DRAFT MEMORANDUM

TO: **LEWANDA MIRANDA**

FROM: **SUSAN R. GASHEL**

RE: **REVIEW OF OREGON PROPOSED RULES AND OPERATING AGREEMENT**

DATE: **October 4, 2017**

General Statement: In my opinion, the SLA is setting itself up for increased litigation if these regulations are adopted as they currently stand. There are so many ambiguities, and conflicts with the federal regulations; the (most likely unintended) result is that vendors will have many new ways to challenge the SLA's actions. I do believe that this is not what the SLA intended. In fashioning administrative regulations, the aim of a government agency is to ensure that its rules are reasonably related with the law. "[A] regulation is not rationally related to the regulatory purpose of a statute just because an agency says so and that reasonableness is not a purely legal question. Pan Am. Petroleum Corp. v. Fed. Power Comm'n, 352 F.2d 241, 244 (10th Cir. 1965)

Instead, these regulations appear to be fashioned to increase the control the SLA has over the vendors. This does not conform to the purpose of the R-S Act. In fact, many of these regulations would likely be overturned because the harm they would cause could not be considered a reasonable expression of congressional will.

Active Participation. My advice is that the Oregon Business Enterprise Consumer Committee (BECC) formally adopt a resolution disagreeing with the regulations, and forward that resolution by certified mail, return receipt requested (or by private mail carrier, being sure to maintain the receipts) to the Commissioner, Rehabilitation Services Administration (RSA).

Approval of RSA is Required Before Implementation of the Regulations or the Operating Agreement. 34 CFR § 395.3(a)(11)(iii).

Operating Agreement

Federal Law

The analysis begins with the Randolph-Sheppard Act, 20 U.S.C. §§ 107 through 107f (R-S Act), which authorizes blind licensees to operate vending facilities on federal property (20 U.S.C. § 107(a)), granting the licensees the priority including the assignment of vending machine income to achieve and protect the priority (20 U.S.C. § 107(b)(1)), requiring the Secretary of Education to designate a public agency in each state to issue licenses to blind persons to operate vending facilities (20 U.S.C. § 107a(a)(5)), and, finally, requiring that licenses be issued for an indefinite period (20 U.S.C. § 107a(b)).

The implementing regulations require that licenses be issued for an indefinite period, subject to suspension or termination when the state licensing agency (SLA) finds that the facility is not being operated in accordance with rules and regulations, the permit, or the agreement with the vendor. 34 C.F.R. § 395.7(b). Before terminating or suspending a vendor, the vendor must be afforded the opportunity for a full evidentiary hearing. Id. Note that the regulation speaks of an agreement with the vendor.

State Law

Oregon's recently amended law provides that that blind persons licensed by the Commission have priority in managing vending facilities on public properties. 2017 Oregon Laws Ch. 717 (H.B. 3253). The SLA has the authority to "[a]dopt rules as necessary to ensure the proper and satisfactory operation of vending facilities and for the benefit of vending facility managers." Id. The only references to agreements with blind managers provide for "the percentage of net proceeds that the commission will collect from the vending facility manager," and for increases under certain circumstances. Id.

The "Biennial" Provision

There is nothing in state or federal law that authorizes a time-limited vending agreement. Licenses are issued for an indefinite period, and can only be terminated when the manager fails tO comply with regulations or the permit, and only after a full evidentiary hearing. All vendors are to be treated uniformly by the SLA. 34 CFR 395.3(a)(11)(i).

In effect, if the SLA fails to sign an agreement after a two year period, the manager does not have the authority to continue to operate the facility. In effect, the manager is suspended. Merriam-Webster defines suspend as "to debar temporarily especially from a privilege, office, or function." If the SLA does not renew the agreement, the manager is debarred from the privilege of operating his or her vending facility. This is impermissible under the federal regulation at 34 C.F.R. § 395.7(b) which prevents the SLA from suspending a vendor without cause. In effect, the SLA is seeking a privilege not permitted under the R-S Act – that of suspending a vendor – preventing a vendor from operating a vending facility – without cause.

If the state is not willing to merely make addendums to current indefinite operating agreements to reflect the statute's requirement regarding payment of set-aside, I recommend filing a grievance. If the SLA threatens to throw out vendors who do not sign new agreements, they should sign under protest, and write under the name that the R-S Act requires an indefinite operating agreement.

Moreover, it is a waste of resources to re-do agreement every two years. If the set-aside amount changes, the SLA can provide an addendum to the operating agreement.

Equipment maintenance and repair limitations.

There is no authority under the R-S Act for the SLA to impose limitations on the requirement that it repair and maintain equipment. At a minimum, the language should be changed to require that any limitations proposed or required by the Director be reasonable. How reasonable is it to place a limitation on repair of a piece of obsolete equipment? While I do not have personal knowledge of the condition of the equipment that Oregon provides vendors, I know of circumstances in other states where vendors' equipment is barely functional.

$50 Penalty for Late Reports and Set Aside Payments

Some provision to waive this penalty when there is illness, death in the family, natural disasters and the like is required.

Regulation Review

Definitions – Suggested changes are underlined, suggested deletions are striken through. Only paragraphs to which suggested changes are made are included. A paragraph entitled Rationale or Comment follows certain paragraphs:

a. ACTIVE PARTICIPATION means an ongoing process of information sharing, discussions and good faith negotiations between the Business Enterprise Consumer Committee and the Commission to achieve joint planning and approval by the BECC of program policies, standards, and procedures affecting the overall operation of the vending facility program, ~~developing and understanding of the Commission's major administrative, policy and program development decisions that impact the Commission's Business Enterprise Program~~, prior to their implementation by the state licensing agency;

RATIONALE: The terms "active" and "participate" involve more than that understanding the Commission's decisions. The words "active" and "participation," by their dictionary meanings, mean "involved, exerting influence, taking part in." Moreover, the Commission cannot logically control whether or not the BECC "understands" the Commission's decisions. Furthermore, 20 U.S.C. § 107b-1(3) specifically states that the SLA shall insure that such committee's responsibilities include participation, with the State agency, in major administrative decisions and policy and program development. So it is the SLA's responsibility to ensure active participation in policy and program development. Having the approval of the BECC – in effect – immunizes the SLA from grievances filed because of the SLA's decisions. Blind vendors bring many years of experience to the program, while program personnel frequently come and go. Why would the Commission not want to take advantage of the vendors' knowledge? The Commission's proposed regulation marginalizes the blind vendors' role. My recommendation is that the BECC adopt a policy of either approval, or disapproval of every action proposed by the Commission. This should be accomplished by motion. Thus, the minutes should clearly reflect the BECC's approval or disapproval of every proposed action.

f. CAFETERIA ~~means a food-dispensing facility:~~

~~(a) That can provide a variety of prepared foods and beverages;~~
~~(b) Where a patron may move through a self-service line;~~
~~(c) That may employ some servers to wait on patrons; and~~
~~(d) That provides seating suitable for patrons to consume meals;~~
is as defined in 34 C.F.R. § 395.1(d).

