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Senator June Robinson, Chair  
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Senator Yasmin Trudeau, Vice Chair, Capital  
Senator Noel Frame, Vice Chair, Finance  
Senator Chris Gildon, Ranking Member, Operating  
Senator Nikki Torres, Assistant Ranking Member, Operating  
Senator Mark Schoesler, Ranking Member, Capital  
Senator Perry Dozier, Assistant Ranking Member, Capital  
Senate Ways & Means Committee  
Washington State Legislature

## Re: COST Opposes Retroactive Tax on Insurers – S.B. 5949

Dear Chair Robinson; Vice Chairs Stanford, Trudeau, and Frame; Ranking Members Gildon and Schoesler; Assistant Ranking Members Torres and Dozier; and Members of the Committee:

On behalf of the Council On State Taxation (COST), I respectfully submit this testimony opposing S.B. 5949's retroactive imposition of a tax.<sup>1</sup> Rather than fostering a positive environment for businesses to operate in Washington, this proposed legislation would penalize insurers that litigated and relied upon a Washington State Supreme Court decision supporting a taxpayer, and not the Washington Department of Revenue's (DOR), position on an exemption.<sup>2</sup> The proposed retroactivity violates several principles of sound tax policy – including transparency, fairness, economic neutrality, and competitiveness.

## About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of approximately 500 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. Many COST members have operations in Washington that would be negatively impacted by this proposed retroactive legislation.

<sup>1</sup> We take no position on this legislation if it only applies prospectively.

<sup>2</sup> See *Envolve Pharmacy Solutions, Inc. v. Department of Revenue*, 4 Wn.3d 142 (2024).

### **COST's Position on Retroactivity**

The COST Board of Directors adopted a formal policy statement opposing retroactive tax legislation. The relevant provision of this policy position is as follows:

*Legislation imposing new or increased tax liabilities attributable to prior periods is fundamentally unfair and in some cases unconstitutional and thus must be avoided. Under no circumstance should legislation imposing new or increased tax liabilities be applied to any periods beginning prior to the date the legislation was enacted. Retroactive legislation or administrative pronouncements that do not impose new or increased tax liabilities may be appropriate.<sup>3</sup>*

When a legislative body retroactively changes laws covering time periods for which liability for tax has already legally attached, questions about the stability, reliability, and fairness of the tax system inevitably arise. Taxpayers make significant financial decisions based on the current tax laws and those laws after decision from this State's Supreme Court should not be undermined by attempting to use retroactive legislation to change taxpayers tax liabilities after the fact. Additionally, retroactive changes often have negative consequences for a company's financial reporting.

The proposed retroactivity of S.B. 5949 to October 2, 2019, the date of an interim guidance statement<sup>4</sup> issued by the DOR, unfairly penalizes taxpayers that rejected that guidance as not following the State's tax law, a position affirmed by this State's Supreme Court that the DOR's guidance was not supported by law. Additionally, the retroactive application creates potential U.S. Constitutional issues.<sup>5</sup> There is an easy cure to address this retroactive issue, by simply removing subsections (5) and (6) of section (1) of S.B. 5949.

### **Administratively Burdensome for Affected Businesses**

The COST Board of Directors adopted a formal policy statement urging states to impose fair, efficient, and customer-focused tax administration:

*Fair, efficient and customer-focused tax administration is critical to the effectiveness of our voluntary system of tax compliance. A burdensome, unfair, or otherwise biased administrative system negatively impacts tax compliance and hinders economic competitiveness.<sup>6</sup>*

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<sup>3</sup> COST policy position against “Retroactive Tax Legislation” is available at: <https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/retroactivetaxlegislation.pdf>.

<sup>4</sup> Available at: <https://dor.wa.gov/interim-guidance-statement-regarding-application-insurance-business-exemption>

<sup>5</sup> See *United States v. Carlton*, 512 U.S. 26 (1994), where the U.S. Supreme Court held only a modest period of retroactivity is allowed to not be struck down under the U.S. Constitution's Due Process Clause. Retroactive legislation back to 2019 is not modest. Importantly, only the U.S. Supreme Court can overturn its prior precedents, not lower courts, including the Washington Supreme Court. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

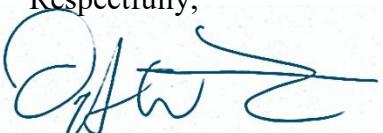
<sup>6</sup> COST policy position on “Fair, Efficient, and Customer Focused Tax Administration” is available at: <http://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/fair-efficient-and-customer-focused-tax-administration---revised-feb-2024---final.pdf>.

The proposed retroactive tax provisions in S.B. 5949 violate this policy position because it is a burdensome tax that will impose financial burdens on taxpayers that correctly relied upon the original 1935 exemption, affirmed by this State's Supreme Court. The DOR's guidance was merely interim guidance and did not go through formal rule making procedures for public comment. The DOR's invalid guidance has already required taxpayers to go through expensive and protracted litigation, and the proposed retroactivity of S.B. 5949 will only lead to more of the same. This does not create a positive business environment for the State.

### **Conclusion**

For the foregoing reasons, COST strongly urges members of the Committee to reject the provisions of S.B. 5949 that are retroactive.

Respectfully,



Dylan B. Waits

cc: COST Board of Directors  
Patrick J. Reynolds, COST President & Executive Director