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**IMPLEMENTATION OF OREGON'S MEASURE 91 IN THE  
STATE LEGISLATURE**KEN HELM<sup>†</sup> AND LOGAN LEICHTMAN<sup>††</sup>

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## INTRODUCTION

Justice Louis Brandeis recognized that “a single courageous [s]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>1</sup> Since the 1970s, states have experimented with the repeal of marijuana prohibition, first through decriminalization, then through legalization for medical uses, and finally through legalization of adult recreational use. However, marijuana remains federally illegal on Schedule I of the Controlled Substances Act (CSA).<sup>2</sup> This means that any state that wants to legalize marijuana within its borders must strike a delicate regulatory balance that satisfies federal concerns and also provides a system that encourages citizen participation.

In November 2014 Oregon became the third state in the United States to try the novel social experiment of legalizing the growth and use of marijuana for recreational purposes, joining Washington and Colorado. Since that time, Alaska and Washington, D.C. have passed legalization initiatives of their own. A number of other states are considering legislation of this type, either through their state

1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. Schedule I, 21 C.F.R. § 1308.11 (2015). The CSA sorts controlled substances into categories or “schedules.” Schedule I is the most-tightly-regulated schedule and consists of those drugs that have a high potential for abuse and no currently accepted medical use. *See* 21 U.S.C. § 812(b)(1) (2013).

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legislatures or through the initiative process.<sup>3</sup> Each state that passes these laws will be able to draw on the experience of its predecessors, but there is no well-defined body of law yet that governs how these states will interact with a federal system in which the sanctioned activity is still illegal. Since every state is unique and has its own diverse set of stakeholders and interest groups, each state that passes legislation of this type will need to construct a set of regulations that takes into consideration these various groups. Overregulation in this arena will discourage engagement and only serve to drive consumers further into existing black-market channels, while under regulation will fail to meet the concerns of those responsible for enforcing the regulation as well as those who opposed passage of the law. Thus, it is of utmost importance to seek out and engage all of the affected stakeholders to ensure full participation in the new regulatory system.

To ensure participation in the process, the Oregon state legislature established the Joint Committee on Implementing Measure 91 (Committee) for the 2015 regular legislative session. The purpose of the Committee was to hear citizens' concerns with Measure 91 as passed and to craft bills that would correct any oversights in the initiative. At the same time, the Committee would need to gain an understanding of the existing medical program in order to create a recreational system that could work in harmony with this program.<sup>4</sup> This paper chronicles the Committee's work in the 2015 regular session as it worked to meet its objectives.

Part I details the history of legalization in Oregon, and Part II provides key elements of the Oregon Medical Marijuana Program since its inception and key components of Measure 91 as passed in 2014. Part III discusses the coordination that will need to occur between the various governmental bodies at the federal, state, and local levels. Part IV details the stakeholder concerns involved, as expressed to the Committee in public hearings and through written testimony. Last, Part V concludes with a thorough overview of the bills passed by the Committee, ideas that were deliberated on but not enacted, and considerations for future legislation to be enacted in subsequent sessions.

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3. See Dan Merica, *Oregon, Alaska, and Washington, D.C. Legalize Marijuana*, CNN, <http://www.cnn.com/2014/11/04/politics/marijuana-2014/index.html> (last updated Nov. 5, 2014).

4. *Oregon Medical Marijuana System: February 11th Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (statement of Sen. Ginny Burdick, Comm. Co-Chair).

## I. THE HISTORY OF MARIJUANA LEGALIZATION IN OREGON

A. *Decriminalization*

Oregon has long been at the forefront of marijuana-law reform. Starting in 1973, Oregon became the first state to decriminalize marijuana possession. This historic legislation changed the nature of the penalty for possessing under one ounce of marijuana from a criminal sanction to a fine.<sup>5</sup> Possession of more than one ounce remained a felony until 2013 when the legislature reduced possession of less than four ounces to a Class B misdemeanor.<sup>6</sup> This decriminalization legislation went largely undisturbed in the intervening years, except for an attempt in 1995 to recriminalize marijuana possession, which was blocked from floor vote in the state senate on the last day of the session,<sup>7</sup> and an attempt in 1998 that was blocked by a referendum vote.<sup>8</sup>

B. *Medical*

In 1998, Oregon joined a small group of states that allowed the prescription and use of medical marijuana through the passage of the Oregon Medical Marijuana Act (OMMA), which passed with 54.6% of the vote.<sup>9</sup> In 2004, the Oregon Medical Marijuana Allowance Measure 33 would have permitted dispensary sales as well as increased the personal possession limit and the number of plants allowed.<sup>10</sup> This Measure was defeated with 42.8% of voters in favor.<sup>11</sup> In 2009, the legislature moved marijuana from Schedule I of Oregon's Controlled Substances Act to Schedule II, as determined by

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5. See Act of July 22, 1973, Ch. 680, 1973 Or. Laws 1521, *repealed by* Act of July 26, 1977, Ch. 745, 1977 Or. Laws 701.

6. OR. REV. STAT. § 475.864(3)(b) (2013).

7. Since the bill was read that day, a suspension of the rules would have been required to put it to a floor vote, and the suspension was not passed.

8. Or. Sec'y of State, *Initiative, Referendum and Recall: 1996–1999*, OREGON BLUE BOOK, <http://bluebook.state.or.us/state/elections/elections22.htm> (last visited Dec. 8, 2015). The legislation as enacted would have raised the penalty for possessing under one ounce to a Class C misdemeanor.

9. *Id.*; see Oregon Medical Marijuana Act, ch. 4, 1999 Or. Laws 5.

10. 1 OR. SEC'Y OF STATE, VOTERS' PAMPHLET 12, 12–18 (2004), <http://library.state.or.us/repository/2010/201003011350161/ORVPGenMari2004m.pdf>; see, e.g., *Oregon Medical Marijuana Allowance Measure 33*, BALLOTPEdia, [http://ballotpedia.org/Oregon\\_Medical\\_Marijuana\\_Allowance\\_Measure\\_33\\_\(2004\)](http://ballotpedia.org/Oregon_Medical_Marijuana_Allowance_Measure_33_(2004)) (last visited Dec. 8, 2015).

11. *Oregon Medical Marijuana Allowance Measure 33*, *supra* note 10.

the State Board of Pharmacy.<sup>12</sup>

Another attempt to create a dispensary system was made in 2010 with the Oregon Regulated Medical Marijuana Supply System Act, Measure 74. This initiative would have allowed state-licensed growers and dispensaries to supply Oregon's medical-marijuana patients. It was defeated with only 44.2% in favor of the initiative.<sup>13</sup> Dispensaries were finally created by statute in 2013 with the passage of House Bill 3460,<sup>14</sup> but for some it was only a brief allowance due to the passage of Senate Bill 1531 in 2014. Additionally, this Bill permitted cities and counties to adopt moratoriums on dispensaries between May 1, 2014, and May 1, 2015.<sup>15</sup> These moratoria allowed local governments the time they would need to craft regulations on the hours, location, and manner of dispensing.

### C. Recreational

The path to legal recreational use of marijuana in Oregon was long and hard fought. The first attempt, in 1986, was the Oregon Marijuana Legalization for Personal Use Act, Ballot Measure 5. It would have legalized private possession and growing solely for personal use for anyone over age eighteen.<sup>16</sup> It was defeated, with only 26.3% of voters in favor.<sup>17</sup>

After a number of initiatives did not make it onto the ballot, chief petitioner Paul Stanford, representing the Campaign for the Restoration and Regulation of Hemp, was able to obtain enough signatures to certify the Oregon Cannabis Tax Act Initiative, Measure 80.<sup>18</sup> This Measure would have established a state-run distribution structure. The Measure directed that the revenue generated from the sales would be divided at a rate of ninety percent to the state's general

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12. Act of Aug. 4, 2009, ch. 898, § 2, 2009 Or. Laws 3203, 3203. Marijuana is now listed as a Schedule II drug in Oregon. OR. ADMIN. R. 855-080-0022 (2010).

13. See Or. Sec'y of State, *Initiative, Referendum and Recall: 2006–2010*, OR. BLUE BOOK, <http://bluebook.state.or.us/state/elections/elections22b.htm> (last visited Dec. 8, 2015).

14. Act of Aug. 14, 2013, ch. 726, § 2, 2013 Or. Laws 2088, 2088–89 (codified at OR. REV. STAT. § 475.314 (2013)).

15. Act of Mar. 19, 2014, ch. 79, 2014 Or. Laws 2735 (to be codified at OR. REV. STAT. §§ 475.300–346).

16. OR. SEC'Y OF STATE, VOTERS' PAMPHLET 16 (1986), <http://library.state.or.us/repository/2010/201003011350161/ORVPGenMari1986.pdf>. (last visited Dec. 8, 2015).

17. Or. Sec'y of State, *Initiative, Referendum and Recall: 1980–1987*, OR. BLUE BOOK, <http://bluebook.state.or.us/state/elections/elections20.htm> (last visited Dec. 8, 2015).

18. *Oregon Cannabis Tax Act Initiative*, BALLOTPEdia, [http://ballotpedia.org/Oregon\\_Cannabis\\_Tax\\_Act\\_Initiative,\\_Measure\\_80\\_\(2012\)](http://ballotpedia.org/Oregon_Cannabis_Tax_Act_Initiative,_Measure_80_(2012)) (last visited Dec. 8, 2015).

fund and the remainder to drug education, treatment, and hemp promotion.<sup>19</sup> The Measure failed by the closest margin to date on this issue, with 46.6% of voters in favor.<sup>20</sup> Then, in 2014, chief petitioner Anthony Johnson was able to certify the Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, Measure 91 (Measure 91). A majority of Oregon voters decided that it was the right time and the right initiative, and repealed marijuana prohibition in the state with 56.1% in favor of the Measure.<sup>21</sup>

## II. OREGON INITIATIVES

### A. *The Oregon Medical Marijuana Program*

The drafters of the OMMA did not have the wealth of examples that drafters of legislation today may draw on. Since the law was one of the first of its kind in the country, the drafters had to strike out on their own and begin experimentation. However, many of the enacted provisions remained largely the same as when originally passed by the earlier citizen initiative, a testament to both the ingenuity of the drafters and the unwillingness of the Oregon legislature to interfere too extensively with the will of the voters.

The OMMA created an exception to criminal laws of the state regarding marijuana possession, delivery, and production.<sup>22</sup> This exception was granted to people who hold a valid registry identification card, so long as they acted within the bounds of the program. Activities that were considered outside of the program included driving under the influence, use in a “public place,” as that term is defined in the criminal code,<sup>23</sup> delivery to a noncardholder, delivery for consideration,<sup>24</sup> and use in a correctional facility.<sup>25</sup>

Cards were authorized for a patient and one designated caregiver per patient, provided that the patient could demonstrate to an attending physician that the patient suffered from one of an

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19. *Id.*

20. Or. Sec’y of State, *Initiative, Referendum and Recall: 2012–2014*, OREGON BLUE BOOK, <http://bluebook.state.or.us/state/elections/elections22c.htm> (last visited Dec. 8, 2015).

21. *Id.*

22. Oregon Medical Marijuana Act, ch. 4, § 4, 1999 Or. Laws 5, 6–7 (codified at OR. REV. STAT. §§ 475.309–346 (2003)).

23. “Public place” is defined at section 161.015(10).

24. Oregon Medical Marijuana Act § 5 (codified at OR. REV. STAT. § 475.316(c)–(d) (2013)).

25. Act of July 21, 1999, ch. 825, § 3, 1999 Or. Laws 2013, 2014.

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enumerated list of “debilitating conditions.” The original list consisted of cancer; glaucoma; HIV or AIDS; and any condition or treatment that causes cachexia, severe pain and nausea, seizures, and muscle spasms.<sup>26</sup> This list was later amended to include Alzheimer’s disease<sup>27</sup> and post-traumatic stress disorder.<sup>28</sup> It also clarified that a “side effect related to treatment of” one of the listed illnesses would qualify a patient for registration.<sup>29</sup>

The drafters of the OMMA showed a great deal of concern for patient privacy. The law stated that possession of a registry card could not be probable cause for a search or subject the cardholder to government inspection.<sup>30</sup> Cardholder information could be released to employees of the regulating agency acting in their official capacity and law enforcement “only as necessary to verify that a person is a lawful cardholder.”<sup>31</sup> Physicians were protected by laws that forbade the Oregon Board of Medical Examiners, or any other professional licensing board, from issuing sanctions against a physician for advising a patient on the medical use of marijuana.<sup>32</sup>

While the original OMMA only allowed patients and their caregivers to register for a card, in 2005 the legislature created a third category of cardholder, the grower. A patient could now designate a grower and register a grow site separate from the home of the patient.<sup>33</sup> All marijuana produced by the grower was considered property of the patient and to be turned over to the patient on demand.<sup>34</sup> Either the patient or the caregiver could reimburse the grower for the cost of supplies and facilities, but no other costs, including labor, were authorized for reimbursement.<sup>35</sup> This bill also raised the combined possession limits for patient, caregiver, and grower to their current levels of six mature plants, eighteen immature plants, and twenty-four ounces of usable marijuana. A single person could be designated as the grower for up to four patients, and no limit was established for the number of growers that could grow at one

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26. Oregon Medical Marijuana Act § 3(2).

27. Act of June 25, 2007, ch. 573, § 1, 2007 Or. Laws 1498, 1498.

28. Act of June 6, 2013, ch. 337, § 1, 2013 Or. Laws 871, 871.

29. *Id.*

30. Oregon Medical Marijuana Act § 8.

31. *Id.* § 12.

32. *Id.* §§ 8–9.

33. Act of Aug. 29, 2005, ch. 822, sec. 3, § 475.309, 2005 Or. Laws 2410, 2411–2413.

34. *Id.* sec. 8.

35. *Id.*

site.<sup>36</sup>

Dispensaries, called “medical marijuana facilities,” were added to the OMMA in 2013, and the law directed the Oregon Health Authority (OHA) to be responsible for their administration.<sup>37</sup> These new dispensaries would have to be sited in a commercial, industrial, mixed-use, or agricultural zone; could not be located within 1,000 feet of a school or any other dispensary; and would be subject to minimum security requirements, including a video-surveillance system, alarm system, and safe.<sup>38</sup> Testing was only required for pesticides, mold, and mildew, with no mention of testing for potency. To allow for greater flexibility in the commercial aspects of this venture, the Bill expanded the authorized reimbursement to dispensaries and growers to include “the normal and customary costs of doing business, including costs related to transferring, handling, securing, insuring, testing, packaging[,] and processing usable marijuana and immature marijuana plants[,] and the cost of supplies, utilities, rent[,] or mortgage.”<sup>39</sup> The cost of labor was absent from this list, but the Bill did not specifically prohibit reimbursement of labor like the law’s previous incarnation.

