Oregon
Kate Brown, Governor

Government Ethics Commission
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March 4, 2015

Terry Meehan
Associate General Counsel
Oregon State University
Office of the President
600 Kerr Administration Bldg.
Corvallis, OR 97331-2128

Dear Mr. Meehan:

This is in response to your correspondence received by the Oregon Government Ethics Commission (Commission) on January 26, 2015, regarding the application of Oregon Government Ethics law to the participation of Oregon State University (OSU) administrators in proposed for-profit business entities jointly owned and managed by OSU and a private company.

**OREGON GOVERNMENT ETHICS COMMISSION STAFF ADVISORY OPINION NO. 15S-002**

STATED FACTS: Recent legislation created a new governance model for Oregon's public universities and on 7/1/14, OSU became a university with a governing board. OSU remains a government entity, but with expanded statutory powers, including to "...enter into any partnership, joint venture or other business arrangement and create and participate fully in the operation of any business structure, including but not limited to the development of business structures and networks with any public or private government, nonprofit or for-profit person or entity, that in the judgment of the university or the governing board is necessary or appropriate." [ORS 352.033 and ORS 352.107(1)(c)]

In 2008, the OSU Foundation, an Oregon non-profit corporation that is tax exempt under section 501(c)(3) of the Internal Revenue Code, collaborated with a for-profit business in the United Kingdom called INTO University Partnerships Limited (IUP) to create, promote, and operate international student programs and residential facilities at OSU's Corvallis campus.

OSU is currently negotiating with IUP to form a new entity to create, promote, and operate international student programs at the OSU Cascade Campus in Bend. OSU

wishes to acquire an ownership interest in the new for-profit entity and assign OSU administrators to participate on behalf of OSU in its management.

OSU has developed two alternate business structures, both of which differ from the 2008 collaborative venture in three respects: (1) each uses one or more limited liability corporations (LLCs) rather than corporations; (2) neither has boards of directors; and (3) OSU, rather than the OSU Foundation, has an ownership interest in each.

Under the first proposed structure, OSU will directly hold a 50% membership interest in a for-profit Delaware LLC, which will likely be known as OSU Cascades-INTO, LLC (Cascades LLC). An affiliate of IUP will own the other 50% membership interest. Cascades LLC will be co-managed by the IUP affiliate and OSU. OSU will designate OSU administrators to act on its behalf in carrying out OSU's functions as co-manager of the Cascades LLC.

The second proposed structure is the same as the first with one exception. Instead of OSU serving directly as co-manager, a special purpose Oregon LLC, wholly owned by OSU, would act on OSU's behalf as co-manager of the Cascades LLC (OSU Manager LLC). The sole purpose of OSU Manager LLC, which would have no ownership interest in the Cascades entity, would be to represent OSU in the co-management, along with the IUP affiliate, of the Cascades LLC. All rights to manage and conduct the business and affairs of OSU Manager LLC would be held by OSU, as an Oregon "member managed" LLC.

These assigned administrators will not receive any compensation for their services related to the Cascades LLC or, under the second proposed structure, OSU Manager LLC, other than their regular OSU compensation.

QUESTION: Would OSU administrators assigned to act on behalf of OSU in the co-management of a for-profit LLC, and who derive no compensation from the businesses described above as Cascades LLC or OSU Manager LLC, under either the first or second proposed business structures, be at risk of violating ORS 244.040 by virtue of that assignment?

ANSWER: No. Any person serving an Oregon public university with a governing board as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services, is a public official. Because OSU administrators are public officials, the limits and restrictions in Oregon Government Ethics law would apply to their actions as public officials. [ORS 174.109, ORS 174.117(1)(i), and ORS 244.020(14)]

ORS 244.040(1) prohibits public officials from using or attempting to use their official position to obtain a financial gain or avoid a financial detriment for themselves, their

relative or household member, or a business with which either they, a relative, or household member are associated, if the financial gain or avoidance of detriment would not otherwise be available but for the holding of their official position. Public officials are not prohibited from accepting official compensation, reimbursements or honoraria. [ORS 244.040(2)].

As stated in the facts of this case, the OSU administrator assigned to co-manage the for-profit Cascades LLC, under either of the proposed business structures, would receive their compensation only from OSU and would receive no personal financial benefit from any of the proposed LLCs, regardless of legal structure. Assuming also that no relative or household member of the OSU administrator would receive a personal financial benefit from any of the proposed LLCs, the only question remaining is whether the LLCs described in the stated facts as Cascades LLC or OSU Manager, under either of the proposed business structures, would be businesses with which the OSU administrator would be associated for purposes of the application of ORS 244.040(1).

