

To: Attorney General Office  
From: Sarah Austin, Policy Analyst, Maine Center for Economic Policy  
Date: August 16, 2018  
RE: Homecare Ballot Initiative Language

The Maine Center for Economic Policy has decades of experience analyzing state tax policies and quantifying their distributional and revenue impacts for lawmakers, the media, and the public at-large. We are submitting comments to support the Attorney General's office in preparing voter materials for the homecare ballot initiative as it pertains to the tax provisions. We offer our view on the emerging discrepancies in legal interpretation between the Governor's Department of Administrative and Financial Services (DAFS) and nonpartisan independent analysis of the Office of Fiscal and Program Review (OFPR).

Our organization is not endorsing the proponent or opponent campaigns of the homecare ballot initiative. However, we have spent many hours reviewing the language and campaign materials and assessing the impacts of the proposal as they relate to taxes because the first-in-the-nation proposal would have significant revenue and distributional impact on our state's tax code.

Our analysis agrees with that of the proponent campaign, OFPR, and many individuals who submitted comments to the Secretary of State's office<sup>1</sup> that the tax language matches the clear intent of the measure to tax earned and unearned income that exceeds the individual social security threshold. We feel that it is important that voters are given clear information to decide the fate of this initiative.

OFPR has already released to the public a nonpartisan analysis of the ballot initiative which contains a clear description of the tax mechanism.

"For wage income, employers will pay 1.9% and employees will pay 1.9% (total of 3.8%). For nonwage income, individuals will pay 3.8% of Maine adjusted gross income above the threshold, reduced by a credit for whatever amount would have already been accounted for by the tax on wage income paid by both the employee and employer."

In this description, two things are key. First, OFPR makes very explicit that the 3.8% tax is only applied to "nonwage income" meaning that there is no scenario under which the 3.8% tax would tax wage income. They are also clear in their analysis that the tax applies to an individual's income above the threshold. This analysis was included on the petitions that more than 70,000 Mainers signed to qualify this initiative for the ballot and has been publicly available since October of 2017.

This June, the public had the opportunity to weigh in on the question language for this proposal. After taking the comments into consideration, the final question language from the Secretary of State's office still supports this interpretation.

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<sup>1</sup> The Maine Heritage Policy Center and many supporters submitted comments to the Secretary of State's office advocating for question language that detailed the tax as one that applied to "income earned over the threshold subject to social security employment tax." In this wording it is clear that the tax applies to income that is not subject to social security tax.

“Do you want to create the Universal Home Care Program to provide home-based assistance to people with disabilities and senior citizens, regardless of income, funded by a new 3.8% tax on individuals and families with Maine wage and adjusted gross income above the amount subject to Social Security taxes, which is \$128,400 in 2018?”

The inclusion of “family” helps clarify for the reader that the tax applies to a broader swath of income including rental, dividends, stocks, and bonds that may be shared between multiple members of a family unlike wage income that is attributed to only one person. The question then reinforces that the tax is designed to only tax the income that is not already subject to social security tax by clarifying that the tax applies to income “above the amount subject to social security tax.”

We have found that DAFS—using the analysis of Maine Revenue Services—has taken another interpretation which distorts the intent of the proposal, imposing an unintended tax and ignoring key portions of the law that make clear the mechanism under which the tax is collected. We believe the DAFS interpretation to be incorrect and advocate for the Attorney General office to present the proposal in line with the nonpartisan OFPR and the Office of the Secretary of State’s interpretation.

Under DAFS reading, the law would tax income already subject to social security tax. This is because they interpret the social security threshold to be applied to household Maine Adjusted Gross Income (MAGI), which could result in a two-income household with separate incomes under the individual threshold to pay the 3.8% tax on the portion of their combined income that exceeds the \$128,400 threshold when they file jointly.

But the context of the law through both the mechanism to tax income not taxed by social security and the mechanism through which the unearned income tax is clearly designed to mirror the tax on *individual* wages creates a much clearer reading of the bill that interprets MAGI as *individual* income.

The administration asserts that they are taking the most literal meaning of MAGI even though Maine statute allows for other interpretations to apply when the context of the bill depends on it. Title 36 §5102 provides that “[t]he following definitions shall apply throughout this Part, except as the context may otherwise require.”

Furthermore, courts often consider the legislative context and intent when the text of a law is ambiguous. In the administration’s effort to shoe horn their interpretation of MAGI into this bill, they acknowledge that the language “points in different directions,” and “contains a degree of ambiguity.” Their comments even acknowledge that there is “risk” that their interpretation would fail under judicial review and that courts often side with the reading that best reflects legislative intent when the text is unclear.

While we also agree that there is some ambiguity in a plain reading of the language, the context of the bill and the flexibility of the surrounding statute guides the reader to a clear and sensible interpretation. The tax portion of the bill is constructed in three parts designed to tax income not subject to social security tax, equalize the taxation of earned and unearned income, and avoid double taxation in the process.

The first section establishes an employer-paid payroll tax on wage and salary income above the social security threshold. The second section applies an employee-paid tax on wages above the social security tax threshold. Together these sections impose a 3.8% total tax on wage and salary income above the social security threshold that is paid for in equal shares by employee and employer. Like the social security tax, this tax is assessed at the individual level.

The third element of this law, §5204-D, works parallel to the prior two sections to establish a 3.8% tax on non-wage or salary income that exceeds an individual's social security threshold. It works by calculating the tax on all individual income over the social security threshold and then crediting any tax already paid through the payroll portion of the law. This sort of credit structure is already used in other tax applications to reconcile the way income is taxed across entities.

The federal Credit for Tax on Undistributed Capital Gains follows a similar structure. It allows a tax payer to take a credit for taxes on the portion of their capital gains that have been paid on the owner's behalf by another entity. Under this tax structure, a filer reports all their capital gains for the year, calculates their taxes owed, and then credits themselves for the taxes already paid that year by a third party. *This type of credit structure is used to avoid double taxation, not create the conditions for it.*

While the tax created by this initiative is innovative in concept, the actual mechanics through which the law works is not outside of tax policy already in use today. We believe the proposed law is easily interpreted to fulfill the proponent's intent and we urge the Attorney General's office to use this interpretation in the materials it prepares for voter education.