

September 1, 2000

No. 8272

This opinion is issued in response to questions presented by Chuck Smith, Director of the Oregon State Treasury Debt Management Division, about the possible effects of an initiative measure that will appear as Ballot Measure 93 (the Measure) on the ballot for the general election on November 7, 2000.^{1/}

FIRST QUESTION PRESENTED

Will the Measure, if approved by the people, impair the state's authority to issue general obligation (GO) bonds, revenue bonds or certificates of participation (COPs) on or after the effective date of the Measure?

ANSWER GIVEN

No. The Measure does not require voter approval for the issuance of bonds or COPs or otherwise impair the state's authority to issue bonds or COPs. If a measure to approve a new bond or COP program were presented to the voters, the Measure would require the state to include specific information in the ballot title and Voters' Pamphlet.

SECOND QUESTION PRESENTED

Will the Measure, if approved by the people, impair the state's authority to levy a statewide property tax, if needed, to repay state GO bonds that are (a) issued before the effective date of the Measure, or (b) issued on or after the effective date of the Measure?

ANSWER GIVEN

The Measure would not impair the state's authority to levy a statewide property tax to repay bonds issued under existing state GO bond programs, whether the bonds are issued before or after the effective date of the Measure. If a new state GO bond program were created on or after the effective date of the Measure, the state could not levy a statewide property tax to repay

bonds under such a program unless the tax levy were approved by the percentage of voters required by the Measure.

THIRD QUESTION PRESENTED

Will the Measure, if approved by the people, limit the state's ability to adjust loan interest rates or to increase origination fees or other charges to borrowers for loans that are made on or after the effective date of the Measure under state bond programs operating before that date?

ANSWER GIVEN

No. The Measure will not affect the state's ability to adjust interest rates or to increase fees or other charges to borrowers. The payments made by borrowers to repay state bond program loans are not taxes, fees or charges "imposed, assessed or levied" by the state for purposes of the Measure.^{2/} Even if a court were to disagree with that conclusion, we believe that the interest received by the state would not be subject to the Measure because it is excepted as "earnings from interest." Additionally, the interest, origination fees and other charges to borrowers would generally come within the Measure's exception for charges for a service that is available from government at a cost equal to or less than that from the private sector. Moreover, any increase in interest rates for new loans that is necessary to maintain the same spread between the rate paid by the state on its bonds and the rate received by the state for its loans would come within the exception for a pass-through of increased costs for wholesale inputs that are outside the state's control.

FOURTH QUESTION PRESENTED

Will the Measure, if approved by the people, limit the state's ability to repay bonds from lottery proceeds on or after the effective date of the Measure?

ANSWER GIVEN

No. The Measure has an exception for lottery revenues.

DISCUSSION

If approved by the people, Measure 93 would amend the Oregon Constitution by adding a new section to Article I that would require voter approval of most new or increased state and local government taxes, fees and charges on or after December 7, 2000, the effective date of the Measure.^{3/} Proposed Art. I, sec. 32a (1)(a).^{4/} Under this provision, the new or increased taxes, fees or charges must be approved "by not less than the percentage of participating voters who voted 'Yes'" on the Measure.^{5/} *Id.*

The Measure would also require the repeal and a refund of certain new or increased state and local government taxes, fees and charges enacted in the two years before December 7, 2000, unless those taxes, fees and charges were approved by the voters at the time of enactment, or are

approved at the next election by at least the percentage of participating voters who voted “yes” on the Measure. Sec. 32a (4)(a). Taxes to pay voter approved bonded indebtedness are exempt from this requirement. *Id.*

In interpreting a constitutional provision adopted through the initiative process, we apply the method of analysis outlined by the court in *PGE v. Bureau of Labor and Industries (PGE)*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993). We first look at the text and context of the provision to determine the intent of the voters, giving words of common usage their plain, natural and ordinary meaning. *Id.* at 611. The context of a constitutional provision adopted by ballot measure includes related ballot measures before the voters at the same election and pre-existing provisions of the constitution. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 560 n 8, 871 P2d 106 (1994). If the voters' intent is clear from the text and context, the search ends there. If the voters' intent is not clear from the text and context of the constitutional provision, we look to its history to attempt to discern that intent. *Id.* at 559. The history of an initiated constitutional provision includes information available to the voters at the time the measure was adopted, such as the ballot title, explanatory statement and arguments for and against the measure included in the Voters' Pamphlet, as well as contemporaneous news reports and editorials on the measure. *Id.* at 560 n 8.

Because we are interpreting the Measure before publication in the Voters' Pamphlet of any arguments about the measure, our analysis is limited to the existing materials that we know will be available to the voters. Aside from the Measure's text and context, the only other sources of information from which we may attempt to discern the intent of the voters, at this time, are the ballot title certified for the Measure and the official explanatory statement.⁶¹ The arguments concerning the Measure that will be published in the Voters' Pamphlet and distributed to the voters will become part of the context and history of the Measure that a court may consider if the Measure is adopted. See *Lipscomb v. State Board of Higher Education*, 305 Or 472, 484-85, 753 P2d 939 (1988); *Northwest Natural Gas Co. v. Frank*, 293 Or 374, 381, 648 P2d 1284 (1982). Although the Oregon Supreme Court has admonished that “[d]iscriminating and cautious use must be made of such material because of its partisan character,” *id.* at 383 (quoting *State ex rel Chapman v. Appling*, 220 Or 41, 68-69, 348 P2d 759 (1960)), the possibility remains that discourses about the Measure in the Voters' Pamphlet could yet create an additional “legislative history” on the meaning of the Measure that has the potential of materially affecting the conclusions stated in this opinion.