#### *B. Oregon’s Measure 91 as Passed*

Oregon’s Measure 91 provided a detailed framework for the state’s adult recreational-use law, a framework that will be built upon as the legislature works out the unforeseen and uncovered issues involved. At the outset of the initiative, federal enforcement priorities are listed as one of the purposes of the act.<sup>40</sup> This was done in an attempt to harmonize the new regulations with the Department of Justice’s guidance, provided by the Cole Memorandum, on when the department would enforce federal law (detailed in Part III). While the preamble does not contain any substantive provisions of the law, it is nonetheless important as a demonstration to the federal government that the state is dedicated to working within the current enforcement structure while experimenting with novel laws within its own borders. To this effect, the Measure is very clear that it will not amend or

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36. *Id.* sec. 9(2)(c).

37. Act of Aug. 14, 2013, ch. 726, § 2, 2013 Or. Laws 2088, 2088–2089.

38. *Id.* § 2(3).

39. *Id.* § 2(9)(a)–(b).

40. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, ch. 1, § 1, 2015 Or. Laws.



affect federal law, require a person to violate federal law, or exempt anyone from the enforcement of federal law.<sup>41</sup> Likewise, and to comport with the federal government's broad authority to regulate interstate commerce, the importation of marijuana from or the exportation of marijuana to other states is specifically prohibited under the Measure.<sup>42</sup>

The drafters of Measure 91 wanted to create a statute that would parallel the state's alcohol laws in the way it is regulated. As a result of this, the initiative directed the Oregon Liquor Control Commission (OLCC) to promulgate rules and oversee licensing under the new regulatory structure.<sup>43</sup> Measure 91 required the OLCC to adopt these rules and make available the forms and procedures needed for license applications by January 1, 2016.<sup>44</sup> The OLCC then must begin taking license applications by January 4, 2016.<sup>45</sup> No other administrative body was given specific statutory authority for the regulation of recreational marijuana use or state-licensed marijuana businesses; however, the Oregon Department of Agriculture (ODA) and the OHA were called out to "assist and cooperate" with the OLCC "to the extent necessary" to carry out the duties assigned to the OLCC.<sup>46</sup>

Similar to the law regulating alcohol, Measure 91 set the legal age of possession at twenty-one years. Personal-possession limits were set at eight ounces of usable marijuana, sixteen ounces in solid form, seventy-two ounces in liquid form, and up to one ounce of extracts.<sup>47</sup> Individuals could possess, though not use, up to one ounce of marijuana in a public place.<sup>48</sup> Individuals were also permitted to grow their own marijuana at home, up to four mature plants, with no limit on the number of immature plants.<sup>49</sup> An "immature" plant is defined as one that does not have visible flowers or buds, and a "mature" plant is defined as any plant that is not immature.<sup>50</sup>

Like other states' marijuana initiatives, Measure 91 detailed the license types to be issued by the OLCC. The Measure contained four

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41. *Id.* § 4.

42. *Id.* § 45.

43. *Id.* § 7.

44. *Id.* § 7(3).

45. *Id.* § 18.

46. *Id.* §§ 8–9.

47. *Id.* § 79(6).

48. *Id.* § 79(6)(a).

49. *Id.* § 6(a).

50. *Id.* § 5(9), (22).

different license types: production, processing, wholesale, and retail.<sup>51</sup> The statute expressly allowed licensees to hold one or more of multiple types of licenses without any express prohibition on the number that any one individual could hold or the location of facilities with different licenses.<sup>52</sup> The licenses are characterized as purely personal privileges, which can be transferred to another premise, but they are not considered property and cannot be sold.<sup>53</sup> They cannot be passed to a license holder's heirs either through a will or intestate succession, but upon the death, insolvency, or bankruptcy of a license holder, the licensed facility may be operated for a short time to wind up the business.<sup>54</sup>

Oregon, unlike most other states, does not employ a sales tax for revenue generation. Point-of-sale taxes are imposed very infrequently and only by specific authorization. Therefore, Measure 91 established an excise tax on the production of marijuana.<sup>55</sup> The tax is set to be levied only on the first sale from a marijuana producer, at the rate of \$35 per ounce of flower, \$10 per ounce of leaves, and \$5 per immature plant.<sup>56</sup> The Measure contained a provision to adjust this rate commensurate with changes in the consumer price index, but no adjustment of the tax rate based on an indexing of the retail price of marijuana was set forth.<sup>57</sup> In addition to the provisions for state taxation, the Measure expressly forbade county and city governments from imposing any fee or tax of their own.<sup>58</sup> To mitigate the impact of this prohibition on local government's law-enforcement duties under the new law, tax revenue collected by the state is set to be appropriated to the localities based on population for the first two years, then afterwards based on the number of licensed premises in each locality.<sup>59</sup>

The section of Measure 91 that details the authority of cities and counties to regulate marijuana licensees is perhaps most similar to the regulation of alcohol, with many of its provisions copied wholesale from Oregon's Liquor Control Act. Measure 91 supersedes

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51. *Id.* §§ 19–22.

52. *Id.* § 24.

53. *Id.* § 25.

54. *Id.* § 25(2).

55. *Id.* §§ 31–42.

56. *Id.* § 33.

57. *Id.* § 33(4).

58. *Id.* § 42.

59. *Id.* § 44(d)–(e).

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inconsistent local laws but gives localities the authority to establish reasonable time, place, and manner regulations of the “nuisance” aspects of the licensed premises.<sup>60</sup> The Measure also provided an opt-out provision for a city or county, in nearly the exact same form as for liquor.<sup>61</sup> This option allows a city or county that chooses to completely prohibit the establishment of licensed marijuana premises to do so if an initiative petition signed by ten percent of its electorate is filed and approved by its voters at the next statewide general election. Cities or counties in Oregon that wish to exercise this option would be able to first do so in the November 2016 statewide general election.

### III. COORDINATION WITH OTHER GOVERNMENT ENTITIES

#### *A. Federal Government—The Cole Memorandum and Federal Enforcement*

Although a majority of states have now loosened restrictions on marijuana within their borders by legalization of adult recreational or medical use, marijuana still remains illegal under federal law. It is classified in Schedule I of the CSA, a schedule reserved for those drugs that are considered to have a high potential for abuse, no currently accepted medical use, and a lack of accepted safety for use.<sup>62</sup> This seems to run contrary to how marijuana is perceived at the state level, as many states have now recognized at least a medical use for marijuana as well as that marijuana has no greater abuse potential than other legal drugs. However, until the federal government amends the CSA to reflect some states’ experience, those state-licensed marijuana establishments are still at risk of federal enforcement actions.

Beginning in 2009, the U.S. Department of Justice began to issue directives to the U.S. Attorneys General on how and when to enforce federal law against marijuana businesses that are in compliance with state law. On October 19, 2009, Deputy Attorney General David Ogden released the first in a series of federal guidance memorandums

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60. *Id.* §§ 58–59; *see also* OR. REV. STAT. §§ 471.045, .164 (2013) (liquor laws that supersede and repeal inconsistent charters and ordinances but allow cities and counties to regulate establishments).

61. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act § 60; *see also* OR. REV. STAT. § 471.506 (pathway for local election on liquor-related regulations).

62. 21 U.S.C. § 812(b)(1)(A)–(C) (2014).

(Ogden Memorandum).<sup>63</sup> This first memorandum directed the U.S. Attorneys General to be conservative with prosecutorial resources when deciding whether to prosecute for marijuana-related crimes. It pointed out that individual patients or their caregivers who are in compliance with applicable state law are not the proper targets for federal enforcement. However, the Ogden Memorandum noted that businesses may attempt to use state medical-marijuana programs as a mask to hide their otherwise illegal activity while appearing compliant with state regulators. To root out those that would use state law to obscure their activities, the Ogden Memorandum set forth a list of characteristics that could serve as an indication that a business's purported compliance was merely pretextual, including: unlawful firearm possession or other violence, sales to minors, and possession of amounts in excess of that allowed under applicable state law.<sup>64</sup>

The position of the federal government was reiterated two years later by Deputy Attorney General James Cole in a memorandum regarding efforts by states to scale up marijuana production.<sup>65</sup> It stated that such larger scale operations, despite being purportedly in full compliance with state law, may yet run afoul of the federal enforcement priority of preventing the trafficking of product into other states. It further stated that the Ogden Memorandum was never intended to be used as protection from federal enforcement, but rather was only direction on when and where to focus prosecutorial resources.<sup>66</sup>

In 2013, the Department of Justice issued what would become the authoritative statement on federal enforcement priorities for marijuana (Cole Memorandum). These eight federal enforcement priorities were:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;

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63. Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to Selected U.S. Attorneys (Oct. 19, 2009) [hereinafter Ogden Memorandum], <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

64. *Id.* at 2.

65. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to U.S. Attorneys on Guidance Regarding the Ogden Memo (June 29, 2011), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

66. *Id.* at 2.

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- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public-health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana on public lands; and
- Preventing marijuana possession or use on federal property.<sup>67</sup>

This detailed list of priorities provided more specific direction to prosecutors and sent a clear message to the states that wished to legalize marijuana within their borders. The message was that marijuana legalization would be tolerated only if a state provided for tight control and regulation of the market.

For a state to comply with these priorities it would need to develop a robust regulatory scheme, one that was designed to keep the product wholly within the state and that contained other controls necessary to keep the money out of the hands of criminal elements. Furthermore, the states would need to regulate marijuana in a manner similar to alcohol in order to prevent drugged driving and sales to minors. In sum, these minimum features of a legal market for marijuana provided a framework whereby the federal government sought to allow for those legal markets in order to undermine the dominance of the black market for this product, while providing controls designed to prevent unintentionally strengthening the black market's foothold. Through this method, the federal government allowed the states to proceed while it was not yet in a position to fully repeal marijuana prohibition nationwide, but made sure that those

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67. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to U.S. Attorneys on Guidance Regarding Marijuana Enforcement 1 (Aug. 29, 2013) [hereinafter Cole Memorandum], <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

states knew that they would be under scrutiny while they went forward.

### *B. State Agency Roles*

Measure 91 gave the OLCC primary authority over the licensure of marijuana businesses and the regulation of sales of marijuana in Oregon. The drafters realized, however, that this task could not be accomplished alone, and so they tasked other agencies to assist with certain aspects of the regulations that would draw upon the specific expertise of other agencies. First among these was the OHA, the agency that is responsible for the medical-marijuana program as well as the inspection of restaurant kitchens and other food-preparation sites. Next was the ODA, which regulates farm activities within the state and is responsible for the inspection of larger scale commercial-kitchen operations and food packaging. Finally, the Department of Revenue (DOR) will collect taxes and face challenges unique to this new market.

Many of those who came to testify before the Committee feared that the legalization of marijuana in Oregon would put an end to the medical-marijuana program implemented by the OHA. Among the negative repercussions thought to result from this merging of markets would be the following: a reduced incentive for producers to develop strains lower in THC and higher in cannabidiol (CBD), an increased difficulty for producers to subsidize product for low-income patients, and a general lack of protection for patients' rights as they relate to the usage of marijuana as a treatment for debilitating conditions.<sup>68</sup> The idea that recreational marijuana would spell the death of the medical-marijuana program was repeatedly denounced by the Committee. Patient advocates instead preferred to create tighter regulations on the existing medical program to create consistency between the two systems, and Committee members were receptive to the idea.<sup>69</sup> No one agency would control all aspects of marijuana regulation, and interagency coordination would be crucial to the success of the new markets.

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68. See, e.g., *Oregon Medical Marijuana Program: February 11th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Anthony Taylor, Cofounder of Compassionate Oregon); see also ANTHONY TAYLOR & CHERYL K. SMITH, *THE CASE FOR RETAINING AND IMPROVING THE OREGON MEDICAL MARIJUANA PROGRAM* (2015), <http://compassionateoregon.org/content/OMMA.2015.pdf> (Compassionate Oregon's report submitted as an exhibit to the informational meeting).

69. See TAYLOR & SMITH, *supra* note 68, at 14.

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### 1. Oregon Liquor Control Commission

From January 2015 to March 2015, the OLCC held a number of listening sessions throughout the state.<sup>70</sup> The purpose of these sessions was to gain a clearer understanding of the needs and desires of citizens regarding marijuana regulation, to form recommendations to present to the legislature, and to inform the OLCC's own rulemaking. As a result, on March 11, 2015, the OLCC testified before the Committee with recommendations for authority beyond what was given to them in Measure 91.<sup>71</sup> The issue of how much authority to detail in the statute versus how much discretionary control to give through rulemaking authority was interwoven throughout this and future discussions with the Committee. Ultimately, much of the authority given to the OLCC will be exercised as agency rules, with minimum standards and guidance set in statute.

OLCC agents were not provided the power to possess marijuana for enforcement purposes in Measure 91. The Measure actually specifically denied the OLCC the power to "purchase, own, sell, or possess any marijuana items."<sup>72</sup> This was an attempt by the drafters to prevent the same type of state-run warehousing and distribution system that OLCC uses for alcohol, but without this power, agents would be in violation of the law if they were to seize an amount greater than what they would be allowed to possess personally.<sup>73</sup> The OLCC requested this power and the power to authorize possession for people who are otherwise not allowed to possess marijuana, such as minors, for the purposes of conducting sting operations.<sup>74</sup>

In a later hearing, state Senator Ted Ferrioli questioned whether the OLCC would have the power to sell the seized product for tax deficiencies or enforcement purposes.<sup>75</sup> The OLCC responded that this was not intended and that language to that effect should not

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70. See Or. Liquor Control Comm'n, *Public Involvement*, OREGON.GOV, <http://www.oregon.gov/olcc/marijuana/Pages/Public-Involvement.aspx> (last visited Oct. 12, 2015).

71. *OLCC Recommendations on Marijuana Policy: March 11th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Robert Patridge, Chair, OLCC).

72. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, ch. 1, § 7(5), 2015 Or. Laws.

73. *OLCC Recommendations on Marijuana Policy*, *supra* note 71.

74. *Id.*

75. *SB 844: March 23d Public Hearing of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Tom Burns, Director of Marijuana Program, OLCC).

appear in the statute.<sup>76</sup> Senator Ferrioli stressed that this power would help serve enforcement objectives by acting as a deterrent to bad actors within the system. However, there is a concern that this type of state-conducted sale may run afoul of the Cole Memorandum's priorities, which only touched on state-regulated marijuana operations, not state-run marijuana facilities. As a result of these discussions, language that provided this power to the OLCC was removed from amendments to the proposed bill.<sup>77</sup>

Another issue that was not addressed in Measure 91 was peace-officer authority for OLCC agents. They claimed a need for this authority, which they have when pursuing alcohol violations, in order to effectively carry out enforcement operations without having to wait for police to arrive in order to issue citations.<sup>78</sup> There was general agreement that while this was an important power to have, the scope of the power must be restricted in order to ensure compliance with the Cole Memorandum's priorities. Specifically, the concern was over the use of firearms in carrying out these actions.

The Cole Memorandum stated broadly that a priority was to "[p]revent[] violence and the use of firearms" without specific reference to whether the violence was lawfully conducted on the part of peace officers.<sup>79</sup> Therefore, the members of the Committee thought it was important to restrict the ability of the OLCC's marijuana specialists to carry firearms in the exercise of their authority, in order to reduce the amount of firearm-related violence that could occur during enforcement actions. In addition to these concerns, many groups were afraid that giving the OLCC's agents peace-officer authority would give them the power to inspect home grows. However, representatives from the OLCC stated many times that they did not wish to have this power and would not seek to use it if given, and the OLCC urged the Committee to draft the law so that they would not have this power. They asked only for the power to inspect facilities licensed by them, which would not include home growers.<sup>80</sup>

In addition to the powers that the OLCC would need to carry out its assigned task, the OLCC formulated a plan that would allow for

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76. *Id.*

77. *Id.*

78. *OLCC Recommendations on Marijuana Policy*, *supra* note 71.

