

April 24, 1997

Kerry E. Barnett, Director
Department of Consumer and Business Services
440-1 Labor & Industries Building
Salem, OR 97310

Re: Opinion Request OP-1997-3

Dear Mr. Barnett:

You ask several questions concerning ORS 244.045, which regulates the subsequent employment of certain public officials. Your questions⁽¹⁾ and our short answers are set forth below, followed by a discussion.

1. Do the restrictions in ORS 244.045(1) apply to all persons serving, or having served, or who will serve as the director of the Department of Insurance and Finance (DIF), the director of the Department of Consumer and Business Services (DCBS), the administrator of the Insurance Division, or the administrator of the Division of Finance and Corporate Securities?

The restrictions of ORS 244.045(1) (1987) applied to any person who served as the director of DIF between September 27, 1987 and August 27, 1993, when the office was abolished. The restrictions of ORS 244.045(1) (1995), with the exception of those restrictions imposed by amendment in 1993 (namely, expansion to include financial gain), apply to any person who served or serves as the director of DCBS on or after August 27, 1993. The restrictions relating to financial gain that were added in 1993 apply only to any person "elected, appointed or employed" as the director of DCBS after November 4, 1993.

The requirements of ORS 244.045(1) do not apply to persons holding the offices of Administrator of the Insurance Division or Administrator of the Division of Finance and Corporate Securities unless such persons were "elected, appointed or employed" to their offices after November 4, 1993, in which case all restrictions apply.

2. What is the effect of Oregon Laws 1993, chapter 743, section 10a, which made the 1993 amendments to ORS 244.045 applicable only to public officials "elected, appointed or employed after * * * November 4, 1993"? What is meant by "elected, appointed or employed" as it applies to the offices identified in question 1?

The effect of Oregon Laws 1993, chapter 743, section 10a, is to "grandfather" certain persons so that they would not be subject to the restrictions added by the 1993 legislature. The most significant of those restrictions is the requirement that, for a period of time, a former public official may not receive any financial gain, other than reimbursement of expenses, from certain private employers.

As to the administrator of the Insurance Division and the administrator of the Division of Finance and Corporate Securities, "elected, appointed or employed" means the date the director of DCBS appoints a person to either of those offices. As to the director, "elected, appointed or employed" means the date the director is appointed by the Governor.

3. ORS 244.045(1)(a) prohibits employment with, or receipt of financial gain from, "any private employer engaged in the activity, occupation or industry over which the former public official had

authority." What does this include? What is meant by the phrase "over which the former public official had authority"?

See discussion.

4. Does ORS 244.045(1)(a) restrict employment with a new business engaged in the "activity, occupation or industry over which the former public official had authority" if such business did not exist at the time the public official held office?

Yes.

5. Does ORS 244.045(1)(a) restrict employment with a business engaged in the "activity, occupation or industry over which the former public official had authority" if such business operated in another state and did not (or was not authorized to) operate in Oregon when the public official held office? What if the business operates in Oregon but the job duties of the former public official would not involve operations in Oregon?

ORS 244.045(1)(a) prohibits employment with a business engaged in the activity, occupation or industry over which the former public official had authority, provided that the business has some connection with Oregon, as, for example, an insurer holding a certificate of authority to do business in Oregon or a bank with a branch in Oregon. If the business operates exclusively in states other than Oregon (or in a foreign country), ORS 24.045(1)(a) does not apply to a former public official employed by, or receiving financial gain from, that business. If the business operates in Oregon, the former public official is subject to ORS 244.045(1)(a) whether or not the former official's job duties involve operations in Oregon.

Discussion

ORS 244.045 provides, in relevant part:

(1) A person who has been a Public Utility Commissioner, the Director of the Department of Consumer and Business Services, the Administrator of the Division of Finance and Corporate Securities, the Administrator of the Insurance Division, the Administrator of the Oregon Liquor Control Commission or the Director of the Oregon State Lottery shall not:

(a) Within one year after the public official ceases to hold the position become an employee of or receive any financial gain, other than reimbursement of expenses, from any private employer engaged in the activity, occupation or industry over which the former public official had authority; or

(b) Within two years after the public official ceases to hold the position:

(A) Be a lobbyist for or appear as a representative before the agency over which the person exercised authority as a public official;

(B) Influence or try to influence the actions of the agency; or

(C) Disclose any confidential information gained as a public official.