I. Authority to Issue New Bonds or COPS

We are first asked whether the Measure, if approved, would impair the state's authority to issue general obligation bonds, revenue bonds or COPS on or after the effective date of the Measure.

The Measure contains several references to “bonds,” section 32a(1)(b), (1)(c), (10), (11), and one reference to COPS, section 32a(10). None of those provisions imposes any express limitation or restriction on the state's authority to issue bonds or COPS, except section 32a(1)(b), which requires the ballot title and official Voters' Pamphlet explanatory statement for a measure

to approve a bond measure to begin with specific words and to include a projection of the total cost of the bond, including interest.^{7/}

At least three provisions of the Measure may suggest, however, that the Measure would require voter approval before the state may issue bonds. First, by describing ballot title and Voters' Pamphlet requirements for "a measure to * * * approve a bond measure," section 32a(1)(b) implies that bond measures must be approved by the voters. Second, by stating that section 32a "does not require voter approval for the issuance of * * * bonds issued to repay bonds issued prior to the effective date of this section or issued in conformance with this section," section 32a(1)(c) implies that section 32a requires voter approval for the issuance of all other bonds. Third, by making COPs subject to the "same limitations and requirements as a bond measure," section 32a(10) implies that there are both limitations and requirements on bond measures. The only limitations or requirements in the Measure that restrict government activity other than the requirements for the ballot title and Voters' Pamphlet is the voter approval requirement for new or increased taxes, fees or charges. Therefore, we consider whether the issuance of a bond or COP would itself be a new "tax, fee, or charge * * * imposed, assessed or levied," as those terms are used in the Measure. If so, the state could not issue a new bond or COP on or after December 7, 2000, without voter approval, unless the bond came within the exception in section 32a(1)(c) for refunding bonds.

The Measure contains no specific definitions of the terms "tax," "fee" or "charge." Instead, it identifies a limited series of revenues that are not to be considered new or increased taxes, fees or charges for purposes of the measure. This subsection states:

The following revenues shall not be considered new or increased taxes, fees, or charges for the purposes of this section: user fees charged by Peoples' Utility Districts or port districts; mass transit fares; college or university tuition and fees; incurred charges and assessments for local improvements as defined by Article XI Section 11b of this Constitution; increases in charges for government products and services solely to pass through increased costs of wholesale inputs that are not government employee labor costs, or otherwise under the charging government's control; fines or forfeitures for violation of law; lottery revenue; fees paid to official business and trade associations by those engaged in that business or occupation; earnings from interest, investments, donations, or asset sales; and fees or charges for products or services which may be legally obtained from a reasonably available source other than government, provided that the new or increased fee or charge for the product or service is not greater than the average private sector charge for the same product or service in the same market.

Sec. 32a(3). Because this section provides that the "revenues" listed in section 32a(3) shall not be considered taxes, fees or charges, we could infer that all other revenues received by a state or local government or taxing district are taxes, fees or charges that require voter approval unless expressly excepted by another provision of the Measure. Such an interpretation might seem particularly apt given that this provision specifically excepts "earnings from interest, investments, donations, or asset sales" – none of which would generally be understood to be taxes, fees or charges. *See also* sec. 32a(6)(a) (vote not required when increases in revenue

“occur solely due to a change in federal tax law, increases in income, or other changes in the circumstances of individual taxpayers”).

When a government issues a bond or COP, it both receives “revenue”^{8/} in the form of the proceeds from the bond sale (the principal) and creates a governmental obligation.^{9/} If the Measure is intended to require voter approval whenever a government receives revenues other than those excepted by section 32a(3), then voter approval would be required when the state issues (or sells) a bond or COP and receives the proceeds from the sale.

By its terms, however, the Measure does not require voter approval of all “revenues.” Instead, the Measure requires voter approval only for a “new tax, fee, or charge * * * imposed, assessed or levied” or an “existing tax, fee or charge * * * increased” by the state, a local government or a taxing district. Sec. 32a(1)(a). Based on its text, we conclude that the Measure requires voter approval only for nonexempt revenues that are taxes, fees or charges imposed, assessed or levied by a government or taxing district. *Cf. Roseburg School District v. City of Roseburg*, 316 Or 374, 381, 851 P2d 595 (1993) (Measure 5 “is a limitation on only those certain forms of revenue generation that fall within its definitions”). Nothing in any related provisions of the Oregon Constitution (context) or in the ballot title (history) suggests any different interpretation. Hence, to ascertain whether the state’s authority to issue new bonds or COPs is limited by the voter approval requirement, we must determine whether the proceeds from the sale of a bond or COP are a “tax, fee, or charge * * * imposed, assessed or levied.”

