



**DEPARTMENT OF JUSTICE**  
GENERAL COUNSEL DIVISION

October 1, 2014

Darren Bond, Deputy State Treasurer  
Oregon State Treasury  
350 Winter Street NE, Suite 100  
Salem, OR 97301-3896

Re: Opinion Request OP-2014-1

Dear Mr. Bond:

The State Treasurer asks a question about the payment of bonds issued by or for the benefit of Oregon public universities with institutional governing boards. Below we set out your question and our short answer followed by a discussion.

**QUESTION AND SHORT ANSWER**

**Question:** Does the requirement in ORS 351.379(3) that a university pay the debt service on bonds issued by the state for the benefit of a university with a governing board on a *pari passu* basis with the payment of university-issued revenue bonds mean that, if a university has a revenue shortfall, it must use the available funds to pay the debt service on both in proportion to the amounts owed?

**Short Answer:** No. We interpret the *pari passu* language to require universities to time payments to the State Treasurer and revenue bond holders roughly equally within a fiscal period but not to require lien parity.

**DISCUSSION**

**I. Background**

Before 2011, Oregon's seven public universities were part of the Oregon University System (OUS), a state agency. The State Treasurer issued bonds for universities as for any other state agency. In 2011, Senate Bill 242 (2011) changed OUS's status from a "state agency" to a "public university system." Or Laws 2011, ch 637, § 19; ORS 351.011(1). In 2013, the legislature enacted Senate Bill 270 (2013) authorizing universities to establish their own institutional governing boards. Or Laws 2013, ch 768, § 3; ORS 352.054.<sup>1/</sup>

When a university establishes a governing board, the State Treasurer and OUS must provide it with a payment schedule for outstanding state bonds and other state obligations. ORS 351.379(3). The schedule “must include amounts sufficient to pay principal, interest and premium, if any, on the state bonds” and the related costs. *Id.* Universities may ask the State Treasurer to issue new bonds on their behalf. ORS 351.369(1). If he does, he must amend the payment schedule to include any bonds that will be paid with university-controlled funds. ORS 351.379(3).

Universities are also authorized to issue their own “revenue bonds.” ORS 351.374(1)(a). Those bonds are paid for from university revenues, which include all university income, including tuition and fees, but exclude “moneys received by the university from taxes collected by the State of Oregon.” ORS 351.365(7). Most significant for purposes of this opinion, revenue bonds “[a]re not payable from \* \* \* any amounts a university \* \* \* is required to \* \* \* [p]ay to the State Treasurer pursuant to a schedule described in ORS 351.379.” ORS 351.374(5)(d)(B). Nor may revenue bonds “be secured by a pledge of or lien on” those amounts. *Id.*

The State Treasurer has authority to require a university to enter into an agreement to deposit with the treasurer “any amounts under the control of the university that the State Treasurer determines should be held by the State Treasurer to provide for payment of state bonds and other state obligations.” ORS 352.135(2). Revenue bonds are not payable from and may not be secured by a pledge or lien on amounts deposited with the State Treasurer pursuant to ORS 352.135(2). ORS 351.374(5)(d)(A).

If a university asks the State Treasurer to issue state bonds for its benefit that will be paid with university-controlled moneys and also intends to issue revenue bonds, the State Treasurer must approve the issuance of the revenue bonds. ORS 351.369. The State Treasurer reviews the university’s cash flow projections and other information to determine sufficiency to pay both the state obligations and the revenue bonds. ORS 351.369(2). If the university issues revenue bonds without the State Treasurer’s approval, it is not eligible to receive the proceeds of the state-issued bonds. ORS 351.369(3).

ORS 351.379(3) mandates that:

[T]he university \* \* \* shall pay the amounts specified in the schedule provided by the State Treasurer and the Oregon University System on or before the dates specified in the schedule from the legally available revenue of the university and on a *pari passu* basis with the payment of any revenue bonds of the university issued pursuant to ORS 351.374.