This statute is referred to as a "revolving door" law, intended to prevent for a specified period of time former government employees from unfairly profiting from or otherwise trading upon their contacts or associations acquired during their tenure as public servants. See *Forti v. New York State Ethics*

Comm'n, 554 NE 2d 876 (NY 1990); cf. *Moine v. Oregon Gov't Ethics Comm'n*, 128 Or App 681, 877 P2d 96, *rev den* (1994), (the "revolving door" prohibition necessarily is directed only at former public officials). Violation of ORS 244.045 may result in a civil penalty of \$5,000 or less. ORS 244.350(1).

1. Application of ORS 244.045(1) to Certain Officials

ORS 244.045 was first enacted in 1987. As passed, the law provided that:

A person who has been a Public Utility Commissioner, *the Insurance Commissioner, Supervisor of the Savings and Loan, Credit Union and Consumer Finance Section or the Supervisor of the Banking Section* shall not:

(1) Within one year after the public official ceases to hold the position become an employe [sic] of any private employer engaged in the activity, occupation or industry over which the former public official had authority; or

(2) Within two years after the public official ceases to hold the position:

(a) Be a lobbyist for or appear as a representative before the agency over which the person exercised authority as a public official;

(b) Influence or try to influence the actions of the agency; or

(c) Disclose any confidential information gained as a public official.

Or Laws 1987, ch 360, § 1 (emphasis added). The Governor signed this bill into law on June 24, 1987, but it did not take effect until September 27, 1987, as there was no emergency clause. House Bill 2629 (1987).

During the 1987 legislative session, certain offices referred to in the initial version of the "revolving door" law were effectively abolished. The legislature created the Department of Insurance and Finance and its director and, in so doing, subsumed and abolished subordinate offices.

Except as otherwise provided in this Act, *any reference in any law* * * * of the Legislative Assembly * * * to * * * the *Insurance Commissioner, * * * the Supervisor of the Banking or Savings and Loan, Credit Union and Consumer Finance Section*, the Administrator of the Financial Institutions Division or any of their subordinate officials, shall be considered as referring to or describing the director.

Or Laws 1987, ch 373, § 15 (emphasis added). This law took effect on July 1, 1987, by operation of an emergency clause. Or Laws 1987, ch 373.[\(2\)](#)

In an apparent attempt to reconcile these new laws, the introductory paragraph of ORS 244.045 was codified to add the Director of the Department of Insurance and Finance. References to the redundant offices were not, however, deleted.

A person who has been a Public Utility Commissioner, *the Director of the Department of Insurance and Finance*, the Insurance Commissioner, Supervisor of the Savings and Loan, Credit Union and Consumer Finance Section or the Supervisor of the Banking Section shall not * * *.

ORS 244.045 (1987) (emphasis added). While the statute appears to refer to several different officials, in

actuality, there were only two offices, the Public Utility Commissioner and the Director of the Department of Insurance and Finance.

After the changes in the law, the director of DIF reorganized the department. New offices were created, including the Administrator of the Insurance Division and the Administrator of the Division of Finance and Corporate Securities.⁽³⁾

On August 27, 1993, the legislature abolished DIF and created DCBS. Or Laws 1993, ch 744. DCBS incorporated DIF and added new agencies under its umbrella. *Id.* As of August 27, 1993, the tenure of the director of DIF ceased by operation of law.⁽⁴⁾

The 1993 legislature also amended ORS 244.045, which still referred to the director of DIF. Or Laws 1993, ch 743, § 10. However, the legislature deleted the references to the other terms by which the director was previously designated, namely, (1) the Insurance Commissioner, (2) the Supervisor of the Savings and Loan, Credit Union and Consumer Finance Section and (3) the Supervisor of the Banking Section.⁽⁵⁾ *Id.* The amendment added two public officers subordinate to the director, the administrator of the Division of Finance and Corporate Securities and the administrator of the Insurance Division. *Id.* (Other officials were added as well. *Id.*) The amendments took effect on November 4, 1993. Or Laws 1993, ch 743. When codified, the reference to the director of DIF was changed to the director of DCBS. *See* ORS 244.045 (1993). These changes are reflected in the current language of ORS 244.045.

