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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

October 10, 2017

Senator Michael Dembrow
900 Court Street NE S407
Salem OR 97301

Re: Application of bill for raising revenue jurisprudence and Article IX, section 3a, to SB 1070

Dear Senator Dembrow:

Senate Bill 1070 (2017) requires the Environmental Quality Commission (EQC) to adopt and administer a greenhouse gas (GHG) cap-and-investment program.[1] You asked whether SB 1070 is a bill for raising revenue for purposes of Article IV, sections 18 and 25 (2), of the Oregon Constitution, and whether Article IX, section 3a, of the Oregon Constitution would apply to certain proceeds received by the state pursuant to SB 1070.

We begin with a general explanation of cap-and-trade programs, of which cap-and-investment programs are a variant. We then describe the provisions of SB 1070 that require establishment of a cap-and-investment program and analyze whether those provisions make the bill a bill for raising revenue. We conclude that SB 1070 is not a bill for raising revenue. Finally, we conclude that under Article IX, section 3a, Oregon Constitution, certain state proceeds from the sale at auction of allowances within a SB 1070 cap-and-investment program would very likely be required to be used exclusively for certain highway purposes.

Design and function of cap-and-trade programs generally

Cap-and-trade is one type of market-based approach to reducing greenhouse gas emissions.[2] Under traditional command-and-control regulations for reducing emissions, governments generally require businesses to install certain types of emissions reduction technologies or to meet certain minimum emissions standards.[3] By contrast, market-based programs such as cap-and-trade add a financial cost to producing GHGs, thus providing an economic incentive for private businesses and consumers to reduce emissions. Market-based

[1] Senate Bill 1070 also repeals ORS 468A.205, which establishes certain GHG emission reduction goals for the state, and instead requires the EQC to adopt by rule statewide GHG emission goals for 2025 and limits for years 2035 and 2050. The bill also includes other provisions necessary for developing and administering a cap-and-investment program, such as establishing registration and reporting requirements for entities subject to the program, authorizing the commission to adopt a schedule of registration fees and establishing a temporary program development fee to fund EQC's development by rule of a cap-and-investment program. We do not discuss the registration and program development fees, the inclusion of which does not make a bill a bill for raising revenue under Article IV, sections 18 and 25 (2). *See Northern Counties Trust v. Sears*, 30 Or. 388 (1895).

[2] Another commonly discussed market-based approach is a carbon tax, which we do not discuss in this opinion. For a general description of how a cap-and-trade program differs from a carbon tax, *see* Oregon Department of Environmental Quality, *Considerations for Designing a Cap-and-Trade Program in Oregon*, at 2 (Feb. 14, 2017) http://www.oregon.gov/deq/FilterDocs/ghgmarketstudy.pdf (visited Sept. 27, 2017).

[3] Mac Taylor, Legislative Analyst's Office, *The 2017-18 Budget: Cap-and-Trade*, at 6-7 (Feb. 2017), available at http://www.lao.ca.gov/reports/2017/3553/cap-and-trade-021317.pdf (last visited Sept. 27, 2017).

programs, in theory, provide flexibility for the private sector to determine what emission reduction activities are the least costly for them and whether the costs of the activities are less than the financial cost of continuing to emit GHGs.[4]

In a cap-and-trade program, a government establishes an overall limit (a "cap") on the aggregate GHG emissions from a group of covered entities, expressed in tons of carbon dioxide equivalent. The cap generally covers a broad spectrum of entities that emit more than an annual threshold amount of GHGs, including electricity generators and importers, industrial facilities and certain upstream entities within the transportation fuel industry. The cap declines over time, ultimately arriving at a target emissions level by a target year.

