

December 15, 1999

Mari Anne Gest
Public and Legislative Affairs Director
Office of the State Treasurer
159 State Capitol
Salem, Oregon 97310-0840

Dear Ms. Gest:

This letter is in response to your correspondence dated December 3, 1999 concerning appointment of Oregon Qualified Tuition Savings Board members.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF OPINION
99S-032**

STATED FACTS: The Oregon Qualified Tuition Savings Program was created by the 1999 Legislature to enable persons to establish savings accounts to be used for higher education expenses. Such accounts will be tax exempt up to \$2,000 per couple per year.

The State Treasurer is required to appoint board members for the new Oregon Qualified Tuition Savings Board. The board will set policy and approve a Request for Proposals (RFP) that would be sent to major financial institutions. The RFP will be for administration and management of the program as well as marketing and design of the plans and investment of the dollars for the program. After the contract is awarded, the treasurer's office plans to allow financial institutions and individuals that are qualified and comply with the training requirements to sell the plan.

One individual who would be an important asset to the board has extraordinary knowledge of college savings plans. This individual works for a subsidiary of US Bancorp -- Piper Jaffray. US Bancorp also has another subsidiary called FAME, which may bid on the RFP, but it is uncertain at this time.

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RELEVANT STATUTES: The following Oregon Revised Statutes are applicable to the issues addressed herein:

ORS 244.020(1): Actual conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (7) of this section.

ORS 244.020(2): Business means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official is associated in a nonremunerative capacity.

ORS 244.020(3): Business with which the person is associated means any business of which the person or the person's relative is a director, officer, owner or employee, or agent or any corporation in which the person or the person's relative owns or has owned stock worth \$1,000 or more at any point in the preceding calendar year.

ORS 244.020(7): Potential conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the following:

(b) Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative or business with which the person or the person's relative is associated, is a member or is engaged. The commission may by rule limit the minimum size of or otherwise establish criteria for or identify the smaller classes that qualify under this exception.

ORS 244.020(15): Public official means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services.

ORS 244.040: Code of ethics; prohibited actions; honoraria. The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

(1)(a) No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated.

ORS 244.120: Methods of handling conflicts; generally; application to elected officials or members of boards. (1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:

ORS 244.120(2): An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:

(a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or

(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

(A) Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.

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(B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.

QUESTION: If FAME does not bid on the RFP would the individual be in violation of Government Standards and Practices laws by serving on the board? How would this change if FAME did bid on the RFP?

OPINION: Oregon Government Standards and Practices laws define actual conflict of interest in ORS 244.020(1) and potential conflict of interest in ORS 244.020(7). The difference between an actual and a potential conflict of interest is determined by the words would and could.

An actual conflict of interest occurs when the action is reasonably certain to result in a financial benefit or detriment. It will occur when an action taken by a public official would directly and specifically affect the financial interest of the official, the official's relative or **a business with which the official or a relative is associated.**

A potential conflict of interest exists when an official takes action that could possibly have a financial impact on the official, a relative of the official or **a business with which the official or a relative is associated.**

ORS 244.040(1)(a) prohibits a public official from using, or attempting to use, official position or office to obtain financial gain or avoidance of financial detriment for the official, the official's relative or **a business with which the official or the official's relative is associated.** This prohibition exists regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

If FAME, or any other subsidiary of US Bankcorp, did not bid on the RFP the individual would not have a conflict of interest because the business with which the individual is associated would not be involved in the program.

If FAME, or any other subsidiary of US Bankcorp, bid on, and was awarded the contract for the administration and management of the program as well as marketing and design of the plans and investment of the dollars for the program, it appears that an exception to

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the conflict of interest statutes would take place. ORS 244.020(7)(b) provides an exception to conflicts of interest when an official action affects all members of a class to the same degree. In this instance it appears the class may be any and all financial institutions and/or their representatives. Sometimes a public official may take action that would have a financial affect on that official, a relative of that official or a business with which the official or the official s relative is associated. If other people, or companies, in a class are also affected to the same degree by that action, the official would be exempt from conflict of interest disclosure requirements. It should be noted that only the Oregon Government Standards and Practices Commission is authorized by law to determine the existence of a class for the purpose of compliance with the conflict of interest provisions of ORS Chapter 244. Accordingly, the individual would be able to serve on the board and to sell the program without a violation of Government Standards and Practices laws pursuant to ORS 244.020(7)(b).

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS CHAPTER 244 TO THE FACTS STATED HEREIN. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. IT IS MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION.

Sincerely,

L. Patrick Hearn
Executive Director

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