with Oregon sales \$100,000,000 and above. We do not agree. Given the numerous changes that IP # 33 would

make to ORS 317.090, the level of detail that McCann suggests is not feasible within the 25-word limit. McCann's suggested detail is included in the summary which, with its greater word limit, allows for that level of detail. We also note that McCann's suggested "yes" statement is inaccurate in stating that the initiative "reduces taxes for corporations with Oregon sales below \$10 million." That is so because the initiative leaves unchanged the minimum tax paid by corporations with Oregon sales of less than \$500,000.

We certify the following results statements:

Result of "Yes" Vote: "Yes" vote will decrease annual minimum tax for some corporations, increase annual minimum tax for some corporations, depending on amount of corporation's sales in Oregon.

Result of "No" Vote: "No" vote retains current law, does not change amounts of minimum tax for corporations that are based on amount of corporation's sales made in Oregon.

E. The summary

ORS 250.035(2)(d) requires a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." The draft summary reads:

Summary: Currently, each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; minimum tax amount increases based on the level of the corporation's sales in Oregon. Measure decreases the minimum tax for corporations with Oregon sales between \$500,000 and \$9,999,999. Measure increases minimum tax for corporations with Oregon sales over \$100,000,000 by requiring payment of 2% of the excess of Oregon sales over \$100,000,000. Measure does not change minimum tax for corporations with Oregon sales in other amounts. Corporations with taxable income less than \$10,000,000 shall pay minimum tax on sales rather than tax on taxable income. Amendment applies to tax years beginning on/after January 1, 2015. Other provisions.

Harmon contends that the summary is deficient because one sentence is "incorrect and underinclusive." Specifically, he contends that the reference to "Oregon sales over \$100,000,000" is incorrect and, to be accurate, must state that the changes affect corporations with sales "of \$100,000,000 or more." We agree that the summary should be clarified in that respect and make appropriate changes.

Harmon also contends that the statement describing the proposed change to corporations with sales of more \$100,000,000 or more is inaccurate because it only mentions the increase tax of 2% payment of the excess of sales over \$100,000,000, and does not mention the payment of \$100,000 that is currently required. However, the \$100,000 payment is the current minimum tax and the initiative does not change that. Rather, the change to current law is the 2% increase.

Because the \$100,000 minimum tax is not changed by the initiative, it is unnecessary to detail that, just as it is unnecessary to detail the specific minimum tax amounts that must be paid by corporations in other sales brackets.

McCann contends that the summary should be revised for that same reasons identified in the caption and results statements. We agree that there is room in the summary to explain that the initiative would eliminate the current cap of \$100,000 if passed, and make changes accordingly.

We certify the following summary:

Summary: Currently, each corporation or affiliated group of corporations filing a tax return under ORS 317.710 must pay an annual minimum tax; the tax amount increases based on the level of the corporation's sales in Oregon. Measure decreases the minimum tax for corporations with Oregon sales between \$500,000 and \$9,999,999. Measure eliminates current corporate minimum tax cap of \$100,000; increases minimum tax for corporations with Oregon sales of \$100,000,000 or more by requiring payment of 2% of the excess of Oregon sales over \$100,000,000. Corporations with taxable income of less than \$10,000,000 shall pay minimum tax on sales in Oregon rather than tax on taxable income. Amendment applies to tax years beginning on/after January 1, 2015. Other provisions.

for Jeff J. Payne
Assistant Attorney General
Jeff.J.Payne@doj.state.or.us

JJP:chc/4781767

Enclosure

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Jill Gibson Odell
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Portland, OR 97223

Certified by Attorney General on November 14, 2013.

BALLOT TITLE

Modifies annual minimum tax for some corporations, depending on the amount of corporation's Oregon sales

Result of "Yes" Vote: "Yes" vote will decrease annual minimum tax for some corporations, increase annual minimum tax for some corporations, depending on amount of corporation's sales in Oregon.

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SECRETARY OF THE STATE
KATE BROWN

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