A. Bonds^{10/}

We do not believe that bond sale proceeds are a “tax,” “fee,” or “charge” as those terms are commonly understood.^{11/} Although section 32a(10) directs the courts to apply the strictest scrutiny to any “new or renamed government funding mechanism,” bonds are not new funding mechanisms. In fact, section 32a makes several references to bonds. If the voter approval requirements in section 32a(1)(a) were intended to apply to the issuance of a government bond, we believe that the Measure would state that expressly, rather than relying on an interpretation of three terms, “tax, fee or charge,” that do not readily apply to the proceeds from the sale of bonds. Rather than attempt to ascertain the scope of those terms for purposes of this opinion, however, we look to the plain meaning of the terms “imposed,” “assessed” and “levied” because the only new taxes, fees or charges that require voter approval are those that are “imposed, assessed or levied.”

The word "impose" means:

to make, frame, or apply (as a charge, tax, obligation, rule, penalty) as compulsory, obligatory, or enforceable <[impose] a duty on a city official> <the obligations imposed by international law -- *Encyc. Americana*>

WEBSTER’S at 1136. The word “assess” means:

2 a : to determine the amount of and impose (as a tax, charge, or fine) according to an established rate or apportionment <the tax to be [assess]ed upon all retail

sales> **b** : to subject to a tax, charge, or levy so determined <each member will be [assess]ed \$25>

Id. at 131. The verb “levy” means:

to impose or collect (as a tax or tribute) by legal process or by authority : EXACT

Id. at 1301. Both “impose” and “assess” are more than a request for voluntary action; they involve an element of compulsion. The term “levy” may either involve this element of compulsion or may merely mean to collect. In interpreting the term “levy” as used in other ballot measures limiting taxes, we have stated:

because the property tax limitation measure was intended to be a limitation on governmental authority, "levy" should be construed relative to the government act that authorizes the charge. That act "occurs when the fees are imposed and made compulsory by official governmental action." * * * Thus, "levy" should be given the meaning "to impose" rather than "to collect."

48 Op Atty Gen 241, 253 (1997) (quoting 44 Op Atty Gen 85, 226 (1984)). *See also Dept. of Rev. v. Co. of Multnomah*, 4 OTR 133, 147-48 (1970) (citing *Carikonen v. Williams*, 76 Wash 2d 617, 458 P2d 280 (1969)) (“when used in connection with the authority to tax, [“levy”] denotes the exercise of the legislative function * * * determining that a tax shall be imposed”). Thus, we conclude that a tax, fee or charge is subject to the voter approval requirements in section 32a(1)(a) only if its payment is made compulsory or obligatory by government.

This interpretation is supported by the explanatory statement that will appear in the Voters’ Pamphlet. The explanatory statement says, in relevant part, that “[t]he measure does not require voter approval for * * * voluntary payments to governments which are not imposed, assessed or levied.”

When the state issues bonds, it is incurring debt by selling a bond.^{12/} The bond is the written evidence of the state’s obligation to pay to the bondholder the bond principal, with interest. The state sells bonds to one or more underwriters within or outside of the state of Oregon, either at a public sale or a private negotiated sale.^{13/} ORS 286.038. In either case, the underwriters’ purchase of the bonds is not compulsory or obligatory, but completely voluntary. The revenue received by the state in a bond sale is the result of a voluntary exchange; it is not a tax, fee or charge “imposed, assessed or levied” upon the underwriters. Not only is the purchase of bonds entirely voluntary, but bonds are available from a variety of governmental and nongovernmental sources.^{14/} The underwriters who purchase Oregon state bonds have available a whole menu of municipal bonds, which include bonds issued by all 50 states and other government bodies. They need not buy Oregon state bonds.

Because the revenue received from the bond sale (the proceeds) is not a tax, fee or charge that is “imposed, assessed or levied,” the voter approval requirement in section 32a(1)(a) does not apply to the issuance of state bonds. Accordingly, we conclude that the Measure would not impair the state’s authority to issue general obligation bonds or revenue bonds after the effective

date of the Measure. If the state chose to present a new bond program to the voters for approval,^{15/} the Measure would require the state to include specific information in the ballot title and Voters' Pamphlet.

B. Certificates of Participation

Section 32a(10) states that "certificates of participation * * * shall be subject to the same limitations and requirements as a bond measure." We conclude above that the voter approval requirement in section 32a(1)(a) does not apply to bonds. Therefore, we also conclude that the voter approval requirement does not apply to COPs and that the Measure would not impair the state's authority to issue COPs after its effective date.

The only limitation or restriction on the issuance of bonds is the requirement in section 32a(1)(b) that the ballot title and official Voters' Pamphlet explanatory statement for a measure to approve a bond measure must begin with specific words and include a projection of the total cost of the bond, including interest. Thus, if a measure to approve a COP program were presented to the voters, the Measure would require the state to include this information in the ballot title and Voters' Pamphlet.

II. Authority to Levy Taxes to Repay State General Obligation Bonds

The repayment obligation of the state's general obligation (GO) bonds is secured by the full faith and credit of the state. This generally means that, if other repayment sources are inadequate, the state agrees to use any or all of its unrestricted revenue sources, including its authority to levy a statewide property tax, as needed to pay the principal and interest on the bonds. *See* DICTIONARY OF FINANCE AND INVESTMENT TERMS (Barrons 4th ed 1995). We are asked whether the Measure would impair the state's authority to levy a statewide property tax to repay state GO bonds.

