



**DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION**

MEMORANDUM

FOR PUBLIC RELEASE

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SUBJECT: Licensure and regulatory requirements for religious/entheogenic psilocybin practitioners

The Oregon Psilocybin Advisory Board's (OPAB) licensing and equity subcommittees have voted in favor of proposals that would subject "entheogenic" practitioners to a lessor standard of licensure or regulation by the Oregon Health Authority (OHA). An entheogenic practitioner is someone who uses psilocybin for religious, spiritual or ritualistic purposes.¹ The subcommittees have asked OPAB to recommend to OHA that it adopt rules creating a separate category of privileges for entheogenic practitioners. This raises a number of legal questions. We

¹ Merriam-Webster defines "entheogen" as:

a psychoactive, hallucinogenic substance or preparation (such as psilocybin * * *) especially when derived from plants or fungi and used in religious, spiritual, or ritualistic contexts.

Therefore, we conclude that an entheogenic practitioner is someone who uses psilocybin for religious, spiritual or ritualistic purposes.

will provide short answers to your questions with longer analysis to follow. OHA has asked for this legal opinion to be publicly released. Although publicly released, this memorandum is intended for reliance by state officers only.²

1. Can OHA exempt entheogenic psilocybin practitioners from licensure?

Short Answer: No. There is no statutory authority for OHA to exempt anyone engaged in the manufacturing, delivery or possession of psilocybin from licensure and licensure is the only mechanism for being exempt from state criminal liability.

2. Can OHA exempt entheogenic practitioner licensees from all of psilocybin rules or does it have a legal duty to regulate all licensees, at least in part to protect public health and safety?

Short Answer: OHA cannot exempt entheogenic practitioners from all rules and it does have to adopt rules and regulate licensees to protect public health and safety.

3. Can OHA adopt rules with different or less restrictive standards for entheogenic practitioner licensees?

Short Answer: No. Making less restrictive standards for entheogenic practitioners would likely violate the establishment clause protections of the Oregon and United States constitution. Applying fewer restrictions on entheogenic practitioners would likely be viewed as granting a privilege to religion that is not available on a secular basis.

4. Does the Religious Freedom Restoration Act (RFRA) or a state equivalent, or any other constitutional provision or law compel OHA to treat applications from religious or entheogenic organizations differently from other applications?

Short Answer: No.

ANALYSIS

I. Summary of Proposal

To provide more context for these questions we summarize the information provided to the OPAB subcommittees by the proponents of the proposal that OPAB is likely to vote on. The proponents highlight the fact that there are indigenous groups with historic documented use of psilocybin, including Mayans, Mahuatls, Zapotecs and others.³ The proponents believe that some of the requirements in Measure 109 adopted by the voters in 2020, now codified in ORS

² ORS 180.060(3).

³ Dennis power point presentation, at 10,

<https://www.oregon.gov/oha/PH/PREVENTIONWELLNESS/Documents/Entheogenic%20Practitioners%20under%20M109.pdf>.

475A as the Oregon Psilocybin Services Act (the Act)⁴ burdenentheogenic practice and without the Act, entheogenic practitioners would in fact be more protected by the federal Religious Freedom Restoration Act (RFRA)⁵ and the Religious Land Use and Institutionalized Persons Act (RLUIPA).⁶ Proponents list the following provisions of the Act as limiting entheogenic practices:

- At least one facilitator must be present and must not take psilocybin during ceremony
- Facilitation must be performed in a non-directive manner
- Psilocybin must be consumed and experienced at a licensed facility
- Prohibition on outdoor cultivation
- Only psilocybin is lawful (as opposed to other plant species)
- Psilocybin must be sold - can't be given away or included with services
- Mandatory client information forms and preparation sessions; must offer integration sessions⁷