You ask if the *pari passu* language requires a university that has insufficient funds to pay the amounts due on both state and revenue bonds to split the available moneys between the payment of state bonds and revenue bonds in proportion to the amounts due.

## II. Analysis

To construe ORS 351.379(3), we apply the interpretive method the Supreme Court first articulated in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993), and further refined in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). The task is to discern the intent of the legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). To discern legislative intent, courts first look to the text and context of the statute. *Id.* at 610-611, 859 P2d 1143. The court will also consider legislative history even if the text and context are not ambiguous, but will give it only the consideration the court deems appropriate. *State v. Gaines*, 346 Or at 171-72; ORS 174.020(1)(b).

### A. Text

We begin by examining the text, applying relevant rules for its construction. The legislature did not define the phrase *pari passu* for purposes of ORS 351.379(3). Courts generally give words of common usage their plain and ordinary meanings. *Zimmerman v. Allstate Property and Casualty Ins.*, 354 Or 271, 279-80, 311 P3d 497 (2013) (stating rule). But if a term has a well-defined legal meaning, courts will give it that meaning. *Dept of Transportation v. Stallcup*, 341 Or 93, 99, 138 P3d 9 (2006).

#### 1. Plain and ordinary meaning

*Pari passu* is a Latin phrase that translates as “equal step.” Buchheit & Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 Emory LJ 869, 871 (special ed 2004). A dictionary of common usage defines the phrase consistently with its Latin translation to mean “at an equal rate or pace: with identical and simultaneous progression.” WEBSTER’S THIRD NEW INT’L DICTIONARY at 1642 (2002 ed). Applying that definition in ORS 351.379(3), debt service payments for both state and revenue bonds would need to be made at an equal rate or pace. From a practical standpoint, it is not clear how such a matching of debt service payments is to be achieved. The timing of debt service payments on bonds already issued by the state is set out in the payment schedule. One plausible meaning of the *pari passu* requirement is that universities may not issue revenue bonds whose periodic debt service payments would substantially precede payments to the State of Oregon required under the schedule within a fiscal period.

#### 2. Legal meaning

Although *pari passu* is defined in a dictionary of common usage, we recognize that the phrase is not often used in the common parlance. Rather, it is most often used in a legal context. We next consider whether it has a well-defined legal meaning. A legal dictionary defines *pari passu* to mean “[p]roportionally; at an equal pace; without preference, <creditors of a bankrupt estate will receive distributions *pari passu* >.” BLACK’S LAW DICTIONARY at 1147 (8<sup>TH</sup> ed). The legal definition includes the concepts of proportionality and without preference. To pay two debts proportionally or without preference could mean that, in the event of insufficient funds to pay both debts, both must be paid in proportion to the amount owed.



In practice, the legal meaning of *pari passu* differs depending on the context in which it is used. Its use in the credit context began as a principle of bankruptcy law. The principle held that when a borrower went bankrupt and its assets were liquidated, creditors who ranked equally or “*pari passu*” stood on equal footing as to the distribution of assets. Chabot & Gulati, *Santa Anna and his Black Eagle: The Origins of Pari Passu*, 9(3) Capital Markets LJ 216 (2014).

In modern application, the phrase is used in two types of debt contracts: corporate international debt financing agreements and sovereign international debt financing agreements.<sup>2/</sup> In the corporate borrowing context, the *pari passu* clause is most often understood to mean that, upon the insolvency of the corporate borrower, unsecured creditors share in the assets pro-rata according to their pre-insolvency entitlements. Mokal, *Priority as Pathology: The Pari Passu Myth*, 60 Cambridge LJ 581 (2001).<sup>3/</sup> Because a university “is a governmental entity performing governmental functions and exercising governmental powers” and not a corporation whose assets may be liquidated in bankruptcy, this context is inapposite. ORS 352.033.