To implement a cap-and-trade program, the government annually issues carbon allowances in an amount equal to the applicable annual cap, each allowance being essentially a permit to emit one ton of carbon dioxide equivalent.[5] The government can distribute allowances by allocating them for free to covered entities, which it typically chooses to do in order to protect businesses exposed to trade pressure from competitors outside the government's jurisdiction,[6] or by selling them at auction, with the proceeds going to the government. Auctioning allowances is considered to be a transparent process for distributing allowances, extricates the government from determining who should receive allowances and how many and establishes a market price for GHG emissions.[7] In practice, jurisdictions with cap-and-trade programs usually distribute allowances through a combination of free allocations and auctions.[8] Once distributed, allowances can be traded by covered entities on a secondary market—that secondary market activity is the "trade" component of a cap-and-trade program.

Covered entities can also purchase "offsets." Offsets are GHG emission reduction projects undertaken by entities that are not subject to the state's cap-and-trade program. Governments usually limit how many offsets an entity can use to demonstrate compliance. [9]

To meet their compliance obligations within a cap-and-trade program, covered entities must surrender to the government compliance instruments (allowances plus offsets) equal to the covered entity's total emissions for a compliance period. A covered entity, for example, may be allocated some free allowances but will need to make up a shortfall in its compliance obligation by reducing emissions, purchasing allowances at auction, purchasing allowances on the secondary market or purchasing offsets, singly or in any combination.

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[4] *Id.*

[5] For example, if the cap for a given year is 50 million tons of carbon dioxide equivalent across all covered entities, the state will issue 50 million allowances for that year.

[6] In California, for example, a certain percentage of emission allowances are allocated for free to covered entities that are considered most likely to leave the state because of the cap-and-trade program, e.g., manufacturers. That likelihood is generally referred to as a covered entity's "leakage" risk. The allocations are intended to reduce leakage risk by helping to avoid sudden, steep cost increases for those entities. The number of freely allocated allowances that such an entity receives is generally based on the entity's production activity and efficiency compared to a sector-specific benchmark. *See* Alex Hoover, *Understanding California's Cap-and-Trade Regulations* (July 27, 2011) http://www.acc.com/legalresources/quickcounsel/UCCTR.cfm (visited Oct. 1, 2017); California Air Resources Board (CARB), *Allowance Allocation for Industrial Assistance* (visited Oct. 1, 2017) https://www.arb.ca.gov/cc/capandtrade/allowanceallocation/allowanceallocation.htm#industry.

[7] *Considerations for Designing a Cap-and-Trade Program in Oregon*, at 2 (visited Oct. 2, 2017); Taylor at 7.

[8] *See, e.g.*, CARB, *Allowance Allocation* (visited Sept. 27, 2017) (describing the four primary methods that CARB uses for allocating allowances for leakage prevention and transition assistance in the California cap-and-trade program and illustrating that CARB also sells allowances through quarterly auctions and sets aside a small amount of allowances in an allowance price containment reserve).

[9] Taylor at 7.

It is important to remember that under a cap-and-trade program the government does not receive proceeds from entities buying and selling allowances on the secondary market or from the generation and sale of offsets. Rather, the government receives proceeds only by selling allowances at state-run auctions.

The term "cap-and-investment" describes one way that a cap-and-trade program can be designed to direct a government's use of allowance auction proceeds. In a cap-and-investment program, the government sells some allowances at auction and invests the proceeds in activities that further expand the environmental benefits of the program.[10]

Relevant provisions of SB 1070

Senate Bill 1070, in relevant part, requires establishment of a cap-and-investment program in Oregon and directs the EQC to further develop the program by rule.[11] The purposes of the cap-and-investment program, as described in section 6 of the bill, "are to reduce greenhouse gas emissions consistent with the statewide greenhouse gas emissions levels established under section 4 of this 2017 Act and to promote adaptation and resilience by this state's communities and economy in the face of climate change."

