

November 5, 2010

Jon DuFrene  
Chief Financial Officer  
11410 SW 68<sup>th</sup> Parkway  
Tigard, OR 97281-3700

Dear Mr. DuFrene:

This is in response to your correspondence regarding how the provisions of Oregon Government Ethics law may apply to discounts offered to public officials by Microsoft Corporation through the Home Use Program.

OREGON GOVERNMENT ETHICS COMMISSION STAFF ADVISORY OPINION NO.  
10S-003

STATED FACTS: Microsoft Corporation (Microsoft) is a public multinational corporation that develops, manufactures, licenses, and supports a wide range of products and services, predominantly related to computing, through its various product divisions.

Microsoft has made discounts available on consumer software products to state and local government employees. These discounts are offered through various nationwide programs. One program offers discounts pursuant to a contract between Microsoft and the Western States Contracting Alliance (WSCA) for those states and localities that are WSCA members. It is through these volume-licensing agreements that Microsoft offers products and services for state and local government employees.

Microsoft has made discounts available to state or local government employees in Oregon through a nationwide program under terms and conditions similar to nationwide programs available to employees of private companies.

The Home Use Program (HUP) is a Software Assurance benefit available to Microsoft volume licensing customers with active Software Assurance coverage on their Office applications. The HUP allows employees licensed at work to obtain the use of a licensed copy of select Microsoft software at a discounted price for personal use.

Employees who use the covered licenses at work are eligible to purchase these Office applications for use on a home PC during the term of their employment. The temporary license expires with the employer's Software Assurance coverage, or upon termination of employment with the covered customer.

The purpose of this offer is to enable employees to use at home the same Microsoft products that they use at work. The cost of the HUP software is \$9.95 for the license and download of each product available. In addition, physical back-up media is also available for an additional \$12.00.

Employees' compliance with the Microsoft Software License Terms (MSLT) for software that employees acquire through the HUP is between the user and Microsoft. Volume Licensing customers are not responsible for their individual employees' compliance with the MSLT for software that employees acquire through the HUP. Those terms are between Microsoft and the individual employees. Microsoft does require that the licensee limit HUP access to eligible employees and that employees are informed when they should discontinue use of the software, for example if the Software Assurance coverage ends or an employee is terminated.

QUESTION: Would a public official violate Oregon Government Ethics law by accepting Microsoft discounts on software for personal use that are available and based upon the Home Use Program?

ANSWER: It would appear, based on the stated facts, that the discounted software for personal use would meet the meaning of a "gift" as found in ORS 244.020(6)(a):

A "gift" means something of economic value given to a public official, a candidate or a relative or member of the household of the public official or candidate:

(A) Without valuable consideration of equivalent value, including the full or partial forgiveness of indebtedness, which is not extended to "others" who are not public officials or candidates or the relatives or members of the household of public officials or candidates on the same terms and conditions.

There are restrictions on the value of gifts accepted by a public official, if the source of the gift has a legislative or administrative interest in decisions or votes of the public official when acting in the capacity of a public official.

ORS 244.025(1) and (2) place a limit on the aggregate value of gifts that a public official, a relative or member of the public official's household may be offered or accept during a calendar year. The aggregate value of gifts from a single source that could

“reasonably be known”, to have a legislative or administrative interest in the decision or vote of the public official may not exceed \$50.

A legislative or administrative interest defined in ORS 244.020(9) as an economic interest that is distinct from the economic interest held by a member of the “general public” in any matter subject to the decision or vote of the public official acting in the public official’s capacity as a public official.

In the context of gifts accepted by a public official, the public official must determine if the source of the offer, Microsoft Corporation, has a legislative or administrative interest in the decisions or votes of the public official.

If there is no legislative or administrative interest in the decisions or votes of the public official, the public official can accept unlimited gifts from that source. [ORS 244.040(2)(f)]

When offered a gift, this places greater responsibility on the individual public official to determine if there are limitations or restrictions.