The Measure requires voter approval of any new or increased taxes, fees or charges "unless the new tax, fee, or charge, or increase thereof is first approved * * * by not less than the percentage of participating voters who voted "Yes" on [the Measure]." Sec. 32a(1)(a). There is an exception to this requirement for taxes levied to repay certain bonded indebtedness. Section 32a(1)(c) provides:

Nothing in this section [32a] shall affect taxes levied for the repayment of bonded indebtedness *approved by voters* in an election held prior to Nov. 7, 2000, or the issuance of refunding bonds to pay such bonded indebtedness. This section does not require voter approval for the issuance of, or the levy of taxes to pay, bonds issued to repay bonds issued prior to the effective date of this section or issued in conformance with this section.

(Emphasis added.)

In 48 Op Atty Gen 241, 288-290 (1997), we interpreted language in Measure 47 (1996)^{16/} that was identical to the first sentence of section 32a(1)(c), except for the date before which the

election must have occurred.^{17/} We were asked whether the phrase “approved by the voters” modifies “taxes levied for the repayment of bonded indebtedness” or only the “bonded indebtedness.” Based on the text alone, we found that the language of that sentence was susceptible to only one interpretation – that the phrase modified only “bonded indebtedness.” Otherwise, the reference to “*such* bonded indebtedness” at the end of the first sentence has no appropriate antecedent. Thus, we concluded that exception applied “to taxes to repay bonds, provided the bonds were approved by the voters” in an election before the critical date. *Id.* at 288. Nothing in the text or context of Measure 93 suggests a different interpretation.

In 48 Op Atty Gen 315 (1997), we specifically considered the application of that same language to certain state GO bonds. Relying in part on our previous interpretation of the term “bonded indebtedness” in other provisions of Measure 47 as including “all kinds of bonds, including but not necessarily limited to general obligation bonds and revenue bonds,” 48 Op Atty Gen 67, 82 (1996), 48 Op Atty Gen 241 at 251, and the apparent intent of the exception for bonded indebtedness to preserve contractual obligations for bonds issued with a promise to levy a tax to repay the bonds, *id.* at 254, we concluded first that state GO bonds were “bonded indebtedness” as that term was used in this exception. 48 Op Atty Gen 315 at 320. We then concluded that because the people of the State of Oregon (i.e., the voters) approved each of the then-existing state GO bond programs as an amendment to the Oregon Constitution in a general election held before the effective date for Measure 47 (December 5, 1996), and no further voter approval or action is needed to issue bonds under those programs, those state GO bonds have been approved by the voters within the meaning of the exception.^{18/} *Id.* at 321-22. Again, there is nothing in the text or context of Measure 93 that would suggest any different interpretation.

Each of the now-existing state GO bond programs was approved by the voters in a general election held before November 7, 2000. Because the bonded indebtedness authorized by those programs has already been voter-approved, the levy of statewide property taxes to repay any bond issued under Articles XI-A, XI-D, XI-E, XI-F(1), XI-F(2), XI-G, XI-H, XI-I(1), XI-I(2), XI-J or XI-K of the Oregon Constitution would come within the exception in section 32a(1)(c), whether the bonds themselves are issued before or after the effective date of the Measure.

If any new state GO bond programs are approved by the people of the State of Oregon on or after November 7, 2000, new or increased taxes could not be levied to repay bonds issued under such programs unless the voter approval requirements of section 32a(1)(a) are met. Failure to obtain the requisite supermajority of votes, however, would mean only that the state could not levy or increase taxes, or impose or increase any other fees or charges, to repay the bonds. If a simple majority of the voters approved a new state GO bond program, the program would be valid, and bonds could be issued so long as sufficient revenues existed to cover repayment of the bond obligations.

III. Ability to Adjust Interest Rates for New Loans

The purpose of many of the state’s GO and revenue bond programs is to provide loans.^{19/} *See, e.g.,* Or Const Art XI-A (farm and home loans to veterans); ORS 285B.575 (loans to municipalities for safe drinking water projects), ORS 456.645 (single-family mortgage loans).

The revenue to repay such bonds comes primarily from the principal and interest payments made by those who receive loans under the bond program, e.g., veterans, municipalities, homeowners. Generally, when the interest that the state must pay on its new bonds goes up or down due to inflation or other factors, the state increases or reduces the interest rate on the new loans that it finances with those bonds so as to keep the “spread” between the rate paid by the state and the rate received by the state sufficient to cover the state’s costs for the loans, including defaults, and to pay the ongoing administrative costs of the loan program.

We are asked whether the Measure would limit the state’s ability to adjust interest rates or to increase origination fees or other charges to borrowers for loans that are made on or after the effective date of the Measure. We conclude that any increases in loan interest rates, origination fees or other loan charges are not subject to the Measure’s voter approval requirement for several reasons.

