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July 6, 2006

VIA FACSIMILE & REGULAR MAIL (503) 378-5156

Joyce Dougherty

Oregon Department of Education

Child Nutrition and Food Distribution

Public Service Building

255 Capitol Street NE

Salem, OR 97301-0203

Re: Donated Commodity Pricing

DOJ File No. 581-090-GG0618-06

Dear Ms. Dougherty:

You have asked four questions regarding ODE's authority to administer commodities received through the USDA Commodity Processing Program. Your questions, brief answer and discussion are set out below:

# QUESTIONS PRESENTED

1. Is the United States Department of Agriculture's (USDA) “Commodity Processing Program” governed by ORS 327.520?
2. Under ORS 327.520, can the Oregon Department of Education (ODE) divert commodities to processors on behalf of school districts?
3. If the ODE can divert commodities to processors on behalf of school districts, is the cost for doing so subject to ORS 327.520?

4, Under ORS 327.520, can the ODE vary the “per unit” cost charged school districts participating in the National School Lunch Program (NSLP) depending on the form or manner in which USDA donated commodities are provided to the school districts?

# BRIEF ANSWER

1. Yes. ORS 367.520 governs donated food that is to be distributed to school districts by the ODE. The Commodity Processing Program makes commodities donated by the USDA available to the ODE for distribution to school districts participating in the NSLP.
2. Yes. Under ORS 327.520, the ODE “may accept and distribute donated commodities,” Commodities donated by the USDA are only available to school districts through the ODE. The broad language of the statute gives the ODE authority to divert commodities to processors who later distribute the commodities to school districts.
3. Yes. In diverting commodities to processors on behalf of school districts, ODE incurs administrative cost. ORS 327.520 specifically includes administrative cost as an expense that can be charged to school districts receiving donated commodities.
4. No. The goal of ORS 327.520 is to charge each school district participating in the NSLP equally, independent of where it is or whether a school district receives commodities as “brown box” or diverts commodities for processing. The ODE therefore cannot vary the "per unit" cost it charges a school district based on the form or manner in which a commodity is provided to a school district or where the district is located.

# DISCUSSION

1. Is the USDA's “Commodity Processing Program” governed by ORS 327.520?

ORS 327.520 governs “acceptance and distribution of donated commodities to schools.” The Commodity Processing Program is a part of the United States Department of Agriculture's (USDA) National School Lunch Program (NSLP). The purpose of the Commodity Processing Program is to "expand donated food use from a limited number of commodities to a broader array of nutritionally sound, popular items." l Commodities donated by the USDA for use in the NSLP are only available to Oregon Department of Education (ODE), and ODE, as the state's “distributing agency,” is in charge of the “effective and efficient” administration of the program. 7 C.F.R. §250.3. Because the Commodity Processing Program provides commodities donated by the USDA and accepted by ODE to be distributed to school districts, it is governed by ORS 327.520.

l USDA "Food and Nutrition Service — Nutrition Fact Sheet, March 2006

2. Under ORS 327.520, can the ODE divert commodities to processors on behalf of school districts?

Distribution of commodities from the federal NSLP in Oregon is controlled by ORS 327.520. The language of ORS 327.520 is broad enough to allow the ODE to divert commodities to processors on behalf of school districts. Under the statute;

The Department of Education may accept and distribute donated commodities available for either public or private nonprofit educational institutions, subject to state or federal law or regulation relating to such acceptance and distribution. The department shall make a charge sufficient to cover but not exceed all costs of distribution to the individual schools. The charge may include administrative expenses, freight, warehousing, storing, processing, and transshipment to the end that all participating schools shall receive such donated commodities at the same unit cost irrespective of location of the school with respect to the original point of delivery within the state.