Other changes were made to ORS 244.045 in 1993. The language "or receive any financial gain, other than reimbursement of expenses" was added, thereby expanding the restrictions on former public officials. ORS 244.045(1)(a). Also, a grandfather clause was added. Or Laws 1993, ch 743, § 10a. Under the terms of this grandfather clause, the amendments applied only to those public officials "elected, appointed or employed after the effective date of [the] Act." The Act became law on November 4, 1993.⁽⁶⁾

Until August 27, 1993, ORS 244.045(1) applied to the director of DIF (and the Public Utility Commissioner). With the abolition of DIF and the creation of DCBS, the law became applicable on that date to the director of DCBS. However, the added language of the grandfather clause applied the new amendments relating to financial gain to the director of DCBS only if that person was "elected, appointed or employed" after November 4, 1993.

The offices of Administrator of the Insurance Division and Administrator of the Division of Finance and Corporate Securities were not added to ORS 244.045(1) until November 4, 1993. Therefore, the requirements of ORS 244.045(1) did not apply to persons holding such offices before that date.

The Oregon Government Standards and Practices Commission (OGSPC) has interpreted the 1993 Act's grandfather clause with respect to ORS 244.045(2), which was added by that Act to restrict the subsequent employment of assistant attorneys general. The OGSPC opined that this restriction applies only to assistant attorneys general *hired* after the effective date of the Act. OGSPC Advisory Opinion approved May 18, 1995, to Denise Fjordbeck, Oregon Association of Justice Attorneys (No. 95A-1002).⁽⁷⁾ The OGSPC opinion states that:

The relevant legislative history supports this interpretation * * * that the bill * * * is not retroactive. * * * Thus, the legislative history supports the conclusion that the amendments were not intended to apply to persons already employed before the effective date of

November 4, 1993. Furthermore, this interpretation allows the statutes to apply consistently to public officials "elected, appointed, or employed" after the effective date.

Id. at 2. Although the OGSPC opinion is expressly limited to its facts, we believe that its reasoning and conclusion would apply to all persons already elected to, appointed to or employed in public offices on the date those offices were added to ORS 244.045 by the 1993 amendments, i.e., such public officials would not be covered by the statute.

2. "Elected, Appointed or Employed" after the Effective Date

The phrase "elected, appointed or employed," used in the grandfather clause discussed above, is not defined by the legislation itself. It is a broadly drafted clause intended to encompass all the public offices and methods of selecting public officials now covered by ORS 244.045. Individuals who are "elected, appointed or employed" before November 4, 1993, are not subject to the 1993 amendments to that statute. The language appears to focus on the act designating the individual to become a public official rather than the action of actually assuming office. For example, the only elected official included in ORS 244.045, the State Treasurer, is elected to the office about two months before becoming the State Treasurer.

The purpose of a grandfather clause is to prevent hardship to individuals who have existing status or rights, but not to grant additional rights. See *Spaght v. Dept. of Transportation*, 29 Or App 681, 564 P2d 1092, *rev den* (1977). Thus, we believe the grandfather clause was intended to ensure that the law applied only to those individuals who assumed their official position with notice of the restrictions imposed by ORS 244.045 on certain aspects of their future private employment. From this perspective, it is reasonable for the legislature to make the Act apply on the occurrence of the act officially designating the individual as a public official (i.e., election, appointment), even though additional acts (taking the oath of office,⁽⁸⁾ Senate confirmation) may be required before the individual actually assumes the office.⁽⁹⁾

An appointment is made "when the last act required of the person with the appointing authority has been performed." 63A Am Jur 2d, *Public Officers and Employees*, § 106. Although an appointment may need to be confirmed by another body before the individual is legally entitled to the office, the act of confirmation is distinct from appointment. *Id.* at § 117.

