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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 26, 2015

Joint Committee on Implementing Measure 91
c/o Adam Crawford, Committee Administrator
900 Court Street NE HR-B
Salem, OR 97301

Re: State agency collection of revenue from marijuana industry

Dear Co-chairs Burdick and Lininger and members of the committee:

You asked two questions relating to the collection by a state agency of revenue that stems from the marijuana industry. First, you asked for an overview of the relationship between the state agency, the State Treasury and a private commercial bank and how they are linked to the federal banking system. Second, you asked whether the agency collection of this revenue under the state comprehensive regulatory framework violates the federal Controlled Substances Act (CSA), 21 U.S.C. 801 et seq., or federal anti-money laundering laws.

I. Relationship between state agencies, State Treasury, banks and federal banking regulations

Before addressing the collection and deposit of revenue that stems from the marijuana industry, we first discuss the relationship between state agencies, the State Treasury and private commercial banks for purposes of the general collection of revenue.

The State Treasurer acts as the banking and cash management officer for the state agencies.[1] In a way, the Treasury serves as the bank for the state agencies. However, this differs from being a centralized state bank, which is prohibited by the Oregon Constitution.[2] For instance, the Treasurer does not make, purchase or hold loans of private funds. Rather, the State Treasurer serves as a depository of public funds and makes loans to public bodies.[3] Unlike private commercial banks, the activities of the Treasury are neither administered by the Department of Consumer and Business Services[4] nor regulated by the Federal Reserve, and the Treasury is not an "insured institution" the deposits of which are insured under the provisions of the FDIC.[5]

As outlined in the *Oregon State Treasury Cash Management Manual*, when a state agency receives moneys, the agency deposits the moneys at various private commercial banks around the state with which the Treasury has established bank accounts.[6] In other words, when this agency

[1] ORS 293.875.
[2] Article XI, section 1, Oregon Constitution; *see also* ORS 706.008, defining "bank" as a "company . . . that accepts deposits insured to any extent by the Bank Insurance Fund under the provisions of the Federal Deposit Insurance Act. . . ."
[3] ORS 295.001 to 295.108.
[4] *See* ORS 705.610 and 708A.010.
[5] ORS 706.008 (13).
[6] http://www.oregon.gov/treasury/Divisions/Finance/StateAgencies/Pages/Cash-Management-Manual.aspx (visited May 19, 2015), *Oregon State Treasury Cash Management Manual,* at 4.

deposit transaction occurs, the agency is actually depositing into the Treasurer's account; the Treasury is the bank's customer and the owner of the account, and the agency is an agent of the Treasury. Generally, moneys received from tax revenues are directed to the General Fund of the State Treasury.[7] Additionally, the General Fund may hold moneys received from federal funding[8] on which certain conditions are placed.[9] Similar to other funds that are deposited by an agency, the funds that are assigned to the General Fund are deposited into the Treasury account held at the private commercial bank. Through an internal process, the Treasury prepares the accounting necessary for tracking and distribution of funds into separate accounts.

It is important to note that the private commercial banks with which the State Treasury may hold an account fall under the scope of federal banking system regulations for activities such as electronic funds transfers, check processing, insuring deposits and disbursing moneys.[10] However, when an agency writes a check, it is not drawn on the bank; rather, the item is drawn on the Treasury. While the Treasury has its own unique routing number that is recognized by the Federal Reserve System for the purposes of check processing and clearing, the actual processing still operates through the commercial banking partner.

II. Collection of marijuana funds

It is our belief that the state's collection of revenue from marijuana-related industry sources is permissible and does not run afoul of the CSA or federal anti-money laundering laws. Marijuana remains illegal under federal law. Nevertheless, those individuals who earn revenue from engaging in marijuana-related businesses are required to comply with federal tax laws. For the purposes of income tax, it does not matter that the source from which the revenue is derived is illegal.[11] The Internal Revenue Service may still tax and collect on this revenue. Similarly, under the principle of state sovereignty, the Legislative Assembly may establish a system to regulate and tax in-state marijuana-related activity as a valid exercise of the state's police power.[12] In further exercise of its authority, the State of Oregon may delegate to a state agency the administration of the tax system and the collection of taxes and registration fees.[13] When a state agency collects revenue that stems from the marijuana industry, the revenue collection will be conducted pursuant to statutes and administrative rules that authorize the collection from marijuana-related industry sources.

[7] ORS 293.105; *see also* ORS 453.412, "All moneys received by the Department of Revenue under ORS 453.396 to 453.414 shall be deposited in the State Treasury. . . ."
[8] Federal funds are revenues that the federal government has legally dedicated to specific programs and services, and the federal government may limit the state's choices about where and how to spend these moneys.
[9] ORS 293.167, defining "restricted funds" as funds in the General Fund whose use is restricted to particular purposes by . . . federal law.
[10] *See* ORS 708A.405, requiring Oregon commercial banks to secure insurance for their deposits from the Federal Deposit Insurance Corporation (FDIC); *see also Oregon State Treasury Cash Management Manual,* at 3-4.
[11] Section 61 of the Internal Revenue Code defining "gross income"; *see also James v. United States,* 366 U.S. 213, 218-220 (1961). Generally, income from any source is subject to federal taxation; this is true even when the activity that generates the income is unlawful.
[12] *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2578 (2012). "The Constitution may restrict state governments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the 'police power.'"
[13] *See Meyer v. Lord,* 37 Or. App. 59, 64-65 (1978); *see also Warren v. Marion County*, 222 Or. 307, 314 (1960).