ORS 244.020(2) defines business by enumerating several legal entities as businesses, followed by the catch-all phrase "and any other legal entity operated for economic gain...." In the past, the Commission and its staff have issued opinions and offered advice to the effect that government bodies, including public universities, are not considered to be businesses because they are not included in the statutorily enumerated list of business entities, nor are they operated for economic gain. [Commission Advisory Opinions No. 06A-1002 and 14S-003]

In order to be a business with which a public official is associated, the entity must first meet the definition of a business. ORS 244.020(2) includes in its enumerated list of businesses, "any corporation." Cascades LLC as described above in both proposed structures, is a for-profit Delaware limited liability corporation, and thus meets the definition of a business. OSU Manager LLC is an Oregon limited liability corporation and also meets the definition of a business.

ORS 244.020(3)(a) defines a business with which a person is associated as "any private business or closely held corporation of which the person or the person's relative is a director, officer, owner or employee, or agent..." Thus, in 2008 the Commission advised that when OSU administrators were required, as part of a partnership agreement between the non-profit OSU Foundation and IUP, to serve on the board of directors of a for-profit corporation, those administrators would be at risk of violating ORS 244.040(1). This conclusion was reached because in their official capacity as OSU administrators, those public officials would have been required to participate in actions that would have a financial impact on the for-profit business with which they were associated as directors. [Commission Staff Advisory Opinion 08S-005]

The Commission has never directly addressed whether a for-profit business created, managed, and owned by a public university may meet the definition of a business and therefore be a business with which assigned employees would be associated for purposes of Oregon Government Ethics law. In both proposed business structures as described above, Cascades LLC and OSU Manager LLC meet the statutory definition of businesses and it appears that an OSU administrator whose duties included the co-management of Cascades LLC, either directly or through OSU Manager LLC, would be an agent of Cascades LLC, making it a business with which the OSU administrator would be associated. Therefore, at first blush it would appear that if OSU administrators are required, as part of their official duties, to participate in actions that would have a financial impact on a private for-profit business such as Cascades LLC, they would risk violating ORS 244.040(1). However, there are factors which would argue against that interpretation.

First, the legislature has recently granted OSU and other public universities with a governing board expanded authority to "create and participate fully in the operation of any business structure" deemed necessary or appropriate by the governing board. In order to participate fully in the operation of any business, OSU must act through individuals who serve them. If the assigned OSU administrators were prohibited by ORS 244.040(1) from taking actions that would financially benefit Cascades LLC, which would seem to be the aim of their management duties, the purpose of the expanded authority granted to OSU by the legislature would be frustrated.

Second, although not specifically on point, ORS 351.067 should be considered when analyzing the current question. First adopted in 1989, ORS 351.067 was most recently amended in 2013 when the statutes creating the new governance model were adopted. ORS 351.067(1) allows public universities with a governing board, such as OSU, to authorize receipt of compensation for any officer or employee from private or public resources, including income from providing services or other valuable consideration for a private corporation, individual, or entity, and performing public duties paid by private organizations, including institution corporate affiliates, that augments an officer's or employee's publicly funded salary. ORS 351.067(3) explicitly states that any compensation authorized and described above is considered official compensation or reimbursement of expenses for purposes of ORS 244.040 and is not considered an honorarium prohibited by ORS 244.042.

ORS 351.067 contains the only explicit statutory exemption to the ethics provisions found outside of ORS Chapter 244. Evidently, the legislature recognized a need for a different application of ORS 244.040 to public university officials and employees when it comes to their receipt of remuneration from a private source. Pursuant to ORS 351.067, if OSU authorized its administrators to receive compensation from Cascades LLC or another private for-profit entity, it would be considered official compensation or

reimbursement of expenses for purposes of ORS 244.040, rather than a prohibited use of their official position.