79. Cole Memorandum, *supra* note 67, at 2.

80. *March 25th Work Session for S.B. 844 of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Tom Burns, Director of Marijuana Program, OLCC).



medical growers licensed by the OHA to opt in to the recreational retail system.<sup>81</sup> Those growers who receive the consent of cardholders for whom they grow would be able to sell to retail outlets any excess over and above what the cardholders required in exchange for submission to tracking and separate licensure by the OLCC. According to estimates of the medical-marijuana supply chain, much more marijuana is currently being produced by licensed medical growers than is needed by the cardholders.<sup>82</sup> Thus, in order to prevent diversion to black markets or other states, which would violate the Cole Memorandum's priorities, there needed to be a way either to restrict oversupply or provide overproducers with a legal outlet. The OLCC chose the latter to meet both federal priorities and provide the nascent retail supply chain with an early infusion of product while OLCC-licensed producers are in development.

## 2. Oregon Health Authority

As discussed in Part II, A, above, the OHA is responsible for the management and implementation of the medical-marijuana program in Oregon. Therefore, any changes to the statutes that authorize the program will directly impact the function of the OHA in this regard. In addition, the OHA carries out other functions that will impact the marijuana industry in Oregon, including environmental-laboratory accreditation<sup>83</sup> and inspection of certain food-production facilities such as restaurants.<sup>84</sup> Furthermore, the opt-in program mentioned in the previous section would require coordination and information sharing between the OLCC and the OHA in order to work properly.

After laboratory testing and accreditation of the testing labs were identified as key issues for the Committee, the OHA was quickly put forth as the agency most competent to handle those functions.<sup>85</sup> The

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81. *OLCC Opt-in Program: May 27th Work Session for H.B. 3400 of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Robert Patridge, Chair, OLCC); see also OR. LIQUOR CONTROL COMMISSION, MEDICAL-RECREATIONAL OPT-IN PROGRAM (2015), <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/76198> (introduced as Exhibit 6 during Robert Patridge's testimony at the March 25th Work Session for Senate Bill 844).

82. *May 20th Public Hearing for H.B. 3400 of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Seth Crawford, Instructor, Oregon State University).

83. OR. REV. STAT. § 438.615 (2013).

84. *Id.* § 616.010(2).

85. See, e.g., *Laboratory Regulation and Standards: February 9th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of

OHA has developed an accreditation system known as the Oregon Environmental Laboratory Accreditation Program (ORELAP) that is used in conjunction with national accreditation standards and appears to be generally trusted by those involved with marijuana testing (laboratory testing will be covered in more detail in Part IV below). In addition to drawing on the OHA expertise with laboratories, rules promulgated pursuant to the authority created by Measure 91 and any subsequent statutory enactments would need to draw heavily on the work done previously by the OHA with regard to the medical program in order to promote uniformity of laws and prevent duplicating work already performed.

### 3. Oregon Department of Agriculture

Much like alcohol, the OLCC will not be regulating the agricultural inputs that go into making usable marijuana. That task falls to the ODA, just as they are responsible for regulating the practices used to grow grapes to make Oregon's Pinot Noirs. However, unlike grape crops, marijuana grow sites must have security measures required by the OLCC as a prerequisite to licensing.<sup>86</sup> This unusual situation will necessitate coordination between the two agencies in order to ensure that the security requirements are feasible for outdoor and indoor grow sites and not too onerous on the farmers. In addition, more requirements demand more inspections, which will need to be coordinated between the agencies so that existing farming practices are not overly disturbed from duplicative or otherwise overly burdensome inspection procedures.

Along with the regulation of actual crop growth, the ODA has the authority to regulate large-scale food production, packing facilities, and commercial bakeries.<sup>87</sup> Therefore, the ODA has broad authority over the regulation of products produced from marijuana and the processes by which marijuana is dried and cured for smoking.

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Jeremy Sackett, Cofounder, Cascadia Labs).

86. There are no minimum security requirements for licensed producers set in statute. OLCC has placed security requirements for all licensees, including video surveillance, an alarm system, and a safe, in their temporary administrative rules adopted October 22, 2015. Producers are additionally required to obscure the crops from public view, and in the case of outdoor growers, erect a wall at least eight feet high. OR. ADMIN. R. 845-025-1400-1470 (2015). The rules also include a waiver for licensees who can prove to the satisfaction of the Commission that the security requirements are unnecessary or overly burdensome, and that alternative security procedures will satisfy the goals of the rule. *Id.* r. 845-025-1400(1).

87. OR REV. STAT. §§ 616.010(1), 625.020(1).

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Marijuana in edible form is a large and growing sector of the marijuana market, so in addition to the requirement of an OLCC license for the privilege of dealing in marijuana, most processors of marijuana will need to receive some form of license from the ODA in order to create products. Again, this will require coordination between the two agencies to ensure that regulation is carried out in an efficient and not overly burdensome manner.

#### 4. Department of Revenue

While the DOR will not have any direct role in the regulation of marijuana businesses, nonetheless it will be integral to the success of the new markets by virtue of being responsible for the collection of tax revenues. This may seem to be a trivial part of the system. But one of the main selling points to voters was the revenue-generation potential of a legal-marijuana market, so the proper collection of the taxes is vital to ensuring that this benefit is realized.

Collecting tax revenue in this market, however, presents a number of unique challenges. First and foremost on the minds of those at the agency is the concern that collecting the revenue will be considered money laundering in violation of the CSA. Legislative counsel assuaged this fear in a formal opinion issued May 26, 2015, which states that the collection should not be considered money laundering when safeguards are put in place.<sup>88</sup> Most dispositive to that determination is the establishment of an Oregon marijuana account that is separate and distinct from the general fund. The legislative counsel claimed that this will prevent the commingling of funds between Oregon's marijuana revenues and funds received from federal sources.<sup>89</sup> Furthermore, the legislative counsel believes that the structure created by statute and administrative rule is permissible as a wholly intrastate activity that would qualify as an exception within the state's police power.<sup>90</sup>

In addition to those legal concerns, there are technical issues in the actual collection of the tax payments. Due to issues with receiving bank services, discussed in detail in Part IV, marijuana businesses are often operated almost exclusively on a cash basis. Most other

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88. See Memorandum from Dexter A. Johnson, Legislative Counsel, Or. Legislative Counsel Comm. to Joint Comm. on Implementing Measure 91, at 2–4 (May 26, 2015), <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/76076>.

89. *Id.* at 4.

90. See *id.* at 2.

businesses now make their tax payments electronically, an option that is not available to businesses without bank accounts, so the DOR would need to renovate its facilities to be able to securely handle larger amounts of cash.<sup>91</sup> This would also necessitate cash-intake points throughout the state, as it would be burdensome and unsafe to require a person to drive their cash to Salem from more distant locales.

### *C. Local Governments—Preemption and Local Control*

Just as the federal government may preempt inconsistent legislation by states, many states preempt local ordinances that are inconsistent with state statutes. In the absence of clear, unequivocal language though there is often a matter of interpreting a statute in order to find preemption. Measure 91 contained this clear preemptive language, stating that it was designed to operate uniformly throughout the state and that to effect this all inconsistent charters and ordinances were repealed.<sup>92</sup> But the Measure also stated that it did not “require a person to violate federal law,” or “exempt a person from a federal law or obstruct the enforcement of a federal law.”<sup>93</sup>

Representatives from the organizations that advocate for local governments construed those phrases to mean that they should not be forced to accept the establishment of marijuana businesses within their borders, acceptance they thought would require them to violate federal law. Measure 91 provided an opt-out option almost exactly identical to that for alcohol, but these organizations did not think that option went far enough in allowing local governments a “clean” opt out.<sup>94</sup> They feared that forcing those counties and cities to wait until the next general election in 2016 would lead to a situation where the businesses were already in place by the time of the election, thereby making it harder to remove the established businesses than to disallow them in the first instance. To prevent this, they warned, a community may attempt to seek a federal injunction to avoid compliance with the

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91. *May 27th Work Session for H.B. 3400 of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Deanna Mack, Agency Legislative Coordinator, DOR).

92. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, ch. 1, § 58, 2015 Or. Laws.

93. *Id.* § 4(4)–(5).

94. See, e.g., *Opting Out: February 16th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Rob Bovett, Legal Counsel, Association of Oregon Counties).

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new law.<sup>95</sup>

Many citizens thought to the contrary, and opposition to the local governments' position quickly mounted. The American Civil Liberties Union, among others, argued that allowing counties and cities to opt out would create a rough patchwork system instead of statewide uniformity and would frustrate the legislature's efforts to bring this market into the light of regulation.<sup>96</sup> This would in turn delay full participation in the legal market, which may jeopardize compliance with the Cole Memorandum's priorities.

Legislators on the Committee were split on the issue as well, which resulted in a number of proposals for amendments to resolve it. Among these possible compromises were the following: allowing local governments to adopt ordinances to opt out at any time with a referral to the voters; allowing the same opt out, but only if the ordinance is adopted within 180 days of the effective date of the Measure; or reducing local governments' power to regulate so heavily as to effectively ban marijuana businesses. The one thing that could be agreed on in all proposals was that no local governments would be allowed to ban medical marijuana growing. A vote to adopt one of these compromise positions threatened to disband the Committee and effectively forced a tabling of the discussion, though eventually a compromise was reached that presented multiple avenues for local governments to opt out.<sup>97</sup>

#### IV. STAKEHOLDER INTERESTS AND CITIZEN CONCERNS

##### *A. Concentrates, Extracts, and Edibles*

As the marijuana industry has evolved, new products have been developed that go beyond the typical smokeable "flower" in terms of delivery method, potency, activation time, and duration of psychoactive effect. These new products demand particularized regulations to protect consumers. Threats to safety can come not only from tainted or incorrectly labeled products but also from an

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95. *March 4th Public Hearing for S.B. 542 of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Rob Bovett, Legal Counsel, Association of Oregon Counties).

96. *See, e.g., March 4th Public Hearing for S.B. 542 of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of David Fidanque, Executive Director, American Civil Liberties Union of Oregon).

97. *May 11th Work Session for S.B. 844 of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (statement of Sen. Ted Ferrioli).

uninformed consumer using a product that is too potent to handle. However, these new regulations need not be cut from whole cloth. There has been an existing legal industry for these products on the medical side, and lessons learned from the regulations adopted to deal with that industry should inform the development of regulations for the adult recreational-use market.

Edibles have quickly become a popular and growing segment of the legalized marijuana market. In 2014 in Colorado, marijuana-infused edible products sold almost five million units<sup>98</sup> and are now estimated to make up nearly fifty percent of sales in the legal market.<sup>99</sup> A variety of factors account for this market segment's growth, including medical patients who cannot smoke, existing consumers who are interested in a new experience, and new consumers who would like to experience marijuana but are not interested in smoking.

With the prevalence of edible products on the market comes the need to regulate dosage. This can be achieved by limiting the amount of the psychoactive components—THC, CBD, or cannabitol—per serving as well as by limiting the number of servings per package. This need is underscored by the existence of products which would appear to an uninformed consumer as intended for a single use, but contain more of the psychoactive ingredient than most consumers would be able to handle appropriately.<sup>100</sup> Colorado has provided perhaps the best example to date of regulation coupled with a public-education campaign. Colorado imposes a limit of 100 milligrams of THC total per package.<sup>101</sup> In conjunction, they have introduced the “First Time 5” campaign, which encourages inexperienced users to consume a small dose and then wait for the drug to take effect before consuming any more, to better effectively gauge their body's own

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98. See COLO. DEP'T OF REVENUE, MARIJUANA ENFORCEMENT DIVISION: ANNUAL UPDATE 25 (2015), [https://www.colorado.gov/pacific/sites/default/files/2014%20MED%20Annual%20Report\\_1.pdf](https://www.colorado.gov/pacific/sites/default/files/2014%20MED%20Annual%20Report_1.pdf).

99. Jordan Steffen, *Pot Edibles Were Big Surprise in First Year of Recreational Sales*, DENV. POST (Dec. 26, 2014), [http://www.denverpost.com/potanniversary/ci\\_27174833/pot-edibles-were-big-surprise-first-year-recreational](http://www.denverpost.com/potanniversary/ci_27174833/pot-edibles-were-big-surprise-first-year-recreational).

100. For example, Eugene, Oregon's Coma Treats produces the “Tiger Budder Chocolate Candy Bar,” which contains 350 milligrams of THC total. It is scored into four segments, each containing 87.5 milligrams of THC, a dose which is large even for many experienced consumers. The package itself includes a warning to inexperienced users to try 50 milligrams, less than one square of the scored candy bar. See Coma Treats, *Product Line*, Coma Treats, <http://www.comatreats.com/product-line.html> (last visited Dec. 10, 2015).

101. COLO. CODE REGS. § 212-2.1004.5 (2015).

reaction at a safe and manageable level.<sup>102</sup>

Labeling for edible and non-edible cannabis products will be necessary. It is important that the consumer knows exactly what is in the product in terms of its potency and which psychoactive chemicals are present in the product. For edible products it is also necessary to include any applicable nutrition or ingredient information as well as allergy warnings and other information necessary to meet appropriate food-product standards. All of the information necessary may quickly crowd the labels of products though so regulators should bear this in mind when constructing labeling requirements.

In addition to labeling concerns, packaging of marijuana products must be regulated to protect minors and adults from accidental ingestion. The OHA already has in place packaging regulations, which include that containers must be child-resistant, opaque, closable, and packaged in a way that is not attractive to minors.<sup>103</sup> Despite these regulations, many producers of marijuana products have expressed frustration in what they perceive as inconsistent enforcement and a lack of clear direction from the OHA on what packaging will be compliant.<sup>104</sup> Without this direction processors say that they have had to determine on their own whether packaging will be compliant, and many have had products removed from shelves for noncompliant packaging despite their good-faith attempts to meet the requirements. This has made it difficult for processors to plan and prevents them from scaling by forcing them to avoid larger batches in fear that they may lose the entire batch due to inconsistent enforcement. To combat this uncertainty, they have asked for more clearly defined standards as well as some sort of preapproval system for packaging and labeling to prevent the removal and destruction of a product that could have been saved and repackaged before it left the manufacturer.<sup>105</sup>

There are a variety of methods used to create concentrates and extracts, some of which can be dangerous to public safety. These can range from simply infusing butter with marijuana in a crock pot to more complicated high-heat and high-pressure methods such as

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102. *First Time 5 Edible Education*, COUNCIL ON RESPONSIBLE CANNABIS EDUC., <http://www.firsttime5.com/> (last visited Dec. 11, 2015).

103. OR. ADMIN. R. 333-008-1225 (2015).

104. See, e.g., *Edibles, Labeling, Packaging, Potency and Product Purity: February 28th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Anthony Taylor, Founding Partner, Canyon Six Industries).

