

February 15, 2021

Senator Ginny Burdick, Chair  
Senator Brian Boquist, Vice-Chair  
Oregon State Legislature  
Senate Committee on Finance and Revenue

**VIA E-MAIL**

**Re: -1 Amendment to Senate Bill 312**

Dear Chair Burdick, Vice-Chair Boquist and Committee Members:

I am writing today to follow up on my initial letter dated February 10<sup>th</sup> on S.B. 312, which is attached as Exhibit A. This letter provides additional technical guidance related to the implementation of the -1 amendment to S.B. 312 (S.B. 132-1), which if enacted would require the Secretary of State to make taxpayer information available to the public on the internet.

This amendment does not rectify any of the legal issues outlined in my initial letter and oral testimony. Thus, Oregon would face the risk of litigation if S.B. 312-1 were enacted as the legislation still appears to violate federal law in addition to raising concerns under both the U.S. and Oregon Constitutions.

**Federal Law Violations**

S.B. 312-1 does not address the violations of federal law set forth in my initial letter and expressed during my oral testimony on February 10<sup>th</sup>. S.B. 312-1 continues to raise significant taxpayer privacy issues as the publication of the taxpayer statement and the information contained within by the Secretary of State is likely to result in the disclosure of information ultimately found on federal tax returns.

As previously noted, Internal Revenue Code (“IRC”) § 6103(a) mandates that a taxpayer’s “[r]eturns and return information shall be confidential” and prohibits “*any officer or employee of any State*” from “disclos[ing] any return or return information obtained by him in any manner in connection with his services as such an officer or an employee or otherwise . . .” (emphasis added).

S.B. 312-1 states that a taxpayer’s statement provided to the Secretary of State is “a public record” and requires the Secretary of State to make all the information contained within a taxpayer’s statement “available to the public on an ongoing basis in the form of a searchable database accessible through the Internet.”

The revisions to who must disclose taxpayer information – from the Legislative Revenue Office to the Secretary of State – do not remedy any potential violations of federal law as IRC § 6103 mandates “*any officer or employee of any State*” to keep federal tax returns and return information confidential. Oregon’s Secretary of State is included in this mandate as the Secretary of State is an officer or employee of the State.

Among the numerous items a taxpayer must disclose on its statement under S.B. 312-1 are the total tax expenditures claimed by the taxpayer on its Oregon income or excise tax return. Oregon statutorily defines “tax expenditure” to explicitly include federal laws that exempt income from tax. Specifically, ORS § 291.201 defines “tax expenditure” to mean:

“[A]ny *law of the federal government* or this state that exempts, in whole or in part, certain persons, income, goods, services, or property from the impact of established taxes, including but not limited to tax deductions, tax exclusions, tax subtractions, tax exemptions, tax deferrals, preferential tax rates and tax credits” (emphasis added).

Thus, the Secretary of State’s disclosure of a taxpayer’s “tax expenditures,” which include “tax deductions, tax exclusions, tax subtractions, and tax exemptions” permitted under federal law that are adopted under Oregon law and flow through to the Oregon tax return would likely amount to the prohibited disclosure of “return information” under IRC § 6103.

Based on Oregon’s rolling conformity with the Internal Revenue Code, pursuant to ORS § 317.010(7)(b), Oregon automatically conforms to many federal deductions under the IRC. For example (and this is just one of many), Oregon conforms to IRC § 162 – the general trade or business deduction. Thus, based on the definition of tax expenditure, this federal “return information” is an item that a taxpayer would be required to report in its statement to the Secretary of State that the Secretary of State would in turn be required to publically disclose potentially violating the confidentiality mandate in IRC § 6103.

Based on the likely disclosure of federal return information, the IRC § 6103 penalties referenced in my initial letter remain. Again, in addition to the potential criminal liability state employees could face, the IRS would be precluded from sharing information with Oregon as it would no longer be able to satisfy the confidentiality requirement found in IRC § 6103(8)(A). Specifically, this provision provides:

[N]o return or return information shall be disclosed . . . to any officer or employee of any State which requires a taxpayer to attach to, or included in, any State tax return a copy of any portion of his Federal return, or information reflected on such Federal return, *unless such State adopts provisions of law which protect the confidentiality* of the copy of the Federal return (or portion thereof) attached to, or the Federal return information reflected on, such State tax return (emphasis added).

S.B. 132-1 does nothing to alleviate the disclosure of federal return information; thus, if adopted, Oregon would face the grave risk of severing its information-sharing agreement with the IRS. A risk that other states have not been willing to face.

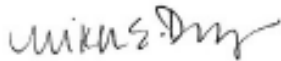
**U.S. and Oregon Constitutional Violations**

S.B. 312-1 also worsens the constitutional concerns outlined in my initial letter and oral testimony. By now focusing solely on publicly traded companies that are required to apportion their income, S.B. 312-1 continues to discriminate against large multistate taxpayers.

