



STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

December 23, 2015

Senator Peter Courtney  
President of the Senate  
900 Court Street NE S201  
Salem OR 97301

Re: Authority of OHSU and public universities to invest moneys and enter into various agreements

Dear President Courtney:

You asked several questions regarding the ability of Oregon Health and Science University (OHSU) and the public universities (PUs) to enter into various agreements and investments. The answers to your questions require analysis of both statute and the Oregon Constitution.

In the Statutory Analysis section of this opinion, we find that OHSU and the PUs have extensive statutory authority to make loans and investments. In the Constitutional Analysis section, we examine whether the statutory authority granted to OHSU and the PUs to invest in stocks violates Article XI, section 6, of the Oregon Constitution. While some uncertainty exists, we conclude that there is likely no constitutional violation.

**STATUTORY ANALYSIS**

**Question 1: Do OHSU or the PUs have statutory authority to enter into surplus notes or to make loans to private companies?**

OHSU and the PUs have the statutory authority to enter into surplus notes and to make loans to private companies.

ORS 353.050 (3) grants OHSU the statutory authority to, among other things, “[m]ake any and all contracts and agreements, enter into any partnership, joint venture or other business arrangement, [and] create and participate fully in the operation of any business structure[.]” Similarly, ORS 353.050 (7) grants OHSU the statutory authority to “[a]cquire, receive, hold, keep, pledge, control, convey, manage, use, lend, expend and invest all funds, appropriations, gifts, bequests, stock and revenue from any source[.]”

ORS 352.087 grants the PUs nearly identical statutory authority. Subsection (1)(c) permits the PUs to, among other things, “[m]ake any and all contracts and agreements, enter into any partnership, joint venture or other business arrangement and create and participate fully in the operation of any business structure[.]” Similarly, subsection (1)(a) grants the PUs the statutory authority to “[a]cquire, receive, hold, keep, pledge, control, convey, manage, use, lend,

expend and invest all moneys, appropriations, gifts, bequests, stock and revenue from any source.”

**Question 2: Do OHSU and the PUs have statutory authority to invest in financial instruments such as stocks, bonds, real estate and private equities?**

As noted, ORS 353.050 (3) and (7) and 352.087 (1) grant OHSU and the PUs the respective statutory authority to invest moneys in any manner they see fit, including investments in stocks, bonds, real estate and private equities. This general authority to invest moneys is supplemented throughout statute.<sup>1</sup> In particular, ORS 353.050 (19) grants OHSU, and ORS 352.087 (1)(e) grants the PUs, the specific right to invest in stocks.

**Question 3: Are there statutory limitations or reporting requirements regarding the ability of OHSU and the PUs to make such investments?**

While statute generally permits OHSU and the PUs to make any type of loan or investment, there are limited exceptions and reporting requirements. With respect to OHSU, legal title to all real property and facilities acquired by the State of Oregon for OHSU before OHSU became a public corporation remain owned by the State of Oregon.<sup>2</sup> OHSU also must file an annual “report of the university’s activities and operations for the preceding year” with the Legislative Assembly and other governmental entities.<sup>3</sup> Finally, OHSU’s budget must be prepared “in accordance with generally accepted accounting principles[.]”<sup>4</sup>

In contrast to OHSU, all real property held by the PUs, including property acquired after the formation of a governing board, remains the property of the State of Oregon.<sup>5</sup> In addition, the Higher Education Coordinating Commission evaluates each PU in an annual report to the Legislative Assembly, which may include the commission’s recommendations “regarding the ability of the university to meet academic goals and fulfill its fiduciary responsibilities.”<sup>6</sup>

**Question 4: Is the State of Oregon at risk if loans made by OHSU or the PUs are not repaid, or if investments are not successful?**

The State of Oregon is not at direct risk if loans or investments that are made by OHSU or the PUs result in financial losses. The only way for OHSU or the PUs to bind the State of Oregon is through the issuance of general obligation bonds, which may not be issued without the consent and involvement of the Legislative Assembly and the State Treasurer. In contrast, OHSU and the PUs may issue revenue bonds, which are not obligations of the State of