105. *Id.*

butane hash oil, which requires volatile chemicals that can be dangerous when used outside of a properly controlled environment. The fact that these products are in high demand and not generally available to all consumers has led to attempts at home production, with sometimes disastrous results.<sup>106</sup> Therefore, it is necessary to determine which methods may be safely used by consumers at home, such as butter or alcohol extractions, which require at most only low heat and no significant pressure, and which methods are dangerous enough to require the producer to obtain a license and submit to safety inspections. Furthermore, the actual regulations for the manufacture of these products must be put in place to ensure that licensed processors are safely producing these products in a manner that will eliminate explosive accidents as well as reduce to a safe level the amount of residual solvents left in the final product.

### *B. Product Safety, Testing, and Tracking*

Since usable marijuana in its most basic form is simply dried without other processing, it is imperative to ensure that there are no contaminants present in the final product that would present a danger to consumers. These dangers can include, but are not limited to, microbiological agents, pesticides, and molds, especially in the genus *Aspergillus*, the spores of which can cause lung disease and are not destroyed by combustion of the marijuana.<sup>107</sup> In addition to the contaminants that may be present from the cultivation of the crop, concentrates and extracts run the risk of containing residual solvents or pesticides, which may concentrate to unsafe levels as a result of the extraction process if not properly filtered out.<sup>108</sup> It is also necessary that consumers know how much of the psychoactive components are present in the product they will consume. Potency can vary from plant to plant, and even different parts of the plant may contain varying levels of cannabinoids. Therefore, testing for potency using representative samples should be required in conjunction with testing

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106. Noelle Crombie, *Butane Hash Oil: A Quick and Powerful Marijuana High Feeds Demand*, OREGONIAN (May 12, 2014, 9:05 AM), [http://www.oregonlive.com/marijuana/index.ssf/2014/05/butane\\_hash\\_oil\\_overview\\_1.html](http://www.oregonlive.com/marijuana/index.ssf/2014/05/butane_hash_oil_overview_1.html).

107. *Lab Regulation and Standards: February 9th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Mowgli Holmes, Phylos Bioscience); see also MOWGLI HOLMES & BETHANY SHERMAN, CANNABIS SAFETY INST., IMPLEMENTATION OF OR MEASURE 91, 4 (2014), <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/44490>.

108. HOLMES & SHERMAN, *supra* note 107, at 5.



for contaminants.

Measure 91 only provided that the OLCC “may require . . . a laboratory analysis demonstrating to the satisfaction of the commission that particular marijuana items comply with the minimum standards in this state.”<sup>109</sup> This language did not give any new concrete standard by which to gauge compliance and relegated all testing standards to the agency’s rulemaking process. Some standards had been put in place by the OHA but participants from both dispensaries and testing laboratories felt that those regulations were still incomplete.

The OHA regulations on testing required that usable marijuana and immature plants be tested before transfer to a cardholder or caregiver for “pesticides, mold[,] and mildew”<sup>110</sup> and that usable marijuana be tested for levels of THC and CBD.<sup>111</sup> Since the rules only required testing before transfer to a customer, the burden of testing was placed on the registered person responsible for the marijuana facility. This dispensary-driven testing system led to a situation where each dispensary conducted testing at their preferred laboratory selected from a nonstandardized field, which led to inconsistency with test results, increased testing costs,<sup>112</sup> and contaminants making it through the system undetected.<sup>113</sup>

A registered facility could conduct its own testing if it complied with the minimum standards established by the rule<sup>114</sup> and accepted previously performed analysis results from a processor in the case of prepackaged products.<sup>115</sup> Aside from this mention of prepackaged products, the rules did not contain specific provisions for testing concentrates and extracts for contaminants unique to those products.

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109. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, ch. 1, § 50, 2015 Or. Laws.

110. OR. ADMIN. R. 333-008-1190(2)–(3) (2015).

111. *Id.* r. 333-008-1190(5).

112. *See, e.g., Lab Regulation and Standards: February 9th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Jesse Peters, Eco Firma Farms) (“Today, if I grow ten pounds and sell one pound to ten different dispensaries, ten different tests on the same batch are required, a total of about \$1,000 to \$2,000 for those ten tests. If I can test that entire batch, the cost will be between \$100 and \$200; an expense that has far less, if any, impact on the final price being charged to patients and eventually consumers.”).

113. Noelle Crombie, *A Tainted High*, OREGONIAN (June 11, 2015), <http://www.oregonlive.com/marijuana-legalization/pesticides/index.html>.

114. OR. ADMIN. R. 333-008-1190(10).

115. *Id.* r. 333-008-1190(5)(c).

These gaps could create further inconsistencies and chain-of-custody issues that would continue to undermine the dependability of test results.

Because of these concerns, owners of dispensary and testing laboratories asked for a revision to the process as well as more defined standards. They wanted the minimum required contaminants to be tested for and placed in the implementing statute rather than being left to the OHA to set by rule. This, they claimed, would set a minimum requirement for safety testing and ensure that no potentially harmful contaminants were categorically omitted from regulation but also allow the OHA the flexibility needed to set standards and practices.<sup>116</sup>

In addition to these minimum features, market participants asked for an accreditation and certification procedure.<sup>117</sup> The purpose of this was twofold. First, an accreditation would ensure that the laboratories were independently monitored and approved, which would strengthen trust in the system and provide neutral standards for the quality of analysis results. For this, the OHA's ORELAP was touted as the body best suited and experienced to handle this type of accreditation. Second, requiring certification through a license would enable the labs to legally possess quantities of marijuana, which they would need to carry out the tests, and ensure that the OLCC had some independent oversight of the laboratories so that they could be easily regulated and have inventories tracked in parallel with other licensees.<sup>118</sup>

Tracking will be necessary to enforce compliance with the new testing requirements, but it will also be necessary for inventory control, specifically to ensure compliance with the Cole Memorandum's priorities. The need for this was quickly realized and was the topic of discussion at the next meeting after the discussion of laboratory testing. The desire was to create what has been termed a seed-to-sale tracking system similar to that used in other states that have legalized marijuana.<sup>119</sup> These types of systems monitor

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116. See *Lab Regulation and Standards: February 9th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Mowgli Holmes, Phlyos Bioscience).

117. *Id.*

118. *Id.*

119. See *Oregon Medical Marijuana System, February 11th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (statement of Sen. Floyd Prozanski).

inventory through all aspects of the plant's life cycle and each stage of processing until a final sale to the consumer.

METRC, the official state system for Colorado, and Biotrack THC, the official state system for Washington, are two systems that have emerged as leaders in this field. The METRC system assigns a unique identifier to each inventory component and utilizes a radio-frequency identification (RFID) tag to track those.<sup>120</sup> The RFID tags can be read manually or with scanners at a distance of up to five meters, and scanning can be automated at passage through doorways or other choke points, similar to security devices in stores. The system uses Internet-based tools for reporting, which require very little expense for the user to participate; at a minimum each person responsible need only purchase the RFID tags required for their inventory. The Biotrack THC system, in contrast, uses a barcode-based system.<sup>121</sup> The barcode tags in this system can be read manually or by using scanners, but like other barcode-based systems, the scanner can only read one tag at a time, and tags must be read by holding the scanner close to the tag. The Biotrack THC system does not include Internet-based reporting and requires each user to have a dedicated computer to operate in the system. This, the company states, is due to concerns over security, specifically when dealing with patients' medical data. The OLCC has indicated that it would prefer an RFID-based system.<sup>122</sup>

### *C. Land Use and Siting*

The commercial sale of marijuana requires facilities for growing, processing, and sale. These facilities all needed to be located within the state to comply with federal enforcement priorities. Some facilities that have been established to serve the medical market will be converted for recreational sales and many may choose to establish collocated facilities to serve both markets. But these facilities alone will not be able to supply enough product to meet the expected demand for recreational marijuana, so a number of new facilities of each type will be needed. The operations of these businesses have the

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120. See *The System*, METRC, <http://www.metrc.com/#!/the-system/cjg9> (last visited Dec. 11, 2015).

121. See *Benefits*, BIOTRACKTHC, <https://www.biotrackthc.com/how-it-works> (last visited Dec. 11, 2015).

122. See *OLCC Recommendations on Marijuana Policy: March 11th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Robert Patridge, Chair, OLCC).

potential for conflict with other established businesses; therefore, careful attention must be paid to directing the siting of these facilities in order to reduce conflict.

Oregon is a home-rule state,<sup>123</sup> meaning that local governments have wide authority to pass ordinances on any subject that is not already governed by the state. The legislature has enacted comprehensive land-use planning statutes that require coordination between state agencies and local governments to meet statewide planning goals.<sup>124</sup> These policies are considered “matters of statewide concern” and serve to preempt inconsistent local enactments.<sup>125</sup> Local governments, though, have the power to implement zoning ordinances, which will bear heavily on any new development.

Local governments primarily use zoning to control how land is developed. This informs our traditional understanding of land-use planning, where, for example, residential uses are separated from industrial uses, and usage types are clustered to further reduce incompatibility.<sup>126</sup> Measure 91 only granted to local governments the authority to regulate the “nuisance aspects” of marijuana establishments, but it did not address which zones marijuana facilities would be allowed in.<sup>127</sup> Certain marijuana establishments, such as processors and large growing operations, inherently conflict with residential land uses and should be sited only in zones that allow for industrial or heavy agricultural uses. Retail outlets, on the other hand, can peacefully coexist with other businesses in commercial or mixed-use zones, just like medical dispensaries have done since they were established in Oregon.

A unique aspect to this industry is that marijuana facilities may not be located within 1,000 feet of a school, regardless of the zone in which the properties are located.<sup>128</sup> This provision of the OMMA was not copied into Measure 91. The Committee members made it clear early on that this would be added to any implementing legislation, and one state representative introduced a bill that would prohibit marijuana facilities within one mile of a school, though this bill did

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123. OR. CONST. art. VI, § 10; *see* OR. REV. STAT. § 203.035 (2013).

124. *See* OR. REV. STAT. § 197.005.

125. *Id.* § 197.013.

126. *See generally* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387–90 (1926) (discussing zoning as an exercise of the police power).

127. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, ch. 1, § 59(1), 2015 Or. Laws.

128. OR. REV. STAT. § 475.314(3)(d).

not receive support after its introduction.<sup>129</sup> Regarding this 1,000-foot limitation, state Senator Prozanski expressed a desire to fix what he considered an oversight of the OMMA, which was what happens if a school established within 1,000 feet of an existing marijuana facility.<sup>130</sup> His bill would allow a marijuana establishment in good standing to remain at its location if a school moved nearby in order to prevent the losses associated with having to relocate a business. This suggestion received strong support.<sup>131</sup>

The Committee thought it prudent to limit the size of grows for both recreational and medical marijuana to prevent oversupply in the recreational market, diversion to the black market from the medical market, or a centralization of grow operations.<sup>132</sup> Proposals for the medical supply focused on the number of plants at each grow site, as they could be tied to the number of registered cardholders in the medical system as a ready indicator of demand, and this would close the “card stacking” loophole in the current system. On the recreational side, initial proposals questioned whether the limits should be based on plant counts, a grow site’s area, or the growing canopy’s area. This uncertainty was due to the unavailability of accurate estimates for recreational demand for a market that did not previously exist in Oregon and has only existed in other states for a relatively short time.<sup>133</sup> In addition to these concerns, those setting the limits would need to take into account varying yields based on the type of grow, indoor or outdoor.

Stakeholders desired a way to ensure that investment and effort would not go to waste on the decision of a local body. For this reason, local officials encouraged the use of a land-use compatibility

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129. See *June 15th Public Hearing for H.B. 2041 of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015).

130. See *March 4th Public Hearing for S.B. 460 of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (statement of Sen. Floyd Prozanski).

131. *Id.* (testimony of Anthony Johnson, Chief Petitioner of Measure 91, New Approach Oregon).

132. See *March 30th Public Hearings for S.B. 936 of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (statement of Mark Mayer, Deputy Legislative Counsel).

133. See *May 20th Public Hearing for H.B. 3400*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Seth Crawford, Instructor, Oregon State University). *But see June 3d Public Hearing for H.B. 3400 of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Beau Whitney, Chief Operating Officer, Greenpoint Oregon); BEAU R. WHITNEY, OREGON CANNABIS DEMAND FORECAST ANALYSIS (2015), <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/77387> (Exhibit 3 presented by Beau Whitney at the June 3d public hearing).

statement.<sup>134</sup> This is a statement provided by the local governing body to allow a proposed use at a proposed location, and it would be required before a license application could be filed with the OLCC. This statement does not guarantee any approvals, but it helps to prevent investments in locations that cannot be used.

Since marijuana relies on agricultural inputs, there will also be a range of issues associated with the farming aspects of this market. Water rights, an analysis of which is too complicated to delve into here, can be very difficult to obtain for new entrants and would be completely unavailable from federal sources. In addition, outdoor grows that are located near industrial hemp farms may face problems from open pollination, which can ruin a cultivator's efforts to isolate strains.<sup>135</sup> While industrial hemp growing has been legal in Oregon since 2009,<sup>136</sup> few licenses have been issued, and in August 2015 the ODA stopped issuing licenses to grow industrial hemp, though they have stated that this decision was not due to concerns over marijuana pollination.<sup>137</sup>

In addition to these general farming concerns, there are also issues specific to Oregon's comprehensive land-use planning system. One of the ways the state seeks to protect farmland is through the use of Exclusive Farm Use zoning, a restrictive zone intended to limit nonagricultural uses. A new primary farm dwelling may not be sited on a parcel of high-value farmland in this zone unless the average gross income from farming the property for a period of years exceeds

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134. *Environmental, Land Use, and Siting Issues: February 23d Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Kelly A. Madding, Director, Jackson County Development Services); OR. DEP'T OF ENVTL. QUALITY, LAND USE COMPATABILITY STATEMENT (2014), <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/48424> (Exhibit 5 presented by Kelly A. Madding at the February 23d informational meeting).

135. See, e.g., *Environmental, Land Use, and Siting Issues: February 23 Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Russ Karow, Professor Emeritus, Department of Crop and Soil Science, Oregon State University). Only female plants are used in the commercial production of marijuana. Growers prevent pollination of the plants to improve crop yields, increase potency, and prevent seed production. Hemp plants are a cultivar of the same species as marijuana, and can easily cross-pollinate with cultivated marijuana. Since hemp cultivars are defined by their lack of THC, this cross-pollination can drastically reduce the potency of the cultivated marijuana. Pollen can be carried on the wind, or by pollinating insects such as bees, in approximately a three-to-five-mile radius.

136. See OR. REV. STAT. § 571.305 (2013).

137. Noelle Crombie, *Oregon Stops Issuing Industrial Hemp Licenses*, OREGONIAN (Aug. 25, 2015, 8:48 AM), [http://www.oregonlive.com/marijuana/index.ssf/2015/08/oregon\\_to\\_stop\\_issuing\\_license.html](http://www.oregonlive.com/marijuana/index.ssf/2015/08/oregon_to_stop_issuing_license.html).