The meaning of a *pari passu* clause in the international financing agreements of sovereigns is less clear, because sovereigns are not subject to bankruptcy and asset liquidation by their creditors. *See, e.g.*, 53 Emory LJ at 874-75 (questioning the practical significance of use in contracts of sovereign borrowers who are not subject to bankruptcy); Philip R. Wood, PROJECT FINANCE, SUBORDINATED DEBT AND STATE LOANS at 165 (1995) (“[I]n the state context, the meaning of the clause is uncertain because there is no hierarchy of payments which is legally enforced under a bankruptcy regime.”).

Many commentators point out the anachronistic and ambiguous nature of the term in the sovereign debt context. *See, e.g.*, Buchheit, *The Pari Passu Clause Sub Specie Aeternitatis*, 10 Int’l Fin L Rev 11, 11 (1991) (“no one seems quite sure what the clause really means, at least in the context of a loan to a sovereign borrower.”); 9(3) Capital Market LJ at 216 (the *pari passu* clause “has become perhaps the most controversial and well known clause in international finance, while at the same time also being the least understood.”); 53 Emory LJ at 875 (although there “are good historical” reasons for use of the phrase, the common theme among modern commentators is a lack of “precise denotation” as to its modern meaning).

Until recently, commentators seemed to agree that the clause prohibited only actions that would change the legal ranking of a debt or earmark assets or revenue streams to the benefit of specific creditors. 53 Emory LJ at 876. Commentators had not suggested that the clause required a solvent sovereign creditor to pay equally-ranking debt “on a strictly lockstep basis.” *Id.* One court, however, recently held that the clause had the latter meaning as used in a particular contract. *NML Capital, Ltd. v. Republic of Argentina*, 699 F3d 246 (2<sup>nd</sup> Cir 2012). In reaching that conclusion, the court held that the meaning of a *pari passu* clause “in the sovereign debt context is far from ‘general, uniform and unvarying.’” *Id.* (quoting *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F3d 458, 466 (2<sup>nd</sup> Cir 2010) and citing numerous commentators that discussed the ambiguity and uncertain meaning of the phrase in this context.).

In short, the phrase *pari passu* does not have a well-established legal meaning in sovereign debt instruments. And, although universities are governmental entities, use of the phrase in sovereign international debt financing agreements does not shed a great deal of light on its use in an Oregon statute.

## B. Context

### 1. Other provisions of the same act

We next examine the context in which the legislature used the phrase. Context includes other provisions of the same act. *State v. Fitzhugh*, 260 Or App 401, 408, 317 P3d 371 (2013). We find ORS 351.374, which was enacted in the same act as ORS 351.379(3), to be particularly illuminating. Subsection 5(d) of that statute provides that revenue bonds:

- are not payable from any amounts a university is required to pay to the State Treasurer pursuant to the schedule described in ORS 351.379;
- may not be secured by a pledge of or lien on those amounts;
- may not be paid with any amounts that the State Treasurer requires universities to deposit to pay state obligations; and,
- may not be secured with a lien on any of those deposited amounts.

ORS 351.374(5)(d) does not contain any exceptions or qualifications. See *Con-Way, Inc. & Affiliates v. Dept. of Rev.*, 353 Or 616, 625, 302 P3d 804 (2013) (quoting *PGE v. Bureau of Labor and Industries*, 317 Or at 614, for the proposition that “[t]he legislature knows how to include qualifying language in a statute when it wants to do so.”).

ORS 351.379(3) would conflict with ORS 351.374(5)(d) if the former meant that universities were required to pay revenue bonds and state bonds pro rata from available funds in the event that the university had insufficient funds to pay both. The following example illustrates: (1) assume that a university has \$1,000,000 in funds available to pay debt service; (2) \$600,000 is due under the state debt payment schedule; and, (3) \$600,000 is due on revenue bonds. To pay scheduled state debt and revenue bonds proportionally from available revenue, the university would have to pay \$500,000 on the scheduled state debt and \$500,000 on revenue bond debt. The university would be required to divert \$100,000 in amounts required to pay the scheduled state debt to pay revenue bonds. We think it unlikely that the legislature intended to put universities in the position of having to violate ORS 351.374(5)(d) to satisfy ORS 351.379(3).