RATIONALE: Oregon may pass regulations; but to the extent that a regulation directly conflicts with the requirements of federal law (including regulations), the Supremacy Clause requires that they be given no effect. U.S. Const. art. VI., Cl. 2. In other words, if the definition above conflicts with the federal regulation, it would be given no effect. This is referred to as Preemption. Moreover, it needlessly complicates matters when definitions are almost identical. Since the principles of Preemption come into play, it is unnecessary for state regulations to set forth the federal definition; a reference to the federal regulation suffices.

i. DIRECT COMPETITION ~~VENDING MACHINES~~ has the meaning provided in 34 CFR § 395.1(f). ~~"Direct competition" means the presence and operation of a vending machine or a vending facility on the same premises as a vending facility operated by a blind vendor, except that vending machines or vending facilities operated in areas serving employees the majority of whom normally do not have direct access (in terms of uninterrupted ease of approach and the amount of time required to patronize the vending facility) to the vending facility operated by a blind vendor shall not be considered to be in direct competition with the vending facility operated by a blind vendor;~~

RATIONALE: Preemption.

k. FEDERAL PROPERTY ~~has the meaning provided~~ is as defined in 34 CFR § 395.1(g)~~, for property within the state of Oregon~~;

RATIONALE: Preemption. Moreover, the RSA has opined that one state licensing agency can carry on business in another state. In a case where I was the arbitrator the State of South Carolina proposed to run a multi-state hospital cafeteria contract, with the other states where the cafeterias were located agreeing. Because of RSA's opinion, the panel ruled that a bid could not be denied on that basis. Accordingly, the state of Oregon should not limit itself from being able to take advantage of such an opportunity in the future.

q. [NET PROCEEDS ~~means the amount remaining from the sale of articles or services of vending facilities, and any vending machine or other income accruing to blind vendors after deducting the cost of such sale and other expenses (excluding set-aside charges required to be paid by such vending facility managers);~~ is as defined in 34 C.F.R. § 395.1(k).

RATIONALE: Preemption.

w. TEAMING PARTNER means a private company that has entered into an agreement with the Commission to provide support to a vending facility manager in the day to day conduct of the vending facility operation;

COMMENT: Is not the agreement between the vendor and the teaming partner? How is the manager the operator of the facility when he or she is not free to select the teaming partner?

z. VENDING FACILITY is as defined in 34 C.F.R. § 395.1(x); ~~FACILITY means:~~

~~(a) Shelters, counters, shelving, display and wall cases, refrigerating apparatus and other appropriate auxiliary equipment that are necessary or customarily used for the vending of articles, including an established mix of healthy vending items approved by the Commission for the Blind and the agency department or political subdivision charged with maintaining the public building or property where the vending facility is located;~~

~~(b) Manual or coin-operated vending machines or similar devices for vending articles, including machines or devices that accept electronic payment;~~

~~or~~

~~(c) Cafeterias or snack bars for the dispensing of food stuffs and beverages;~~

RATIONALE: Preemption.

aa.~~ VENDING FACILITY AGREEMENT means an agreement between the appropriate officials with a public property or federal property and the Commission that defines the terms and conditions for the establishment and operation of a vending facility;~~

RATIONALE: The federal regulations use the term “permit” to describe this type of agreement. It is needlessly confusing to re-define it and give it a different term.

cc. VENDING MACHINE~~, for the purpose of assigning vending machine income under this part, means a coin or currency operated machine which dispenses articles or services, except that those machines operated by the United States Postal Service for the sale of postage stamps or other postal products and services, machines providing services of a recreational nature, and telephones shall not be considered to be vending machines;~~ is as defined in 34 C.F.R. § 395.1(y).

RATIONALE: Preemption.

dd. VENDING MACHINE INCOME ~~means receipts (other than those of a blind vendor) from vending machine operations on Federal property, after deducting the cost of goods sold (including reasonable service and maintenance costs in accordance with customary business practices of commercial vending concerns, where the machines are operated, serviced, or maintained by, or with the approval of, a department, agency, or instrumentality of the United States, or commissions paid (other than to a blind vendor) by a commercial vending concern which operates, services, and maintains vending machines on Federal property for, or with the approval of, a department, agency, or instrumentality of the United States~~; is as defined in 34 C.F.R. § 395.1(z).

C. LICENSES

~~With respect to issuing a license to a trainee~~

1. The Commission shall issue a license to a trainee who has met all eligibility requirements, who has successfully completed the Business Enterprise program's training program, and who has passed the final training examination.
2. The Commission shall issue a license to a blind person who is licensed in another state only under the following circumstances:

a. The applicant shall have signed a consent form for release of information for all states where the applicant has received or applied for rehabilitation services authorizing the Commission to obtain the followinginformation;

1. ~~The applicant shall have no~~ outstanding debts with ~~any~~other rehabilitation agencies;

2. License suspension or termination for cause (i.e, resignation of license by applicant is not considered for cause).

~~c.~~ The ~~applicant's license shall not be suspended or terminated;~~

RATIONALE: It is overly intrusive for the Commission to require such a broad consent form when it only needs to know two things: was the vendor terminated for cause and does the vendor owe money in another state. Moreover, even if a vendor is terminated for cause, the vendor may have learned from his or her mistakes, and may well succeed in a different environment. I personally know of vendors who have done just that.

b. The applicant shall be a citizen of the United States and be present in the State of Oregon;

c. The applicant shall be a blind person;

d. The applicant shall be a client of the Commission's vocational rehabilitation program;

e. The applicant shall be certified by the Commission's vocational rehabilitation program as capable and qualified to operate a vending facility;

f. The applicant shall complete and submit an application form to the Director;

g. The applicant shall complete the Business Enterprise program testing requirements;

h. The applicant shall demonstrate proficiency in the required skills assessed on-the-job by Business Enterprise staff at a vending facility approved by the Director;

i. The applicant shall demonstrate proficiency in mathematics, writing, reading comprehension, and computer skills to the extent necessary to successfully operate a vending facility, and;

j. The applicant shall achieve a passing score on the final training examination.

RATIONALE: Renumbered for clarity.

~~With respect to denial of licensure to a vending facility manager from another state;~~

~~The Commission shall deny licensure when:~~

~~1. An applicant does not complete and submit an application form to the Director;~~

~~2. A applicant does not complete the Business Enterprise program testing requirements;~~

~~3. An applicant does not complete a signed consent form for release of information for all states where the applicant has received or applied for rehabilitation services;~~

~~4. An applicant has outstanding debts with any rehabilitation agencies;~~

~~5. An applicant's license has been suspended or terminated;~~

~~6. An applicant is not a client of the Commission's vocational rehabilitation program;~~

~~7. An applicant is not certified by the Commission's vocational rehabilitation program as capable and qualified to operate a vending facility;~~

~~8. An applicant does not demonstrate proficiency in the required skills when assessed on-the-job by Business Enterprise staff at a vending facility approved by the Director;~~

~~9. An applicant does not demonstrate proficiency in mathematics, writing, reading comprehension, and computer skills to the extent necessary to successfully operate a vending facility;~~
~~10. An applicant does not achieve a passing score on the final training examination;~~

RATIONALE: In C.2. it clearly states that all of the above deleted material must be accomplished. Accordingly, it is duplicative and not needed to re-state the entire rule when it is obvious that an out-of-state applicant must complete all of the requirements in C.2 to receive the license.