\$80,000.<sup>138</sup> Due to the high price of marijuana relative to other crops, many thought that this test would be insufficient and desired to disallow a marijuana crop to be used for this purpose.<sup>139</sup> This would prevent a person from cultivating a marijuana crop for a few years, building a house, and then selling it, a practice that would reduce available high-value farmland in Oregon.

#### *D. Employers and Employees*

Measure 91 does not “amend or affect in any way state or federal law pertaining to employment matters.”<sup>140</sup> Employment law is an area of heavy overlap between state and federal regulations, and as a result, the Oregon Supreme Court has already had occasion to decide a case regarding marijuana in an employment context.<sup>141</sup> In this case, a registered medical-marijuana cardholder, anticipating a drug test, disclosed to his employer that he used marijuana and was discharged as a result.<sup>142</sup> He filed a complaint with the Bureau of Labor and Industries, who filed charges against the employer. An administrative-law judge found for the employee, ruling that failing to engage in “a meaningful interactive process” violated the employer’s duty to accommodate a disability under the Americans with Disabilities Act (ADA).<sup>143</sup> The Oregon Court of Appeals affirmed without reaching the merits, and the employer sought review from the Oregon Supreme Court.

The employer argued that the ADA, which excludes users of controlled substances from its protection, does not apply to registered medical-marijuana users who are still in violation of federal controlled-substance laws.<sup>144</sup> The court looked to whether the state law was preempted “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” and held

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138. OR. ADMIN. R. 660-033-0135(4)(a) (2015).

139. See *Environmental, Land Use, and Siting Issues: February 23d Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Steve McCoy, Farm and Forest Staff Att’y, 1,000 Friends of Oregon).

140. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, ch. 1, § 4(1), 2015 Or. Laws.

141. See *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010).

142. *Id.* at 520–21.

143. *Id.* at 521.

144. *Id.*

that it did.<sup>145</sup> Since state law affirmatively authorized the use of marijuana in violation of federal law, this stood as an “obstacle” to execution. Further, the court refused to find an exception for use “under supervision of a licensed health care professional” because Oregon law does not require a prescription for medical marijuana and there is no mechanism in place for the attending physician to control consumption.<sup>146</sup> The court reversed the lower courts’ decisions and held that the employer was not required to accommodate an employee for medical marijuana due to federal preemption under the CSA.

Decided one year later, *Willis v. Winters* narrowed this holding. In this case, the Oregon Supreme Court addressed the same issues as in *Emerald Steel* as they applied to the issuance of a concealed-handgun license.<sup>147</sup> The case consolidated four cases where registered medical-marijuana cardholders applied to their local sheriff’s office for a concealed-handgun license, but were denied the license based solely on their status as registered cardholders. Applying the analysis of *Emerald Steel* regarding preemption, the court held that the state’s concealed-handgun license did not “affirmatively authorize conduct that federal law prohibits” inasmuch as it did not authorize possession of a handgun.<sup>148</sup> Rather, the state law served only to “exempt[] licensees from state criminal liability for the possession of a concealed handgun” for those who were otherwise legally in possession of the handgun.<sup>149</sup> Since the state law did not bear on the ability of a marijuana user to obtain a firearm, this, the court reasoned, did not stand as an obstacle to the execution of federal law prohibiting users of controlled substances from possessing firearms.

These two cases taken together show that in areas of overlapping concern, such as employment law, the Oregon Supreme Court is more likely to find federal preemption. This is especially so when the federal law relied on contains an express prohibition on the activity in question. When the matter is one of mostly intrastate concern, such as laws exempting people only from certain state criminal conduct, the court will be less likely to find that the state law stands as an obstacle to the execution of the federal law.

Regarding the employees of the new recreational marijuana

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145. *Id.* at 528–30.

146. *Id.* at 534.

147. *Willis v. Winters*, 253 P.3d 1058, 1062–63 (Or. 2011).

148. *Id.*

149. *Id.*



businesses, they will need the same protections as other employees in other industries. They should be afforded the power to unionize, if they so choose, and should be eligible for the minimum wage in the state. In addition, they should be afforded strong whistleblower protection to ensure that they feel comfortable calling attention to violations of state law before those violations result in a federal investigation. These employees will need to have accountability because of the nature of the product, and the OLCC already requires this of alcohol servers.<sup>150</sup> Requiring a server permit in this manner will help guarantee that employees of marijuana businesses know the law and reduce the potential for violations of federal enforcement priorities.

*E. Landlord—Tenant and Residential Issues*

Just as with employment law, Measure 91 does not amend or affect state or federal landlord-tenant law.<sup>151</sup> Again, that does not mean that there will be no impact on landlord-tenant relationships. Primarily, landlords are concerned with preserving the condition of their property and will be most concerned with the possibility of smoke damage. Oregon's Indoor Clean Air Act does not differentiate between cigarette and marijuana smoke, so landlords may restrict marijuana usage through application of a standard no-smoking policy, but must include a smoking policy in the lease,<sup>152</sup> though this requirement does not apply to manufactured or floating homes.

Absent a smoking policy to restrict usage, property owners may wish to restrict only specific activity related to marijuana, such as home growing or processing. This can be accomplished through a term in the lease agreement, a rider that specifically addresses marijuana-related activities, or with consent of the tenant if adopted after entering into the lease agreement.<sup>153</sup> The holding of *Emerald Steel* applies in this context as well, which will serve to shield property owners from the requirement of providing accommodation to medical-marijuana users. However, landlords are not restricted from providing accommodation if they so choose. In addition, landlords

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150. See OR. REV. STAT. § 471.360 (2013).

151. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, ch. 1, § 4(2), 2015 Or. Laws.

152. Act of June 11, 2015, ch. 388, sec. 10, § 90.220(4), 2015 Or. Laws; see also OR. REV. STAT. 479.305 (specifies what must be included in a smoking policy).

153. See OR. REV. STAT. § 90.262(1).

may also wish to allow usage within the common areas of their properties, provided that those common areas are closed to the public and do not otherwise meet the definition of “public place” as used in the statute.<sup>154</sup>

#### *F. Law Enforcement and Youth Prevention*

Legitimizing the new recreational market requires taking steps to prevent purchase and use by minors. This is reflected in the fact that it is the first listed of the federal enforcement priorities outlined in the Cole Memorandum.<sup>155</sup> This can be achieved primarily by taking a two-prong approach that combines measures to prevent the sales to minors at the retail establishment and supplemental prevention education to reduce demand from potential consumers who have not yet reached adulthood. The education portion will be accomplished primarily through existing programs and supplemented by an appropriation of five percent of monthly revenue from the Oregon Marijuana Account, which is provided to the OHA for “the establishment, operation, and maintenance of alcohol and drug abuse prevention, early intervention and treatment services.”<sup>156</sup>

As with other aspects of Measure 91, much of the law dealing with prevention of sale to minors was based on relevant alcohol law.<sup>157</sup> However, to ensure full compliance with federal priorities, the laws regarding marijuana are much stricter regarding minors. For

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154. See Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act § 54; see also OR. REV. STAT. § 161.015(10) (“‘Public place’ means a place to which the general public has access and includes . . . hallways, lobbies and other parts of apartment houses and hotels not constituting rooms or apartments designed for actual residence, and highways, streets, schools, places of amusement, parks, playgrounds and premises used in connection with public passenger transportation.”).

155. Cole Memorandum, *supra* note 67, at 1.

156. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act § 44(2)(f).

157. Compare OR. REV. STAT. § 471.130 (requiring statement of age or identification from certain purchasers of alcoholic beverages before sale), and *id.* § 471.410 (listing mandatory minimum penalties for providing liquor to a person under twenty-one, providing liquor to an intoxicated person, or allowing consumption by a minor on the property), and *id.* § 471.430 (specifying treatment and assessment options for a minor who buys alcoholic beverages, enters a licensed premises, or operates a motor vehicle while possessing alcoholic beverages) with Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, § 14 (prohibiting the sale of marijuana to any person under twenty-one years of age), and *id.* § 16 (requiring identification before marijuana sales may be made if there is “reasonable doubt” about purchaser’s age), and *id.* § 47 (prohibiting the provision of marijuana to an intoxicated person and prohibiting a minor from consuming marijuana on the property), and *id.* § 49 (specifying treatment and assessment options for a minor who buys marijuana).

example, an exemption from criminal liability is afforded to a parent or guardian who provides alcohol to their minor child if in a private residence.<sup>158</sup> This exemption is absent from Measure 91.<sup>159</sup> The limitations on minors entering retail marijuana establishments are similarly restrictive, as minors may only enter an age-restricted establishment if the entry is necessitated by an emergency.<sup>160</sup> This extra restrictiveness should be expected due to the long tradition of alcohol consumption in family and social environments and the lack of tradition surrounding marijuana.

With more stringent laws controlling a minor's access to marijuana establishments, greater vigilance must be exercised in age verification. For this, the OLCC initially requested that retail marijuana outlets be required to use age-verification scanners, devices that scan the bar code on the back of a piece of identification to verify its authenticity.<sup>161</sup> These devices are used in some establishments that sell alcohol, either by choice of the proprietor or as a way of avoiding penalties for past infractions;<sup>162</sup> however, they are not required as a condition of licensure.

The American Civil Liberties Union was the most vocal in opposing this request due to privacy concerns, expressing fear that the information would be saved and possibly used against the person or sold for marketing purposes.<sup>163</sup> Furthermore, requiring age-verification equipment would potentially place the law into conflict with other Oregon law that prohibits the collection of personal data through these scanners, except to verify identity to prevent purchasing fraud or if there is a reasonable doubt about the purchaser's age.<sup>164</sup> Under that law, a business using these devices may only store the

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158. OR. REV. STAT. § 471.410(2).

159. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act § 47(2)(a).

160. *Id.* § 49(2).

161. *OLCC Recommendations on Marijuana Policy: March 11th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Robert Patridge, Chair, OLCC); *see also* OR. LIQUOR CONTROL COMM'N, OLCC RECOMMENDATIONS ON MARIJUANA POLICY (2015), [http://www.oregon.gov/olcc/docs/commission\\_minutes/2015/OLCC\\_Recommendations\\_Marijuana\\_Policy.pdf](http://www.oregon.gov/olcc/docs/commission_minutes/2015/OLCC_Recommendations_Marijuana_Policy.pdf) (submitted as exhibit with Robert Patridge's testimony at March 11th meeting).

162. *See* OR. REV. STAT. § 471.342.

163. *March 23d Public Hearing for S.B. 844 of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Kimberly McCullough, Legislative Director, American Civil Liberties Union of Oregon).

164. OR. REV. STAT. § 807.750(2)(b).

name, address, date of birth, and identification card's number "for the purpose of preventing fraud or other criminal activity."<sup>165</sup> When properly used, these devices do not store personal information beyond that which is allowed and do not transmit the information to outside storage facilities, but more devices in use raise the potential for bad actors within the system to misappropriate this information.

To assist local law enforcement with upholding the new laws, Measure 91 sets aside revenue from the Oregon marijuana account for appropriation by local governments.<sup>166</sup> To this end, ten percent of revenue will be given each month for division between cities,<sup>167</sup> ten percent will be given to counties,<sup>168</sup> and fifteen percent will be given to the state police.<sup>169</sup> Appropriations made before July 1, 2017, will be divided among local governments based on population.<sup>170</sup> Distributions made after that will be divided into shares that are based on the number of producer, processor, and wholesaler licenses within the jurisdiction and in part on the number of retail licenses.<sup>171</sup> Concern has been raised over this calculation method, since localities that have more centralized distribution, such as one large retailer that serves the entire community, will receive less in revenue distributions than a locality with many smaller stores despite having a comparable sales volume.<sup>172</sup> Regardless of the method used to calculate revenue distributions, Committee members have expressed that they intend to deny distributions to any local governments who exercise one of the various opt-out methods.

One benefit of the new laws that has already been realized is the reduced workload on local prosecutors. Since the passage of Measure 91, some counties, including Multnomah county, Oregon's most populous county, have started dropping cases based on marijuana-related activity that would no longer be crimes after Measure 91's effective date.<sup>173</sup> Further, state Representative Andy Olson has

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165. *Id.* § 807.750(4).

166. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, ch. 1, § 44, 2015 Or. Laws.

167. *Id.* § 44(2)(d).

168. *Id.* § 44(2)(e).

169. *Id.* § 44(2)(c).

170. *Id.* § 44(2)(d)(A), (e)(A).

171. *Id.* § 44(2)(d)(B), (e)(B).

172. See, e.g., *February 16th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (written testimony of Rob Bovett, Legal Counsel, Association of Oregon Counties).

173. Shelby Sebens, *Portland Prosecutors Drop Pot Cases After Oregon Legalization*

expressed the need to introduce provisions into implementing legislation that will expunge convictions for those who were convicted under the old laws and have completed their sentence.<sup>174</sup> This will serve to reduce the stigma associated with a past conviction and help people whose activity is no longer illegal in seeking employment and other services. Penalties for violations of the Measure can be reduced to reflect the underlying legality of the product, which will reduce the number of felony prosecutions within the state and create an easier path to expungement in the future.<sup>175</sup>

### *G. Banking and Financial Services*

The Federal Deposit Insurance Corporation (FDIC), created in response to the Great Depression, guarantees deposits made at subscribing banks up to a specified amount.<sup>176</sup> That safety net, coupled with reliance on and regulation from the Federal Reserve, also guarantees that any bank that wishes to offer the protection that depositors have come to expect must follow rules set forth by the federal government. Part of this compliance is through monitoring and practices designed to root out and prevent money-laundering activities in violation of the federal CSA.<sup>177</sup> Even in a state where marijuana is legal, banking services are unavailable to marijuana businesses.

The Department of the Treasury's Financial Crimes Enforcement Network issued a guidance statement detailing how banks were to deal with marijuana businesses.<sup>178</sup> It directed banks to conduct due diligence and assess risk factors before opening accounts for marijuana businesses. Primarily, these were to determine whether the business was properly licensed within its state, operating within state regulatory structures, and avoiding activity that would put the

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*Vote*, REUTERS, Nov. 14, 2014, <http://www.reuters.com/article/2014/11/14/us-usa-marijuana-oregon-idUSKCN0IY2B320141114>.

174. *See, e.g., Measure 91 Policy Bill Framework Overview: May 18th Informational Meeting of Joint Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Mark Mayer, Deputy Legislative Counsel).

175. *Id.*

176. *See, e.g., FED. DEPOSIT INS. CORP., A BRIEF HISTORY OF DEPOSIT INSURANCE IN THE UNITED STATES* 22 (1998), <https://www.fdic.gov/bank/historical/brief/brhist.pdf>.

177. *See* 18 U.S.C. § 1956 (2014).