That conclusion is bolstered by other language in the sentence imposing the *pari passu* requirement. The sentence is made up of two conjoined clauses. The first clause requires universities to “pay the amounts specified in the schedule \* \* \* on or before the dates specified in the schedule from the legally available revenue of the university[.]” The first clause is joined to the *pari passu* clause by the conjunction “and.” “And” means “in addition to” or “together with.” WEBSTER’S at 80. Hence the legislature appears to have intended the *pari passu* requirement to be compatible with the requirement to timely pay the amounts due under the schedule rather than an exception to that requirement.



In addition, ORS 351.369(3) permits the State Treasurer to disapprove a university's issuance of revenue bonds if he determines that the university will have insufficient cash flow to both pay state bonds and revenue bonds. A university that does not obtain that approval and that issues revenue bonds is ineligible to receive proceeds of the state bonds described in that statute. In other words, the legislature intends state bonds to be paid in full even if that means that a university cannot issue revenue bonds. Read together, ORS 351.369(3), ORS 351.374(5)(d) and 351.379(3) demonstrate that the legislature intended to ensure full payment of state debt obligations. It is unlikely that the legislature intended the *pari passu* language to impose a requirement that would undermine the clear and consistent intent evident in those provisions.

## 2. ORS 353.330

There is one other potentially pertinent statute, ORS 353.330, which contains the phrase *pari passu*. ORS 353.330 is not a statute enacted in the same act as ORS 351.379(3), but it existed when ORS 351.379(3) was enacted and addresses a similar situation. We examine it for any light it may shed. See *State v. Thompson*, 166 Or App 370, 377-378, 998 P2d 762 (2000) (statute in a different chapter, while not controlling, may be examined to determine whether it sheds any light on the statute in question).

ORS 353.330 was enacted in 1995 when the Oregon Health and Science University (OHSU) separated from the state to become a public corporation. Or Laws 1995, ch 162, § 1. Like universities, OHSU had outstanding state debts issued when it was part of the state. The legislature also authorized OHSU to issue its own debt obligations upon separation from the state. ORS 353.340.

ORS 353.330 addresses the respective rights of holders of existing state debt obligations and debt obligations subsequently issued by OHSU. It provides that holders of OHSU-issued obligations "may be paid *pari passu*" with existing state obligations from university funds. But the state must be "granted a lien or other security interest" in those funds "that is not junior to and is at least *pari passu* with any other lien or other security interest granted" to holders of debt obligations issued by OHSU. ORS 353.330(2). In that context, it is clear that "paid *pari passu*" means paid equally in the sense of having an equal lien, security interest or right to payment from university funds with holders of state debt obligations.

But the text and context of that provision materially differ from the text and context of ORS 351.379(3) suggesting that the legislature intended different meanings. OHSU's statutory scheme differs in the following significant ways: (1) the State Treasurer is not required to establish a state debt payment schedule, but only to enter into a payment agreement with OHSU; (2) OHSU is not prohibited from paying for its bonds with any amounts required to pay scheduled state obligations; (3) nor is it prohibited from placing a lien on amounts required to pay scheduled state debt obligations; (4) the treasurer is not authorized to veto OHSU's issuance of bonds if it has insufficient revenue to pay state debt obligations; and, (5) OHSU is required to seek funds from the legislature if it has a shortfall in moneys to pay state debts, ORS 353.370. Nothing in that statutory scheme suggests that the legislature intended to prohibit OHSU from giving its bondholders and state bondholders an equal lien on its revenues. ORS 353.330 permits



OHSU to do just that. It does so directly in clear language expressly addressing the creation of equal liens. In other words, when the legislature intends to create lien parity it knows how to do so in unambiguous language.

