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**REPORT  
ON THE  
ACTIVITIES OF THE  
ADVISORY COMMITTEE  
ON  
FAIR COMPETITION WITH PRIVATE ENTERPRISE**

**JANUARY 15, 2007**

**Prepared for: John Elias Baldacci, Governor  
Joint Standing Committee on State and Local Government**

**Prepared by: Advisory Committee on Competition with Private Enterprise**

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The forms in the Appendices can be found online at [www.maine.gov/dafs/advcom](http://www.maine.gov/dafs/advcom).

## **Report of the Advisory Committee on Fair Competition with Private Enterprise**

Government entities provide a wide variety of goods and services to their constituencies. From time to time, some of those functions may adversely affect private enterprise. In 2000, the Maine Legislature created the Advisory Committee on Fair Competition with Private Enterprise to review complaints where competition with private enterprise is potentially unfair.

The Advisory Committee consists of members appointed from government agencies, a state employee and private sector representatives who meet to review complaints on government competition with private enterprise.

The Committee began its work shortly after appointment in the fall of 2000. It took several steps to organize a thoughtful process for interaction with persons or businesses, which perceived unfair competition by government agencies. Since its inception, it has reviewed a number of complaints of unfair competition by government with private enterprise in a variety of areas including, water testing, printing, and textbook sales. During calendar year 2006, the Committee received one formal complaint of unfair competition.

The complaint was filed by Maine Coast Design (MCD) against Maine Office of Tourism (MOT) claiming that pay per click advertising on the Internet purchased by MOT unfairly competed with MCD's ability to purchase pay per click advertising on the Internet. After a deliberative review of information provided by both parties, the Advisory Committee concluded the following: 1. The Maine Office of Tourism has a statutory mission to promote the State's tourism industry; 2. Pay per click advertisement is one part of the Maine Office of Tourism's overall strategy for promoting Maine's tourism industry; 3. In bidding for keyword terms the MOT does compete with private enterprise for placement and price; 4. This competition could not be quantified as unfair since other businesses were not excluded from advertising in some manner as a sponsor link, the pay per click advertising budget was limited, and active participation by the searcher was required in selecting a sponsor link responsive to his or her search and; 5. There are practices and issues involved in pay-per-click advertising that represent policy decisions that are outside the scope of the Advisory Committee's review and are referred for further consideration and decisions by appropriate legislative entities. These issues include keyword search methodology, particularly broad match searches, negative match, and geographic exclusion. (The Advisory Committee's full report has been reproduced on page 7.)

The Advisory Committee's responsibilities were expanded during the first regular session of the 121<sup>st</sup> Maine Legislature to approve the provision of services and goods by state agencies that are not otherwise allowed by law, and may compete with private enterprise. The Committee has developed a process for reviewing these types of requests from agencies. During calendar year 2006, the Committee received no requests from state agencies to approve the provision of goods or services.

In other activities, the Advisory Committee continues to discuss ways to increase awareness of the Committee's functions. Legislative outreach was continued and information regarding the Committee was provided to business groups, trade associations and media outlets.

## COMMITTEE MEMBERS

Domna Giatas	Department of Administrative and Financial Services
Brian Dancause	Department of Economic and Community Development
Walter Beesley	Department of Education
George Burgoyne	Representing State Employees
Appointment Pending	Private Enterprise
Diana George Chapin	Representing Private Enterprise
David McCausland	Representing Private Enterprise
Richard Thompson	Representing the Public
Christine Burke	Representing the Public

The Committee is staffed by Betty Lamoreau, Director, Division of Purchases.

## **COMPLAINT PROCESS**

**(Under MRSA Title 5, Section 55)**

The committee has developed a process to allow sharing of information between the complainant, the government agency and the Committee when a complaint of unfair competition is alleged. To avoid unspecific or frivolous complaints, the Committee requires a written complaint procedure.