178. *See* FIN. CRIMES ENF'T NETWORK, U.S. DEP'T OF THE TREASURY, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (2014), [https://www.fincen.gov/statutes\\_regs/guidance/pdf/FIN-2014-G001.pdf](https://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf).

business at peril of violating federal enforcement priorities.<sup>179</sup>

The guidance reiterated the requirement for banks to file a Suspicious Activity Report when they know or suspect that a transaction involves money from an illegally derived source or is made for the purpose of money laundering. It also provided filings specific to marijuana: limited, priority, and termination. “Marijuana limited” filings were for those businesses that were in compliance with state law and the Cole Memorandum’s priorities, “marijuana priority” filings were for those who were in violation of state law or federal priorities, and “marijuana termination” filings were to be used when a bank decided to end a customer relationship based on marijuana activity, and were to be used as the narrative explanation for the termination.<sup>180</sup> To assist banks in determining which activity would warrant a priority filing, the guidance provided eleven “red flags” that would indicate whether a marijuana business was compliant with state law and federal priorities.<sup>181</sup>

While this guidance seemed promising at first, bankers remained unwilling to extend services to marijuana businesses. They saw the guidance as offering no additional protection, but rather detailing all of the ways that the banks could find themselves running afoul of the law.<sup>182</sup> In the first year after the guidelines were issued, approximately 3,200 Suspicious Activity Report filings were made, of which approximately 1,300 were termination filings.<sup>183</sup> While this at first appears to be a bleak picture, analysis shows that the number of termination filings decreased as the year progressed. Yet banks that wish to offer services to marijuana-related businesses are still in the minority. A Gresham, Oregon-based bank had announced publicly

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179. *Id.* at 2–3.

180. *Id.* at 3–4.

181. *Id.* at 5–7. The following scenarios are examples of situations that were deemed to be red flags: a customer appears to be using state law as a pretext for laundering money from another criminal enterprise, the business cannot produce state-law compliance documentation, a customer is trying to conceal marijuana-related activity yet is attempting to deposit cash that smells of marijuana, and a banking customer is attempting to conceal involvement with marijuana activity that would implicate federal enforcement priorities.

182. Matt Ferner, *Obama’s Marijuana Banking Rules Don’t Change Anything*, *Bankers Say*, HUFFINGTON POST (Feb. 21, 2014, 3:59 PM), [http://www.huffingtonpost.com/2014/02/21/marijuana-banking\\_n\\_4791193.html](http://www.huffingtonpost.com/2014/02/21/marijuana-banking_n_4791193.html).

183. Alison Jimenez & Steven Kemmerling, *Who is Filing Suspicious Activity Reports on the Marijuana Industry?*, DYNAMIC SEC. ANALYTICS (Apr. 13, 2015), [http://securitie sanalytics.com/marijuana\\_SARs](http://securitie sanalytics.com/marijuana_SARs).

that it would be accepting marijuana business customers,<sup>184</sup> but decided to close its marijuana-related accounts in the face of pressure from federal regulators.<sup>185</sup>

In addition to the difficulty in securing banking services, marijuana businesses are having trouble finding other financial services such as bonding and insurance. The OLCC has stated that it intends to require general liability insurance, as well as bonds for potential tax obligations.<sup>186</sup> However, even the “insurer of last resort,” underwriter Lloyd’s of London, has stated that it will not deal with marijuana businesses until the product is legal under federal law.<sup>187</sup>

Even after financial-service providers decide to deal with marijuana businesses, those businesses will be unable to take ordinary business deductions. Under § 280E of the Internal Revenue Code, a business may not take tax deductions or credits if the business “consists of trafficking in controlled substances” under Schedules I or II of the CSA.<sup>188</sup> This further hinders marijuana businesses from operating as other businesses and reinforces the foothold of the black market, which does not have to pay any taxes and thus is not worried about deductions.

These problems lead to the conclusion that banking issues cannot be solved at the state level. Provisions may be made to alleviate these issues, but no direct action to reform a federally controlled system may be taken except by Congress. The Committee adopted a Senate Joint Memorial to be sent to Congress, asking them to develop a solution to the banking issue and to declassify marijuana as a Schedule I drug under the CSA.<sup>189</sup> Bills have been introduced in each of the houses of Congress,<sup>190</sup> but no bill introduced to date has

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184. See *Banking and Marijuana: February 25th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Jef Baker, President and Chief Executive Officer, MBank).

185. David Migoya, *Oregon Bank that Wanted Pot Accounts in Colorado is Ditching Them All*, DENVER POST (Apr. 14, 2015, 2:31 PM), [http://www.denverpost.com/business/ci\\_27905128/oregon-bank-that-wanted-pot-accounts-colorado-is](http://www.denverpost.com/business/ci_27905128/oregon-bank-that-wanted-pot-accounts-colorado-is).

186. See *OLCC Recommendations on Marijuana Policy: March 11th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Robert Patridge, Chair, OLCC); OLCC RECOMMENDATIONS ON MARIJUANA POLICY, *supra* note 161, at 1.

187. Tony C. Dreibus, *Lloyd’s of London to Exit U.S. Cannabis Insurance Industry*, MARIJUANA BUS. DAILY (May 29, 2015), <http://mjbizdaily.com/exclusive-lloyds-of-london-to-exit-u-s-cannabis-industry/>.

188. I.R.C. § 280E (2014).

189. See S.J. MEM’L 12, 2015 Leg., 78th Sess. (Or. 2015).

190. See, e.g., Marijuana Businesses Access to Banking Act, H.R. 2076, 114th Cong.

garnered the support needed to make it through both houses and their committees. Until such time as Congress passes this or a similar law, marijuana-related businesses will continue to have difficulty in securing ordinary financial services widely available to other businesses.

#### *H. Taxation*

Measure 91 provided for an excise tax to be collected at the first sale from a grower.<sup>191</sup> The rate provided was \$35 per ounce of marijuana flowers, \$10 per ounce of leaves, and \$5 per immature plant.<sup>192</sup> This method was adopted due to the fact that Oregon does not generally impose sales taxes.<sup>193</sup> However, this means that for an ounce of lower grade marijuana, which would eventually retail for \$100, the applicable tax rate would be approximately thirty-five percent. As the product increases in potency and price, this applicable rate will drop as a percentage of the final price, with an estimated average of around twenty-six percent.

This shifting tax rate would incentivize producers to only produce the highest grades of marijuana, thereby reducing the availability of other products and removing certain strains from the market, which may be beneficial for medical use or research. It also would place the burden of paying the tax on the producer, who has narrow profit margins and a reduced ability to pay the tax as compared to the ultimate consumer, who can avoid the tax by purchasing a smaller quantity or none at all. Therefore it was determined that the tax should be moved to the point of sale and based on a percentage of the sale price, in effect a standard sales tax.<sup>194</sup>

In addition to the state-imposed tax, local governments also wished to implement their own taxes. They claimed that revenues under the Measure would take some time to collect and disburse but that the heaviest expenditures for enforcement would come at the

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(2015).

191. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, ch. 1, § 33(3), 2015 Or. Laws.

192. *Id.* § 33(1).

193. See, e.g., *Sales Tax*, OR. DEP'T OF REVENUE, <http://www.oregon.gov/DOR/Pages/sales-tax.aspx> (last visited Dec. 14, 2015).

194. See *Measure 91 Policy Bill Framework Overview: May 18 Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (statement of Rep. Ann Lininger, Co-Chair, J. Comm. on Implementing Measure 91).



beginning.<sup>195</sup> Early revenues are expected to be lower and will ramp up to their projected levels over the course of a few years, as fewer consumers purchase from black- or gray-market sources and more participate in the legal market.<sup>196</sup> Furthermore, even when revenues have reached expected levels, local governments believe that their share of ten percent of the projected forty million dollars in yearly revenue will be too low to support enforcement activities. Thus, they believe that the imposition of a local tax will more directly correlate the generation of funds to the need for enforcement activities.

Measure 91 contained the preemptive language, “No county or city of this state shall impose any fee or tax . . . in connection with the purchase, sale, production, processing, transportation, and delivery of marijuana items.”<sup>197</sup> To avoid this preemption, many local governments passed their own taxes prior to the effective date of the Measure.<sup>198</sup> This, they believe, does not run afoul of the prohibition, because the taxes will have already been “imposed” prior to the effective date of the Measure.<sup>199</sup> In order to stop a previously adopted local tax, it is argued that the legislature would have to prohibit “collection” of the tax.<sup>200</sup> Legal challenges to these prior-adopted local taxes have yet to come, but are expected.

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195. See, e.g., *Taxes and Revenue: February 16th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Scott Winkels, Intergovernmental Relations Associate, League of Oregon Cities).

196. See *id.* (testimony of Mazen Malik, Senior Economist, Legislative Revenue Office); see also LEGISLATIVE REVENUE OFFICE, *THE REVENUE IMPACT OF MARIJUANA LEGALIZATION UNDER MEASURE 91* (2014), <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/46043> (exhibit to Mazen Malik’s testimony at February 16th meeting).

197. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act § 42.

198. See Ian K. Kullgren, *Measure 91: Cities Pre-emptively Taxing Recreational Pot Seek Safety in Numbers*, OREGONIAN (Oct. 24, 2014, 8:28 AM), [http://www.oregonlive.com/washingtoncounty/index.ssf/2014/10/measure\\_91\\_cities\\_preemptive.html](http://www.oregonlive.com/washingtoncounty/index.ssf/2014/10/measure_91_cities_preemptive.html); see also LEAGUE OF OR. CITIES, *OREGON CITIES WITH MARIJUANA TAXES* (2014), <http://www.orcities.org/Portals/17/A-Z/2014LocalMarijuanaTaxes1222014.pdf>.

199. See LEAGUE OF OR. CITIES, *LOCAL GOVERNMENT REGULATION OF MARIJUANA IN OREGON 10* (2015), <http://www.orcities.org/Portals/17/A-Z/A%20to%20Z%20Documents/LocalRegulationMarijuana08-14-15.pdf>.

200. Memorandum from Sean O’Day, Gen. Counsel, League of Or. Cities, Katherine Thomas, Assistant Gen. Counsel, League of Or. Cities, & Rob Bovett, Legal Counsel, Ass’n of Or. Ctys., to Mike McCauley, Exec. Dir., League of Or. Cities, & Mike McArthur, Exec. Dir., Ass’n of Or. Ctys. (Mar. 4, 2015), <http://www.orcities.org/Portals/17/A-Z/Measure91MemoFINAL.pdf>.

## V. MEASURE 91'S IMPLEMENTATION IN THE OREGON LEGISLATURE

### A. *What Was Passed*

During the 2015 legislative session, the Joint Committee on Implementing Measure 91 moved four bills out of committee that passed the full houses and were signed into law by the governor. House Bill 3400 is the policy omnibus bill, containing the bulk of the implementing statutes across a broad range of issues. House Bill 2041 contains the tax provisions. Senate Bill 844 sets forth a task force and also contains some amendments to the OMMA regarding patient rights, and Senate Bill 460 provides the “early start” for sales through medical dispensaries before the recreational facilities are licensed and running. This part will discuss relevant substantive provisions of each of these bills as they relate to the issues presented above.

#### 1. Oregon Medical Marijuana Act

An express goal of the Committee was not to disrupt the operation of the OMMA to too great of an extent. Measure 91, by its terms, contained the limitation that it did not “amend or affect in any way the Oregon Medical Marijuana Act.”<sup>201</sup> Despite that blanket statement though, there are aspects of the OMMA that the Committee found necessary to alter in order to bring it into harmony with the recreational system and to ensure that both systems can work within regulations to prevent violation of federal enforcement priorities. These provisions become operative March 1, 2016.<sup>202</sup>

To ensure that compliance and tracking systems could operate effectively, the registration systems within the OMMA needed to be made more robust. At the producer level, this entailed a reworking of the grow-site registration system in an attempt to limit the card stacking that had previously been the norm. Primarily this will be carried out by placing new limitations on the number of plants that a grow site may produce, regardless of how many registered cardholders for whom a grower is producing.

The statute retains the six-plant possession limit for individual cardholders, but removes any similar limit on the number of immature plants.<sup>203</sup> To conform better to scientific understanding of plant

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201. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act § 4(7).

202. Act of June 30, 2015, ch. 614, § 179, 2015 Or. Laws.

203. *Id.* § 82(1).

biology, an immature plant is now classified as one that is not flowering, rather than a plant that is less than twelve inches in height.<sup>204</sup> If a grow site is within a residential zone, there is a limit of twelve mature plants or up to twenty-four if the site is registered and growing that amount before January 1, 2015.<sup>205</sup> For grow sites in nonresidential zones, these limits are forty-eight mature plants to up to ninety-six plants if the site is registered and growing that amount before January 1, 2015.<sup>206</sup> This, the Committee thought, was necessary to encourage medical growers to move out of residential areas and to ensure that the medical supply chain does not produce product in such excess that it will be diverted into black or gray markets in violation of federal enforcement priorities. In addition to those restrictions, there is a two-year-residency requirement for a grower to register,<sup>207</sup> and growers must report quantities grown to the OHA.<sup>208</sup>

Despite this restriction on the amount of product that can be produced, participants in the medical-marijuana program were given greater freedom to dispose of their product. The statute raised personal-possession limits of harvested marijuana to better reflect the amount that may be harvested at one time. A cardholder and the cardholder's registered caregiver may now jointly possess twenty-four ounces of usable marijuana, and a grower may possess their harvest of up to twelve pounds per plant for outdoor grows and six pounds per plant for indoor grows.<sup>209</sup> A cardholder may now reimburse the grower for all costs, including labor,<sup>210</sup> and the cardholder may assign a portion of the right to possess to the grower.<sup>211</sup> This last provision was necessary to support an opt-in option for medical growers to the recreational supply chain.

The statute also added processors, who were previously unregulated, under the oversight of the OHA.<sup>212</sup> This was needed due to concerns regarding product safety and testing. The statute establishes a registration system and contains a two-year-residency

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204. *Id.* §§ 1(11), 84.

205. *Id.* § 82(3).

206. *Id.* § 82(4).

207. *Id.* § 81(2)(b).

208. *Id.* § 81a.

209. *Id.* § 82a.

210. *Id.* § 81(8).

211. *Id.* § 83.

212. *Id.* §§ 85a, 85b.

requirement similar to that for producers.<sup>213</sup> A processor who is making cannabinoid extracts—defined as those products created by extracting psychoactive components of marijuana using hydrocarbon-based solvents, high-heat, or pressure methods<sup>214</sup>—may not be located in a residential area.<sup>215</sup> A medical processor may not transfer medical product, extracts, or concentrates to anyone who is not a registered cardholder or caregiver, and no one but a registered processor may transfer these products to a medical dispensary.<sup>216</sup> These restrictions do not apply to a primary caregiver who processes medical products for their registered cardholder.<sup>217</sup>

Changes made to the dispensary system were relatively minor. The statute gave the OHA actual authority to establish a dispensary system by rule and requires that dispensaries be registered within this system.<sup>218</sup> There is now a two-year-residency requirement for the individual responsible as there is for growers and processors.<sup>219</sup> A dispensary may not be located in an area zoned exclusively residential<sup>220</sup> and may not be established within 1,000 feet of a school,<sup>221</sup> but if a school moves in after the dispensary, the dispensary can stay so long as it remains in good standing with the OHA.<sup>222</sup> This provision is mirrored for recreational retail establishments as well. In order to bring the business practices of these establishments in line with other legal businesses, the individual responsible for a dispensary may now designate or assign responsibility, provided that the new individual meets the same application requirements that a new registrant would face.<sup>223</sup> Similarly, upon foreclosure a secured party may continue to operate the business after submitting proof that it meets the regulation requirements to the OHA.<sup>224</sup>

The statute directs the OHA to establish a database for tracking transfers, but also provides significant protection to cardholders from

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213. *Id.* § 85(1), (2).