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<sup>1</sup> See, e.g., ORS 353.050 (4) (authorizing OHSU to invest in “real and personal property of any nature, including intellectual property, in its own name); 353.050 (6) (authorizing OHSU to invest any gifts given to the university); 353.050 (9) (authorizing OHSU to construct and improve buildings and structures for the university); 353.050 (23) (authorizing OHSU to enter into “affiliation, cooperation, territorial, management or other similar agreements” for health care delivery systems); 352.087 (1)(f) (authorizing PUs to invest in “personal property, including intellectual property, of any nature, tangible or intangible”); 352.087 (1)(h) (authorizing PUs to hold security interests on real and personal property); 352.087 (1)(i) (authorizing PUs to spend all available moneys without appropriation or expenditure limitation approval from the Legislative Assembly, other than those received pursuant to a funding request); 352.087 (1)(j) (authorizing PUs to invest in real property); 352.135 (1)(b) (stating that all unobligated moneys received after a governing board is formed may be invested by the PU).

<sup>2</sup> ORS 353.108.

<sup>3</sup> ORS 353.080.

<sup>4</sup> ORS 353.140 (2).

<sup>5</sup> ORS 352.025 (2)(c), 352.113.

<sup>6</sup> ORS 352.061.

Oregon.<sup>7</sup> Finally, the State Treasurer has the authority, at the State Treasurer's discretion, to require a PU to enter into a written agreement that "provides for the State Treasurer to receive, hold, keep, manage and invest 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[.]"<sup>8</sup>

Please note that while the State of Oregon is not legally obligated to reimburse any financial losses suffered by OHSU or the PUs as a result of unsuccessful loans or investments, the Legislative Assembly would likely be asked to do so.

## **CONSTITUTIONAL ANALYSIS**

### **Question 5: Does the investment authority granted to OHSU and the PUs violate the Oregon Constitution?**

While some uncertainty exists, we believe that the answer is no.

#### **Constitutional Issue**

Article XI, section 6, of the Oregon Constitution, states in relevant part that the "state" may not own shares in a company:

(1) The state shall not subscribed to, or be interested in the stock of any company, association or corporation.

By its terms, this provision has no effect on most of the loans or investments that may be made by OHSU or the PUs. It prohibits the State of Oregon only from investing in stocks and does not specify any other entity or investment vehicle.<sup>9</sup> However, as detailed above, both OHSU<sup>10</sup> and the PUs<sup>11</sup> have explicit statutory authority to invest in corporate stocks. The question thus becomes whether this statutory authority was granted to OHSU and the PUs in violation of Article XI, section 6, of the Oregon Constitution.

#### **Background and Current Legal Status of OHSU and the PUs**

The relevant history, legal relationship and current legal status of OHSU and the PUs with the State of Oregon are nearly identical. Therefore, we believe the following Article XI, section 6, analysis applies equally to OHSU and to the PUs.

#### ***OHSU***

Prior to 1995, both OHSU and the PUs were part of the State System of Higher Education and were governed by the State Board of Higher Education. In 1995, OHSU left the State System of Higher Education and became a public corporation, allowing OHSU to operate

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<sup>7</sup> ORS 353.340, 352.388 (8), 352.408 (5)(b).

<sup>8</sup> ORS 352.135 (2).

<sup>9</sup> In this regard, the Attorney General has specifically stated that the state may invest in, for example, corporate bonds (45 Op. Att'y Gen. 27, 34 (1985); 1986 Ore. AG LEXIS 106, p. 18); guaranteed investment contracts (43 Op. Att'y Gen. 186, 189 (1983); 45 Op. Att'y Gen. 27, 34; 1986 Ore. AG LEXIS 106, p. 18); and royalty agreements (1986 Ore. AG LEXIS 106, p. 18).

<sup>10</sup> ORS 353.050 (7), (19).

<sup>11</sup> ORS 352.087 (1)(a), (1)(e).

as part of the state in some respects and as an independent entity in others.<sup>12</sup> As explained in ORS 353.020:

Oregon Health and Science University is established as a public corporation and shall exercise and carry out all powers, rights and privileges that are expressly conferred upon it, are implied by law or are incident to such powers. The university shall be a governmental entity performing governmental functions and exercising governmental powers. The university shall be an independent public corporation with statewide purposes and missions and without territorial boundaries. The university shall be a governmental entity but shall not be considered a unit of local or municipal government or a state agency for purposes of state statutes or constitutional provisions.