E. PROGRESSIVE DISCIPLINE

The Commission shall utilize progressive discipline to document and correct performance or conduct issues, prior to terminating or suspending a vending facility manager's license. Except as provided by OAR 585-015-0025, Section F, Emergency Removal from Vending Facility, the Commission shall use progressive discipline with the vending facility managers. All notices of disciplinary action shall advise the vending facility manager of ~~their~~ his or her right to appeal. The notice shall also advise the vending facility manager of the availability of the BECC to assist and act as an advocate. Throughout the process, if the Commission and/or the licensee determine that the performance or conduct issues can be appropriately addressed through training, the Commission shall make such training available to the vending facility manager.

RATIONALE: Training should be offered throughout any corrective action. Otherwise, the Commission is not in compliance with 20 U.S.C. § 107d-4.

The Commission may take the following progressive discipline steps:

Step 1: Verbal warning: Business Enterprise program staff will discuss the performance or conduct issue(s) that was observed or reported with the vending facility manager. Business Enterprise staff will explain the expected corrective actions, and the expected amount of time to complete the corrective actions, to the vending facility manager. Business Enterprise staff will document the discussion and provide the vending facility manager a copy of the documentation. The manager shall sign a copy of the documentation after having been afforded the opportunity to read it in the manager's preferred mode.

> RATIONALE: Absent proof that the manager has knowledge of the expected corrective actions, the SLA leaves itself open to a charge that the vendor never received the expected corrective actions.

Step 2: Written warning: if a vending facility manager does not take the corrective actions that were documented in step 1, and the performance or conduct issue(s) continue, Business Enterprise staff will issue the vending facility manager a written warning that documents the performance or conduct issue(s) that continue to be reported or observed, the actions that were not taken after the step 1 warning, and the required immediate corrective action(s) and timeline(s), the vending facility manager must complete to remedy the issue(s). The Director will review the written warning with the vending facility manager to ensure ~~they~~ he or she fully understands the expected immediate and sustained corrective actions that need to occur, to prevent further progressive discipline or termination of their license or operating agreement. The vending facility manager shall receive a copy of the written warning. The manager shall sign a copy of the documentation after having been afforded the opportunity to read it in the manager's preferred mode.

Step 3: Final warning: if a vending facility manager does not take the corrective actions that were documented in step 2, and the performance or conduct issue(s) continue, Business Enterprise staff will issue the vending facility manager a final written warning. The final warning shall document the performance or conduct issue(s) that continue to be reported or observed, the actions that were not taken after the step 2 warning, and the required immediate corrective action(s) and timeline(s), the vending facility manager must complete to remedy the issue(s). The manager shall sign a copy of the documentation after having been afforded the opportunity to read it in the manager's preferred mode.

Step 4: Termination: if the vending facility manager does not complete the required corrective actions, outlined in step 3, within the required timeline, the Commission may begin the process to terminate the vending facility manager's license or operating agreement. The vending facility manager shall receive due process as outlined in Section F, Termination of License.

If the Commission determines that the performance or conduct issues can be appropriately addressed through training, the Commission shall make such training available to the vending facility manager.

F. TERMINATION OF LICENSE

The Commission may terminate the license of a vending facility manager when the vending ~~facility~~ manager:

~~1. Ceases to meet eligibility requirements;~~

2. Resigns ~~or retires~~ from the Business Enterprise program;

    ~~RATIONALE~~: Unnecessary.

3. Abandons or fails to personally manage the assigned vending facility. Abandonment shall occur when the manager neither operates nor manages a vending facility for a period of at least five (5) working days;

    RATIONALE: This (1) allows for circumstances where a vendor is unexpectedly ill or injured and cannot do what is necessary to keep the facility open; (2) prevents the SLA from arbitrarily declaring a facility ~~abandoned~~.

4. May be terminated as provided for in 34 C.F.R. § 395.7(b). ~~Does not comply with~~ applicable ~~laws, rules, the permit or vending facility agreement to which the manager is assigned;~~

~~5. Does not~~ comply ~~with the terms and conditions of their operating agreement;~~

    RATIONALE: Preemption. Duplicative.

6. Intentionally or recklessly damages or destroys equipment

furnished by the Commission or the agency named in the permit or vending facility ~~agreement~~;

7. ~~Commits~~ theft, fraud or embezzlement;

8. Uses, or is under the influence of an intoxicant or illegal drug while at a vending ~~facility~~;

~~9. Fails to submit required monthly set-aside or other reports;~~

~~10. Intentionally submits false reports;~~

~~11. Fails to retain supporting documentation for monthly reports;~~

~~12. Fails to cooperate with a financial audit;~~

~~13. Fails to submit to an eye exam when requested;~~

~~14. Fails to pay set-aside charges or scheduled repayments for more than sixty (60) days;~~

~~15. Fails to maintain required insurance coverage,~~

~~16. Fails to provide proof of insurance coverage;~~

~~17. Illegally operates a motor vehicle while on duty or while traveling to or from a vending facility;~~

~~18. Represents themselves as employees of the State of Oregon or the Commission, or solicits or negotiates for new vending facility agreements or permits.~~

> RATIONALE: Assuming that these requirements are contained elsewhere in the law or regulations or are codified in Oregon or Federal law generally, these are unnecessary.

A. POST LICENSURE TRAINING

The Commission shall provide training to vending facility managers and licensees at least once per calendar year.

1. Vending facility managers and licensees are required to attend one Commission sponsored training per calendar year; <u>this requirement may be waived only with the Commission’s written consent due to illness or bereavement</u>;

> RATIONALE: This exception is consistent with the fact that the BEP is a rehabilitation program.

2. Vending facility managers and licensees may attend via teleconference;

3. Planning for training will be done with the active participation

of the Business Enterprise Consumer Committee, who shall sponsor, with the assistance of the SLA, such annual meeting and other instructional conferences as the BECC may deem required.

RATIONALE: This conforms the rule to 34 C.F.R. § 395.14(5).

4. Training topics may include strategies for improved work opportunities, budgeting, marketing, customer service, employee management and industry trends.

B. ADDITIONAL TRAINING

1. When the Commission determines and/or a vending facility manager or licensee seeks or requires additional training, the Commission may arrange for additional training.

RATIONALE: It is important for licensees to be aware that they have the right to seek additional training.

2. The Commission shall provide post-employment services consistent with the requirements in 34 CFR 395.11.

C. CONTINUING EDUCATION (CE) TRAINING

In order to ensure continued professional growth and to enhance opportunities for upward mobility, all vending facility managers, and licensees, are required to complete continuing education credits each calendar year. In order to meet this requirement, the vending facility manager shall complete three of the following activities.

Credit for training will be given as follows:

1. Attendance at Vending facility manager training sponsored by the BECC ~~Commission~~ with the assistance of the ~~BECC~~ Commission;

RATIONALE: Conforms to 34 CFR § 395.14(b)(5).

2. Attendance at The National Association of Blind Merchants (NABM) BLAST Conference, Randolph-Sheppard Vendors of America (RSVA) Sagebrush Conference, the National Automatic Merchandising Association (NAMA) One Show, National Restaurant Association (NRA) Annual Conference, National Association of Convenience Stores (NACS) Annual Conference;

3. Successful completion of a Hadley Institute for the Blind and

Visually Impaired on-line training course offered by Hadley's Forsythe Business Program;

4. Certification or recertification in the National Restaurant Association's ServSafe food safety program;
5. Attending a State NAMA Conference;
6. Attending an industry sponsored food show.
7. Successful completion of a college business course.

