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GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
LANSING

RACHAEL EUBANKS
STATE TREASURER

October 16, 2024

Center for Popular Democracy
Frank Kearl
449 Troutman St., Ste. A
Brooklyn, NY 11237

Dear Mr. Kearl:

Background Information:

The Department of Treasury is in receipt of the Request for Rulemaking you submitted on behalf of the Center for Popular Democracy. The request was for Treasury to promulgate a set of administrative rules entitled "Michigan Opioid Healing and Recovery Fund Auditing Procedures." The stated purpose of the rule set would be to "create an audit mechanism and structure to collect data on state- and local-level spending of the Michigan Opioid Healing and Recovery Fund as required by MCL 12.253(5)."

The Michigan Opioid Healing and Recovery Fund (the Fund) represents the State of Michigan's share of the nationwide settlements reached several years ago, resolving all opioids litigation brought by state and local political subdivisions against certain pharmaceutical distributors, manufacturers, and related companies. Michigan is expected to receive approximately \$1.6 billion from the settlements over the next 16 years.

Response to Request for Rulemaking:

The Request for Rulemaking is DENIED for the reasons set forth below.

In Michigan, the authority to promulgate or adopt administrative rules must be specifically delegated to an agency by the state legislature. *Clonlara, Inc. v. State Bd. of Educ.*, 442 Mich 230, 237 (1993). Moreover, any legislatively delegated power to adopt administrative rules must be clearly granted in the enabling statute, and the statute granting such power must be strictly construed. *Lake Isabella Dev. Inc. v. Village of Lake Isabella*, 259 Mich App 393, 401 (2003).

The enabling statute referenced in the Request for Rulemaking is MCL 12.253, the statute creating the Fund. The specific provision regarding Treasury's audit authority, MCL 12.253(5), states as follows:

(5) The department of treasury is the administrator of the Michigan opioid healing and recovery fund for audits of the fund.

This brief provision does not itself grant Treasury rulemaking authority with respect to audits of the Fund. Nor do the other provisions of MCL 12.253 contain any language conferring power or authority on Treasury to promulgate administrative rules regarding audits of the Fund, or any other topic related to the Fund.

Treasury does have certain rulemaking authority under the Revenue Act, the statute from which it derives most of its powers. However, Treasury's rulemaking authority under the Revenue Act is not unlimited; that authority is restricted to rules that are necessary to the enforcement of "the provisions of tax and other revenue measures" administered by Treasury. MCL 205.3(b). In this instance, the Revenue Act does not provide the necessary authority. MCL 12.253 is clearly not a tax statute, so audit rules could not be considered necessary to the enforcement of tax provisions contained in the statute. Neither is it a "revenue measure," a statute or legislative enactment that either explicitly levies taxes or otherwise raises funds (revenue) via some other method, to be used to defray the costs of governmental expenditures. Although MCL 12.253 does make provision for the investment of payments into the Fund, the statute does not raise money and the Fund itself is not a source of revenue to be used to defray governmental expenditures.

Accordingly, under applicable law, Treasury does not have the necessary legislatively granted authority to promulgate administrative rules regarding audits of the Fund. The Request for Rulemaking must therefore be denied.

Additional Information:

The Michigan Department of Health and Human Services (MDHHS) developed the following website for the community to learn about how this funding is spent: www.michigan.gov/opioids/opioidsettlements. MDHHS also provides two annual reports to the Legislature regarding opioid settlement spending.

There is no authority for the State of Michigan to track how local settlement dollars are spent. Local settlement shares go directly to municipalities without any state government involvement. The Michigan Association of Counties has created a micounties.org/opioid-settlement-resource-center that has much of the requested data.

Sincerely,



Lance Wilkinson
Director, Bureau of Tax Policy