The public purpose of OHSU as a public corporation,<sup>13</sup> as well as the specific laws that apply and do not apply to OHSU,<sup>14</sup> are further set out in statute.

#### *PUs*

In 2001,<sup>15</sup> the State System of Higher Education was replaced with the Oregon University System. In 2013<sup>16</sup> and 2015,<sup>17</sup> the remaining seven public universities were given independent governing boards, and the Oregon University System and the State Board of Higher Education were abolished. While not public corporations, the newly independent public universities similarly operate as part of the state in some respects and as independent entities in others. As explained in ORS 352.033:

A university with a governing board is a governmental entity performing governmental functions and exercising governmental powers. A university with a governing board is not considered a unit of local or municipal government or a state agency, board, commission or institution for purposes of state statutes or constitutional provisions.

The public mission and purpose of the PUs,<sup>18</sup> as well as the specific laws that apply and do not apply to the PUs,<sup>19</sup> are further set out in statute.

#### OHSU and the PUs Are Instrumentalities of the State

We understand from the materials you provided to us<sup>20</sup> that the Oregon Commission on Judicial Fitness and Disability (Commission on Judicial Fitness) recently concluded that even with an independent governing board, Portland State University remains an “instrumentality of

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<sup>12</sup> Chapter 162, Oregon Laws 1995.

<sup>13</sup> ORS 353.030.

<sup>14</sup> ORS 353.100.

<sup>15</sup> Sections 1 and 2, chapter 382, Oregon Laws 2001.

<sup>16</sup> Chapter 768, Oregon Laws 2013.

<sup>17</sup> Chapter 767, Oregon Laws 2015.

<sup>18</sup> ORS 352.039.

<sup>19</sup> ORS 352.138.

<sup>20</sup> As specific complaints filed with the Commission on Judicial Fitness are confidential, we are unable to fully analyze or comment on any opinion issued by the commission. See <http://courts.oregon.gov/cjfd/Pages/index.aspx> (visited December 22, 2015).

the state” and that, as a consequence, an individual may not serve simultaneously as a member of the governing board of the university and as a “Plan B” judge without violating Article III, section 1, of the Oregon Constitution (separation of powers).

The information you provided further claims that the commission reached its decision based on the test set forth in *Clarke v. Oregon Health Sciences University*.<sup>21</sup> In this case the court held that OHSU was an “instrumentality of the state” that would be entitled to sovereign immunity under common law, as it (1) performs state functions, and (2) has such powers and duties only as the state entrusts to it, and these powers and duties are set forth in statute.<sup>22</sup>

We agree with the Commission on Judicial Fitness that the PUs, like OHSU, must be considered instrumentalities of the state. We similarly conclude that an individual may not serve simultaneously on the OHSU Board of Directors, or on the board of trustees of a PU, and as, for example, a state judge or a member of the Legislative Assembly. However, this is not the entirety of the analysis.

#### Article XI, Section 6, Analysis

As noted earlier, OHSU and the newly independent PUs are created by statute to be part of the state in some instances and independent from the state in others. The ability of public corporations such as OHSU to be considered as part of the state for certain constitutional provisions and as independent from the state for others has been recognized by Oregon courts. As explained by the Court of Appeals after a review of several Supreme Court cases involving the State Accident Insurance Fund Corporation (SAIF), a similarly situated public corporation:

[T]hose cases reveal a tendency of the court to treat SAIF as the state for some purposes, but not for others. In *Eckles*, for example, the court concluded that, for purposes of Article I, section 20, SAIF is a state entity. 306 Ore. at 387. Later in the opinion, however, the court concluded that, for purposes of Article I, section 21, a contract with SAIF is not a contract with the state. *Id.* at 389.