The presentation materials we reviewed contain no specific examples of how these statutory provisions burden entheogenic practice. OHA has yet to adopt any rules further implementing the Act. Apparently as a way to lessen perceived burdens or ease restrictions on religious and spiritual practice the proposal, if adopted, would create lesser and different standards that would apply to entheogenic practitioners in order to allow the greatest amount of religious liberty. These are the considerations for the framework of the proposal in pertinent part:

- Must permit a broad range of religious practices and ceremonies without unnecessary interference
- Must create a pathway for religious practice that is within financial reach of marginalized communities
- There should be special rules around the growing, storing, handling, and testing of psilocybin mushrooms that reflect the view common in many entheogenic communities that the mushrooms themselves are sacred objects worthy of reverential treatment
- Rules must provide meaningful oversight of and accountability for religious practitioners, particularly in:
 - Screening new members;

⁴ Specifically, ORS 475A.210 to 475A.722.

⁵ 42 USC 2000bb, *et seq.*

⁶ 42 USC 2000cc, *et seq.* As will be explained below, this likely is not accurate.

⁷ Dennis Power Point presentation, at 27.

- Disclosing risks/obtaining informed consent;
- Preventing abuse; and
- Ensuring that religious practice is conducted in a safe manner.
- Must not give preferences to “religious” over “non-religious” organizations or individuals
- Protections should be framed in terms of sincere practice relating to one’s deeply-held values, beliefs, and convictions, rather than affiliation with a religious organization
- Use “entheogenic” rather than “religious”⁸

Other pertinent key features of the proposal:

- Liberal rules around religious and spiritual ceremony
- Affordable pathway to services
- Peer-support assistance
- Liberal rules for entheogenic products, including “homegrown” mushrooms
- Protects those who practice in accordance with sincerely held faith, belief, or conviction
- As proposed, only available to nonprofit organizations
- Requires participation in a plant medicine reciprocity program⁹

II. Exemption from licensure

Your first question is whether, if it is recommended by OPAB, OHA could exempt certain individuals or organizations from licensure. One of the enumerated purposes of the Act is to “[p]ermit persons licensed, controlled and regulated by this state to legally manufacture psilocybin products and provide psilocybin services to persons 21 years of age and older, subject to the provisions of [the Act].”¹⁰ The Act specifies that the purpose of licensure is to exempt “the person that holds the license from the criminal laws of this state for possession, delivery or manufacture of psilocybin products, provided that the person complies with all state laws and rules applicable to licensees.”¹¹ Licensees acting in accordance with the Act and OHA rules adopted pursuant to the Act are not subject to criminal or civil offenses with regard to the manufacture, delivery or possession of psilocybin.¹² OHA is required to accept applications and issue licenses for the manufacturing and sale of psilocybin products, the provision of psilocybin

⁸ Dennis Power Point presentation, at 32-34.

⁹ Dennis Power Point Presentation, at 36.

¹⁰ ORS 475A.205(1)(e)(A).

¹¹ ORS 475A.474.

¹² ORS 475A.275.

services (psilocybin service center and psilocybin facilitator licenses), and testing laboratories.¹³ OHA can also create other licensure categories related to the consumption of psilocybin products.¹⁴

There is nothing in the Act that gives OHA the authority to exempt an individual or entity from licensure and an individual or entity without an OHA license issued under the Act who manufactures, delivers, or possesses psilocybin is subject to applicable civil or criminal offenses.

III. Exemption from all psilocybin rules

Your second question is whether OHA could license an entheogenic practitioner but exempt them from all regulation. The legislative findings that accompany the Act state that OHA must adopt rules to implement a “comprehensive regulatory framework that will allow persons 21 years of age and older in this state to be provided psilocybin services.”¹⁵ OHA has the duty, function and power to “regulate the manufacturing, transportation, delivery, sale and purchase of psilocybin products and the provision of psilocybin services in this state in accordance with the provisions of ORS 475A.210 to 475A.722.”¹⁶ In addition, OHA must adopt, amend or repeal rules as necessary to carry out the intent and provisions of ORS 475A.210 to 475A.722, *including rules that the authority considers necessary to protect the public health and safety.*¹⁷ Furthermore, there are specific provisions in the Act that direct OHA’s rulemaking, including requiring OHA to adopt rules that:

- Restrict the quantities of psilocybin products at a licensed premises.¹⁸
- Require licensed manufacturers to test products.¹⁹
- Set out the requirements, specifications, and guidelines for providing services to clients, preparation sessions, client information forms, administration sessions and integration sessions.²⁰
- Contain minimum standards of education and training for psilocybin service facilitators.²¹

Licensed psilocybin centers and facilitators are required to “meet any public health and safety standards and industry best practices established by the authority by rule.”²² OHA must develop

¹³ ORS 475A.235(2)(b)(B), 475A.290, 475A.305, 475A.325, 475A.594.

¹⁴ ORS 475A.235(2)(b)(B).

¹⁵ ORS 475A.200(8)(b).

¹⁶ ORS 475A.235(2)(b)(A).

¹⁷ ORS 475A.235(2)(c).

¹⁸ ORS 475A.300.

¹⁹ ORS 475A.290(4)(c).

²⁰ ORS 475A.340.

²¹ ORS 475A.380.

²² ORS 475A.305(3)(d) and 475A.325(4)(c).

and maintain a system of tracking transfers of psilocybin products between licensed premises, and the specifics of this will be in rule.²³

Given that OHA is tasked with creating a comprehensive regulatory framework, and more specific rulemaking directives that require licensees to comply with certain rules, we do not believe that OHA has the statutory authority to exempt a licensee or a particular category of licensees from all OHA psilocybin rules. As a corollary to that, we agree that OHA does have a duty to regulate licensees, at a minimum, to protect public health and safety, and also to implement and effectuate the other purposes of the Act.

IV. Adopting different or less restrictive standards for entheogenic practitioner licensees

Your third question is whether OHA can adopt rules that subject a certain subset of licensees to different standards. OPAB is likely to propose that OHA adopt a set of draft rules titled “Privileges and Duties of Entheogenic Practitioners.”²⁴ Under the proposal a licensee could apply to OHA for entheogenic privileges that would entitle the licensee to follow a different set of OHA standards than would apply to other licensees. Those eligible for these privileges would be:

- Individuals who hold a psilocybin service facilitator license.
- Nonprofit organizations that hold a psilocybin service center operator license.
- Nonprofit organizations that hold a psilocybin manufacturer license.²⁵

A licensed manufacturer with entheogenic privileges would be required to “participate in or donate to a reciprocal exchange program”; and “provide to OHA an annual report describing the entheogenic manufacturer’s participation in or donations to a reciprocal exchange program.”²⁶ A licensed service center operator with entheogenic privileges would be required to “provide periodic reports * * * describing the entheogenic service center’s participation in or donations to a reciprocal exchange program” and to “collect information and submit periodic reports * * * describing clients’ participation in or donations to a reciprocal exchange program, to the extent that the entheogenic service center is involved with such participation or donations.”²⁷

Clients wishing to receive services from a licensee with entheogenic practitioner privileges would have to meet certain criteria, including being formally affiliated with an entheogenic service center; or signing an attestation that they have a good faith intention to

²³ ORS 475A.400(1).

²⁴

[https://www.oregon.gov/oha/PH/PREVENTIONWELLNESS/Documents/Privileges%20and%20Duties%20of%20Entheogenic%20Practitioners\(DRAFT%20v.9%20-%20CLEAN\).pdf](https://www.oregon.gov/oha/PH/PREVENTIONWELLNESS/Documents/Privileges%20and%20Duties%20of%20Entheogenic%20Practitioners(DRAFT%20v.9%20-%20CLEAN).pdf)

²⁵ Draft Privileges and Duties of Entheogenic Practitioners, v.9, at 2-3, OAR 333-XXX-XXX2(4).

²⁶ *Id.*, at 5, OAR 333-XXX-XXX4(4)(b)(H) and (I).

