

ADVISORY OPINION 94 - 58

December 15, 1994

RE: May state agency market products and services to entities which they regulate?

DECISION: No, not for profit, but may provide information at cost.

This opinion is in response to your September 28, 1994, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the October 13 and November 10, and December 15, 1994, meetings of the Commission, and the following opinion is issued.

You state the relevant facts as follows. The Department of Financial Institutions ("Department") plans to create and market financial computer software to banks and financial institutions which it regulates. The Department also plans to offer financial seminars, for a fee, to banks and financial institutions. Both of these ventures would be profit making and may result in additional compensation for Department employees.

As a representative of an association of state employees, you ask if the Department's plans are in violation of the Executive Branch Code of Ethics. You are concerned that a government agency should not be used for profit. In addition, you believe a conflict of interest exists when a state agency attempts to market a product to a private business that the agency regulates.

The Commissioner of the Department of Financial Institutions states that "the Department has no plan to market its training and examination software to any entity it regulates, nor does the Department intend to offer compliance seminars to regulatees except as an at-cost service designed to raise industry compliance."

KRS 11A.005 provides:

11A.005 Statement of public policy.

(1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:

- (a) A public servant be independent and impartial;
 - (b) Government policy and decisions be made through the established processes of government;
 - (c) A public servant not use public office to obtain private benefits;
- and
- (d) The public has confidence in the integrity of its government and public servants.

KRS 11A.020 provides:

11A.020 Public servant prohibited from certain conduct -- Disclosure of personal or private interest.

(1) No public servant, by himself or through others, shall knowingly:

- (a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;
- (b) Use or attempt to use any means to influence a public agency in

derogation of the state at large;

(c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or

(d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

A regulatory agency such as the Department of Financial Institutions should not market its services or products for profit to those it regulates. However, the Department is not prohibited from providing information at cost to those it regulates through seminars or publications, including software, provided such costs are reasonable and do not provide special private benefits to department employees.

The Department may sell its products and services to other regulatory agencies, such as other states, for profit.

The Department should not allow any marketing program to affect the independence and impartiality of the employees who examine financial institutions and prepare examination reports.

As for the payment of "salary incentives" to Department employees, the Commission must consider KRS 11A.020(c) above, which prohibits state employees from using their official positions to obtain financial gain.

The Commission also recognizes that the 1994 General Assembly, in Senate Bill 221, authorized payment of salary incentives as part of pilot personnel programs. In light of such legislative authority, the Commission considers salary incentives paid in accordance with the provisions of SB 221 to be part of the employees' total compensation for their official duties, and not personal financial gain as contemplated in KRS 11A.020(c). Such compensation is similar to the lump sum "outstanding merit" increases which have been paid to employees in the past.

The Department's plan for salary incentives has been tentatively approved by the personnel steering committee, as required by SB 221. The Department's commissioner is on record as being committed "to close management of the . . . project so that it only involves an amount of regulatory energy that is commensurate with its benefit to regulation."

Here the commissioner touches on a concern of the Commission--that Department employees, in being motivated to increase their total compensation might concentrate on revenue-producing activities and neglect vital non-revenue-producing actions, such as examining and preventing failures of financial institutions. This concern does not appear to be directly addressed by the ethics law but rather by good management of the Department in assigning proper priority to revenue-producing programs.

Although SB 221 appears to be inconsistent with KRS Chapter 11A concerning salary incentives, the Commission finds that the ethics law (KRS 11A) does not prohibit the department's proposed project.