As regards the two subordinate DCBS positions, i.e., the administrator of the Insurance Division and the administrator of the Division of Finance and Corporate Securities, those positions are appointed by the director of DCBS, with the approval of the Governor. ORS 705.115. The determinative date for these individuals is the date of their appointment by the director.

As regards the director of DCBS, the position is appointed by the Governor and confirmed by the Senate. ORS 705.105(3). Here, too, the determinative date is the date of appointment by the Governor.

3. Activity, Occupation or Industry Over Which the Public Official Had Authority

You ask what is covered by the language in ORS 244.045(1)(a) that prohibits employment with, or receipt of financial gain from, "any private employer engaged in the activity, occupation or industry over which the former public official had authority." The terms "activity, occupation or industry" are not found either in the text of ORS 244.045 or in other related statutes. These terms are not particularly apt descriptions of financial and insurance services, which are included in those things regulated by the director of DCBS, the administrator of the Insurance Division or the administrator of the Division of

Finance and Corporate Securities. Thus, it is unclear what the reference to "activity" or "industry" might be in this context.

When the intent of the legislature is not clear from the text and context of a statute, the courts may consider the legislative history of the act. *See Portland General Electric v. Bureau of Labor & Industries*, 317 Or 606, 611-12, 859 P2d 1143 (1993). Thus, we look to the history of ORS 244.045 for assistance in determining its intent.

When the original bill that became ORS 244.045 was under consideration by the 1987 legislature, Representative Peg Jolin, chief sponsor of the bill, explained that its purpose was to "prohibit state regulators of utilities, insurance companies and banking institutions from accepting employment, lobbying or acting as an agent or attorney for industries or companies that they have regulated." Testimony of Rep. Peg Jolin, House Committee on State and Federal Affairs (HB 2629), March 13, 1987, Exhibit A. Rep. Jolin further testified how the bill would apply to the Insurance Commissioner, stating:

In my opinion, * * * [the Insurance Commissioner] would be prohibited from taking a job, let's say as a lawyer for some insurance company. Um, or working as a regulator [sic - in regulatory affairs], as did Driscoll, in her particular scenario, taking a job as a chief regulator in that industry.⁽¹⁰⁾

Testimony of Rep. Peg Jolin, House Committee on State and Federal Affairs (HB 2629), March 13, 1987, tape 52A, at 80. Other testimony was consistent. For example, Cory Streisinger, testifying for the Governor's office in support of the bill, stated that she understood the term "industry" to mean a regulated industry in the sense of an industry subject to the rules and regulations of a particular agency. Minutes, House Committee on State and Federal Affairs (HB 2629), March 13, 1987, at 5. At the time the legislation was enacted, it was believed that it would create little hardship. The view was stated that rarely did people come from private industry to work in the public sector as a regulator of that industry and then return to private industry upon termination of their tenure as public officials.⁽¹¹⁾

The 1993 legislature did not modify this fundamental concept. From this indicated legislative intent, we reason that a public official subject to ORS 244.045(1) may not be employed by any business or in any industry over which the official had regulatory or supervisory responsibilities while the official was in office. Thus, the administrator of the Insurance Division would be prohibited, for example, from going to work for an insurance company, insurance agency, insurance adjustor or insurance consultant. *See* ORS chs 731, 744. The administrator of the Division of Finance and Corporate Securities could not, for example, work for a bank, savings and loan association, credit union, pawnbroker, collection agency or securities broker. *See* ORS chs 59, 697, 707, 722, 723 and 726. The director of DCBS could not work for any of these businesses or for any other business regulated by other arms of DCBS, such as an appraisal business. *See* ORS ch 674.⁽¹²⁾

4. Business Not in Existence When Public Official Held Office

The prohibition on employment with or receipt of financial gain from a private employer engaged in the activity, occupation or industry over which the former public official had authority could be read as referring to an employer, such as an insurer or financial institution, that was already regulated by the former public official. Alternatively, this provision could be read as referring to any entity that becomes subject to the regulation of the office formerly held by the public official (e.g., an insurer subsequently

admitted to do business in Oregon or a newly formed financial institution).