²⁷ *Id.*, at 5, OAR 333-XXX-XXX4(4)(c)(G) and (H).

practice or explore their religion or spirituality.²⁸ In addition, they must participate in or donate to a reciprocal exchange program.²⁹

A “reciprocal exchange program” is defined in the draft recommendation as “a program that partners with an indigenous plant medicine community for the purpose of: (a) Promoting the preservation or dissemination of indigenous knowledge or wisdom; or (b) Minimizing or reversing the impacts of colonialism, extraction, or cultural appropriation on that community.”³⁰

A licensee with entheogenic privileges would be able to do the following:

- For facilitators³¹:
 - Not be restricted to any particular limit in the amount of psilocybin that a client may use in an individual ceremony (OHA rules are likely to limit amounts that can be administered, at least according to the product label).
 - Facilitate any number of administration sessions for a client after completing one preparation session (OHA rules may require a preparation session before each administration session).
 - Facilitate any number of psilocybin administration sessions for a client who has submitted one completed client information form within the last 12 months (OHA rules are likely to require a client information form or an updated form that identifies any changes since the last session, before each administration session).
- For manufacturers³²:
 - Be able to store, handle, and discard psilocybin products in a manner in accordance with one’s beliefs or convictions, provide that such storage, handling, and discarding are safe (OHA rules are likely to specify how psilocybin products can be stored, handled and discarded in order to prevent diversion).
 - Not be restricted in the species of psilocybin that is grown (OHA rules are likely to limit what species can be grown).
 - Not be restricted in the growing techniques or growing substrates that may be used (OHA rules are likely to limit the growing substrates that are permitted, and outdoor cultivation is not allowed under the Act).
 - Offer fresh mushrooms for retail sale (OHA rules are likely to limit the sale of psilocybin to a dried substance).

²⁸ *Id.*, at 3, OAR 333-XXX-XXX3(3).

²⁹ *Id.*, at 3, OAR 333-XXX-XXX3(6).

³⁰ *Id.*, at 1, OAR 333-XXX-XXX1(13).

³¹ *Id.*, at 7, OAR 333-XXX.XXX5(1).

³² *Id.*, at 7, OAR 333-XXX.XXX5(2).

- Not have psilocybin products tested except upon written request from OHA (OHA rules are likely to require testing for all products).
- For service centers³³:
 - Allow clients to lead “ceremonies” (OHA rules are likely to require licensed facilitators to lead administration sessions).³⁴
 - Host any number of psilocybin administration sessions for a client who has completed one preparation session.
 - Host psilocybin administration sessions for clients who have submitted only one completed Client Information Form within the prior 12 months.

The proposal is clearly intended to permit an entheogenic practitioner to comply with less stringent standards than would be applicable to a licensee without entheogenic privileges.

A. State Anti-Discrimination Prohibitions

Before considering a constitutional challenge to OHA rules, Oregon courts would first consider whether the rules violate the Act or some other governing statute or rule.³⁵

OHA has its own rules to protect individuals against discrimination based on a protected class and religion is a protected class.³⁶ OHA has the following rules that protect against discrimination, that are applicable here:

- (1) The Authority shall not, either directly or through another entity, discriminate against any individual, or harass, exclude from participation, or deny the benefit of programs, services or activities because the individual belongs to a protected class.
- (2) The Authority shall not discriminate against an individual in the granting of licenses and certificates because the individual is part of a protected class.
- (3) The Authority shall not apply criteria, standards, or practices that screen out or tend to screen out individuals in a protected class from fully and equally enjoying any goods, programs, services, or activities unless:
 - (a) The criteria can be shown to be necessary for providing those goods, programs, services or activities; or

³³ *Id.*, at 8, OAR 333-XXX.XXX5(3).

³⁴ “Ceremony” is defined as “a psilocybin administration session in which entheogenic practitioner privileges are utilized.” *Id.*, at OAR 333-XXX-XXX1(2).