Money laundering is "the act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced."[14] As noted above, moneys generally are deposited into the General Fund of the State Treasury, and the Treasury implements an accounting process that provides for the sorting and tracking of funds. Ballot Measure 91 (chapter 1, Oregon Laws 2015) established the Oregon Marijuana Account as part of the state's regulatory scheme. We point out that this account is separate and distinct from the General Fund.[15] In all cases, revenues related to Ballot Measure 91 will not be deposited in the General Fund nor spent for the general governmental purposes of the state. This separate accounting is significant because it eliminates the potential for commingling of federal funds received by the state with funds received from state-regulated marijuana activity. It is also significant in the event that the agency distributes refunds to individuals where the moneys may include funds from the marijuana industry.[16]

Federal anti-money laundering laws involve the flow of resources to and from crimes.[17] Yet, state agency collection and deposit of revenue related to the marijuana industry is ongoing. For example, under the Oregon Medical Marijuana Act, the Oregon Health Authority collects registration fees that are used to support the Oregon Medical Marijuana Program.[18] Likewise, the Colorado Department of Revenue, through its Marijuana Enforcement Division, administers the collection and deposit of revenue that stems from the marijuana industry.[19]

In response to the growing number of state-legalization initiatives, the United States Department of the Treasury has issued clarification regarding financial services that are provided to businesses and individuals engaged in state-regulated marijuana-related activity. The U.S. Treasury's Financial Crimes Enforcement Network (FinCEN) issued a memorandum with respect to a financial institution's obligations under the Bank Secrecy Act and the form and manner in which a financial institution may provide services to marijuana-related businesses (BSA Expectations Memorandum, or BSA Memo).[20] This memorandum[21] provides an anti-money laundering compliance program that sets forth procedures for financial institutions to follow in providing services to marijuana-related businesses. Specifically, the BSA Memo instructs financial institutions to assess the risk of providing financial services in the following ways:

- Verify that the business is registered or licensed by the state.
- Review the application that the business submitted to the state for registration or licensure.
- Request from the state licensing authority any available information about the business and related parties.
- Develop an understanding of the normal and expected activity for the business, including the types of products to be sold and the types of customers to be served.

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[14] *Black's Law Dictionary*, 1159 (10th ed., 2014).

[15] ORS 293.880. Having the Oregon Marijuana Account be separate from the General Fund is, in part, to ensure that marijuana revenues are not refunded to personal income taxpayers through the "kicker" tax refund mechanism. *See* Article IX, section 14, of the Oregon Constitution.

[16] Sections 34 and 43, chapter 1, Oregon Laws 2015. Authorizes refunds for any tax payment imposed upon or paid in error by a licensee and for moneys received in excess of the amount due.

[17] 18 U.S.C. 1956(a)(1)(A)(i) and (B).

[18] ORS 475.300 to 475.346 and OAR 333-008-0020. The Oregon Medical Marijuana Program was created in 1999 to administer the registration program under the Oregon Medical Marijuana Act.

[19] *See* https://www.colorado.gov/pacific/enforcement/marijuanaenforcement.

[20] http://www.fincen.gov/ (visited May 20, 2015). "FinCEN's mission is to safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities."

[21] http://www.fincen.gov/statutes_regs/guidance/html/FIN-2014-G001.html (visited May 26, 2015), United States Department of the Treasury, Financial Crimes Enforcement Network, BSA [Bank Secrecy Act] Expectations Regarding Marijuana-Related Businesses (February 14, 2014).

- Monitor publicly available information about the business and related parties.
- Update all information related to the business on a periodic basis.[22]

Although the BSA Memo does not directly involve the governance of marijuana-related businesses, it addresses the managing of industry funds by private commercial banks, and it can be vital in ensuring the success of any state program that regulates the marijuana industry. In fact, the state regulatory framework is consistent with and incorporates many of the same risk assessment recommendations the BSA Memo provides for financial institutions. For instance, under the state's comprehensive regulatory framework, a state agency is responsible for the oversight and implementation of the system established for the issuance, renewal, suspension and revocation of licenses and the schedule for licensing and renewal fees and taxes. Thus, we conclude that the state regulatory framework safeguards rather than frustrates federal priorities to prevent money laundering.

Finally, we note that a provision in the Controlled Substances Act provides immunity for all state law enforcement officers engaged in the enforcement of any state or municipal law relating to controlled substances.[23] Therefore, it is arguable that a state agency that acts pursuant to the state regulation of marijuana-related activity falls within the scope of CSA immunity.

In light of the BSA Memo and the considerations discussed above, we conclude that a state agency that acts pursuant to state law in the collection of revenue that stems from the marijuana industry does not violate the CSA, federal banking regulations or federal anti-money laundering laws.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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[22] *Id*.
[23] 21 U.S.C. 885(d); *see also State v. Kama*, 178 Or. App. 561 (2002).