First, the revenue received by the state from its loans is not a tax, fee or charge “imposed, assessed or levied.” As discussed above with respect to the issuance of bonds, voter approval is required by section 32a(1)(a) only for payments that are compulsory or obligatory. The loan is a voluntary agreement between the state and the borrower. Not only is the borrower making a voluntary decision to obtain a loan, but the borrower is also choosing to borrow from the state, rather than other lenders, such as banks, savings and loans or financial service firms. Because the borrower voluntarily agrees to pay interest, loan origination fees and other charges when the borrower chooses to obtain a loan under one of the state’s bond programs, we conclude that the interest, fees and charges are not “imposed, assessed or levied,” and therefore the Measure would not require voter approval for any increases. The explanatory statement that will appear in the Voters’ Pamphlet confirms this interpretation, stating: “[t]he measure does not require voter approval for * * * voluntary payments to governments which are not imposed, assessed or levied, such as * * * loan payments.”

Second, even if a court were to disagree that loans are not taxes, fees or charges imposed, assessed or levied, we believe that the loan interest payments, fees and charges would come within several of the specific exceptions in section 32a(3). Section 32a(3) provides:

The following revenues shall not be considered new or increased taxes, fees, or charges for the purposes of this section [32a]: * * * earnings from interest, * * * and fees or charges for products or services which may be legally obtained from a reasonably available source other than government, provided that the new or increased fee or charge for the product or service is not greater than the average private sector charge for the same product or service in the same market.

When the borrowers make interest payments on loans obtained from the state under its bond programs, the state receives revenue in the form of “earnings from interest.”^{20/} Under section 32a(3), these interest earnings are not considered to be new or increased taxes, fees or charges for purposes of the Measure. Consequently, the state would not need voter approval to increase the interest charges for loans made on or after the effective date of the Measure.

Additionally, under section 32a(3), fees and charges for products or services that are available from a nongovernment source are not considered to be new or increased taxes, fees or charges for purposes of the Measure if the new or increased fee or charge is not greater than the average private sector charge for the same product or service in the same market. A loan can reasonably be regarded as both a financial product and service.^{21/} We understand that because the purpose for the loan programs that are funded by state bonds is to offer loans at a lower cost than those available from the private sector, the interest rates, fees and charges for state loans are generally no greater than those charged in the private sector. If the state loans were more costly than loans from the private sector, the borrowers would not seek loans from the state. Thus, we believe that any increase in interest, fees or other charges for loans made under the state's bond programs would come within this exception.^{22/}

Finally, section 32a(3) also excepts from the revenues that are considered taxes, fees or charges any "increases in charges for government products and services solely to pass through increased costs of wholesale inputs that are not government employee labor costs, or otherwise under the charging government's control." Thus, if its loan interest rates, fees and charges were subject to the Measure, to the extent that the state had to pay a higher interest rate on the bonds that provided money for the new loans, the state could increase interest rates for those loans solely to reflect this increase in the cost of the funds.^{23/}

In sum, we conclude that the borrowers' payments made to repay the state bond program loans are not taxes, fees or charges "imposed, assessed or levied" for purposes of the Measure. Even if a court were to disagree with that conclusion, we believe that the interest received by the state would not be subject to the Measure because it is "earnings from interest" and that, additionally, the interest, origination fees and other charges to borrowers would generally come within the exception in section 32a(3) as charges for a service that is available from government at a cost equal to or less than that from the private sector. Moreover, any increase in interest rates for new loans that is necessary to maintain the same spread between the rate paid by the state on its bonds and the rate received by the state for its loans would come within the exception as a pass-through of increased costs for wholesale inputs that are not within the state's control.

IV. Repayment of Bonds from Lottery Proceeds

Several of the state bond programs are backed by lottery revenue. *See, e.g.,* ORS 391.140 (Westside light rail), ORS 565.103 (State Fair improvements). The Measure excepts "lottery revenue" from the revenues that are considered new or increased taxes, fees or charges. Section 32a(3). Because new or increased lottery revenue is excepted, the amount that the Oregon State Lottery charges for lottery games could be increased without voter approval. Consequently, the Measure would not impair the ability of the state to repay bonds from lottery proceeds on or after the Measure's effective date.

V. Status of Opinion

This opinion is provided at the request of the Oregon State Treasury and may be relied upon only by the State of Oregon, its officers and employees.

HARDY MYERS
Attorney General

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^{1/} Measure 93 provides in relevant part as follows:

Be it enacted by the People of the State of Oregon:

The Constitution of the State of Oregon is amended by creating a new, Section 32a in Article I, which section shall read:

Section 32a. People's right to approve all taxes. The purpose of this 2000 Amendment is to ensure that new taxes and tax increases, which further deprive citizens of income and property, are hereafter directly approved by the people. Therefore, except as provided in Section 6 of Article IX, any new tax, fee, or charge, or increase in an existing tax, fee, or charge, shall require approval by the people, as follows:

(1)(a) No new tax, fee, or charge shall be imposed, assessed or levied, and no existing tax, fee or charge shall be increased by the state or any local government or taxing district, unless the new tax, fee, or charge, or increase thereof is first approved in an election held on the first Tuesday after the first Monday of November of an even numbered year, or any other election held on a date which the state legislative assembly has designated as an annual election date on which measures may be placed on the statewide ballot by initiative petition, and the new tax, fee, or charge, or increase thereof, is approved by not less than the percentage of participating voters who voted "Yes" on this 2000 Amendment. For purposes of this section and subject to subsection (5) of this section, the following shall require only approval by a majority of those voting in the election: (i) a measure to renew an expiring tax levy, which levy solely funds police, fire, or 911 emergency services, the rate or amount of which levy is not greater than the rate or amount of the expiring levy, and (ii) a measure to increase the state motor vehicle fuel tax.

