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Supplemental Testimony for the Record

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Before the

Oregon Senate Committee on Finance and Revenue

Hearing on S.B. 312, Corporate Tax Transparency

Chair Burdick, Vice-Chair Boquist, and members of the committee, I appreciate the opportunity to submit this supplemental testimony in support of S.B. 312 in response to the Chair's holding the written record open until 5:00 PM Pacific Time February 15, 2021. This statement will be largely devoted to addressing claims made by opponents of S.B. 312 in their written and oral testimony on February 10, 2021.

There is no evidence to indicate that Governor Newsom's veto of last year's corporate tax transparency bill, S.B. 972, was based in any way on concerns that it violated Internal Revenue Code Section 6103 prohibitions on disclosure of federal tax return information and thereby risked California tax administrators' access to federal tax return information.

The written testimony of the Smart Growth Coalition included the statement that "Governor Newson vetoed the legislation in part because he understood the disclosure went too far and risked the state's access to federal tax information." In oral testimony, Ms. Nikki Dobay stated (at 40:50 into the hearing) that the bill "was vetoed by the California governor with a very strong message due to the potential violation of I.R.C. 6103." There is no support in the public record for either of these statements. Not only did Governor Newsom's veto message (attached) not express concerns that the bill would risk a violation of Section 6013, but, to the contrary, he noted that Section 6013 *already* allowed state legislative committees to receive the kinds of information that it would have received under the bill. In other words, the bill could inherently *not* have raised any Section 6103 concerns because, unlike S.B. 312, it did not provide for public disclosure of the information but only disclosure of information to legislators already legally authorized to receive it.

The "-1" amendment to S.B. 312 has been carefully drafted in such a way as to make it highly unlikely that any provisions of the bill would run afoul of I.R.C. Section 6103.

- The amendment now provides that the tax-related information to be publicly disclosed will be provided to the Office of the Secretary of State, which will then be responsible for publishing it on the Internet. This procedure was chosen very deliberately. In 1992, Massachusetts voters enacted by ballot initiative a corporate tax transparency law quite similar to S.B. 312 with the -1 Amendment. As explained in the most comprehensive analysis ever written of state corporate tax disclosure policy, authored by law Professor Richard Pomp, at that time:

  > In an informal opinion, the IRS told the staff of the Massachusetts Special Commission on Business Tax Policy that as long as the Secretary of State's office obtains the disclosed data from reports filed with it by corporations, which is what the Massachusetts law provides, there would be no violation of the statute. The informal view of the IRS is that it has entered into an information sharing agreement with the Massachusetts Department of Revenue, which has no role in the preparation of the taxpayer-specific reports that are disclosed. Under the Massachusetts disclosure law, the Department of Revenue would be honoring the agreements so that no violation would exist. The Massachusetts Commissioner of Revenue independently reached the same conclusion.[1]

  In other words, the limited documentary evidence that is available on the issue suggests that S.B. 312 with the -1 Amendment would likely *not* violate I.R.C. Section 6103.

- Virtually none of the information to be disclosed under S.B. 312 with the -1 Amendment has any correspondence whatsoever with the information that would be reported on a federal income tax return. None of the following items to be disclosed have any relationship to federal tax return information: "(a) Total Oregon sales of the unitary group; (b) Sales apportionment factors of the corporation or unitary group; . . . (d) Total tax before credits; . . . (f) Net operating loss deduction, if any, of the corporation or the consolidated group apportioned to the state; (g) Total deductions for management services fees and for royalty, interest, license fees and similar payments made for the use of intangible property to any affiliated entity that is not included in the consolidated state return, if any, that includes the corporation and the names of the entities to which the payments were made; (h) The state excise or income tax liability of the corporation under ORS chapter 317 or 318; (i) Tax paid; (j) The property and payroll factors for this state calculated as required by the Uniform Division of Income for Tax Purposes Act as embodied in Article IV of the Multistate Tax Compact and Multistate Tax Commission regulations applying thereto; . . . and (l) Total non-business income and the amount of non-business income allocated to Oregon."

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[1] Richard D. Pomp, "Corporate Tax Policy and the Right to Know," New York Fiscal Policy Institute, December 1993, p. 58. Professor Pomp is the Alva P. Loiselle Professor of Law at the University of Connecticut School of Law and one of the leading experts in the United States on state tax law. This report was published in full in *State Tax Notes* magazine on February 7, 1994. Citations omitted.

- Only three items to be disclosed have even a tangential relationship to federal tax return information: "(c) Total taxable income of the corporation or the unitary group . . . (e) Tax expenditures claimed, each expenditure individually enumerated . . . (k) Taxable income of the unitary group prior to net operating loss deductions or apportionment. In the case of tax expenditures, only those that flow through to the Oregon corporate income tax return from the federal return (such as accelerated depreciation) could even hypothetically be problematic; Oregon-specific tax expenditures could not be. In the case of (k), Oregon taxable income prior to apportionment, so many Oregon-specific additions and subtractions have been made to federal taxable income to arrive at that figure that its disclosure, too, would reveal nothing about federal taxable income.