It would appear, based on the stated facts, that accepting discounted software for personal use, would meet the specific conditions that would allow the acceptance under the gift exception as found in ORS 244.025.

The statutes cited in this opinion are provided as an addendum to this letter.

**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.**

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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

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## ADDENDUM

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

199-005-0001 the following definitions are provided for words or terms as they are used in ORS Chapter 244, especially in the exceptions to the definition of a gift in ORS 244.020(6)(b):

199-005-0003 Legislative or administrative interest defined in ORS 244.020(9)

(1) If the source of a gift has a legislative or administrative interest, any gift offered to a public official or candidate, a relative or member of a public official's or candidate's household, may only be offered and accepted under conditions set forth as permitted in ORS Chapter 244. If, however, the source of a gift does not have a legislative or administrative interest, gifts are not restricted or prohibited.

(2) "Decision" as used in ORS 244.020(9)(a) and (b) means an act that commits the public body to a particular course of action within the public official's scope of authority and that is connected to the source's economic interest. A decision is not a recommendation or work performed in an advisory capacity. The following examples illustrate the types of acts considered "decisions":

(a) An employee makes a decision when issuing or denying a permit.

(b) An enforcement employee makes decisions on whether to cite, warn or arrest.

(c) An employee who approves contracts makes a decision on a contract.

(d) An employee with the authority to purchase office supplies makes a decision when making those purchases.

(e) Should a chief executive officer, director or manager with authority to make a final decision on a matter delegate the decision to a subordinate, the chief executive officer, director or manager would retain responsibility as the final decision maker. The subordinate's action on the delegated matter would also be a decision.

199-005-0030 Determining the Source of Gifts

(1) ORS 244.025 and 244.040(2)(e) limit the offering and receipt of gifts from sources that could reasonably be known to have a legislative or administrative interest in the vote or decision of the public official who holds any official position or office. This rule is intended to clarify how a public official determines who the source of the gift is. Public officials need to be aware of the source of any gifts they receive (or those that are received by their relatives or members of their household), regardless of amount, to make sure that they comply with the \$50 limit on gifts from a single source in a calendar year. To that end, public officials should not accept gifts in any amount without obtaining information from the

person or entity offering the gift as to who is the source of the gift. It is the public official's personal responsibility to ensure that no single source provides gifts exceeding an aggregate value of \$50 in a calendar year, if the source has a legislative or administrative interest.

(2) The source of any gift provided to a public official is the ultimate payer(s) of the expense.

(3) The \$50 gift limit in ORS 244.025 applies separately to the public official or candidate, and to the public official or candidate's relatives or members of household. Each such individual may accept gifts from a single source of a total of \$50 per calendar year.

244.020(6)(a) "Gift" means something of economic value given to a public official, a candidate or a relative or member of the household of the public official or candidate:

(A) Without valuable consideration of equivalent value, including the full or partial forgiveness of indebtedness, which is not extended to others who are not public officials or candidates or the relatives or members of the household of public officials or candidates on the same terms and conditions; or

(B) For valuable consideration less than that required from others who are not public officials or candidates.

244.020(9) "Legislative or administrative interest" means an economic interest, distinct from that of the general public, in"

(a) Any matter subject to the decision or vote of the public official acting in the public official's capacity as a public official.

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.

244.025 Gift limit (1) During a calendar year, a public official, a candidate or a relative or member of the household of the public official or candidate may not solicit or receive, directly or indirectly, any gift or gifts with an aggregate value in excess of \$50 from any single source that could reasonably be known to have a legislative or administrative interest.

(2) During a calendar year, a person who has a legislative or administrative interest may not offer to the public official or a relative or member of the household of the public official any gift or gifts with an aggregate value in excess of \$50.

(3) During a calendar year, a person who has a legislative or administrative interest may not offer to the candidate or a relative or member of the household of the candidate any gift or gifts with an aggregate value in excess of \$50.