³⁵ *Zockert v. Fanning*, 310 Or 514, 520, 800 P2d 773 (1990) (Oregon courts decide “cases upon subconstitutional grounds, where available, even though litigants argue only constitutional errors. Likewise, the state constitution is consulted before the federal.”).

³⁶ OHA’s rules define “protected class” as “a group of people protected from discrimination by law, on the basis of sexual orientation, race, color, national origin, religion, disability, age, sex (includes pregnancy-related conditions and sexual harassment), marital or familial status, or other class protected by law.” OAR 333-005-0005(10).

- (b) The Authority determines the screening or exclusion identifies a direct threat to the health or safety of others.
- (4) The Authority shall provide programs, services, and activities in the most integrated setting possible to meet the needs of individuals within the context of the program, service, or activity.
- (5) The Authority shall not require an individual to participate in programs, services, or activities that are separate or different, despite the existence of permissibly separate or different programs or activities.³⁷

Entheogenic practitioner privileges would only be available to an applicant that “[i]s or is affiliated with a nonprofit organization that was formed primarily for religious or spiritual purposes” and to an applicant that “signs an attestation demonstrating that entheogenic practitioner privileges would advance the good faith practice of a sincerely held belief or conviction.”³⁸ The proposal avoids using the term religion or religious but explicitly states that is only to avoid potential legal scrutiny.³⁹ It is clear the proposal is intended to benefit religious practitioners thereby discriminating against applicants at least in part on the basis of religion. A licensee with secular beliefs about the use of psilocybin would not be eligible for the more relaxed regulation. In addition, the proposal would restrict the clients that could get services from entheogenic practitioners. The proposed rules state “[i]n order for a client to receive psilocybin services or products that utilize entheogenic practitioner privileges, the client must either be “formally affiliated with an entheogenic service center; or * * * [s]ign an attestation demonstrating a good faith intention to practice or explore their religion or spirituality.”⁴⁰ Such rules would have the effect of limiting access to services, based on a client’s religious belief or practices. It seems clear that the proposal would violate OHA’s own anti-discrimination rules.

B. Oregon Constitutional Analysis

Article I, section 2, of the Oregon Constitution provides: “All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.” Article I, section 3, provides: “No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience.”⁴¹ Article I, section 5, of the Oregon Constitution provides that “[n]o money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly.”

Article I, sections 2 and 3 of the Oregon Constitution, provide “equal constitutional tolerance” for “religious believers and nonbelievers alike.”⁴² The Supreme Court has “assume[d]

³⁷ OAR 943-005-0010(1) to (5).

³⁸ Draft Privileges and Duties of Entheogenic Practitioners, v.9, at 2, OAR 333-XXX-XXX2(1).

³⁹ *Id.*, footnote 1.

⁴⁰ *Id.*, at OAR 333-XXX-XXX3(3).

⁴¹ The Oregon courts construe these provisions independently of the federal First Amendment and would analyze violations under Oregon’s Constitution first, before reaching federal Constitutional questions.

⁴² *Meltebeke v. Bureau of Labor & Indus.*, 322 Or 132, 147, 903 P2d 351 (1995), abrogated on other grounds by *State v. Hickman*, 358 Or 1, 358 P3d 987 (2015).

* * * that Article I, section 3, extends protection to nontraditional religious practices * * *.⁴³ The Court has found that “[i]t is impermissible for a statute to draw a distinction between churches and nonchurch religious organizations.”⁴⁴ While the proposal would extend protection to religious, spiritual and ritual practice, it does not extend protection to those practitioners who wish to incorporate psilocybin as part of a general wellness practice or for treatment of mental health conditions.