(b) The ballot title and official voters pamphlet explanatory statement for a measure to adopt a new tax, fee, or charge; to approve a bond measure; or to increase an existing tax, fee, or charge, shall begin with the words: A "Yes" vote on this measure is a vote to increase taxes. The question submitted to voters also shall clearly describe the proposed new tax, fee, or charge, or increase thereof; if the measure is a bond measure, a projection of the total cost of the bond, including interest thereon; and revenue the measure would produce annually.

(c) Nothing in this section shall affect taxes levied for the repayment of bonded indebtedness approved by voters in an election held prior to Nov. 7, 2000, or the issuance of refunding bonds to pay such bonded indebtedness. This section does not require voter approval for the issuance of, or the levy of taxes to pay, bonds issued to repay bonds

issued prior to the effective date of this section or issued in conformance with this section.

(2) For purposes of this section, any elimination, limitation, or reduction of a tax exemption, credit, deduction, exclusion, or cost-of-living indexing shall be considered a tax increase.

(3) The following revenues shall not be considered new or increased taxes, fees, or charges for the purposes of this section: user fees charged by Peoples' Utility Districts or port districts; mass transit fares; college or university tuition and fees; incurred charges and assessments for local improvements as defined by Article XI Section 11b of this Constitution; increases in charges for government products and services solely to pass through increased costs of wholesale inputs that are not government employee labor costs, or otherwise under the charging government's control; fines or forfeitures for violation of law; lottery revenue; fees paid to official business and trade associations by those engaged in that business or occupation; earnings from interest, investments, donations, or asset sales; and fees or charges for products or services which may be legally obtained from a reasonably available source other than government, provided that the new or increased fee or charge for the product or service is not greater than the average private sector charge for the same product or service in the same market.

(4)(a) If in the two years previous to the effective date of this section, an existing tax, fee, or charge was increased more than three percent (3%), or a new tax, fee, or charge was adopted or first imposed, the increase in the existing tax, fee, or charge, to the extent it exceeded a three percent increase, and any new tax, fee, or charge, shall be either repealed or submitted to the voters for approval at the next election, if the new or increased tax, fee or charge was not approved by at least the percentage of voters required in paragraph (a) of subsection (1) of this section. If a new tax fee or charge was imposed, or an existing tax, fee, or charge increased in the two years previous to the effective date of this section, and the new tax, fee, or charge or increase in an existing tax, fee, or charge, was not approved in conformance with this section, and not approved by voters at the next election, the amount of the new tax, fee, or charge or excessive increase collected shall be refunded to the payer. Taxes to pay voter approved bonded indebtedness, and taxes, fees, and charges listed in subsection (3) of this section are exempt from the requirements of this paragraph (a) of this subsection (4).

(b) Provided that the amount of a fee or charge does not exceed the actual cost of providing the product or service, the following fees and charges may be increased at a rate not greater than the rate of inflation since the effective date of this section, without a public vote: (i) charges and fees in effect on or before December 6, 1998; (ii) charges and fees first adopted or first effective after December 6, 1998, if adopted in accordance with this section.

(5) Nothing in this section shall be construed as nullifying the requirement in Section 11 of Article XI of this Constitution that elections for property tax measures, which are voted on in an election held on a date other than the general election, achieve not less than fifty percent (50%) voter participation to be valid.

(6)(a) This section shall not require a vote of the people when increases in government revenue occur solely due to a change in federal tax law, increases in income, or other changes in the circumstances of individual taxpayers. Nothing in this section shall be construed as authorizing an increase in the tax on a property tax in an amount greater than allowed under Article XI of this Constitution.

(b) If, after the effective date of this section, a government temporarily suspends or

voluntarily lowers a tax, fee, or charge; the tax, fee or charge may be increased later, without a public vote, to the rate or amount it would have been under this section had the suspension or reduction not occurred.

* * * * *

(10) Because governments have at times been creative at redefining terms, or otherwise creating new funding mechanisms in order to circumvent limitations placed upon them by the people, the legislature, in implementing this section, and the courts in interpreting it, shall apply the strictest scrutiny to any new or renamed government funding mechanism; and shall require in every reasonable circumstance voter approval as required in this section for new or increased taxes, fees, or charges, regardless of the creativity used by the government in designing or naming the funding mechanism. Under this section, certificates of participation and all such funding mechanisms shall be subject to the same limitations and requirements as a bond measure.

* * * * *

(12) If any phrase, clause, or part of this Amendment is invalidated by a court of competent jurisdiction, the remaining phrases, clauses, and parts shall remain in full force and effect. If any provision of this amendment is found to violate or infringe upon a right of any person or group under the U.S. Constitution, the provision shall remain in full force and effect for all other persons or groups for which no infringement has been found.

^{2/} This opinion does not address local governments or the Measure's effect on the ability of local governments to increase taxes, fees or charges to repay state bond program loans.

^{3/} An initiated measure becomes effective 30 days after the date on which it is approved by the people. Or Const Art IV, § 1(4)(d).