Additionally, the Commission, may design training specific to an individual or, <u>with the active participation of the BECC</u>, identify other training opportunities not listed above. With the active participation of the BECC, point values will be assigned to such training as appropriate.

It will be the responsibility of the vending facility manager, or licensee, to provide documentation, each January, of attendance or completion of all training. <u>The Commission must maintain said documentation</u>. Failure to meet the continued education requirements will disqualify a vending facility manager from bidding on facilities for the next calendar year.

The Commission may make an exception to the training requirement if the vending facility manager, or licensee, cannot complete the training due to medical issues or other documented hardships.

OAR 585-015-0020

<u>VACANCIES</u>

A. NOTICE

When a new or existing vending facility becomes available, the Business Enterprise Program shall send an announcement to all vending facility managers and licensees. The announcement shall provide the following information for the vending facility ~~(as applicable):"~~

> RATIONALE: There is no reason to give the Commission the latitude to not provide complete information for vacancies. After all, one of the most important decisions a vendor makes in his or her working life is whether to apply for a facility. The vendor must have current, complete

information. If not applicable, or if unknown, the announcement should so state.

1. The vending facility agreement or permit;
2. A list of equipment provided;
3. A list of the types of products sold;
4. Sales figures and net proceeds for the past three (3) years;
5. Number of employees needed for current staffing levels;
6. For new vending facilities, a survey ~~if available~~;

   RATIONALE: A survey should absolutely be required for every new facility. A component of the survey should be building occupancy and building traffic per day.

7. The required date to respond to the vacancy notice;
8. Whether or not the vending facility manager would be required to relinquish t~~heir~~ his or her existing vending facility, if selected.

C. SELECTION

A selection committee shall be formed to interview vending facility managers and licensees who have applied for a vacancy. The selection committee shall recommend to the Director one candidate for selection.

The selection committee shall consist of:

1. The Business Enterprise Consumer Committee chair;

2. The Director or Business Enterprise staff assigned by the Director;

3. A ~~vending facility manager or licensee~~ BECC member selected by the mutual agreement of the Director and Business Enterprise Consumer Committee Chair;

   RATIONALE: Vendors have already expressed their confidence in BECC members by voting them on the committee; accordingly, a BECC member mutually selected will more likely be an individual that applicants will have confidence in. This should allay some grounds for challenging promotion/transfer decision.

4. The building manager or a representative, if the building manager requests to participate, provided the Program has

provided an orientation to blindness training to that individual.
A vending facility manager may not participate on any selection committee for a vacancy he or she has ~~they have~~ applied for. If the Business Enterprise Committee Elected Chair has applied for a vacancy, then the ~~Director and~~ Chair shall select a mutually agreed upon replacement from the Business Enterprise Consumer Committee.

RATIONALE: This gives the Director too much discretion in selection of the Chair's designee; the Director already has discretion with respect to the second licensee selected

The selection committee shall conduct either in-person or telephone interviews of all applicants.

RATIONALE: All applicants should receive either in person or telephone interviews. Charges of unfairness would likely result if some applicants received telephone interviews and other applicants did not.

The selection committee shall establish a list of questions that will be asked of all applicants. The selection committee shall grade each applicant in the following categories:

1. Vending facility manager experience;
2. Other management experience;
3. Customer service experience;
4. Operational performance;
5. Financial performance;
6. Educational background;
7. Training completed;
8. ~~Operational plan for the facility if selected.~~

RATIONALE: I could not find this requirement elsewhere in the rules. If an operational plan is going to be required, the regulation should specify the components that the plan will contain. Otherwise the manager does not have enough information to know precisely what is being asked of him or her.

The selection committee members shall score each of the categories zero (0) to ten (10), the maximum score being eighty (80). Each selection committee member shall add all eight (8) category scores to calculate a total score for each applicant. The selection committee members shall then add their total scores together to give the applicant an aggregated total score. The applicant with the highest aggregated total score shall be recommended. In the event of a tie, the applicant with the most years of experience in the Oregon Business Enterprise program shall be recommended.

~~The Director shall award the facility to the vending facility manager recommended by the selection committee unless the Director can justify to the selection committee the reason for selecting another vending facility manager.~~

> RATIONALE: Why have a selection committee if the Director can override? The selection committee would have to decide whether or it is willing to accept the Director's recommendation. This is a recipe for conflict. Moreover, this does not conform with the requirement that all vendors be treated uniformly (34 C.F.R. § 395.3(a)(11)(i).

If there is only one applicant for a vending facility, the Director may select the applicant without using a selection committee.

OPERATING AGREEMENT

The Commission shall enter into ~~biennial~~ operating agreements with vending facility managers for the operation of vending facilities.

> RATIONALE: Premption. This conflicts with the federal requirement that a vendor not be suspended or terminated unless for cause. If the Commission declines to extend an operating agreement – no cause is required to decline to extend the operating agreement – the vendor is suspended from operating his or her facility. A license without a vending facility to operate is useless. This puts more discretion in the hands of the Commission than Congress contemplated. The requirement for indefinite licenses at 20 U.S.C. § 107a(b) combined with the requirement for indefinite permits at 34

C.F.R. § 395.35(b) can only mean that a vendor is entitled to stay at his or her facility unless the vendor fails to comply with the permit or the program rules.

E. TEMPORARY ASSIGNMENT

If a vending facility manager or licensee is not available or selected for permanent assignment to a vending facility, the Commission shall select a vending facility manager or licensee to operate the vending facility under a temporary operating agreement if a vending facility manager is available and willing to accept the temporary assignment.

A vending facility manager or licensee with indebtedness to the Commission shall not be eligible to operate a vending facility under a temporary operating agreement.

The following process shall be used to select a temporary manager:

1. The Director shall send an announcement of a temporary vending facility assignment to all vending facility managers and licensees. The announcement shall contain the following:

a. The vending facility agreement or permit;

b. A list of equipment provided;

c. A list of the types of products sold;

d. Sales figures and net proceeds for the past three (3) years;

e. For new vending facilities, a survey ~~if available~~;

RATIONALE: A survey should absolutely be required for every new facility. A component of the survey should be building occupancy and building traffic per day.

C. DEDUCTIONS

8. Business consultant services with prior written approval from Agency;

9. Legal fees, directly related to the operation of the vending facility with prior written approval from Agency;

12. Payments for equipment owned or leased by the vending facility manager with prior written approval of the Commission;

COMMENT: Why is the prior written approval of the agency necessary to deduct these fees? These are the types of fees that are permissible to deduct by the IRS. I do not understand why the agency wants to take it upon itself to police the vendors in this manner – it smacks of paternalism. If the Commission is determined to proceed to take on the role of approval of these expenses, at least there should be added to each category above "which approval may not be unreasonably withheld."

The following deductions are not allowed:

1. Cost of food and products purchased for personal use;
2. Personal rent and utilities;
3. Benefits paid to non-employees (other than any spouse, domestic partner, or to a relative by blood or marriage), including health insurance, life insurance, long term care insurance and retirement benefit costs;

RATIONALE: the rule as written creates ambiguity.

G. RETENTION

Vending facility managers shall retain the monthly information and all documentation of sales, revenues, commissions, costs and expenses sent to the Commission for a period of ~~six (6)~~ three (3) calendar years.