214. *Id.* § 1(5).

215. *Id.* § 85(3)(a).

216. *Id.* § 85c.

217. *Id.* § 85d.

218. *Id.* § 86(1)(a)–(b).

219. *Id.* § 86(2)(d).

220. *Id.* § 86(3)(a).

221. *Id.* § 86(3)(d).

222. *Id.* § 86a.

223. *Id.* §§ 86c, 86d.

224. *Id.* § 86e.

disclosure of their personal medical information.<sup>225</sup> Only the amount of information needed to determine compliance may be disclosed to law enforcement, and in no event may information regarding a cardholder's debilitating condition be disclosed.<sup>226</sup> Further patient protections, such as the replacement of specific mention of Alzheimer's disease as a qualifying condition with "a degenerative or pervasive neurological condition," were added in a subsequent bill, thus broadening the list of qualifying conditions and allowing for conditions that may not yet be named but share the same debilitating elements with known conditions.<sup>227</sup> A hospice, palliative-care, home-healthcare, or residential-care facility may now be designated as a caregiver, in addition to the cardholder's primary caregiver, to allow for those facilities to legally administer a cardholder's medical marijuana.<sup>228</sup> Finally, a transplant hospital may not deny a potential recipient solely on the basis that the recipient is a registered cardholder.<sup>229</sup> These additional protections were added in part due to overwhelming public support of the medical-marijuana program as well as concerns from current cardholders that the new recreational system would swallow up the medical system. Registered cardholders were one of the most vocal citizen groups and provided public comment at every opportunity.<sup>230</sup>

## 2. Oregon Liquor Control Commission and Licensing

The powers and duties of the OLCC with regard to marijuana regulation are not extensively listed in statute, but rather much of this will come in the form of administrative rules. This was the result of negotiations between the agency and the Committee. The Committee determined that the best method would be to set a minimum floor in statute with coextensive rulemaking authority, and let the meat of the regulations be determined by rule with a great deal of community input instead of by the legislature's mandate. As a result, the statute grants the OLCC broad rulemaking authority and enforcement power over the current law and any other state marijuana laws.<sup>231</sup> The power

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225. *Id.* § 85e.

226. *Id.* §§ 88d, 88e, 90e(4)–(5).

227. Act of Aug. 12, 2015, ch. 844, § 4, 2015 Or. Laws.

228. *Id.* § 6.

229. *Id.* § 8.

230. *See, e.g., March 30th Public Hearing for H.B. 3400 and S.B. 936 of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015).

231. Act of June 30, 2015, ch. 614, § 2, 2015 Or. Laws.

to purchase, possess, seize, or dispose of marijuana for enforcement purposes was granted in this bill as well, following a direct request from the OLCC on the issue.<sup>232</sup> However, the OLCC regulatory specialists are prohibited from being sworn in as federal law-enforcement officials while performing their duties with regard to marijuana or carrying a firearm, as these activities may run afoul of federal enforcement priorities.<sup>233</sup>

Regarding the regulation of license types, House Bill 3400 adds a few requirements but again sets most of the regulation at the agency-rulemaking level.<sup>234</sup> The two-year-residency requirement for the individual responsible, just as for medical-facility registrants, has been added for all recreational license types.<sup>235</sup> All of the residency requirements end on January 1, 2020.<sup>236</sup> The ability to deny an applicant because of a past conviction for a marijuana-related offense has been reduced from five to two years, reflecting the understanding that many people were convicted of these offenses as a result of activity that would have been conducted legally if it could have been done so at the time.<sup>237</sup> Just as with medical dispensaries, a recreational marijuana retailer may not be licensed within 1,000 feet of a school, but if a school moves in within 1,000 feet, the retailer may stay provided it remains in good standing with the OLCC.<sup>238</sup>

The statute removes the ability of the OLCC to deny an application due to a finding that there are “sufficient” licensed premises in a locality, yet it adds the requirement that the OLCC set canopy-size limits per facility by rule.<sup>239</sup> This was seen as the best method for the OLCC to control output, in order to prevent the oversupply and diversion of product, which were also concerns with regard to the medical supply chain. The law directs the OLCC to establish the limits “in a manner calculated to result in premises that produce the same amount of harvested marijuana leaves and harvested marijuana flowers regardless of whether the marijuana is grown outdoors or indoors.”<sup>240</sup> Outdoor grows can produce more

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232. *Id.* § 3.

233. *Id.* § 30(2)(a)–(b).

234. *See* H.B. 3400, 78th Leg. Assemb., Reg. Sess. (Or. 2015).

235. *See id.* §§ 12(2)(b), 14(2)(b), 15(2)(b), 16(2)(b).

236. *Id.*

237. *Id.* § 8(3)(a)(A).

238. *Id.* § 17.

239. *See id.* §§ 8, 13.

240. *Id.* § 13(1)(a).

flowers per plant but have only one harvest per year, while indoor plants produce less but can be run through multiple grow cycles in one year. Therefore, it is important to set limits that will reflect this difference in order to prevent giving growers using one particular method an unfair advantage in the new market. The statute also contemplates the establishment of a tiered system where responsible licensees may have their limits extended at the time of license renewal.<sup>241</sup>

The OLCC is directed to adopt rules for all license types for requiring annual license renewal, establishing licensing fees, requiring testing, and requiring that applicants meet relevant public-health and safety standards and industry best practices.<sup>242</sup> Furthermore, the OLCC may require producers to submit energy- and water-usage reports.<sup>243</sup> However, it may not limit the number, canopy size, or shipments of immature plants.<sup>244</sup> This last provision was added in part to help support the nursery and seed industries, significant industries in Oregon for a wide variety of plants, for which Oregon could stand to be a market leader in marijuana after a change to federal law allows exports to other states.

### 3. Concentrates, Edibles, and Extracts

As mentioned previously, some, but not all, of the methods for extracting the psychoactive components of marijuana into other substances can be dangerous. Therefore, the definitions provided in the statute were written in such a way as to classify those produced through potentially dangerous methods as “extracts” and those that are generally safe for home production as “concentrates.” Extracts include any methods that use a hydrocarbon-based solvent, high heat, or pressure.<sup>245</sup> Concentrates are defined as those made with fats, oils, alcohol, or carbon dioxide when done in a way that does not use high heat or pressure.<sup>246</sup> The home production of extracts and possession of homemade extracts are prohibited in the statute.<sup>247</sup>

Despite the needed tweak to definitions to subclassify these

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241. *Id.* § 13(1)(b).

242. *Id.* §§ 12(3)(a)–(c), (e), 14(3)(a)–(d), 15(3)(a)–(d), 16(3)(a)–(d).

243. *Id.* § 12(3)(d).

244. *Id.* § 12(3)(e)(B).

245. *Id.* § 1(5).

246. *Id.* § 1(3).

247. *Id.* § 56.

products, much of the rules needed to regulate edibles and extracts will come from existing OHA rules. This fell under the rubric of “don’t reinvent the wheel,” which has been a touchstone of developing any statutes or rules that had a previously existing corollary under the OMMA. Since edibles were already such a large part of the medical system, the previously completed work of the OHA in developing rules stands as a substantial building block on which to base new regulations.

Just as with the duties of the OLCC, a minimum set of standards was adopted in statute to ensure that agency rules cover all needed aspects of regulation. The law directs the OHA to adopt rules, with consultation from the OLCC and the ODA, for labeling standards that communicate health and safety warnings, activation time, test results, potency, serving size and number of servings per package, and content of the marijuana item.<sup>248</sup> The law also directs the OLCC, with consultation from the OHA and the ODA, to adopt packaging standards that are child-resistant and not marketed in a way that is untruthful, misleading, attractive to minors, or a significant risk to public health and safety.<sup>249</sup> Both of these sets of rules may be different for medical and recreational products,<sup>250</sup> and shall take into account cost to the consumer of additional requirements.<sup>251</sup> To alleviate processors’ concerns over uncertainty regarding compliance, both the OHA and the OLCC may require processors to submit proposed labels or packaging for a preliminary determination of compliance before those products will be sold.<sup>252</sup> In addition to these rules, the statute directs the OHA to adopt rules for the maximum concentration of THC per serving of a product and the number of servings per package.<sup>253</sup>

Despite the ODA’s consultation responsibility to develop the aforementioned rules, it does not have much authority over cannabinoid edibles except primarily in its capacity as the inspector of food-processing facilities and its authority over weights and measures.<sup>254</sup> It may not treat marijuana as a food additive or

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248. *Id.* § 101(1)(a).

249. *Id.* § 103(1)(a).

250. *Id.* §§ 101(4)(b), 103(4)(b).

251. *Id.* §§ 101(4)(c), 103(4)(d).

252. *Id.* §§ 102, 104.

253. *Id.* § 105.

254. *Id.* § 114(1).



adulterant.<sup>255</sup> Furthermore, it is restricted from applying or enforcing laws regarding labeling or false advertising, due to the concurrent, overlapping authority of the OHA and the OLCC in this respect.<sup>256</sup>

#### 4. Product Safety, Testing, and Tracking

Once it was determined that a greater need for product testing existed and that the testing laboratories would need to go through an accreditation procedure, ORELAP was tapped as the program best suited to the task. Just as with packaging and labeling requirements, the statute sets a minimum floor for testing and directs the OHA to adopt rules governing the details of testing procedures. At a minimum, the law requires that the OHA establish standards for the testing of microbiological contaminants, pesticides, other contaminants, residual solvents, and THC and CBD concentration.<sup>257</sup> It must set batch and sample sizes, and may set different standards for different products.<sup>258</sup> The law states that it “may” require edibles to be tested under other food-safety laws,<sup>259</sup> and it is certain that this will be required, though there is some uncertainty over where in the manufacturing process is the best place to test for each component. This section becomes effective January 1, 2016,<sup>260</sup> but existing OHA rules under the OMMA can continue to operate until new rules are adopted.

Along with accreditation, this statute attempts to alleviate concern over inconsistent results by moving the point of testing further back in the production process. Under the OMMA, testing was the responsibility of the dispensary. This ensures that the product tested is the same product that goes into the hands of consumers. However, this procedure causes duplicative testing and drives up the ultimate price. House Bill 3400 therefore allows the OHA to require that testing of product be performed before transfer.<sup>261</sup> However, House Bill 3400 also restricts them from mandating multiple tests on the same product unless the “condition of the product is fundamentally changed,”<sup>262</sup> such as when a concentrate is added to an

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255. *Id.* § 114(2)(a)–(b).

256. *Id.* § 114(2)(c).

257. *Id.* § 92(1)(b).

258. *Id.* § 92(c)–(d).

259. *Id.* § 92(2).

260. *Id.* § 178.

261. *Id.* § 92(3)(a)–(b)(4).

262. *Id.* § 92(6).

edible product, where possible new contamination could be introduced or potency altered.

For all testing procedures, the OHA must consider the cost to the ultimate consumer when adopting rules.<sup>263</sup> This is another area that will require interagency coordination due to overlapping authority. In addition to the requirement of accreditation, the laboratories must also be licensed by the OLCC.<sup>264</sup> As a result, there will be at least two sets of inspections, often for the same items. To minimize cost and prevent overburdening the laboratories, the agencies can focus on their core goals during inspection, with the OHA looking primarily to the laboratory aspects and the OLCC inspecting the supply-side aspects to enforce a proper chain of custody through tracking procedures. The statute also directs the OLCC to develop this tracking system and sets the basic features of the system, with the bulk of the regulation established by rule.<sup>265</sup>

In addition to the additional license for testing laboratories, advocates desired a method to create an easier path for research. To conduct research, those involved would need to be in possession of greater amounts than allowed under the law, so some form of license or other certification would be required for the extra allowance. To resolve this issue, the Committee established a research certificate that exempts the researcher and employees from criminal law for possession, manufacture, or delivery when performing their work.<sup>266</sup> The certificate will be implemented by the OLCC, but requires the OHA and the ODA to coordinate in order to identify candidates for medical and agricultural research.<sup>267</sup>

##### 5. Land Use and Local Options

At public hearings and other Committee meetings, many people expressed confusion over the language in Measure 91 that stated that a city or county may regulate the “nuisance aspects” of marijuana operations, finding this language too subjective. As a result, House Bill 3400 removes this “nuisance aspect” language and replaces it with the direction that a city or county may adopt “reasonable

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263. *Id.* § 92(8).

264. *Id.* §§ 93, 94.

265. *Id.* § 23.

266. *Id.* § 113(7).

267. *Id.* § 113(1)–(2).

regulations” on licensee operations.<sup>268</sup> This at first sounds just as subjective, but it is a more widely used legal term, and this usage forestalls a local body from enacting a regulatory law that actually would have the effect of prohibiting marijuana establishments.

To deal with land-use concerns under Oregon’s comprehensive-planning system, the statute also contained a set of specific provisions dealing with farm uses. Growers will be able to count their marijuana as a “crop” for purposes of farm-use statutes, the growing of marijuana is considered a “farming practice,” and the marijuana a product of farm use.<sup>269</sup> This does not come without limitation though. Because of the concerns over too many new dwellings on Exclusive Farm Use land, a marijuana crop may not be used as the basis for siting a new dwelling.<sup>270</sup> Due to safety and security, marijuana may not be sold at a farm stand, and “commercial activity” normally allowed at farm sites in conjunction with other crops is not allowed for marijuana crops.<sup>271</sup> The statute also provides that the OLCC shall request a land-use compatibility statement from local planning authorities and that the local authority must act on the request within twenty-one days to prevent attempts to circumvent the process through stalling.<sup>272</sup>

If a local government does wish to prohibit marijuana operations within its borders, it may choose one of a few options. It may seem at first glance that the local bodies are being given more opt-out options than needed, yet the ability to opt out was a point of contention at public hearings. Therefore, the Committee decided that the best path forward to prevent lawsuits, and to assuage local governments’ fears that they would be forced to violate federal law, was a compromise solution that would allow a relatively simple way out for those who do not wish to participate.

Any city or county may take the option provided in Measure 91: A petition for opt out that gains ten percent of the signatures of the electorate will go onto the ballot at the next general election.<sup>273</sup> Under the new statute, if a city or county was one that voted more than fifty-five percent against Measure 91, they may adopt an ordinance

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268. *Id.* § 33.

269. *Id.* § 34(1)(a)–(c).

270. *Id.* § 34(2)(a).

271. *Id.* § 34(2)(b)–(c).

272. *Id.* § 34(4)(a)–(b).

273. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, ch. 1, § 60, 2015 Or. Laws.

outright that prohibits licensing marijuana facilities within 180 days of the effective date of the Measure.<sup>274</sup> If the city or county was less than fifty-five percent against, they too may adopt an ordinance within 180 days, but this ordinance will be referred to voters at the next statewide general election in 2016.<sup>275</sup>

Cities or counties may choose to prohibit any recreational facilities, medical dispensaries, medical processors, or any combination of those, but they may not prohibit the registration of medical grow sites.<sup>276</sup> The adoption of an ordinance, to be referred to voters, will place a moratorium on the OLCC issuance of licenses,<sup>277</sup> but under both scenarios medical dispensaries and processors may be grandfathered in provided they were registered with the OHA and have completed a land-use application process.<sup>278</sup> A list of the local governments that have adopted ordinances under these sections is available from the OLCC.<sup>279</sup>

## 6. Employment

The Committee could not undertake to amend employment law, but it could grant to employees of marijuana businesses the same protection that other Oregon workers enjoy. This issue was championed by labor unions that wanted to ensure that employees of this new industry, one that relies heavily on agricultural inputs, would not be marginalized by the lack of the National Labor Relations Board's protection for this industry.<sup>280</sup> To provide this protection, the statute granted the right for employees to unionize and gave them whistleblower protection.<sup>281</sup> In addition, the OLCC may establish merit-based criteria for licensure or renewal.<sup>282</sup> This would allow businesses that have already shown that they can work within the

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274. Act of June 30, 2015, ch. 614, § 133, 2015 Or. Laws.

275. *Id.* § 134.

276. *Id.* §§ 133(2)(a), 134(1).

277. *Id.* § 134(4)(a).

278. *Id.* §§ 133(6)–(7), 134(6)–(7).

279. See Or. Liquor Control Comm'n, *Record of Cities/Counties Prohibiting Licensed Recreational Marijuana Facilities*, OREGON.GOV (2015), [http://www.oregon.gov/olcc/marijuana/Documents/Cities\\_Counties\\_RMJOptOut.pdf](http://www.oregon.gov/olcc/marijuana/Documents/Cities_Counties_RMJOptOut.pdf).

280. *Licensing—Parameters and Possibility of R & D License: February 16th Informational Meeting of J. Comm. on Implementing Measure 91*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Theron Lauritson, International Campaign Director, United Food and Commercial Workers).

281. Act of June 30, 2015, ch. 614, §§ 20a–20b, 2015 Or. Laws.

282. *Id.* § 20c.

regulated market some preferential treatment in a situation where licenses are scarce.

To protect customers and ensure that employees know the laws, employees of recreational retail facilities are required to obtain a marijuana-handler permit.<sup>283</sup> The statute directs the OLCC to adopt rules for these permits,<sup>284</sup> including the requirement of a class.<sup>285</sup> An employee may not be required to take the class more than once for the permit, except to lift a suspension or restore a revoked permit.<sup>286</sup>

#### 7. Law Enforcement and Youth Prevention

Not much was altered from Measure 91 regarding youth prevention, but some additional protections were added. The Committee decided that all licensed premises should be age restricted to prevent the possibility of minors accessing retail products in the store, though this would not apply to minors who are participating in the OLCC-run sting operations.<sup>287</sup> The OLCC may require age-verification equipment of certain retailers, but the retailer may not retain any of the information obtained or use it for any purpose other than age verification.<sup>288</sup> In addition, if a person under twenty-one consumes a marijuana product and requests emergency services as a result, that person may not have the evidence obtained from that request used against them in prosecution.<sup>289</sup> This will hopefully encourage minors who may have violated the law to still seek emergency services without the fear of being prosecuted for it. The statute also creates a Cannabis Education Program, to be implemented by the OHA, the State Board of Education, and the Alcohol and Drug Policy Commission, that will develop materials for students, parents, teachers, administrators, and school board members.<sup>290</sup>

Although activities outside those authorized by Measure 91 and the subsequent statutes remain illegal, penalties for those activities have been greatly reduced. Many felonies have been reduced to misdemeanors and misdemeanors to violations.<sup>291</sup> This reduction is

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283. *Id.* § 19.

284. *Id.* § 20(1).

285. *Id.* § 20(2)(a).

286. *Id.* § 20(2)(c)(A)–(B).

287. *Id.* § 33.

288. *Id.* § 26.

289. *Id.* § 25(9)(a).

290. *Id.* § 117.

291. *See id.* §§ 119–28.

especially useful for minors, who no longer will face the threat of a felony conviction for what many consider a youthful indiscretion. New avenues for expunction of past convictions for marijuana offenses have been added. The statute allows a person who has completed a sentence and any other conditions of adjudication after one year to have the conviction expunged and for minors who have not been convicted of other offenses to have the conviction set aside.<sup>292</sup>

#### 8. Taxation

The decision to move the tax to the point of sale was made carefully, as sales taxes are generally disfavored in Oregon. However, weighing all available options, this method of taxation was determined to be the most reasonable and practicable.<sup>293</sup> Rather than set a blanket rate for all marijuana items, the Committee wanted to allow for differential tax rates for each type of product. However, due to the current lack of data on retail stores, it was determined that at the outset these rates should all be the same. These were each set at seventeen percent to start, a figure that the Legislative Revenue Office calculated to provide the most amount of revenue without encouraging customers to participate in untaxed illegal markets.<sup>294</sup> Because Oregon businesses are not familiar with collecting sales taxes from customers, marijuana retailers are permitted to retain two percent of the tax collected to offset additional expenses and equipment required in the collection of the tax.<sup>295</sup> Businesses may also take deductions and credits against their Oregon income taxes, despite those being disallowed as federal income-tax deductions.<sup>296</sup>

Local governments were given the option to impose local taxes, but they may only enact local taxes of up to three percent.<sup>297</sup> This was allowed as a compromise to those cities that have already enacted local taxes, and the Committee hopes that these cities repeal their prior-enacted taxes and adopt those allowed under this section. Any city or county that exercises one of the opt-out options, though, may

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292. Act of Aug. 12, 2015, ch. 844, §§ 2–3, 2015 Or. Laws.

293. Act of July 20, 2015, ch. 699, § 2(1), 2015 Or. Laws.

294. *Id.* § 2(2).

295. *Id.* § 13.

296. *Id.* § 20.

297. Act of June 30, 2015, ch. 614, § 34a, 2015 Or. Laws.

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not impose any local tax under this section<sup>298</sup> and will not receive statewide revenue distributions.<sup>299</sup>

### 9. Additional Provisions

Due to the time needed for rulemaking and the application and licensing procedures, retail recreational-marijuana facilities are not expected to be open until the spring or summer of 2016. But it is legal for adults to possess as of July 1, 2015, so this creates the problem of supply to the recreational market. In order to discourage Oregon consumers from purchasing from illegal markets, and for Oregon to remain in full compliance with the federal enforcement priorities, it was determined that there should be an “early start” to allow limited sales to recreational customers from medical dispensaries. This permits a person over twenty-one as of October 1, 2015, to enter a medical dispensary and purchase up to one-quarter ounce of usable marijuana, four immature plants, or any number of seeds per day.<sup>300</sup> Cities and counties are free to adopt ordinances to prohibit these sales, but this provision will be repealed on December 31, 2016, as regularly licensed retail facilities will be open by that time.<sup>301</sup> An adjustment period is afforded to the dispensaries before they must begin collecting sales tax from noncardholders, which will be mandatory as of January 4, 2016, and the tax imposed on all early sales will be at twenty-five percent.<sup>302</sup>

To provide product to the recreational market while licensed producers are ramping up, the OLCC presented a plan for a medical-marijuana grow-site opt in, which was adopted by the Committee. Under this plan, a person registered to grow medical marijuana may obtain a license from the OLCC provided that they meet the requirements for recreational licensure, agree to be subject to the recreational marijuana laws, and submit to the tracking system maintained by the OLCC.<sup>303</sup> The grower must also obtain permission from all of the registered cardholders listed for the grow site.<sup>304</sup> After receiving the license, the grower may sell any product in excess of

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298. *Id.* §§ 133(5), 134(5).

299. Act of July 20, 2015, ch. 699, § 14(4), 2015 Or. Laws.

300. Act of July 27, 2015, ch. 784, § 2(1)–(2), 2015 Or. Laws.

301. *Id.* §§ 2(3), 3.

302. Act of July 20, 2015, ch. 699, § 21a, 2015 Or. Laws.

303. Act of June 30, 2015, ch. 614, § 116(2), (4)(b), 2015 Or. Laws.

304. *Id.* § 116(2)(c).

what is needed for their registered cardholders into the recreational market.<sup>305</sup> If at any time the person responsible for the grow site wishes to back out, he or she may do so easily by simply surrendering the license to the OLCC and ending sales to recreational retailers.<sup>306</sup>

The Committee also established two task forces. The first one is the Task Force on Cannabis Environmental Best Practices. It consists of members from the legislature, industry specialists, and public-utility representatives, and will study growers' agricultural practices and growers' electricity and water use.<sup>307</sup> The second one is the Task Force on Researching the Medical and Public Health Properties of Cannabis. It includes members of the legislature, state agencies, and medical experts, and will study the medical aspects of cannabis.<sup>308</sup> Both of these task forces will report their findings to the legislature.

### *B. Ideas That Did Not Make It*

Many retail marijuana establishments wish to allow for on-site consumption. This could range from samples of products in stores to a more Amsterdam-style café system. Some have alluded to the establishment of "social clubs," which would be separate from sales outlets, to provide a place where members may gather and enjoy marijuana together, similar to what would be allowed in a private residence. This frames the issue presented earlier of what constitutes a "public place" for purposes of criminal laws. If a membership-only establishment that is not licensed to sell marijuana wishes to allow for on-site consumption, is it a "public place" or not? Case law has not been developed on point, and those that do attempt to establish these clubs may see themselves receiving unwanted attention from law enforcement. The legislature may address this in the future, but there must be a positive experience with the laws that have been enacted before it will consider this issue.

One idea that was put forth to address the banking issues was that of a state-owned bank for marijuana-related business accounts. This would run similar to a credit union, and would not be insured under the FDIC. Similar suggestions have been made in other states,<sup>309</sup> but the Federal Reserve has, to date, refused to issue master

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305. *Id.* § 116(4)(c).

306. *Id.* § 116(5).

307. *Id.* § 132.

308. Act of Aug. 12, 2015, ch. 844, § 1, 2015 Or. Laws.

309. See, for example, Colorado's The Fourth Corner Credit Union.



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accounts to banks wishing to specialize in marijuana business. It is the hope of the legislature that this will be resolved at the federal level soon, but the issue may be taken up again if no solution comes from those sources. However, it was much too large of a task to wrestle this session, and it is prudent to push it back to a later date to wait and see what the federal government will do.

Under the current laws, a medical cardholder who purchases from a licensed recreational retailer must still pay the sales tax, despite the fact that they could purchase product tax free from a medical dispensary. Cardholders wish to be able to present their card at a recreational facility in order to be exempted from the tax. There is an assumption that many cardholders who were using the program as a way to acquire recreational marijuana will not renew their cards and the size of the medical-marijuana program will shrink. This may reduce the availability of products at medical dispensaries and may make it harder for lower income cardholders to obtain the products they need. While this idea is valid, it was believed to be too early to attempt this exemption. It would encourage those who are not actually in medical need to retain their cards as a way of simply paying the registration fee up front to obtain tax-free purchases throughout the year. This is likely to be addressed in a future session, but more data are needed on the amount of tax revenue to be collected and the relative sizes of the two markets before action is taken.

Licensed producers are required to submit reports of energy and water usage, but an idea was originally presented to require the submission of a proposed plan for approval before licensure. This was thought to be too onerous a requirement, and detractors also thought this to be somewhat hypocritical in light of the state's recent efforts to solicit high-energy-consuming technology companies to move to Oregon. As the region sees more drought conditions, water usage will become more important than it already is. However, it was thought that other laws already in place are sufficient to handle the demand for water and energy, and thus there should not be a separate quota placed on this one industry.

As more people participate in the overall market for marijuana products, the market for topical products infused with marijuana will grow. Topical products, products that can be applied to the skin or hair, typically contain a very small amount of the active ingredient and do not cause the psychoactive effects that result from inhaling or ingesting marijuana. Many people who do not otherwise consume marijuana have found these products to be effective for localized pain

and joint stiffness. Producers of these products lobbied at the legislature to have these products reclassified so that they could be sold in regular retail outlets outside of licensed recreational-marijuana stores due to fears that they may not be able to attract a market and that stores may be unwilling to carry the products. However, the perception was that this proposal might have conflicted with federal enforcement priorities, and so the request was denied. This will likely only be possible after a significant relaxation of federal law.

*C. Items That Need to be Addressed in Future Sessions*

For those cities and counties that have adopted prohibitions on recreational sales, there should be a mechanism for them to easily opt back in. It is assumed that some localities who have adopted these ordinances did so with an abundance of caution and will change their minds after a successful rollout of the recreational system. Once they make this decision, though, the localities may wish to be able to quickly participate in the market and not want to wait as long as two years before they can place these items on the ballot for consideration at the next statewide general election. Therefore, the legislature may wish to make the opt-back-in option easier to use in order to encourage participation in the legal market.

Those establishing marijuana businesses desire to seek out-of-state investment. However, due to residency restrictions imposed, they anticipate difficulty in doing so. The residency requirements included in House Bill 3400 sunset after four years, but the legislature may wish to relax the requirement before that time. These residency restrictions were included as a further safeguard against federal enforcement, but, provided that there are no problems with that, it may be possible to loosen them.

The early sales provisions do not allow recreational customers to purchase any concentrates, edibles, or extracts. This is because the OHA and the OLCC's rules for these products will not have been put in place by the time those sales start. These rules will be promulgated in the period between the beginning of early sales and the opening of licensed recreational-retail facilities. Once those rules are in place, and if early sales go well, the legislature may consider opening up these products for the remainder of the early-sales period. Otherwise, a cottage industry of people who are illegally making these products at home may gain a foothold, frustrating participation in the legal market.

The licensure of sites for production of industrial hemp needs to be resolved. This is a crop with a large number of applications and one that was historically thought to be superior to alternatives before it was made illegal along with marijuana in the 1930s. Hemp was legalized in Oregon before marijuana, but barriers prevented the licensure of production facilities until only recently. Now that marijuana will be grown in Oregon, there are additional concerns over possible pollination conflicts. These conflicts have been resolved with other crops through the creation of “pinning” systems. In these systems, a grower pins a pin on a map and draws a circle around it that corresponds to possible pollination threats. Once this is done, other growers are not allowed to plant crops inside the circle. These systems have been voluntary, but a mandatory system may be necessary for this crop.

Finally, laws for driving under the influence of marijuana need to be updated. There is a technology gap that prevents this. Currently, there is no available test for the presence of delta-9-THC aside from a blood test. This is needed as it is the only method of detecting current intoxication as opposed to a urinalysis, which detects only the metabolite carboxy-THC and can yield positives days or weeks after intoxication. Once research can be performed and a new technological solution is presented, the law will need to be amended quickly to incorporate this technology so that law-enforcement officers can more easily detect drugged driving in the same reliable way that we have come to expect from a breathalyzer test for alcohol.

Great steps have been taken so far, but there remains a lot of work to be done to establish this new market firmly and eliminate the black market for marijuana. As more states enter this market and new research is performed, new issues will arise. Some will be resolved, while others may present new obstacles, but the states must continue as laboratories for the laws that will shape society.