Senate Bill 1070 directs the Department of Environmental Quality (DEQ) to distribute its annual budget of allowances through a combination of free allocation and auction.[12] The bill leaves it to the EQC and DEQ to decide what percentage of allowances will be freely allocated and auctioned. With reference to the auction process, the bill requires the EQC to establish by rule "an auction floor price and a schedule for the floor price to increase by a predetermined amount each calendar year as necessary for proper functioning" of the program.[13] No more than four auctions may be held per year.[14] Auctions are predicted to bring in as much as $690 million in proceeds in the first year of the cap-and-investment program.[15]

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[10] Union of Concerned Scientists, *Cap and Invest: How a Cap-and-Trade Program Can Reduce Energy Costs, Create Jobs, and Improve Energy Security* (visited Sept. 27, 2017) http://www.ucsusa.org/sites/default/files/legacy/assets/documents/global_warming/Cap-and-Invest-hi-res.pdf.

[11] *See* SB 1070, section 10 (requiring EQC to adopt a carbon pollution market by rule); section 11 (setting forth minimum requirements for auctions of allowances and directing distribution of proceeds from auctions); section 12 (setting forth minimum requirements for covered entities to demonstrate compliance with the program and penalties).

[12] Specifically, section 10 (1)(d) of SB 1070 requires that some allowances must be set aside annually in an allowance price containment reserve, some must be freely allocated to certain covered entities for leakage prevention, some must be distributed to electric companies and natural gas utilities for consignment to auction, some *may* be distributed to consumer-owned utilities for consignment and, finally, some must be directly sold by the state at auction. Consignment is further addressed in sections 11 (1)(f) and 13 of the bill. Under the consignment provisions, electric companies, natural gas utilities and consumer-owned utilities are allocated free allowances, not to be used to demonstrate compliance but to be consigned back to the state for auction. Consigning entities receive the proceeds from the sale of consigned allowances and are required to use the proceeds for certain activities that serve to stabilize and reduce energy bills while also lowering greenhouse gas emissions. Thus, although the state administers the auctioning of consigned allowances, the state does not receive proceeds from selling them.

[13] SB 1070, section 11 (1)(d). An "auction floor price" means the lowest price that the state will accept for a single allowance at auction.

[14] SB 1070, section 11 (1)(a).

[15] According to a preliminary estimate by DEQ for 2021, the first year that the cap-and-investment program under SB 1070 would be operative. *See* Colin McConnaha, *Greenhouse Gas Cap & Trade Program* (visited Sept. 29, 2017) https://www.oregonlegislature.gov/helm/workgroup_materials/EJJT%20-%20cap%20and%20trade%20EJ%20and%20rural_ag_forest%20workgroups%20(McConnaha,%20DEQ).pdf. Please note, however, that it is inherently difficult to predict the many market factors that contribute to the success of allowance auctions, such as the effectiveness of complementary regulations in reducing emissions, fluctuations in economic growth, market uncertainty due to legal or political challenges, etc. The history of the revenue forecasts for California's cap-and-trade program bear this out. *See* Taylor at 10, 16.

Sections 11 (3) and 13 to 20 of the bill contain detailed provisions for the investment of auction proceeds. It is an overarching requirement of SB 1070 that all state auction proceeds must be used for actions that further the purposes of the cap-and-investment program, as stated in section 6 of the bill.[16] Proceeds that constitute revenues described in Article IX, section 3a, of the Oregon Constitution, are to be deposited in a new Climate Investments Account in the State Highway Fund.[17] Uses of moneys in the Climate Investments Account are restricted both by Article IX, section 3a, and section 6 of the bill, and the bill specifies a minimum percentage that must be used to benefit disadvantaged communities.[18] Of the remaining proceeds, 85 percent must be deposited in a new Oregon Climate Investments Fund and appropriated to DEQ for distribution through a Climate Investments Grant Program, and 15 percent must be deposited in a new Just Transition Fund and distributed through a Just Transition Grant Program administered by the Oregon Business Development Department.[19] The provisions for both the Climate Investments Grant Program and the Just Transition Grant Program place restrictions on how the proceeds dedicated to those programs can be used that are in addition to the requirements that all proceeds be used in a manner that carries out the purposes of the cap-and-investment program.[20]