RATIONALE: The IRS only requires retaining information for three years. What is the purpose of the six year requirement? If the agency is doing its job, it should not need to go back more than 3 years. This is an onerous, unnecessary requirement.

OAR 585-015-0030

BUSINESS ENTERPRISE PROGRAM RESPONSIBLITIES

A. DIRECTOR

20. Communicating with building managers. Said communication shall take place in conformance with 34 C.F.R. § 395.36, whether or not a licensee is located on state, federal, or other property.

RATIONALE: When the SLA includes a manager in communication with building managers, it builds respect for the program and for the manager with those individuals. Communicating without the presence of the manager leads to misunderstandings. With the manager present, there is a greater change of expectations being clearly spelled out and understood by all who are responsible for carrying out those expectations.

22. Conducting audits of vending facilities and vending facility managers <u>when necessary due to reasonable concerns about performance or efficiency or when requested by a manager.</u>

RATIONALE: Audits can be use to harass managers that are unpopular with SLA staff. Imposing a requirement that there be reasonable concerns will ensure that an audit is necessary. Authorizing a manager to request an audit is a tool that the manager can use to increase his or her efficiency.

B. EQUIPMENT AND INVENTORY

1. The Commission shall supply a vending facility manager of a new vending facility the equipment and initial inventory of merchandise necessary to begin business in the vending facility;

2. The right, title to, and interest in the equipment of each vending facility and the initial inventory will be vested in the Commission. The right, title to, and interest in the Initial inventory shall be transferred to vending facility manager only after the vending facility manager has reimbursed the Commission the total cost of the initial inventory, <u>minus reasonable depreciation or current value</u>;

RATIONALE: Suppose of manager wants to buy a 10 year old piece of equipment. The manager should not have to pay more than what the manager would pay on the open market

3. The vending facility manager may reimburse the Commission the total ~~cost~~ <u>value</u> of the initial inventory in one payment, or via a monthly repayment plan of no more than 20 months.

4. The need for any additional equipment <u>as reasonably necessary</u> for an established vending facility is determined by the Director in consultation with the assigned vending facility manager;

RATIONALE: Again, the SLA must act within the bounds of what is commercially reasonable.

5. When the vending facility manager surrenders a vending facility, whether through transfer, resignation or retirement, or termination, the vending facility manager shall turn over all Commission-owned equipment and inventory. The Commission shall return any monies owed, such as initial inventory retained by the Commission, to the vending facility manager, minus set-aside payments or other payments due to the Commission, within 30 days.

C. MAINTENANCE, REPAIR AND REPLACEMENT OF EQUIPMENT

The Commission shall:

1. Maintain, or cause to be maintained, all vending facility equipment, ~~supplied~~ <u>owned</u> by the Commission, in good repair and attractive condition~~, with the following limitations;~~

~~2. Provide for the necessary repair of new equipment assigned to a vending facility during the first six (6) months following installation;~~

~~3. Provide for any necessary repair of used equipment transferred into a vending facility during the first three (3) months following installation;~~

~~4. Repair or replace any equipment during the first six (6) months when the Commission assigns a vending facility manager new to the program to a vending facility;~~

~~5. Pay for repair costs, in excess of one hundred dollars ($100) per repair, limited to four repairs per piece of equipment per calendar year;~~

~~6. Pay for additional repairs, remove, or replace the equipment as determined by the Director;~~

~~7. Replace, or cause to be replaced, any equipment determined by the Commission to be worn-out or obsolete;~~

~~8. Not be responsible or liable for repair, maintenance or any other cost or damages directly or indirectly associated with any use of equipment not owned by the Commission.~~

RATIONALE: There is no authority under the R-S Act for the SLA to impose limitations on the requirement that it repair and maintain equipment. At a minimum, the language should be changed to require that any limitations proposed or required by the Director be reasonable. How reasonable is it to place a limitation on repair of a piece of obsolete equipment?

F. EMERGENCY REMOVAL FROM VENDING FACILITY

1. The Commission shall remove a vending facility manager from a vending facility if there is reasonable evidence of a hazardous situation involving the vending facility manager ~~which~~ that poses an immediate threat to the safety of the vending facility manager or others. This removal may be immediate if the circumstances require. Within at least twenty-four (24) hours of the removal, the Commission shall contact the Chair of the BECC and inform ~~them~~ <u>him or her</u> of the action.

2. In the event of a vending facility manager's removal under ~~paragraphs (1) or (2) of~~ this subsection, the Commission must, within ten (10) working days, do one of the following:

(a) Return the vending facility manager to the vending facility;

(b) <u>Suspend the manager,</u> Mandate re-training, <u>and upon successful</u> completion <u>of re-training, return the manager to the facility</u>;

(c) Terminate the operating agreement but allow the vending facility manager to bid on any vacant vending facilities;

(d) Initiate disciplinary action against the vending facility manager.

~~After~~ <u>Within</u> ten (10) working days, the vending facility manager may request a full evidentiary hearing if the vending facility manager disagrees with the emergency removal.

RATIONALE: This section does not accord with the section on progressive discipline. I have tried to make the two conform.

B. MANAGEMENT AND OPERATION OF THE VENDING FACILITY

General responsibilities:

The vending facility manager:

1. Shall provide to the Director, upon request, any relevant documents and records of such activities <u>reasonably</u> required for conducting a review of the vending facility manager and or the vending facility manager's vending facility;

RATIONALE: Need to ensure that records need to only go back for 3 years; need to ensure that Director cannot arbitrarily ask for records without a reasonable purpose

2. Shall maintain a professional standard for personal appearance, grooming, and conduct;

3. Shall notify the Commission of scheduled or unscheduled leave;

4. Shall provide customer services in a polite and courteous manner and present a positive, professional image of the Commission;

5. Shall address customer complaints promptly;

6. Shall conduct all relations with property management in a positive and constructive manner;

7. Shall pay all set aside monies due.

Vending facility agreement or permit responsibilities:

The vending facility manager:

1. Shall operate the vending facility for business on the days and during the hours specified in the permit or vending facility agreement;

2. Shall be solely responsible for all credit account and debt relating to the operation of the vending facility;

3. Shall establish a refund policy for each vending facility and communicate the policy to the vending facility manager's customers.

4. Shall provide for continued operation of the vending facility in the vending facility manager's absence;

5. Shall employ a sufficient number of persons to ensure the proper and satisfactory operation of the vending facility;

6. Shall provide and document training for all of ~~their~~ his or her employees;

7. Shall provide supervision for all of ~~their~~ his or her employees;
8. Shall ensure that all employees maintain a professional appearance at all times;
9. Shall ensure that vending facility manager and all employees are properly uniformed, if required by the vending facility agreement or permit
10. Shall ensure their employees adhere to all applicable laws, Business Enterprise rules and the vending facility agreement or permit terms;
11. Shall obtain and pay for any applicable permits and licenses required to operate the vending facility;
12. Shall establish prices that are consistent with local market costs;
13. Shall sell only those articles specified in the permit or vending facility agreement ~~and~~ as approved by building management and the Commission, subject to local market availability.

> RATIONALE: Allowing the Commission and the building management to set permissible articles for sale outside of the permit or agreement creates too much uncertainty for the vendor.