^{4/} For ease of reference in this opinion, we will hereinafter refer only to the section and subsection of the proposed constitutional provision.

^{5/} The vote must be at a regular general election or any other election designated by the Legislative Assembly as an annual election at which measures may be placed on the statewide ballot by initiative petition. Sec. 32a (1)(a).

^{6/} As certified by the Oregon Supreme Court in *Novick v. Myers*, 329 Or 11, 986 P2d 1 (1999), the ballot title for Measure 93 states:

AMENDS CONSTITUTION: VOTERS MUST APPROVE
MOST TAXES, FEES; REQUIRES CERTAIN
APPROVAL PERCENTAGE

RESULT OF "YES" VOTE: "Yes" vote means voters approve taxes, fees by certain approval percentage; may repeal recent increases.

RESULT OF "NO" VOTE: "No" vote retains current rules for approving, increasing taxes, fees; maintains previously approved taxes, fees.

SUMMARY: Amends Constitution. Currently voters approve taxes by majority vote; not all new, increased taxes, fees require voter approval. Measure requires voter approval after November 7, 2000 of most new, increased taxes, fees by same percentage of voters passing this measure. Requires repeal and refund of certain recent tax, fee increases unless voters approve increase. Exempts some charges, bonded indebtedness, public safety levies from new approval requirement. Public vote not required in limited circumstances. Establishes standards for taxpayer challenge, judicial review of tax measures. Other changes.

The explanatory statement for Measure 93 which has been filed with the Secretary of State under ORS 251.215 and will be published in the Voters' Pamphlet, states:

Measure 93 would amend the Oregon Constitution to require approval by no less than the percentage of voters approving this measure for new or increased taxes, fees or charges proposed by state and local governments, unless exempted. For example, if this measure passes by sixty percent, it will require sixty percent approval of future taxes, fees and charges. It also requires a refund of certain past collections.

Oregon law generally requires voter approval for property taxes, and allows voters to refer other taxes. Fees and charges generally are not subject to voter approval.

Voter approval of new and increased taxes, fees and charges can be given only at the biennial general election or at an annual election if the legislature permits approval of statewide initiatives at that election. However, simple majority approval is required to renew certain police, fire, and 911 levies and for state gas tax increases. All ballots, including those that propose fee and charge increases, must state "A 'Yes' vote on this measure is a vote to increase taxes."

Affected charges range widely from photocopy fees, to parking fees, to sewer and water charges. However, the measure exempts a variety of charges, including Peoples' utility and port districts; mass transit; college and university; charges for anything provided by government which is available from the private sector if the governmental charge does not exceed the average private sector charge in that market; and inflationary increases in certain charges which were in effect on December 6, 1998 or which are approved by voters as the measure requires.

Governments must refund voter approved levies and other fees lawfully imposed or increased more than three percent after December 6, 1998 unless they are exempt or approved by a simple majority of voters at the next election.

The measure does not require voter approval for: increases which result from changes in income, federal tax laws, property values or other changes in individual taxpayer circumstances; actions which alter the distribution of revenues among governments; and voluntary payments to governments which are not imposed, assessed or levied, such as rent for government property or loan payments.

Certificates of participation and similar financing techniques which may be developed in the future are subject to the same limitations and requirements as a bond measure; this does not add new requirements for bonds.

This measure permits the state to impose temporary charges for not more than one year without voter approval. State temporary charges must be: for a specific purpose, approved by a three-fourths vote of each house of the Legislative Assembly, and signed by the Governor.

The measure permits local government emergency taxes for not more than one year if the Governor declares a local emergency, the local governing body approves the tax by a three-fourths vote, and the tax is approved by voters as the measure requires within 90 days after the declaration of emergency.

This measure prescribes procedures for tax elections, ballot title review, the refund of unlawfully collected taxes and court challenges.

^{7/} The ballot title and official Voters' Pamphlet explanatory statement must begin with the words: "A 'Yes' vote on this measure is a vote to increase taxes."

^{8/} WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (WEBSTER’S) 1942 (unabridged 1993) defines “revenue” as “public income of whatever kind.”

^{9/} The government bond itself is the written evidence of the government’s obligation to repay the principal amount of the bond at maturity, together with interest. *See* MOODY’S ON MUNICIPALS – AN INTRODUCTION TO ISSUING DEBT (1987).

^{10/} Because the Measure refers to “bonds” without any distinction between GO bonds and revenue bonds, we find no basis to distinguish between them in analyzing the effect of the Measure on the state’s authority to issue GO or revenue bonds. Accordingly, for ease of reference, we use the term “bonds” to refer to both.

^{11/} A “tax” is defined as:

1 a (1) : a [usually] pecuniary charge imposed by legislative or other public authority upon persons or property for public purposes : a forced contribution of wealth to meet the public needs of a government.

A “fee” is defined as:

3 b : a charge fixed by law or by an institution (as a university) for certain privileges or services <a license [fee]> <a toll-road [fee]> <a college-admission [fee]> <research [fee]s> <laboratory [fee]s> <tuition [fee]s> **4 a** : a charge fixed by law for the services of a public officer <a sheriff’s [fee]>

A “charge” is defined, in its relevant sense, as:

5 a : expenditure or incurred expense * * * as (1) : payment of costs : money paid out (2) : a pecuniary liability (as rents or taxes against property, a person, or an organization * * *
* **b** : the price demanded for a thing or service

WEBSTER’S at 2345, 833, 377, respectively.