Third, a 1990 opinion from the Oregon Attorney General concerning whether certain government contractors are public officials subject to Oregon Government Ethics law discussed what makes a business entity "governmental" and concluded the following:

> "An individual who performs services under contract for the government is a 'public official' only if, as a result of the contract, the person becomes part of government. That is, the person must not merely perform services for the government, but perform governmental functions or responsibilities on behalf of the government. Additionally, a person who is an officer, employee or agent of a corporation or other entity that contracts with the government to perform services is a 'public official' if that contracting entity is itself governmental. The key factor in deciding whether an entity is government is whether it is controlled by the government. Other relevant factors are the nature of the services performed and the entity's relationship with the government." [Attorney General Opinion No. 8214, April 9. 1990]

It appears that if Commission staff were to adopt a position that Cascades LLC were a business with which OSU administrators would be associated and therefore their assignment as co-managers would place them at risk of violating ORS 244.040, the purposes of the expanded powers legislatively granted public universities under the new governance model would be frustrated. Also, it seems incongruous that ORS 351.067 would allow compensation received by OSU employees from a private business such as Cascades LLC to be considered official compensation for purposes of ORS 244.040 on the same terms as compensation from OSU itself, when non-compensated administrators assigned to manage Cascades LLC would risk violating ORS 244.040 if they took official actions that would financially benefit the LLC and ultimately OSU.

The governmental control over Cascades LLC is obvious in this instance, as OSU would have a 50% ownership interest in Cascades LLC and 100% ownership of OSU Manager LLC. It appears that Cascades LLC and OSU Manager LLC should be treated not as separate businesses with private interests apart from government, but as entities performing government functions on behalf of OSU. As the Attorney General opined, if an entity is controlled by the government and the nature of the services performed are governmental, those who are officers, employees, or agents of that entity are likely public officials subject to the ethics laws. Therefore, if OSU administrators are deemed to be prohibited by ORS 244.040(1) from acting to further Cascade LLC's financial interests, which would benefit OSU, any other non-employee agent who would manage OSU's interest in Cascades LLC would likewise be prohibited because they would also be public officials subject to the same statute.

Finally, the Commission has historically declined to consider OSU and other public universities to be businesses with which an OSU employee was associated for purposes of the use of office and conflict of interest provisions of Oregon Government Ethics law. The recent change in governance and expanded authority did not make public universities "private" universities. OSU is still defined in statute as a special government body, which is a form of a public body. Any university with a governing board is defined as a governmental entity performing governmental functions and exercising governmental powers. [ORS 174.109, ORS 174.117(1)(i) and ORS 352.033].

In conclusion, for the reasons stated above, I consider Cascades LLC and OSU Manager LLC to be part of the special government body which is OSU and not considered businesses with which OSU administrators would be associated for purposes of ORS 244.040. Therefore, OSU administrators assigned, on behalf of, and for the benefit of OSU, to co-manage Cascades LLC, under either of the proposed business structures outlined above, would not be at risk of violating ORS 244.040 by virtue of that assignment.

QUESTION: Would OSU administrators assigned to act on behalf of OSU in the co-management of a for-profit LLC, and who derive no compensation from the businesses described above as Cascades LLC and OSU Manager LLC, under both the first and second proposed business structure, be at risk of violating the conflict of interest provisions of Oregon Government Ethics law by virtue of that assignment?

ANSWER: No. For the reasons stated above, the Commission staff would consider Cascades LLC and OSU Manager LLC to be part of the special government body which is OSU, rather than businesses with which OSU administrators would be associated. Therefore, OSU administrators assigned, on behalf of, and for the benefit of OSU, to co-manage Cascades LLC, under either of the proposed business structures outlined above, would not be at risk of violating the conflict of interest provisions of Oregon Government Ethics law by virtue of that assignment.

Because this analysis departs from the Commission's usual interpretation of a business with which a public official is associated for purposes of the use of office and conflict of interest provisions of Oregon Government Ethics law, it must be emphasized that this opinion applies only to public officials serving a public university with a governing board and limited to the unique circumstances as described above.

**THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS 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 ETHICS COMMISSION.**

Please contact this office again if you would like this opinion submitted to the Oregon Government Ethics Commission for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,

Ronald A. Bersin
Executive Director

RAB/dg 15S-002

ADDENDUM

RELEVANT STATUTES: The following Oregon Revised Statutes (ORS) are applicable to the issues that are addressed in this opinion:

Note: The Commission has jurisdiction over the statutes in ORS Chapter 244, but included as well are other relevant statutes.

ORS174.109 "Public body" defined. Subject to ORS 174.108, as used in the statutes of this state "public body" means state government bodies, local government bodies and special government bodies.