Application of bill for raising revenue jurisprudence to SB 1070

Article IV, section 18, of the Oregon Constitution, requires bills for raising revenue to originate in the House of Representatives, and Article IV, section 25 (2), of the Oregon Constitution, requires bills for raising revenue to receive at least a three-fifths majority vote in favor of passage in each chamber. The phrase "bill for raising revenue" has the same meaning for both constitutional requirements.[21]

In *Bobo v. Kulongoski*, the Oregon Supreme Court adopted a two-pronged test for determining whether a bill is a bill for raising revenue:

> The first is whether the bill collects or brings money into the treasury. If it does not, that is the end of the inquiry. If a bill does bring money into the treasury, the remaining question is whether the bill possesses the essential features of a bill levying a tax.[22]

We first consider whether SB 1070 brings money into the treasury. Again, the *Bobo* court looked to the term "raise" as used in Article I, section 18, of the Oregon Constitution, to draw the conclusion that a bill will raise revenue only if it collects or brings money into the treasury.[23] A bill that transfers moneys that the state has already collected from one program to another does not raise revenue within the meaning of Article IV, section 18, for example, because it "does not collect or bring any money into the treasury; it does not impose a new tax, increase an existing one, or even impose a fee for a service."[24] In *City of Seattle v. Department of Revenue*, however, the Supreme Court determined, without discussion, that a bill repealing a property tax exemption "[w]ithout question" brought money into the treasury.[25] Bills that repeal property tax exemptions modify the base on which a local government may impose property

[16] SB 1070, sections 13 (1), 14 (1), 15 (3), 16 (1), 19 (3).
[17] SB 1070, sections 11 (3), 14.
[18] *Id*.
[19] SB 1070, sections 11 (3), 15-20.
[20] SB 1070, sections 16, 20.
[21] *Bobo v. Kulongoski*, 338 Or. 111, 123 (2005).
[22] *Id*. at 122.
[23] *Id.* at 120.
[24] *Id.* at 122.
[25] *City of Seattle v. Department of Revenue*, 357 Or. 718, 732 (2015).

taxes but do not, in and of themselves, provide for the collection or bringing of money into the treasury. That is because the final decision on the amount of property taxes to be raised lies with local governments, which annually certify property tax rates applicable for the property tax year.[26] The court's determination in *City of Seattle* potentially broadens the set of factual situations in which a bill may "bring[] money into the treasury" for purposes of the first prong of the *Bobo* analysis.

Here, the provisions of SB 1070 do not, in and of themselves, provide for the collection or bringing of money into the treasury. The provisions do not impose an exaction in any set amount on a covered entity, or even delegate to an agency the authority to set a specific fee by rule. Instead, the bill provides for a market-based regulatory program in which DEQ is required to distribute some portion of allowances by sale at auction. DEQ will decide how many allowances to sell, and while the EQC by rule will set the floor price for the auctions, the actual auction price will be determined by the market through the public bidding process. The prices at auction will also change over time, based to some extent on market forces outside the state's control. It is also conceivable, at least in the early years of the program, that individual allowance auctions will generate little, if any, participation.[27] In other words, the amount of money to be collected or brought in by the auctions relies on multiple actions and decisions that will occur subsequent to the passage of the bill. One could argue, based on these considerations, that SB 1070 does not bring money into the treasury.

That said, the auction provisions must be read in the context of the greater cap-and-investment program structure. Senate Bill 1070 requires covered entities to obtain allowances to demonstrate compliance with a statewide GHG emissions cap and requires DEQ to distribute at least some of those allowances by auction. With a properly set declining cap, demand for allowances throughout the life of the program should be high enough that at least some covered entities will be required to purchase allowances from the state, even if the state initially chooses to distribute most allowances for free. Thus, the statutory scheme all but guarantees that allowance auction proceeds will be collected or brought into the treasury, even if the bill itself does not provide for the collection of moneys at a set amount. Given the Supreme Court's conclusion in *City of Seattle* that a bill that modified a tax base but didn't impose a tax rate brought money into the treasury, we believe it is prudent to assume that a court will hold that SB 1070 "collects or brings money into the treasury."

