

April 1, 2003

Dalton Hobbs, Administrator
Department of Agriculture
Agricultural Development & Marketing Division
1207 NW Naito Parkway, Suite 104
Portland, Oregon 97209-2832

Dear Mr. Hobbs:

This letter is in response to your correspondence dated January 30, 2003 concerning possible conflicts of interest by a producer of a commodity also serving as an employee staff member of the commodity commission.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF
OPINION NO. 03S-006**

STATED FACTS: The Oregon Department of Agriculture has oversight authority over Oregon's 28 commodity commissions.

Commodity commissions are made up of producer and handler members of the commodity. Commodity commissions are small state agencies that conduct research, education and promotion programs for that commodity. These programs benefit the state and its citizens through environmental improvements, nutrition, education and economy stimulus. Each commission may hire its own staff which may be either an employee or an independent contractor.

There is no requirement that a staff member be a producer of that commodity. The staff members are paid from commission funds generated by the producers of the commodity. The staff performs administrative (bookkeeping and check signing, execute and sign contracts, prepare correspondence), marketing and research functions. The staff members also have access to conditionally exempt public records that would indicate each producer's production and or price and to whom the production was sold through.

The issue may be one of perception where another producer would prefer that a potential competitor not have access to their business information. In an initial conversation with the Oregon Government Standards and Practices Commission (GSPC) staff we learned of a separate issue arising out of ORS 244.040(1)(a) which would be independent of a class exception and conflicts of interest. This would restrict the staff member from signing a marketing contract because their private business would benefit from the generic marketing.

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

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."

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."

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 \$1000 or more at any point in the preceding calendar year."

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:"

244.020(7)(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 class that qualify under this exception.”

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.”

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:”

244.040(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.”

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:”

244.120(1)(c) “If the public official is any other appointed official subject to this chapter, notify in writing the person who appointed the public official to office of the nature of the conflict, and request that the appointing authority dispose of the matter giving rise to the conflict. Upon receipt of the request, the appointing authority shall designate within a reasonable time an alternate to dispose of the matter, or shall direct the official to dispose of the matter in a manner specified by the appointing authority.”

QUESTION #1: Is there a conflict of interest or any other Oregon Government Standards and Practices laws that would prevent a producer of the commodity from serving as and employee staff member? If so, are there any accommodations that could be made to allow the person to be employed, such as not having signing authority?

OPINION: Oregon Government Standards and Practices laws define actual conflict of interest [ORS 244.020(1)] and potential conflict of interest [ORS 244.020(7)]. The difference between an actual conflict of interest 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 the 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 of the official is associated. A potential conflict of interest exists when an official takes action that could possibly have a financial impact on that official, a relative of that official or a business with which the official or the relative of that official is associated. Such impact is not certain.

ORS 244.120(1)(c) requires that, when an appointed public official is met with a conflict of interest, that public official is to notify the person who appointed the public official to office of the nature of the conflict of interest and request that the appointing authority dispose of the matter giving rise to the conflict.

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. Sometimes a public official may take action that would have a financial effect on that official, a relative of that official or a business with which the official or a relative of that official is associated. If other persons or entities are also affected to the same degree by that action, the official would be exempt from conflict of interest requirements on the basis of a class exception.

Only the Oregon Government Standards and Practices Commission (GSPC) is authorized by law to determine the existence of a class or the size of a class for the purpose of compliance with ORS Chapter 244.

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

QUESTION #2: Is there a conflict of interest or any other law that would prevent a producer of the commodity from serving as an independent contractor to a commission?

OPINION: ORS 576.306(1) states "**Independent contractors performing services for commission**(1) The commission may contract with an independent contractor for the performance of any services..."

ORS 576.306(6) states "A contractor described in subsection (1) of this section shall not be considered a public official, public officer, state officer or executive official for purposes of Oregon law, including ORS chapters 236, **244**, 292, 295 and 297 and ORS 171.725 to 171.785."

Accordingly, the GSPC does not have jurisdiction over independent contractors of agricultural commodity commissions.

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS CHAPTER 244 TO THE FACTS STATED HEREIN. ANY RELEVANT INFORMATION, WHICH WAS NOT INCLUDED BY THE REQUESTER OF THIS OPINION IN THE STATED FACTS, COULD COMPLETELY CHANGE THE OUTCOME OF THIS OPINION. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. THIS OPINION DOES NOT EXEMPT A PUBLIC OFFICIAL FROM LIABILITY UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS ONLY MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION.

Please contact this office again if you would like this opinion submitted to the Oregon Government Standards and Practices Commission (GSPC) for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,

L. Patrick Hearn
Executive Director