

March 17, 2021

**W. Michael Gillette**  
Admitted in Oregon  
T: 503-796-2927  
C: 503-317-2075  
wmgillette@schwabe.com

**MEMORANDUM OPINION**

RE: Proposed legislation creating a government agency to control drug prices

To Whom it May Concern:

I have been asked to express my opinion on the constitutional difficulties that might arise if either of two proposed legislative measures—HB 3267 or SB 844—were to be enacted by the 2021 Regular Legislative Session of the Oregon Legislature.<sup>1</sup> The understanding is that my opinion is not pre-ordained in any way: I may find potential constitutional or other issues, but I also may conclude that nothing in the measure implicates any possible constitutional problems. I am happy to express my opinion in those circumstances.

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<sup>1</sup> The actual wording of the two measures (as opposed to various labels and other formalities of presentation in their separate printed versions) appears to be exactly the same. I shall therefore use the term “the measure” to refer to either proposal or to both of them collectively throughout this opinion memorandum.

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The measure creates a new Oregon governmental entity denominated the “Prescription Drug Affordability Board,” which is made a part of the Oregon Department of Consumer and Business Services. Section 2 (1). In composition, the Board is a five-member body (with three alternates) whose members are appointed by the Governor with confirmation by the Senate. Members serve “at the pleasure of the Governor” for staggered three-year terms, and may be reappointed. Section 2 (2), (3), and (4); Section 12. The only check on the process is Senate confirmation; once its members are confirmed, the Board is the Governor’s creature. Based on my reading of the measure and my research, I wish to point out the following potential constitutional problem.

There is a question whether the operations of the Board, as presently envisioned, could run afoul of Oregon’s obligations under the Eighth Amendment toward certain individuals who are in state custody and suffer from serious health problems. Although that argument might not necessarily be valid in all circumstances, it appears to me that there is merit to it in this context.

The underlying principle is not debatable. The Eighth Amendment’s prohibition on cruel and unusual punishments, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, requires the states to give adequate medical care to prisoners in their custody. *See Estelle v. Gamble*, 429 US

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97, 104-05 (1976) (so holding). That principle is often recognized and applied by the Ninth Circuit Court of Appeals (whose geographical jurisdiction extends to Oregon), and is not subject to serious doubt. *See, e.g., Parsons v. Ryan*, 754 F3d 657 (9<sup>th</sup> Cir 2014); *Rawson v. Recovery Innovations, Inc.*, 975 F3d 742 (9<sup>th</sup> Cir 2020) (illustrating proposition). And, because the underlying rule is a federal constitutional one, Oregon has no choice but to obey it.

The foregoing constitutional principle collides with the proposed measure to the extent that the Board's decisions concerning certain drugs could dis-incentivize drug manufacturers from entering the Oregon market, leading Oregon to being unable to secure proper drug support for some prisoners' medical conditions. That collision between Oregon's federal constitutional obligation and its ability to meet that obligation seems inevitable over time, and it is not something that the Board can remedy or that the measure resolves. To the extent that the future can be predicted (and that is at least as possible with respect to this problem as the measure purports to allow for other predictions), the state faces the prospect of having the measure declared unconstitutional. (Something similar has already occurred in an Oregon Federal District Court ruling that the state's own Covid-19

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vaccination process was in violation of the Eighth Amendment because it failed to provide for early vaccination for incarcerated persons.)<sup>2</sup>

Based on the foregoing discussion, I conclude that the measure is vulnerable to constitutional challenge under the Eighth Amendment and that such a challenge, if made, might succeed.

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<sup>2</sup> The potential problem with incarcerated persons' rights is only the most vivid example of difficulties that can arise under the measure. To the extent that the state has become obligated to provide drug coverages to other groups, such as state retirees, a similar difficulty—one that could implicate the federal Contracts Clause—can arise.