Assuming that SB 1070 passes the first prong of the *Bobo* test, we turn to the second prong which asks "whether the bill possesses the essential features of a bill levying a tax." [28] Oregon courts have adopted the narrow federal standard under which application of the origination clause "has been confined to bills to levy taxes *in the strict sense of the words*, and has not been understood to extend to bills for other purposes, *which may incidentally create*

[26] For this reason, this office has traditionally determined that bills repealing property tax exemptions are not bills for raising revenue. While Ballot Measure 50 (1997) (codified at Article XI, section 11, of the Oregon Constitution) established permanent property tax rate limits for all taxing districts, local governments are free to certify tax rates below their respective limits. Because the amount of revenue raised following passage of a bill repealing a property tax exemption depends on subsequent decisions by independently elected local governing bodies, this office has always concluded that that type of bill fails the first prong of the *Bobo* test and therefore is not a bill for raising revenue.

[27] In the February 2017 quarterly auction under California's cap-and-trade program, for example, only 16.5 percent of the offered allowances were sold at the floor price of $13.57 per ton. Dan Walters, "California's cap and trade auction another washout," *Sacramento Bee*, Mar. 1, 2017, http://www.sacbee.com/news/politics-government/capitol-alert/article135781558.html (visited Oct. 2, 2017). How much auctions in an Oregon cap-and-investment program earn will depend in large part on market conditions but also on administrative choices made by the state, such as the number of allowances allocated for free early in the program and how high the initial cap is.

[28] *Bobo*, 338 Or. at 122.

revenue."[29] Moreover, in *Northern Counties Trust*, the Oregon Supreme Court held that the "controlling feature" of bills for raising revenue is that they "impose taxes upon the people, either directly or indirectly, or lay duties, imposts, or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens, of the benefit of good government."[30] In addition, a law establishing a fee "which the party may pay and obtain the benefits under the law, or let it alone, as he chooses" was outside the category of bills for raising revenue.[31]

In a recent decision by the California Court of Appeals regarding that state's cap-and-trade program, a determination that allowances are valuable commodities was central to the court's conclusion that California's cap-and-trade auctions do not amount to a tax subject to Article XIIIA, section 3(a), of the California Constitution (2006 Edition), which required that "any changes in State taxes enacted for the purpose of increasing rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature."[32] An allowance, the court reasoned,

> conveys a valuable asset—the privilege to pollute the air. This is unlike any tax we know. As EDF contends, "unlike taxes, which offer no discrete benefits to the payers, the auction and reserve provide participants valuable, tradable emission allowances as consideration for the purchase price. They may be used for current compliance, banked for future compliance, or sold, each of which returns value to the holder. Because participants' bids presumably reflect the value they ascribe to the allowances, the revenue generated by the auction and reserve will not exceed the aggregate value to purchasers of the allowances sold.[33]

Oregon's cap-and-investment program set forth in SB 1070 will be similar to California's program. Although California appellate court case law has no precedential value in Oregon, we believe that an Oregon court would likely find the reasoning in *California Chamber of Commerce* persuasive for purposes of the analysis under *Northern Counties Trust*.

Thus, under SB 1070, just as under the California program, an allowance will convey a valuable asset—an authorization to emit one ton of carbon dioxide equivalent.[34] And, as in the California program, a participant's bid for an allowance at auction under the Oregon program will reflect the value the auction participant places on the allowance. Under *Northern Counties Trust*, then, winning bidders at allowance auctions will receive an equivalent in return, other than the enjoyment, in common with the rest of the citizens, of the benefit of good government.