C. INSURANCE
The vending facility manager shall:

1. Obtain and maintain insurance of the type and with the limits specified in the permit or vending facility agreement;
2. Maintain general liability and product liability insurance with limits as the SLA shall from time to time reasonably require ~~of not less than $1,000,000 aggregate~~, if the permit or vending facility agreement does not specify insurance requirements;

> RATIONALE: While some facilities may require $1,000,000 of insurance, others probably do not. This is a subject for active participation, in consultation with an insurance professional.

3. Obtain and maintain workers' compensation insurance, if required by state law;
4. Maintain commercial liability insurance on any vehicles, if the

vehicles are part of the vending facility;

COMMENT: I am not sure what is meant by part of vending facility.

5. Name the vending facility manager and the Commission as co-insured, on all required insurance policies, excluding worker's compensation insurance;

COMMENT: This is a subject for active participation, in consultation with an insurance professional.

6. Ensure that <u>his or her</u> ~~their~~ insurance provider gives the Commission 30-day notice before cancellation;

7. Obtain and file annually with the Commission certificates of insurance indicating that any required insurance coverage is in force;

8. Immediately report to Commission any claim or suit that may be brought against the vending facility manager as the result of any incident at the vending facility.

D. EQUIPMENT AND INVENTORY

The vending facility manager shall:

1. Maintain all equipment assigned to the vending facility in good condition;

2. Ensure that merchandise is fresh, in sufficient variety, and attractively and neatly displayed;

3. Stock the vending facility with products of sufficient variety and quantity to meet the needs of the vending facility's customers;

4. Upon termination of the operating agreement, surrender all Commission-owned equipment in clean and good working order.

A Vending facility manager newly assigned to a vending facility shall pay back to the Commission the amount of the initial inventory plus change fund beginning six (6) months after taking over the facility, at a rate of 5% of initial balance per month. Vending facility managers transferred from another vending facility will begin payment immediately at the 5% rate.

COMMENT: If inventory and change fund is paid with Title I monies, they belong to the vendor, and there is no requirement under law that the vendor pay the Commission back.

E. PURCHASE OF EQUIPMENT

The Rules concerning “Purchase of Equipment” apply only to vending facility manager’s purchases of equipment for ~~their~~ his or her vending facility. The right, title to and interest in the equipment purchased by the Commission to establish a vending facility is vested solely in the Commission, unless the vendor purchases equipment from the Commission.

A Vending facility manager may purchase equipment with the vending facility manager’s own funds. The vending facility manager may receive a credit for the cost of these purchases from the monthly set aside report only with Director’s prior written approval, which agreement may not be unreasonably withheld. The Commission and the vending facility manager shall enter into a written agreement to provide the terms for a credit of the equipment cost on their monthly set aside report. If the vending facility manager chooses to receive the credit of the equipment costs on their monthly set aside report, the right, title and interest in the equipment would then become vested in the Commission. Example of equipment credit, the vending facility manager purchases a $1,000 piece of equipment with own funds, cost is then amortized over 10 months, $100 per month credit toward set aside owed, an example month of calculated set aside owed is $400, $100 credit applied to amount of set aside owed equals $300 set aside payment.

F. EQUIPMENT REPAIR

The vending facility manager:

~~**1.** Shall pay one hundred dollars ($100) for each equipment repair;~~

~~**2.** Shall pay the full repair cost, if the Commission determines a needed repair is caused by the vending facility manager’s neglect or misuse;~~

~~**3.** May authorize a repair that costs up to one hundred dollars ($100), without prior written approval by Commission staff;~~

~~**4.** Shall obtain prior written approval from Commission staff for~~

~~any repair that costs more than one hundred dollars ($100);~~
~~**5.** May obtain prior verbal approval by Commission staff followed by written approval if prior written approval is not practicable, or if an emergency situation exists. An "emergency" is defined as a situation that could cause loss of resale inventory, bodily harm to vending facility employees or customers, loss of the vending facility, or a harmful effect on the environment.~~

> RATIONALE: Conflicts with 34 C.F.R. § 395.10**:** "The State licensing agency shall maintain (or cause to be maintained) all vending facility equipment in good repair and in an attractive condition and shall replace or cause to be replaced worn-out and obsolete equipment as required to ensure the continued successful operation of the facility."

6. Shall pay for all equipment repairs for equipment not owned by the Commission.

OAR 585-015-0035

BUSINESS ENTERPRISE CONSUMER COMMITTEE

A. COMPOSITION

1. The Business Enterprise Consumer Committee shall be composed of one (1) chairperson and five (5) members, all of whom must be vending facility managers;
2. The chairperson and Business Enterprise Consumer Committee members shall all be voting members of the Business Enterprise Consumer Committee;
3. The chairperson and Business Enterprise Consumer Committee members shall all hold two year terms of office, beginning immediately after they are elected;
4. The Business Enterprise Consumer Committee shall be representative, to the extent possible, of vending facility managers within the Business Enterprise Program on the basis of factors such as geography and vending facility type and as a goal, proportional representation of vending facility managers on Federal and public property.

B. ELECTIONS

1. Nominations shall be held at the Business Enterprise

Consumer Committee meeting prior to the October Business Enterprise Consumer Committee meeting;

2. The Commission shall conduct annual elections at the October Business Enterprise Consumer Committee meeting;

3. All vending facility managers and licensees shall be eligible to vote;

4. Participation by any vending facility manager or licensee in any election may not be conditional upon the payment of dues or any other fees;

5. Licensees or vending facility managers, who cannot attend the October Business Enterprise Consumer Committee meeting, may vote by emailing their vote to the Director no later than twenty-four (24) hours prior to election, or less if there are extenuating circumstances;

6. In the event of a tie vote, the nominated vending facility managers who are tied will each have another chance to speak to the vending facility managers or licensees who are present at the meeting, afterwards another vote will be taken. This process will continue until the tie is broken;

7. Vending facility managers or licensees who voted via email, and who are not attending in person or via teleconference, shall not cast further votes in the event of a tie vote.

C. VACANCIES

The Chairperson or Business Enterprise Consumer Committee members may voluntarily vacate their office by submitting written notice to the Business Enterprise Consumer Committee and Director.

In the event of a vacancy of the office of chairperson, the Commission shall hold a special election within 30 days. All vending facility managers and licensees shall be eligible to vote. Voting may be by US mail or email, submitted to the Director.

In the event of a vacancy of any other Business Enterprise Consumer Committee member, the Business Enterprise Consumer Committee shall appoint another vending facility manager to fulfill the remainder of the term. Preference shall be given to a vending facility manager from the represented area.

D. MEETINGS

The Business Enterprise Consumer Committee shall:

1. Meet every even calendar month, beginning in February;
2. Meet in a special meeting if needed, as determined by the chairperson and director, or by a majority of the Business Enterprise Consumer Committee by request to the chair and director;
3. Hold all meetings in compliance with the Oregon Public Meetings Law, ORS 192.610 to ORS 192.710;
4. Vote as committee members only when in attendance at the meeting. Proxy or absentee voting is not allowed.

E. BY-LAWS

The Business Enterprise Consumer Committee shall adopt by-laws as approved by a majority vote of all vending facility managers and licensees to determine policies and procedures for the governance of the Business Enterprise Consumer Committee.