Currently, school districts participating in the NSLP can choose to receive USDA donated commodities from the ODE in their raw, unprocessed form (“brown box” service), or they can choose to have ODE divert the raw commodities to processors under the USDA “Commodity Processing Program.” Under the Commodity Processing Program, selected processors will convert the raw commodities into more convenient, ready-to-use end products, and will distribute the end products to the school districts. If school districts choose to use the Commodity Processing Program they work with the ODE to select which commodities they want and which processors they want to use to get the end products they need. School districts must access the USDA commodities through ODE and cannot bypass ODE in the receipt of either type of food commodity. 7 C.F.R. § 250.10-12.2

ORS 327.520 gives ODE the broad authority to “accept and distribute” USDA commodities. Distributing unprocessed USDA commodities directly to school districts as well as distributing unprocessed commodities to a processor, who then distributes end products to a school district, are both acts covered by ORS 327.520, Further, the statute authorizes the ODE to charge school districts for “processing” cost, such as would be incurred if the ODE processed and distributed commodities itself, as well as "administrative expenses" such as is incurred when the ODE diverts commodities to processors as directed by individual school districts.

2Per 7 C.F.R. §250.12, prior to the beginning of a distribution program, distributing agencies shall enter into written agreements With the VSDA]- Per 7 C-F,R. §250.10, State agencies are eligible to become "distributing agencies." Per 7 C.F.R. §250.1 1, distributing agencies shall certify that "recipient agencies" (such as school districts) are eligible to participate in the program, and make donated food available.

3. Are the fees incurred by the Oregon Department of Education for diverting USDA commodities to processors subject to ORS 327.520?

ORS 327.520 allows the ODE to charge school districts enough to “cover but not exceed all costs of distribution to the individual schools \* \* \* include[ing] administrative expenses, freight, warehousing, storing, processing, and transshipment.” The cost ODE incurs for diverting commodities to processors is an administrative cost subject to the statute. Because the administrative fee is subject to the statute, it must be applied uniformly to each school district in order that “[A]ll participating schools shall receive such donated commodities at the same unit cost irrespective of location of the school with respect to the original point of delivery within the state.” ORS 327.250.

4. Under ORS 327.520, can the ODE vary the “per unit” cost charged school districts based on the form or manner in which school districts choose to receive USDA donated commodities?

The core idea of ORS 327.520 is to provide school districts participating in the NSLP with equal cost access to USDA donated commodities, independent of where in the state they are located. The overall goal of the statute is essentially to “level the playing field” for school districts participating in the program. To comport with the statute, the ODE cannot vary the “per unit” cost charged a school district based on the form or manner in which a school district chooses to receive commodities. As previously noted, the statute provides:

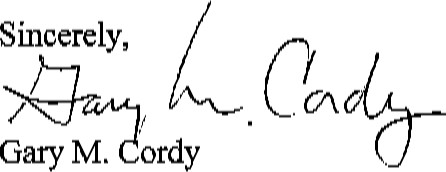
The [D]epartment [of Education] shall make a charge sufficient to cover but not exceed all costs of distribution to the individual schools \* \* \* to the end that all participating schools shall receive such donated commodifies at the same unit cost irrespective of location of the school with respect to the original point of delivery within the state.

ORS 327.520 (emphasis added).

School districts participating in the NSLP can choose to receive USDA commodities through the ODE as “brown box”, i.e. unprocessed commodities. Alternatively, school districts can choose to divert unprocessed commodities to processors through the Commodity Processing Program managed by the ODE. In the school year 2001-02, the fee for brown box service was $1.65 per case, and the fee for diverting commodities for processing was $0.03 per pound, which represented roughly the same overall cost per pound, i.e. the same unit cost. However, since 2001-02, the brown box fee has increased to the current fee of $2.55 per case, but the fee for diverting commodities for processing has remained $0.03 per pound.

The two fees no longer represent the same approximate cost per pound (unit cost), and place an unfair burden on school districts using predominantly brown box service. To remedy this imbalance, the ODE must increase the fee for diverting commodities to processors to approximately $0.05 per pound (or decrease the brown box fee), to bring the two fees to equal unit cost, as required under ORS 327.520. The statute does not allow the ODE to vary the fees charged to school districts based on the manner or form in which a school district chooses to receive commodities because both brown box and processed foods are the same commodity as used in the law. A price per pound for ODE charges represents a cost structure in compliance with the “unit cost” requirement of ORS 327.520.

I hope this advice is responsive to your concerns. If you have other questions, please don't hesitate to ask.



Senior Assistant Attorney General

Government Services and Education Section