Because the prohibition is based on the nature of the industry regulated (not the actual employer), we conclude that it would make no difference that the employer did not exist at the time the public official was in office. The focus of the prohibition is the "activity, occupation or industry" over which the public official had authority. Thus, we conclude that ORS 244.045(1)(a) restricts employment with a new business engaged in the activity, occupation or industry over which the former public official had authority, even if that specific business did not exist at the time the public official held office.

5. Business Operation in Another State

You also ask about the application of ORS 244.045(1)(a) to employment with a business engaged in the activity, occupation or industry over which the public official had authority that (1) operates in another state and did not operate in Oregon when the public official held office, or (2) operates in Oregon but the job duties of the former public official will not involve operations in Oregon.

We return to the legislative intent to determine whether the prohibition in ORS 244.045(1)(a) includes or excludes these scenarios. As noted above, the purpose of the statute is to prevent, for a specified period of time, former public officials from unfairly profiting from or otherwise trading upon their contacts and associations acquired during their tenure as public servants. Such contacts and associations presumably refer to contacts and associations between the former public official and other Oregon officials and employees. The legislative history of the statute supports this interpretation. The legislation was proposed in response to acts of certain former public officials. At the time the bill was introduced, the former Insurance Commissioner had accepted employment with an Oregon insurer and the former Public Utility Commissioner was employed by a utility company with operations in Oregon. *See* note 10.

We therefore reason that ORS 244.045(1)(a) was not intended to apply to a former public official who accepts employment with a business that has no operations in Oregon. In such a situation, the former public official's contacts and associations with the state regulatory agency are irrelevant.

In contrast, a former public official who goes to work for a business with operations in Oregon, but whose job duties do not involve the Oregon operations, is still subject to ORS 244.045(1)(a). This is because the former public official presumably maintains his or her Oregon contacts and associations, which *could* be exploited to benefit the former official's new employer.

For purposes of ORS 244.045(1)(a), it is not relevant whether the business operated in Oregon during the time the former public official was a regulator. What is significant is that the business operates in Oregon at the time it employs the former public official.

Questions Regarding Status of Specific Individuals

The OGSPC has exclusive authority to issue advisory opinions interpreting its own statutes. ORS 244.280.⁽¹³⁾ These opinions will protect the party seeking advice if they act in accordance with the advice given. *Id. See also Davidson v. Oregon Government Ethics Comm.*, 300 Or 415, 423, 712 P2d 87 (1985) (commission is only state agency entitled to issue advisory opinions relating to application of ORS chapter 244 upon which public officials have right to rely).⁽¹⁴⁾

For this reason, we decline to answer certain specific questions relating to the responsibilities or liabilities of individuals. Such questions may be put to the OGSPC.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

1. We have rephrased several of your questions for ease of analysis and discussion.

Return to [previous location](#).

2. The law also provided that the director of DIF, with the approval of the governor, would have authority to organize and reorganize the department and divide it into administrative divisions. Or Laws 1987, ch 373, § 4 (codified at ORS 705.115).

Return to [previous location](#).

3. The old Workers' Compensation Department was also folded into DIF by operation of the 1987 law, and new divisions and offices were created for its operations.

Return to [previous location](#).

4. The new legislation provided:

(3) Any reference in Oregon Revised Statutes to the Director of the Department of Insurance and Finance or to the director where that term is defined to mean the Director of the Department of Insurance and Finance shall be considered a reference to the Director of the Department of Consumer and Business Services.

* * * * *

(5) For the purpose of harmonizing and clarifying sections published in the Oregon Revised Statutes, the Legislative Counsel may substitute for words designating the Director of the Department of Insurance and Finance or the director where that term is defined to mean the Director of the Department of Insurance and Finance, wherever they occur in Oregon Revised Statutes, words designating the Director of the Department of Consumer and Business Services.