S.B. 312-1 remains constitutionally suspect as only publically traded C Corporations that operate both within and outside the state – and not C corporations that operate exclusively within Oregon – would have their taxpayer information disclosed to the public. This is likely to raise concerns under the Commerce and Equal Protection Clauses of the U.S. Constitution as well as concerns under the Uniformity Clause of the Oregon Constitution as an attempt to discriminate against corporations with operations outside of the state. This classification appears to be arbitrary and unfair and the state would have a hard time demonstrating a rational basis for this classification in any litigation that may ensue if S.B. 312-1 were enacted.

Thank you for your attention to these matters. Please do not hesitate to contact me if you have any questions.

Sincerely,



Nikky E. Dobay

Exhibit 1

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Oregon State Legislature  
Senate Committee on Finance and Revenue  
Senator Ginny Burdick, Chair  
Senator Brian Boquist, Vice-Chair

VIA E-MAIL

**Re: Senate Bill 312**

Dear Chair Burdick, Vice-Chair Boquist and Committee Members:

I am writing today to provide technical guidance related to the implementation of S.B. 312, which if enacted would allow the Legislative Revenue Office to publicly disclose taxpayer information. If S.B. 312 is enacted, legal challenges will likely follow as the legislation appears to violate both federal law and the U.S. and Oregon Constitutions.

**Prohibition of Federal Returns and Return Information**

Federal law and the Internal Revenue Service Taxpayer Bill of Rights prohibit the disclosure of federal “returns” and “return information” except in very limited circumstances. S.B. 312 raises significant taxpayer privacy issues, as the publishing of the report to the public may result in disclosure of information ultimately found on federal tax returns.

Internal Revenue Code (IRC) § 6103(a) mandates that a taxpayer’s “[r]eturns and return information shall be confidential” and prohibits an “officer or employee of any State” from “disclos[ing] any return or return information obtained by him in any manner in connection with his services as such an officer or an employee or otherwise . . .”

While the term “return” is defined to include returns filed with the Secretary of the Treasury (or the Secretary’s delegate, e.g., the Commissioner of the Internal Revenue Service), IRC § 6103(b) defines the term “return information” very broadly to mean “a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . .”

Thus, any taxpayer information subject to the public disclosure requirements in S.B. 312 and derived from a taxpayer’s federal return or federal return information would be confidential. Therefore, the disclosure of such information by the Legislative Revenue Officer would be prohibited pursuant to IRC § 6103. While the reportable items outlined in the legislation appear to include only information from the state tax return, such items may stem from the federal return and amount to the release of “return information” from the federal return that is protected by IRC § 6103. For example, the disclosure of Oregon taxable income claimed under Oregon law may amount to the release of return information as federal taxable income

is used as a starting point to determine Oregon taxable income. Further, the disclosure of certain tax expenditures claimed under Oregon law are likely to amount to “deductions” protected as “return information” under IRC § 6103 since Oregon conforms to the certain federal deduction permitted under the IRC that results in Oregon tax expenditures. Consequently, if passed, S.B. 312 is likely to result in significant litigation as to what information falls within the purview and protections of IRC § 6103 as “return information” as this is not a settled area of the law.

If S.B. 312 were found to violate IRC § 6103 disclosure prohibitions, the legislation could jeopardize Oregon’s access to federal tax information critical to administering the personal and corporate income taxes as the IRS will be prohibited from sharing taxpayer information with the state.<sup>1</sup> Further, the state and its employees could be subject to criminal penalties including a fine of up to \$1,000 or up to one-year imprisonment, and the cost of prosecution for the willful unauthorized inspection of return or return information.<sup>2</sup>

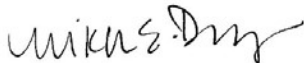
### **Constitutional Infirmities**

S.B. 312 also raises several constitutional concerns as the legislation exclusively targets multistate taxpayers. The legislation requires the public report to include the tax information for C corporations that have an Oregon apportionment percentage of less than 100 percent. Thus, only C Corporations that operate both within and outside the state – and not C corporations that operate exclusively within Oregon – would have their taxpayer information disclosed to the public.

This is likely to raise concerns under the Commerce and Equal Protection Clauses of the U.S. Constitution as well as concerns under the Uniformity Clause of the Oregon Constitution as an attempt to discriminate against corporations with operations outside of the state. Disclosing only the information of C Corporations that have operations outside of the state is arbitrary and unfair, and the state would have a hard time demonstrating a rational basis for this discriminatory provision in the inevitable litigation that would follow if the bill was enacted.

Thank you for your attention to these matters. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Nikky E. Dobay

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<sup>1</sup> IRC § 6103(d)(1).

<sup>2</sup> IRC § 7213A(b).