F. ACTIVE PARTICIPATION

The Commission for the Blind shall ensure the active participation of the Commission's Business Enterprise Consumer Committee in the Commission's major administrative, policy and program development decisions that impact the overall administration of the Commission's Business Enterprise Program. Active Participation includes, but is not limited to:

1. Setting out the method of determining the set aside charges to be levied against the net proceeds of the vending facility managers;
2. Development of Business Enterprise Program rules, policies, and standards;
3. Development of Business Enterprise Program budget requests;
4. Development of criteria for the establishment of new vending facilities;
5. Development of selection criteria for Business Enterprise staff recruitment;

6. Development of training and retraining programs for vending facility managers and licensees;
7. Development and administration of a system for the transfer and promotion of vending facility managers and licensees;
8. Sponsoring and planning, with the assistance of the Commission, meetings and post licensure trainings for vending facility managers and licensees.

As part of Active Participation, the Commission shall provide any program relevant information to the BECC when a particular matter is subject to Active Participation. This may include written or verbal program relevant information. It shall be provided, to the extent possible, in advance of any BECC meeting where the subject is on the agenda.

On a quarterly basis, the Commission will provide to the BECC a financial report in sufficient detail, for the BECC to review. This report shall include listing of all revenues by source (Set Aside, Vending Income Federal, Vending Income State and Other, and Other) as well as expenditure by categories. Upon request, more detail shall be provided to the BECC. The Commission shall provide the BECC with a copy of the RSA-15 Report no later than January 15 for the prior federal fiscal year ending September 30th.

If there is a matter or matters about which the Commission seeks the active participation of the BECC, notice of the request shall be provided to the members of the BECC at least ten (10) working days prior to any meeting where a vote may need to be taken. At the same time, the Commission shall provide any necessary background and reasons for the action, including any recommendations.

When the Business Enterprise Consumer Committee submits officially approved requests and recommendations to the Director in writing, the Director shall provide a written response, including the reasons for the decision reached or the action taken, within 30 days of receipt of the request. The response shall explain why the decision is in the best interest of the Business Enterprise Program.

The Commission bears final authority and responsibility for the administration and operation of the vending facilities program.

G. GRIEVANCES

If the licensee or vending facility manager chooses to submit a written grievance to the Business Enterprise Consumer Committee, the Business Enterprise Consumer Committee shall transmit it to the Commission. The Business Enterprise Consumer Committee, at the request of the vending facility manager shall serve as advocates for the licensee or vending facility manager.

OAR 585-015-0040

<u>DISPUTE RESOLUTION PROCESS</u>

1. Except for the actions described in Paragraph C (1) below, any vending facility manager or licensee must file a written complaint with the Director concerning any Business Enterprise Program action arising from the operation or administration of the program;
2. The complainant shall provide sufficient detail, so that the Director is able to respond and attempt to resolve the matter;
3. The complainant shall file the complaint no later than 60 days after the action giving rise to the complaint or within 60 days of the date the complainant knew or should reasonably have known of the action;
4. The complainant filing a complaint or request for administrative review ~~shall~~ <u>may</u> use the form the Commission develops for this purpose;

   RATIONALE: Requiring a specific form that may or may not be accessible to a blind person likely violates the Americans with Disabilities Act.

5. The Executive Director shall schedule <u>the administrative review in consultation with the complainant,</u> and notify the complainant in writing of the date, time and location for the administrative review;

   RATIONALE: The Complainant has to schedule the interview when someone can cover the facility, so the interview should be scheduled with him or her.

6. The Executive Director shall hold the administrative review within a reasonable time of the complainant's request, taking into consideration the length and complexity of the complaint;

7. The administrative review is informal and is conducted at the direction of the Executive Director or the Executive Director's designee. The complainant will have an opportunity to ask questions and discuss the details of the complaint;

~~8. The complainant shall advise the Executive Director if they intend to have advocates or legal counsel attend with them;~~

RATIONALE: What is the reason for this? The Commission obviously has the upper hand in this situation, and this "notice" requirement likely violates constitutional procedural due process protections.

9. The Executive Director shall issue a written decision on the complaint within 60 days of completing the administrative review;

10. The complainant may request a full evidentiary hearing if the complainant is dissatisfied with the administrative review decision by filing a written request for a hearing with the Executive Director within 30 (thirty) days after issuance of the administrative review decision. An administrative review is not a required prerequisite to a full evidentiary hearing.

RATIONALE: Requiring an administrative review before a full evidentiary hearing places an impediment to constitutionally required due process.

A. FULL EVIDENTIARY HEARING

1. A Complainant may request a full evidentiary hearing in response to:

a. A notice of intent to terminate the licensee's or vending facility manager's license; ~~or~~

b. An administrative review decision or;

c. a vendor's dissatisfaction with any State licensing agency action arising from the operation or administration of the vending facility program.

RATIONALE: Preemption.

2. Requests for full evidentiary hearings shall:

a. Be submitted in writing to the Executive Director within 30 (thirty) days after the date the Executive Director issues an administrative review decision or 30 days after the State licensing agency action which forms the basis of the vendor's complaint;

b. Be submitted in writing to the Executive Director within 60 (sixty) days for vending facility managers from another state who have received a notice denying licensure.

3. The Executive Director shall refer a request for a full evidentiary hearing to the Oregon Office of Administrative Hearings.

a. A full evidentiary hearing is conducted as a contested case hearing before an independent administrative law judge under the procedures set forth in ORS 183.411 to 183.497.

b. The administrative law judge issues a proposed final order in all Commission matters, except when a licensee has defaulted. If the licensee defaults, the administrative law judge may issue a final order.

c. If the licensee is dissatisfied with the results of the hearing, the licensee may seek judicial review of the decision under ORS 183.480 to 183.497; or may request the convening of an arbitration panel as provided for in 34 CFR 395.13.

B. ARBITRATION

A complainant may file a request for arbitration with the Secretary of Education as authorized by Section 107 (d)1 of the Randolph- Sheppard Act, and 34 CFR 395.13 (a) of the regulations issued pursuant to the Act.

OAR 585-015-0045

VENDING MACHINE INCOME FROM FEDERAL PROPERTY

Vending machine income which is retained under paragraph (a) of this section by a State licensing agency shall be used by such agency for the establishment and maintenance of retirement or pension plans, for health insurance contributions, and for the provision of paid sick leave and vacation time for blind vendors in such State, if it is so determined by a majority vote of blind vendors licensed by the State licensing agency, after such agency has provided to each such vendor information on all matters relevant to such purposes. Any vending machine income not necessary for such purposes shall be used by the State licensing agency for the maintenance and replacement of equipment, the purchase of new equipment, management services, and assuring a fair minimum return to vendors. Any assessment charged to blind vendors by a State licensing agency shall be reduced pro rata in an amount equal to the total of such remaining vending machine income.

In the event the Agency receives income from vending machines on federal property which may or may not be in direct competition with a licensed manager, the Agency will be guided by 34 C.F.R. § 395.32 in distributing any such funds to a licensed manager. Any funds not distributed to a licensed manager shall be used by the Agency in accordance with 34 C.F.R. § 395.8 to pay for the managers' benefits package.

VENDING MACHINE INCOME FROM STATE AND OTHER PROPERTY

In the event, the Commission collects and retains vending machine income from state and other properties that is not in direct competition with a vending facility manager, the funds shall be expended as described in OAR 346.