ORS 174.117(1) Subject to ORS 174.108, as used in the statutes of this state "special government body" means any of the following:

(i) A university with a governing board listed in ORS 352.054.

ORS 351.067 Sources of compensation for officers and employees; potential conflict of interest; reporting; standards. (1) The State Board of Higher Education, in carrying out its authority under ORS 351.070, and the governing board of a public university with a governing board listed in ORS 352.054 may authorize receipt of compensation for any

officer or employee from private or public resources, including, but not limited to, income from:

(a) Consulting;

(b) Appearances and speeches;

(c) Intellectual property conceived, reduced to practice or originated and therefore owned within the public university;

(d) Providing services or other valuable consideration for a private corporation, individual, or entity, whether paid in cash or in-kind, stock or other equity interest, or anything of value regardless of whether there is a licensing agreement between the Oregon University System or public university and the private entity; and

(e) Performing public duties paid by private organizations, including institution corporate affiliates, that augments an officer's or employee's publicly funded salary. Such income shall be authorized and received in accordance with policies and standards established by each board.

(2) Each board may not authorize compensation, as described in subsection (1) of this section, that, in the board's judgment, does not comport with the mission of the public university or substantially interferes with an officer's or employee's duties to the university.

(3) Any compensation described and authorized under subsection (1) of this section is considered official compensation or reimbursement of expenses for purposes of ORS 244.040 and is not considered an honorarium prohibited by ORS 244.042. If authorization or receipt of the compensation creates a potential conflict of interest, the officer or employee shall report the potential conflict in writing in accordance with board standards. The disclosure is a public record subject to public inspection.

(4) Each board shall adopt standards governing employee outside employment and activities, including potential conflict of interest, as defined by board standard and consistent with ORS 244.020, and the public disclosure thereof, and procedures for reporting and hearing potential or actual conflict of interest complaints.

ORS 352.033 Status of university with a governing board. A university with a governing board is a governmental entity performing governmental functions and exercising governmental powers. A university with a governing board is not considered a unit of local or municipal government or a state agency, board, commission or institution for purposes of state statutes or constitutional provisions.

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 (12) 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 or a relative of the public official is associated only as a member or board director or in a nonremunerative capacity.

ORS 244.020(3) "Business with which the person is associated" means:

> (a) Any private business or closely held corporation of which the person or the person's relative is a director, officer, owner or employee, or agent or any private business or closely held corporation in which the person or the person's relative owns or has owned stock, another form of equity interest, stock options or debt instruments worth $1,000 or more at any point in the preceding calendar year;
>
> (b) Any publicly held corporation in which the person or the person's relative owns or has owned $100,000 or more in stock or another form of equity interest, stock options or debt instruments at any point in the preceding calendar year;
>
> (c) Any publicly held corporation of which the person or the person's relative is a director or officer; or
>
> (d) For public officials required to file a statement of economic interest under ORS 244.050, any business listed as a source of income as required under ORS 244.060 (3).

ORS 244.020(12) "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:

> (a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.

(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.

(c) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.

ORS 244.020(14) "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 as defined in ORS 174.109 as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services.

ORS 244.020(15) "Relative" means:

(a) The spouse, parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law of the public official or candidate;

(b) The parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law of the spouse of the public official or candidate;

(c) Any individual for whom the public official or candidate has a legal support obligation;

(d) Any individual for whom the public official provides benefits arising from the public official's public employment or from whom the public official receives benefits arising from that individual's employment; or

(e) Any individual from whom the candidate receives benefits arising from that individual's employment.

ORS 244.040(1) Except as provided in subsection (2) of this section, a public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or member of the household of the public official, or any business with which the public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available but for the public official's holding of the official position or office.

(2) Subsection (1) of this section does not apply to:

(a) Any part of an official compensation package as determined by the public body that the public official serves.

(b) The receipt by a public official or a relative or member of the household of the public official of an honorarium or any other item allowed under ORS 244.042.

(c) Reimbursement of expenses.

ORS 244.040(7) The provisions of this section apply regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed under ORS 244.120.

ORS 244.120(1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:

(a) If the public official is a member of the Legislative Assembly, announce publicly, pursuant to rules of the house of which the public official is a member, the nature of the conflict before taking any action thereon in the capacity of a public official.

(b) If the public official is a judge, remove the judge from the case giving rise to the conflict or advise the parties of the nature of the conflict.

(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 manner in a manner specified by the appointing authority.