Perhaps the best approach at this juncture is to recall Justice Linde’s caution in *Woolley* that judicial characterizations of an entity “made in one context are inconclusive on substantially different issues arising in the context of different laws.” *Woolley*, 302 Ore. at 45. In a similar vein, we recall the conclusion of the United States Supreme Court in *Regents of the University of California* that not all state entities are an “arm of the state” for purposes of the Eleventh Amendment. 519 U.S. at 429-30. . . . [I]n summary, what the foregoing account demonstrates is that for some purposes SAIF is treated as an arm of the state, and for some purposes it is not.<sup>23</sup>

There are relatively few cases interpreting Article XI, section 6, of the Oregon Constitution. The seminal case is *Sprague v. Straub*, in which the Supreme Court analyzed

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<sup>21</sup> *Clarke v. Oregon Health Sciences University*, 343 Or. 581 (2007).

<sup>22</sup> *Clarke*, 343 Or. at 600.

<sup>23</sup> *Johnson v. SAIF Corp.*, 202 Or. App. 264, 292-293 (2005).

whether moneys in the Industrial Accident Fund (IAF) and the Public Employees' Retirement Fund (PERF) could be invested in corporate stocks without violating Article XI, section 6. The court first held, "not without difficulty," that Article XI, section 6, constitutes a general prohibition against the purchase of corporate stocks by the State of Oregon.<sup>24</sup> However, the court also found that both the IAF and the PERF were trust funds and that the state had no proprietary interest in the moneys in the funds. For that reason, the court held that corporate stocks purchased with moneys in those funds would not violate Article XI, section 6, because the stocks would not be owned by the state.<sup>25</sup>

The key rationale for the court's determinations in *Sprague* is that Article XI, section 6, applies only when the state has actual ownership of the stocks in question.<sup>26</sup> In reaching this holding, the *Sprague* court further held that:

We find nothing in the history of the various constitutional provisions in Oregon and elsewhere relating to the investment of state funds or the pledging of the state's credit indicating a concern for any losses other than those which would result in a diminution of state-owned assets. The fact that the fund which the state holds is administered as a part of a law which affects the public at large is not enough to make the fund "public" and thus entitle it to protection.<sup>27</sup>

We believe that a court would most likely apply the rationale used in *Sprague* to conclude that the investment of moneys by OHSU and the PUs does not violate Article XI, section 6. The primary reason is that statute is explicit that the State of Oregon has no "proprietary or other interest" in any moneys invested in stocks by OHSU or the PUs.<sup>28</sup> The use of this statutory language is not accidental. Rather, it comes directly from the *Sprague* court's opinion, which cited similar language declaring that the State of Oregon "has no proprietary interest in the Industrial Accident Fund or in the contributions made to the fund by the state prior to June 4, 1929" in reaching its holding that the IAF is "'a trust fund', which the State Treasurer holds only as a 'custodian' and that the state 'has no interest' in it."<sup>29</sup>

This is not to say that these words, by themselves, are sufficient to distance the state from the investments. In particular, the *Sprague* court was clear that its holding did not mean "that Article XI, § 6 can be circumvented simply by the transfer of state moneys to a trustee who

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<sup>24</sup> *Sprague v. Straub*, 252 Or. 507, 518 (1969).

<sup>25</sup> *Sprague*, 252 Or. at 519. The Oregon Supreme Court has further limited the scope of Article XI, section 6, by finding that this prohibition, and the identically construed prohibition on local governments found in Article XI, section 9, do not extend to instances where the state uses revenue bond moneys to acquire and jointly operate an enterprise with a private corporation, or to the creation of a statutory entity in which government entities receive proportionate benefits in exchange for specified financial obligations, but do not actually hold stock. See *Miles v. City of Eugene*, 252 Or. 528, 537 (1969); *DeFazio v. WPPSS*, 296 Or. 550, 577 (1984).

<sup>26</sup> *Sprague*, 252 Or. at 524 ("We are of the opinion that the people intended the prohibition in Article XI, § 6 to apply only to funds owned by the state and not to funds which the state has expended and for which the state has received a quid pro quo, as it does when it receives coverage for its employees through its contributions as an employer to these funds.").

<sup>27</sup> *Sprague*, 252 Or. at 523.