Furthermore, a covered entity may pay for an allowance at auction and obtain the benefits under the cap-and-investment law, or let it alone, as the entity chooses. The cap-and-investment program set forth in SB 1070 will offer each covered entity a variety of compliance options. The covered entity may reduce its emissions, receive free allocations, purchase allowances from the state at auction, purchase allowances on the secondary market or purchase offsets. Thus, a covered entity may forgo the benefit conferred by the auction scheme

[29] *City of Seattle*, 357 Or. at 732-733 (emphasis in original) (*quoting Northern Counties Trust*, 30 Or. at 402).
[30] *Northern Counties Trust*, 30 Or. at 401-402.
[31] *Id.* at 403.
[32] *California Chamber of Commerce v. State Air Resources Board*, 10 Cal. App. 5th 604, 635 (2017).
[33] *Id*. at 646.
[34] SB 1070, section 9 (1) (defining "allowance").

under SB 1070, if, for instance, the covered entity determines that other compliance options will cost less.

In reaching our conclusions, we acknowledge that the revenue impact of SB 1070 could be high. However, under Oregon case law, "the revenue effect of a bill, in and of itself, does not determine if the bill is a 'bill for raising revenue.'"[35] We also recognize that jurisprudence interpreting Article IV, sections 18 and 25 (2), of the Oregon Constitution, is very limited, and that a bill establishing a cap-and-investment program is unlike the factual situations that gave rise to the jurisprudence. We therefore recognize that our conclusions are not free from doubt, and that SB 1070 may not be insulated from challenge under Article IV, sections 18 and 25 (2). In particular, a challenger may argue that the bill should be characterized as a tax because the primary legislative purpose for requiring DEQ to auction allowances is to exact revenues from auction participants for the use of government—i.e., for activities to reduce GHG emissions and promoting adaptation and resilience to climate change—and that the benefits for which the revenues are to be used will be enjoyed in common by all citizens, rather than as an equivalent in return for the bidder's payment.

However, under *Bobo* and *City of Seattle*, the "task is not to determine the primary legislative purpose" for enacting a bill. Rather, where a bill generates revenue for the state, the "task is to determine 'whether the bill possesses the essential features of a bill levying a tax.'"[36] Because we determine that winning bidders at allowance auctions will receive an equivalent in return for their payment in the form of tradeable allowances, and because a covered entity may forgo the benefit conferred by the auction scheme under the bill, we conclude that SB 1070 does not possess the essential features of a bill levying a tax under the Oregon Supreme Court's decisions in *Northern Counties Trust* and *City of Seattle*. Therefore, we conclude that SB 1070 is not a bill for raising revenue for purposes of Article IV, sections 18 and 25 (2), of the Oregon Constitution.

Application of Article IX, section 3a, to SB 1070

You also asked whether certain cap-and-investment auction proceeds would be revenues described in Article IX, section 3a, Oregon Constitution. We conclude that Article IX, section 3a, would very likely apply to certain auction proceeds received from covered entities in the motor vehicle fuel sector.

Article IX, section 3a, provides, in relevant part,

> **Sec. 3a.** (1) Except as provided in subsection (2) of this section, revenue from the following shall be used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state:
>
> (a) Any tax levied on, with respect to, or measured by the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles; and
>
> (b) Any tax or excise levied on the ownership, operation or use of motor vehicles.

[35] *City of Seattle*, 357 Or. at 736.
[36] *Id.* at 735.

The meaning of the term "tax" varies among provisions of the Oregon Constitution; for purposes of Article IX, section 3a, the Oregon Supreme Court has interpreted the term very broadly.[37] In *Automobile Club of Oregon v. State of Oregon*, the Oregon Supreme Court considered, in relevant part, whether the expenditures of a state underground storage tank assessment violated Article IX, section 3a. The assessment was collected from any person taking delivery into an underground storage tank of gasoline intended for resale.[38] In considering whether revenues from the assessment were subject to Article IX, section 3a (1)(a), the court first considered whether, despite its name, the "assessment" was really a "tax" within the meaning of Article IX, section 3a (1)(a). Because the court found that Article IX, section 3a, was adopted by the people for the "clear and unambiguous" purpose of ensuring that moneys derived from taxes and fees on motor vehicles and motor vehicle fuel not be diverted to nonhighway purposes,[39] the court held that the underground storage tank assessment was a tax under Article IX, section 3a(1)(a):