^{12/} In this opinion, we use the term “debt” in this broad sense as something owed. The term “debt” has a special, legal meaning, however, when used in the context of the constitutional limitation on state and local government bodies’ authority to incur debt. *See* Or Const Art XI, §§ 7, 10; *State ex rel Kane v. Goldschmidt*, 308 Or 573, 579-83, 783 P2d 988 (1989).

^{13/} The state does not sell any bonds directly to the public. Instead, the state sells the total amount of a particular bond issue to an underwriter or group of underwriters that are typically a brokerage firm. The underwriters agree to offer the bonds to the public (individuals or institutions within or outside of Oregon) at prices that do not exceed the initial public offering prices specified in the official statement. Members of the public may then go to a broker to purchase individual bonds.

^{14/} For this opinion, we need not determine whether a fee or charge is “imposed” for purposes of the Measure when an individual is not compelled to obtain the service or privilege for which the fee is charged, but the service or privilege is available only from the government that is subject to the Measure (e.g., a hunting license).

^{15/} Because the GO bonds’ reliance on the full credit of the state could otherwise violate the state debt limit, Or Const Art XI, § 7, all state GO bond programs must be authorized in the Oregon Constitution.

^{16/} Ballot Measure 47 (1996) was approved by the people and became Article XI, section 11g, of the Oregon Constitution. In 1997, section 11g was repealed, and the current section 11 adopted in lieu of section 11g and several other sections of Article XI. *See* HJR 85 (1997).

^{17/} The voter approval required to trigger the exception in Measure 47 (1996) needed to be at an election prior to the effective date of Measure 47; for the exception in Measure 93, voter approval must be at an election prior to the date on which the Measure is on the ballot.

^{18/} Our 1997 opinion addressed only those state GO bonds authorized by Articles XI-A, XI-E, XI-F(1), XI-G, XI-H, XI-I(1), XI-I(2) and XI-J of the Oregon Constitution. The same analysis and conclusions would apply equally to state GO bonds authorized by Articles XI-D, XI-F(2) and XI-K.

We were not asked about bond programs under Articles XI-D and XI-F(2) because no bonds had been issued under either of those programs. The state GO bond program under Article XI-K was approved by the voters at the general election in November 1998.

^{19/} Unlike GO bonds, revenue bonds have no general obligation backing from the state. As a rule, revenue bonds are fully self-supporting; the funds to pay principal and interest on revenue bonds come from dedicated revenue, typically program revenues directly associated with the funded project. In addition to dedicating the program revenues, the legislature may also provide other funding to pay principal and interest on revenue bonds in the event that program revenues are insufficient.

Although generally authorized by the Oregon Legislative Assembly without voter approval, the legislature may refer a particular revenue bond program to the people. If a revenue bond program was referred to and approved by the people in an election held before November 7, 2000, the state's authority to levy taxes to repay revenue bonds issued under such a program would be within the exception in section 32a(1)(c), as are taxes to repay the GO bonds discussed above.

^{20/} "Earnings" is defined as "something * * * earned as compensation for labor or the use of capital." WEBSTER'S at 714.

^{21/} See The PALGRAVE DICTIONARY OF MONEY & FINANCE 94-95 (1992) (definition of financial services industry). A loan is a combination of money and its time-value, along with the services required to originate the loan (e.g., taking the application, reviewing the paperwork, running a credit check, setting up the computer), and the ongoing services for the life of the loan (e.g., establishing escrow accounts for taxes and insurance, issuing payment books, collecting and crediting payments, preparing annual tax statements).

A line of cases interpreting the Unlawful Trade Practices Act (UTPA) concludes that a loan is not a "good" or "service" for UTPA purposes. See *Lamm v. Amfac Mortgage Corp.*, 44 Or App 203, 605 P2d 730 (1980); *Cullen v. Investment Strategies, Inc.*, 139 Or App 119, 128, 911 P2d 936 (1996). We do not believe these cases have any relevance in interpreting the terms "products and services" for purposes of Measure 93. The terms used in Measure 93 should be given their plain, common meaning as understood by the voters, not the particular meaning given to them in construing the UTPA.

The explanatory statement that will appear in the Voters' Pamphlet supports a broad interpretation of the terms "products or services." The statement paraphrases the exception in section 32a(3) for "fees or charges for products or services which may be legally obtained from a reasonably available source other than government" (emphasis added) as follows: "charges for anything provided by government which is available from the private sector." (Emphasis added.)

^{22/} This exception would require a case-by-case assessment to determine whether, in fact, the interest rate, fees and other charges for a particular state loan are "not greater than the average private sector charge for the same [loan] in the same market." Section 32a(3).

^{23/} The Measure also provides that if, after its effective date, a government voluntarily lowers a tax fee or charge, the tax fee or charge may be increased later, without a vote, to the amount it would have been had the reduction not occurred. Sec. 32a(6)(b). Thus, if the interest rates, fees or charges for loans under its bond programs were subject to the Measure, the state could adjust those rates or fees downward

and then upward again so long as the rates or fees did not exceed what they were immediately before December 7, 2000.