Or Laws 1993, ch 744, § 35.

Return to [previous location](#).

5. The reference to the Insurance Commissioner was deleted because that position was the same as the director of DIF. Minutes, Senate Ethics, Elections and Campaign Finance Committee (SB 159), March 16, 1993, at 11. Also, by 1993, the "Supervisor, Savings and Loan, Credit Union and Consumer Finance Section" was a title for a person subordinate to the administrator of the Division of Finance and Corporate Securities. *Id.* (In earlier years, the "Supervisor" designation had been used to indicate the official whose responsibilities were akin to the old Savings and Loan Supervisor. That office, like the office of Insurance Commissioner, had been transferred to the director of DIF.)

Return to [previous location](#).

6. The grandfather clause, printed as a note at the end of ORS 244.045, provides:

The amendments to ORS 244.045 by section 10 of this Act apply only to public officials elected, appointed or employed after the effective date of this Act [November 4, 1993].

Or Laws 1993, ch 743, § 10a.

Return to [previous location](#).

7. The opinion asked whether the post-employment restrictions contained in ORS 244.045(2) would apply only to those assistant attorneys general who became so employed on or after November 4, 1993, or to any assistant attorney general who was employed before November 4, 1993, and remained so employed. The OGSPC answered that only the former were covered.

Return to [previous location](#).

8. See Or Const Art XV, § 3.

Return to [previous location](#).

9. We note that the Act will not apply to an individual who is appointed after November 4, 1993, to a position requiring Senate confirmation, but who is not confirmed by the Senate. The Act only

applies to a person "who has been" one of the named officials and to periods "after the * * * official ceases to hold the position." We have previously opined that, until confirmed, an individual cannot lawfully hold a public office that is subject to confirmation. See 39 Op Atty Gen 560 (1979).

Return to [previous location](#).

10. At the time the bill was introduced, ex-Insurance Commissioner Josephine Driscoll had taken a position as the Vice President of Regulatory Affairs for Standard Insurance Company. Minutes, House Committee on State and Federal Affairs (HB 2629), March 13, 1987, Exhibit A. Ex-Public Utility Commissioner John Lobdell had taken a job first with a consortium of gas utilities and then with Northwest Natural Gas. *Id.*

Return to [previous location](#).

11. According to Representative Jolin, in the past twenty years, only one person has come from an industry, been appointed a regulator of that industry, and then returned to work in the industry. Generally, the practice has been to appoint individuals capable of being a good regulator and administrator, rather than someone with direct experience in the industry. Minutes, Senate Committee on Labor (HB 2629), May 13, 1987, at 2.

Return to [previous location](#).

12. We do not believe that the director regulates activities, occupations or industries with regard to his role as head of the Workers' Compensation Division, Occupational Safety and Health Division or the Building Codes Division. See ORS chapters 455, 654, 656.

Return to [previous location](#).

13. ORS 244.280 provides, in relevant part, that:

(1) Upon the written request of any public official, candidate for public office or any person, or upon its own motion, the commission, under signature of the chairperson, may issue and publish opinions on the requirements of this chapter, based on actual or hypothetical circumstances.

(2) If any public official or business with which the public official is associated is in doubt whether a proposed transaction or action constitutes a violation of this chapter, the public official or the business may request in writing a determination from the commission. * * * The requester shall supply such information as the commission requests to enable it to issue the interpretation.

(3) A public official or business with which a public official is associated shall not be liable under this chapter, for any action or transaction carried out in accordance with an advisory interpretation issued under subsection (2) of this section. Such an advisory interpretation shall be considered a formal opinion having precedential effect and shall be subject to review by legal counsel to the commission before the interpretation is sent to the requester.

Return to [previous location](#).

14. In 1993, the Legislative Assembly renamed the Oregon Government Ethics Commission as the Oregon Government Standards and Practices Commission (OGSPC). Or Laws 1993, ch 743, § 32.

Return to [previous location](#).

Go to:

[Top of page.](#)

[AG Opinions home page.](#)



Created 11/01/97
Webmaster see: [Print Services](#).