> The underground storage tank assessment is measured by the receipt of motor vehicle fuel into storage tanks. The limitations of Article IX, section 3a(1)(a), apply to "*[a]ny tax* levied on, with respect to, or *measured by* the storage, withdrawal, use, sale, distribution, importation or *receipt of motor vehicle fuel*." . . . We conclude that, despite the "assessment" label attached to the levy, the underground storage tank assessment is a tax on motor vehicle fuel (a "gasoline tax") under Article IX, section 3a(1)(a).[40]

SB 1070 directs the EQC and DEQ to design a cap-and-investment program that will likely cover emissions from the transportation sector by placing the point of regulation on entities that are as far upstream in the motor vehicle fuel supply chain as possible.[41] Each such covered entity will be required to obtain compliance instruments equal to the GHG emissions resulting from the burning of the motor vehicle fuel in Oregon that the covered entity is responsible for. Like any other regulated party, such covered entities will be able to obtain compliance instruments by being allocated allowances for free from the state (if the state determines it is necessary to prevent leakage), purchasing allowances at auction, purchasing allowances on the secondary market or purchasing offsets.

Again, an allowance is essentially a permit to emit one ton of carbon dioxide equivalent. The auction price paid for an allowance by a covered entity from the motor vehicle fuel sector reflects the auction price that the market is willing to bear for obtaining a permit to emit one ton of carbon dioxide equivalent through the burning, or use, of motor vehicle fuel. Therefore, we believe a court would likely hold that such auction proceeds are "revenue from . . . [a] tax . . . measured by the . . . use . . . of motor vehicle fuel." The use limitations of Article IX, section 3a, would therefore apply to the proceeds.[42]

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[37] *Automobile Club of Oregon v. State of Oregon*, 314 Or. 479, 485-486, 488-489 (1992); *Scappoose Sand & Gravel, Inc. v. Columbia County*, 161 Or. App. 325, 336 (1999) (citing *Automobile Club* for the proposition that the meaning of the term "tax" varies from one context to another and is ascertainable largely by reference to the purposes of the provisions in which the term is used or to which it is applied).

[38] *Automobile Club of Oregon*, 314 Or. at 484-485.

[39] *Id.* at 486-487. S*ee also Rogers v. Lane County*, 307 Or. 534, 541 (1989).

[40] *Automobile Club of Oregon*, 314 Or. at 488-489 (emphasis in original).

[41] *See* SB 1070, section 9 (21), (defining a "source" for purposes of the cap-and-investment program, in part, as "any person that imports, sells or distributes for use in this state fossil fuel that generates greenhouse gases when combusted"); section 9 (7) (defining a "covered entity" for purposes of the cap-and-investment program as "a source that is required by the Environmental Quality Commission to participate in the carbon pollution market").

[42] We note that even if a court were to reach the opposite conclusion, that result would not require modification of, or render unconstitutional, the language of SB 1070. SB 1070, section 11 (3)(b) provides that "auction proceeds that

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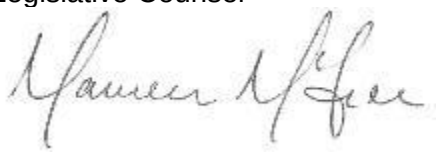
Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel



By
Maureen McGee
Deputy Legislative Counsel

constitute revenues described in Article IX, section 3a, of the Oregon Constitution" must be transferred to the State Treasurer to be deposited in the Climate Investments Account in the State Highway Fund. If a court were to determine that auction proceeds within the cap-and-investment program do not constitute such revenues, no remedy would be required. No auction proceeds would have to be deposited in the Climate Investments Account, though the Legislative Assembly could choose to deposit them in the account.