In contrast, ORS 351.374(5)(d) expressly prohibits universities from paying revenue bonds with, or placing a lien on, any amounts required to pay scheduled state debt. Therefore, it is not surprising that ORS 351.379(3) does not include any language that would permit universities to place a “lien” on or create a “security interest” in those amounts. We conclude that the context and wording differences between ORS 353.330 and 351.379(3) suggest that the 2013 legislature intended *pari passu* to have a different meaning than the 1995 legislature intended in ORS 353.330.<sup>41</sup>

### C. Legislative history

Finally, we examined the legislative history surrounding the enactment of ORS 351.379. See *State v. Gaines*, 346 Or at 172 (explaining that a court may examine legislative history whether or not the text is ambiguous). We did not find any discussion of the *pari passu* requirement. We discovered that the *pari passu* requirement was not included in the bill drafts, but was added by Senate amendment to the A-engrossed version of SB 270 on July 1, 2013.

## CONCLUSION

Based on its text and context, we conclude that the *pari passu* language in ORS 351.379(3) does not require a university that experiences a revenue shortfall to pay scheduled state debt obligations and revenue bond obligations proportionally from available revenues. We base that conclusion in large part on the context provided by other provisions of the same act. Those provisions demonstrate the legislature’s clear and consistent intent that state debt obligations be paid in full. The context provided by ORS 351.375(5)(d), in particular, convinces us that the legislature did not intend the *pari passu* language to require universities to pay revenue bonds with any moneys required to pay scheduled state debt payments.

This conclusion is consistent with the rule of statutory construction that, in interpreting statutes, we must give effect, if possible, to all statutory provisions. See ORS 174.010 (in interpreting statutes courts should adopt a construction that will give effect to all provisions). We also note another potentially pertinent rule of statutory construction would support this conclusion. That rule provides that, if two provisions are inconsistent, a particular intent is paramount and controls over an inconsistent general intent. ORS 174.020. If the vague and ambiguous *pari passu* requirement in ORS 351.379(3) irreconcilably conflicted with the specific and unambiguous prohibition in ORS 351.374(5)(d), we would conclude that ORS 351.374(5)(d) expressed the legislature’s particular intent and controlled.

But the provisions need not be interpreted in a manner that makes them irreconcilably conflict. Both provisions may be given effect by interpreting the *pari passu* requirement to apply to the timing of payments rather than to create an equal lien on university revenues. Therefore, we interpret the *pari passu* language to require universities to time payments to the

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State Treasurer and revenue bond holders roughly equally within a fiscal period. That prohibits universities from achieving a *de facto* payment priority by substantially varying the dates of debt maturity. Although that interpretation presents some practical difficulties, it avoids a conflict with ORS 351.374(5)(d). The State Treasurer may want to seek clarity on this requirement from the legislature.

Sincerely,



Steven A. Wolf  
Chief Counsel  
General Counsel Division

SAW:naw/DM5718991

c: Amy Alapaugh, DOJ  
Cynthia Byrnes, DOJ  
Laura Lockwood-McCall, OST

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<sup>1/</sup> ORS 352.054 establishes governing boards for the University of Oregon, Portland State University, and Oregon State University. It permits Oregon's four other public universities to establish governing boards in the manner set forth in Or Laws 2013, ch 769, § 168a. All four of those universities have taken actions to establish their own governing boards. In this opinion, we refer to universities with governing boards simply as "universities."

<sup>2/</sup> These clauses do not often appear in domestic credit transactions, because U.S. law does not permit the involuntary legal subordination of an existing creditor. 53 Emory LJ at 873-74.

<sup>3/</sup> The effect of such a clause is not absolute, because bankruptcy statutes provide for a ladder of priorities between unsecured creditors. Allen & Overy, *The pari passu clause and the Argentine case*, Global Law Intelligence Unit at 7 (2012).

<sup>4/</sup> One other statute, ORS 286A.102, also uses the *pari passu* phrase. That statute, too, refers specifically to the creation of "liens" and applies only when a "state agency" places a lien on property that it is "authorized by law" to use "to secure obligations."