<sup>28</sup> ORS 353.050 (19) (stating with respect to investments in stocks made by OHSU that "[t]he State of Oregon shall have no proprietary or other interest in such investments or such funds."); ORS 352.087 (1)(e) (stating with respect to investments in stocks made by the PUs that "[t]he State of Oregon may not have any proprietary or other interest in investments or funds referenced in this paragraph.").

<sup>29</sup> *Sprague*, 252 Or. at 518-521 (citing ORS 656.634).

is granted the power to invest in corporate stocks” unless the state truly has “no beneficial ownership of any part of these funds.”<sup>30</sup>

That said, it appears that the State of Oregon does not own the moneys that OHSU or the PUs invest in stocks as, in addition to the statutory law to this effect, the significant majority of moneys received by these entities comes from private sources such as tuition and philanthropic gifts and donations, rather than from the state, tax revenues or the General Fund. Moreover, neither OHSU nor the PUs are accountable to the state for any of the moneys they receive, apart from legislative appropriations.<sup>31</sup> Similarly, under current law, the state has no ability to claim any moneys invested by OHSU or the PUs to pay off state debts or obligations. Finally, no constitutional provision or statute makes the state involuntarily liable for the debts or obligations of OHSU or the PUs.<sup>32</sup>

Given this analysis, the position of OHSU and the PUs seems comparable to the description that the *Sprague* court gave to the State Board of Agriculture, which the court confirmed should be treated identically to IAF with respect to Article XI, section 6, noting that the board “is a corporation, but is not a branch of the state government, nor for the administration of state affairs. It is not accountable to the state for moneys received by it in entries, gate money, or license fees, or any of its receipts except the legislative appropriation.”<sup>33</sup> It also seems appropriate to claim that the moneys invested by OHSU and the PUs “have been gathered not for the general enrichment of the state” but rather for the benefit of the institutions and their students.<sup>34</sup>

## **SUMMARY**

We believe it likely that a court would determine that neither OHSU nor the PUs violate Article XI, section 6, when they invest moneys in the stock of private companies. Despite this belief, it remains possible that a court would disagree with our analysis and hold that OHSU and the PUs remain too closely connected with the State of Oregon to be permitted to invest in stocks. In this regard, a 1952 opinion by the Attorney General specifically determined that the State Board of Higher Education could not exercise its statutory authority to invest in stocks, as the board was a state agency and thus subject to the limitations of Article XI, section 6.<sup>35</sup> It remains possible that a court would determine that just as the restructured and independent OHSU and the PUs remain instrumentalities of the state for separation of powers purposes under Article III, section 1, they also remain part of the state for purposes of Article XI, section 6. However, for the reasons detailed above, we believe that this outcome is unlikely.

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<sup>30</sup> *Sprague*, 252 Or. at 524-525.

<sup>31</sup> See also *DeFazio v. WPPSS*, 296 Or. 550, 575-579 (1984) (analyzing Article XI, section 9, which bans local governments from owning stocks and has been held to be identical in this respect to the prohibition on the state owning stocks in Article XI, section 6. The court found that “[w]hen government engages in public services or activities that generate revenues other than taxes, this court’s past decisions have let government commit those revenues to financing its own projects or to support desired private projects, though of course it remains in the power of state and local lawmakers to provide otherwise.”).

<sup>32</sup> In this regard, we note that the law makes a distinction between situations in which the Legislative Assembly “might think it advisable to reimburse” OHSU or the PUs for any losses incurred in stock investments and situations where “a loss resulting from the investment . . . in corporate stock could affect the financial interest of the state” because the state would be “legally obliged to do so”. See *Sprague*, 252 Or. at 524.

<sup>33</sup> *Sprague*, 252 Or. at 521 (citing *Tongue v. State Board of Agriculture*, 55 Or. 61 (1909)).

<sup>34</sup> See *Sprague*, 252 Or. at 522.

<sup>35</sup> 26 Op. Att’y Gen. 15 (1952).

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Very truly yours,

DEXTER A. JOHNSON  
Legislative Counsel

A handwritten signature in black ink that reads "Daniel R. Gilbert". The signature is written in a cursive style with a large initial "D" and "G".

By  
Daniel R. Gilbert  
Deputy Legislative Counsel