The Oregon Supreme Court has largely adopted a federal First Amendment analysis for establishment-like claims. In *Eugene Sand & Gravel v. City of Eugene*, the Oregon Supreme Court adopted the federal *Lemon* test for claims that raise establishment issues.⁴⁵ The court described the test as follows: “(1) the law must ‘reflect a clearly secular legislative purpose’; (2) it must ‘have a primary effect that neither advances nor inhibits religion’ (as distinguished from an ‘incidental’ effect); and (3) it must ‘avoid excessive governmental entanglement with religion.’”⁴⁶

Based on these Oregon Constitutional provisions, the recommendation in the form of draft rules very likely runs afoul of the Constitutional protections because the proposal does not extend the same privileges to non-entheogenic practitioners, or “non-believers” as it does to entheogenic practitioners. In addition, it very likely runs afoul of the Oregon constitutional equivalent of the Establishment Clause (the federal First Amendment). Applying the three-part test, the proposal does not have a secular purpose, its plain purpose is to benefit entheogenic practitioners – those using psilocybin for religious, spiritual or ritualistic purposes, failing the first test. The primary effect of the proposal is to advance religion because entheogenic practitioners would be subject to less regulation than “regular” licensees. Therefore, the proposal if adopted into rule would fail the second test.

Because the proposal clearly fails the first two *Lemon* tests, a court would likely find the proposal violates the Establishment clause.

⁴³ *State v. Brumwell*, 350 Or 93, 108 n 16, 249 P3d 965 (2011), cert den, 565 US 1124 (2012).

⁴⁴ *Newport Church of the Nazarene v. Hensley*, 335 Or 1, 10, 56 P3d 386 (2002).

⁴⁵ 276 Or 1007 (1976). The U.S. Constitution, Amendment I, provides that “Congress shall make no law respecting an establishment of religion....”. In *Lemon v. Kurtzman*, the U.S. Supreme Court stated that there were “three main evils against which the Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’”⁴⁵ The court went to explain:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such **tests** may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [Board of Education v. Allen, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926, 20 L.Ed.2d 1060 \(1968\)](#); finally, the statute must not foster ‘an excessive government entanglement with religion.’

Walz, supra, at 674, 90 S.Ct., at 1414.

⁴⁶ *Id.* 1012–13 (citations omitted).

V. RFRA and RLUIPA

The Religious Freedom Restoration Act, or RFRA, was enacted in 1993 in response to the 1990 U.S. Supreme Court decision in *Employment Division v. Smith*.⁴⁷ In that case the Supreme Court held that the Free Exercise Clause of the U.S. Constitution permitted states to prohibit sacramental peyote use and thus deny unemployment benefits to a person who was fired because of such drug use, because it was a generally applicable law not directed as religious practice.⁴⁸ RFRA provided that even laws of general applicability had to be narrowly tailored to meet a compelling state interest where the free exercise of religion was affected.⁴⁹ However, in 1997, the U.S. Supreme Court held in *City of Boerne v. Flores*, that RFRA cannot be applied to the states as it was an unconstitutional intrusion into state authority.⁵⁰ Oregon does not have a state-law equivalent of RFRA.

Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000, which does apply to the states, but only with respect to state and local zoning laws and institutionalized persons, neither of which concern OHA's jurisdiction in psilocybin licensing.⁵¹

Your specific question was whether RFRA or a state equivalent, or any other constitutional provision or law compel OHA to treat applications from religious or entheogenic organizations differently from other applications. We can point to nothing in the U.S. Constitution, Oregon Constitution, or state statutes that would compel OHA to treat applications from religious or entheogenic organizations differently than those from "secular" applicants. In fact, doing so would raise questions of whether the religious or entheogenic organizations were receiving preferential treatment as explained above.

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⁴⁷ 494 US 872 (1990).

⁴⁸ *Id.*, at 876-890.

⁴⁹ 42 U.S.C. 2000bb *et seq.*

⁵⁰ 521 Or 527, 536 (1997).

⁵¹ While the Act does require an applicant to submit a land use compatibility statement (LUCS) to OHA, it is the applicable city or county that is responsible for issuing the LUCS. OHA is not making a land use decision when it takes an action on a license.