- Even in the case of (a) total taxable income, for essentially all the publicly traded corporations that would be subject to transparency requirements of S.B. 312 with the -1 Amendment there would be no correspondence between the amount reported and the amount on the federal return because the Oregon tax filing unit (the unitary group) and the federal filing unit (the federal consolidated group) are not the same. As Professor Pomp has noted:

> [B]ecause the federal and state business tax entities are most likely to be very different for larger firms, companies file what is usually called a pro forma federal return with the state business tax return. The pro forma federal return differs from the one actually filed with the IRS in many different ways because the filing unit is different. In these situations, which probably describe . . . the larger firms, which are the ones of most interest to supporters of disclosure, it is difficult to see how IRC section 6103(p)(8)(A) could be violated. [A] pro forma federal return is not signed at the jurat by the chief financial officer of the company. As a result, there is no implied federal liability for what is represented on the form. Indeed, it would be inappropriate for the chief financial officer to sign such a pro forma federal return, because the underlying filing unit most often is different from the one used for federal tax purposes. . . . it would seem that the disclosure of state information based on a pro forma cannot violate section 6103(p)(8)(A) because the pro forma is not part of the federal return that is actually filed with the IRS.[2]

In sum, opponents' raising the possibility of Oregon's losing access to I.R.S. information sharing due to the enactment of S.B. 312 is simply scare mongering aimed at blocking legislation that might reveal the need for action to close additional corporate tax loopholes or repeal ineffective tax breaks from which they benefit. The bill and the -1 Amendment have been carefully drafted to ensure that they would not run afoul of I.R.C. Section 6103.

[2] Richard D. Pomp, "The Political Economy of Tax Return Privacy – Revisited," *State Tax Notes*, June 11, 1995. Internal quotes, references, and paragraph breaks omitted. The article was a response to another article by Professor Robert Strauss, and several conversational references to "Bob" in the quoted text are also omitted for the sake of readability.

Wisconsin's corporate tax disclosure law has, in fact, proved beneficial, in making the case for and motivating important changes in the state's corporate tax policy.

As I explained in response to a question from the Chair during the hearing, Wisconsin is the only other state with a law that permits public disclosure of the bottom-line corporate income tax liability of a corporation subject to the tax. That law dates back to the 1950s:

> From 1923 until 1953, the actual Wisconsin income tax return was public information. . . In 1953, anti-disclosure advocates succeeded in amending the law to deny public access to the actual tax returns but to permit disclosure only of net taxes paid.[3]

This law is quite different than what is proposed by S.B. 312, of course, in that no information is available to facilitate an understanding of why a particular corporation owed what it owed. Nonetheless – and contrary to S.B. 312 opponents[4] – the Wisconsin law has been instrumental in demonstrating the need for corporate tax reforms, in the same way that S.B. 312 proponents believe it will be:

> The Wisconsin Action Coalition (WAC) used this provision of Wisconsin law to compile a list of major corporations doing business in Wisconsin that had not paid state income taxes. WAC's work played a major role in the passage by the Legislature, on two different occasions, of legislation establishing a new corporate minimum income tax. In both cases, the Governor successfully vetoed the proposed tax.[5]

More recently, advocates used information obtained through the use of this law to make an ultimately successful case for the enactment of legislation requiring combined reporting for the corporate income tax. (See the attached excerpts from a presentation using this information.)

One additional change in S.B. 312 is warranted.

Although it is of course motivated by a desire to kill enactment of the bill rather than improve it, opponents have raised a legal vulnerability in the bill that should be addressed. They have noted that the transparency requirements in the bill are limited to companies with sales outside Oregon. As they note, this could, in fact, be found to facially discriminate against interstate commerce in violation of the Constitution's Commerce Clause. As it would be amended by the -1 Amendment, the bill would be limited to publicly traded corporations, most or all of which would be multistate corporations in any case. This limitation would be unlikely to be vulnerable to a Commerce Clause challenge, however, while providing a large enough sample of filers to illuminate problems in Oregon's corporate tax structure – which is the fundamental objective of the bill. The interstate sales requirement of the bill should be dropped.

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[3] Pomp, "Corporate Tax Policy and the Right to Know," p. 31.

[4] At approximately 41:00 into the hearing, Ms. Nikki Dobay stated that the Wisconsin disclosure "program is not really utilized at all."

[5] Pomp, "Corporate Tax Policy and the Right to Know," p. 31.

The -1 Amendment will significantly improve the bill as introduced.

Members of the committee unfortunately did not have an opportunity to review the -1 Amendment in depth before the hearing. My original testimony explained some of the improvements that the Amendment made. I reproduce that discussion here to facilitate the committee's review:

> S.B. 312 as introduced takes important steps toward the kind of corporate tax transparency that is needed, and it will be significantly improved by some refinements that I understand are under development (or may already have been introduced as an amendment by the time of this hearing). For example, disaggregation of tax incentives claimed rather than just reporting of the total, combined with information on companies' Oregon employment levels, is needed to evaluate the cost-effectiveness of the incentives and their job-creation outcomes over time. Information on transactions with non-U.S. parents and subsidiaries will provide evidence as to whether corporations are engaged in international income shifting. Requiring disclosure based on the actual tax calculation entity in Oregon – the unitary combined group – rather than by individual members of the group, is essential to prevent disputes about the accuracy of the information. (Disclosure on an entity-by-entity basis could paint a misleading picture when multiple members of a group are taxable in Oregon because they could be engaged in transactions with each other that cancel out under combined reporting.)

Thank you again for the opportunity to submit this additional testimony.