OAR 585-015-0050

STATEMENT OF FULL TIME EMPLOYMENT

Full time employment for a vending facility manager is considered to be an average minimum of thirty (30) hours per week as represented by a vending facility manager fulfilling the following responsibilities:

1) Ensuring that the facility is operated according to permit or contract;
2) ~~Daily~~ contact with and supervision of scheduled employees;
   RATIONALE: Does this mean that employees have to be contacted even on days when they do not work?
3) Maintaining supervisory and direct control of the

subcontractor;
4) Weekly contact with subcontractors;
5) Weekly contact with teaming partners;
6) Preparing and reporting paperwork;
7) Inventory control and purchasing;
8) Sales and profit and loss reviews;
9) Site visits to inspect vending facility for quality, cleanliness, and proper function of equipment;
10) Travel;
11) Stocking and servicing vending machines;
12) Cash management;
13) Maintaining auxiliary equipment necessary for the operation of a vending facility;
14) Upward mobility training in which the vending facility manager participates;
15) Training of employees;
16) Promoting, advertising, and marketing;
17) Contact with the building manager and related committees; and
18) Contact with Agency staff and others.

A vending facility manager is not expected to perform every responsibility every week. This section does not preclude a vending facility manager from taking vacations or being absent from the facility due to medical reasons or other documented reasons as approved by the Director. It is a responsibility of the vending facility manager to ensure the continued operation of the facility during these times. The Commission, with the active participation of the Business Enterprise Consumer Committee, shall develop a weekly log whereby the vending facility manager will document the above activities. This log is to be submitted to the Director on a monthly basis.

> COMMENT: I recognize that the newly enacted state law calls for "work logs" but this may conflict with the R-S Act. In any event, vendors are not employees, and a work log

requirement may result in a vendor making a claim that he is an employee and therefore the Commission should be providing the vendor with employee benefits.

It is the intent of the Commission to provide full time employment opportunities for vending facility managers. If a vending facility manager is unable to meet the average minimum of 30 hours per week by performing all of the responsibilities outlined in this section, the Commission will ~~assist the vending facility manager in finding more full time employment opportunities.~~ seek to expand the size or scope of the manager's facility.

RATIONALE: The Commission cannot require a manager to take a job; instead it should seek to ensure that the vending facility has a sufficient client base to ensure profitability.

OAR 585-015-0055
SUBCONTRACTING

A. CRITERIA FOR APPROVAL

It is the intent of the Commission to fully support vending facility managers in their direct operation of their assigned vending facilities, and in compliance with the Statement of Full Time Employment. In certain limited circumstances, the Commission may provide written approval for a vending facility manger to enter into an agreement with an approved subcontractor.

A vending facility manager must meet the following criteria before the Commission will consider approval of an agreement between a vending facility manager and an approved subcontractor:

1. The vending facility manager meets minimum requirements of OAR (585-015-0045) vending facility manager statement of full-time employment; and
2. The vending facility manager does not subcontract any of the duties in OAR (585-015-0045) statement of full time employment, excluding OAR (585-015-0045) item 10, stocking and servicing vending machines.

Additionally, the Commission shall also consider the following when determining whether to approve an agreement between a vending facility manager and an approved subcontractor:

a) Quality of service that the vending facility manager and subcontractor are able to provide;
b) Any product storage requirements;

COMMENT: It's not clear to me what exactly the purpose of the subcontracting requirement is, if the manager is going to perform. Is it to do duties such as payroll? I find this regulation to be very ambiguous.

B. ESTABLISHMENT OF A LIST OF APPROVED SUBCONTRACTORS

With written approval from the Commission, a vending facility manager may enter into an agreement with a subcontractor from the list of approved subcontractors. The Commission shall establish a list of approved subcontractors with which a vending facility manager may enter into an agreement. The Commission will ensure that when evaluating the qualifications of potential subcontractors that the following criteria are considered:

1) Past experience;
2) Ability to perform in the geographical areas desired;
3) Accessibility and use of technology;
4) Commission rate;
5) Availability of healthy and local products;
6) ~~Ability to repair equipment within the time frame specified in the permit/contract~~;

RATIONALE: It is not the responsibility of the vendor to repair equipment, thus the vendor cannot contract out a responsibility which is that of the SLA.

7~~) Ability to replace equipment when needed in a timely manner~~;

RATIONALE: It is not the responsibility of the vendor to replace equipment, thus the vendor cannot contract out a responsibility which is that of the SLA.

8) The availability of wholesale product in a geographic area that allows the greatest variety of product;
9) If required by the permit/contract, the availability of fresh food items;

10) The ability to offer healthy or local vending items;
11) The availability of appropriate vehicles, including refrigeration if necessary, to transport products to the vending facilities;
12) The ability to effectively service vending sites that are great distances apart, or require a long travel time;
13) The ability to meet any other requirements unique to a vending facility; and
14) The ability to provide the manpower to meet the demands of the facility, including an emergency situation.

C. EXTENT OF SUBCONTRACTING ALLOWED

The subcontractor may provide for part of the following services within the vending facility manager's assigned vending facility.

1) Vending, to include provision, stocking, and maintaining vending machine equipment; and
2) Cafeterias.

> COMMENT: I agree that vendors should not subcontract out their entire facility, and merely collect a portion of the net income of the facility. Yet, there are times when a subcontract is needed – such as a teaming partner. Other circumstances are sure to exist. It think it would be more productive to come up with a list – an including but not limited to list – of the circumstances under which a subcontractor may be approved by the Commission.

D. APPLICABLE OPERATING AGREEMENTS

This rule is inapplicable to operating agreements executed as of December 31, 2017. As of January 1, 2020, this rule is effective as to all operating agreements, regardless of when they were executed.

OAR 585-015-0060
FAIR MINIMUM RETURN

The Fair Minimum Return policy is established to ensure that all vending facility managers earn at least a minimum amount of annual income.

The fair minimum return yearly income rate will be established annually, with the active participation of the BECC. To be determined eligible for the fair minimum return, a vending facility manager must:

1. Earn less than the fair minimum return rate of annual net proceeds for cafeterias, snack bars, convenience stores and self-operated vending routes; or
2. Earn less than the fair minimum return rate of gross income for sub-contracted facilities.

Eligible vending facility managers qualify for the fair minimum return when the following criteria are met:

1. The vending facility manager meets the minimum requirements of OAR (585-015-0050), vending facility manager statement of full-time employment;
2. Cafeterias, snack bars, espresso carts for which the vending facility manager has operating agreements have net earnings below the annual fair minimum return amount and have a yearly average profit percentage of at least 15%;
3. Subcontracted vending routes that have gross earnings below the annual fair minimum return level, and an annual average profit percentage of 25%;
4. Self-operated vending routes that have net earnings below the annual fair minimum return level and an annual average profit percentage of at least 20%;
5. Any additional income received, not discussed above, from sub-contracting, or teaming partners, would be added to the vending facility manager’s annual earnings at the total gross amount received, when calculating the vending facility manager’s annual average income; and
6. The vending facility manager owes no past due set-aside, has submitted all required monthly set-aside reports and has a fully executed operating agreement.

Distribution and availability of funds

Fair minimum return payments will be issued annually, in February, after the December facility reports have been received

and annual average profit percentage are calculated.
This rule is subject to the availability of funds. If funds are not available, fair minimum return payments would not be made.
This policy remains in effect through the 2019 calendar year.