A complainant must complete a form disclosing information about itself, the government agency (to the extent that information is known), the type and duration of the impact caused by the potentially unfair competition and a requested resolution. Additional documentation may be submitted, as appropriate. (See Appendix A)

Upon receipt of a complaint, the complaint information is forwarded to the affected government agency for written response. A form must be completed that requests (in addition to detailed agency information) a reason for the activity or business, the impact if the activity is altered or curtailed, and any statutory authorization for the practice. (See Appendix B)

The Committee believes strongly that each complainant have an opportunity to state its case to the decision makers. Therefore, all parties are invited to a Committee meeting where each party is given up to fifteen minutes to present evidence and information related to the complaint, after which the Committee may asks questions without time limit.

The Committee has established five basic criteria to evaluate the information obtained regarding each complaint:

- Is there competition?
- Why is the Government Agency engaged in this activity?
- Are there prohibitions to this activity?
- Is there a valid reason for the competition?
- Recommendations and Report to Governor/Legislature

This orderly decision process (Appendix C) allows for careful consideration of a number of factors in determining if competition exists, why it exists and the threshold question: is it unfair? The Committee analyzes the information presented by the parties in making its determinations.

## **Agency Request for Approval of Services/Goods** (Under MRSA Title 5, Section 55-A)

In reviewing requests for the sale of services/goods from departments, the Advisory Committee has established a number of criteria to assist in its evaluation and analysis. These criteria begin with an examination of whether the activity is allowed by statute and if the services/goods are to be offered for sale to the public. These requirements are specifically outlined in Section 55-A. If this initial inquiry finds that there is no statutory authority and the services/goods will be sold to the public, then the Advisory Committee will determine if this activity will result in unfair competition.

An Agency seeking to sell a service/good is provided with a form that requests information about the services/goods to assist the Committee in evaluating the request. (See Appendix D) It also may request information from other sources, as applicable. The Advisory Committee has also established criteria for this review process. (See Appendix E) These criteria weigh the agency's request for the sale of services/goods against the potential impact on private enterprise.

A review and decision by the Advisory Committee under Title 5 MRSA Section 55-A does not preclude a complaint from being filed by an affected business under Title 5 MRSA Section 55 should authorization be granted. Any request under Section 55 by a business claiming unfair competition would warrant further review by the Committee using the criteria outlined for an unfair competition complaint.

**Report of the Advisory Committee on Fair Competition  
with Private Enterprise  
Regarding a Complaint by Maine Coast Design against the Maine Office of Tourism  
September 29, 2006**

**Background**

In April 2006, Maine Coast Design (MCD) filed a written complaint against the Maine Office of Tourism (MOT) claiming that pay per click advertising on the Internet purchased by MOT unfairly competed with MCD's ability to purchase pay per click advertising on the Internet.

The Advisory Committee initially reviewed the complaint on June 8, 2006 and determined that additional information would be needed to understand the nature of the activity that comprised the alleged unfair competition, as well as details on the specific impact of this activity on private enterprise. A series of questions were posed to both parties requesting written responses and an invitation was extended to attend the next Committee meeting and make presentations on these issues. The Advisory Committee received written documentation and heard presentations from both parties on July 13, 2006. At the conclusion of this meeting, additional information was requested from both parties and further deliberation and discussion was continued to the August 17, 2006 meeting. Both parties had another opportunity to address the Committee at the second meeting. At both meetings, the Advisory Committee members had opportunities to ask the parties additional questions and members deliberated on the various issues raised, while focusing on the issue of competition with private enterprise, and specifically if it was unfair.

**Pay Per Click**

The activity which is the basis of MCD's complaint, and the focus of the Advisory Committee's review, is pay per click advertising on the Internet. Pay per click is a method of Internet advertising that allows advertisers to bid on keyword search terms for priority placement in a special sponsor area. By entering keywords through a search engine a list of web sites responsive to the search request are provided. Web site listings can be of two types—sponsored listing (paid advertisements that appear at the top and right hand side of search results) and organic listing (non-paid web listings that are responsive to a keyword search and appear below any paid advertised search results.) Sponsored listing placement is generally based upon the amount bid on the keywords, although different methodologies are utilized by each search engine.<sup>1</sup> A maximum of three sponsored websites are placed at the top of the search result page with an additional eight sponsored websites having placement along the right-hand side of the page.

The Advisory Committee discussions focused on two particular search engines, Yahoo and Google, and most significantly Google. Yahoo was represented as utilizing a highest bid method. So, if a business or other entity bid the highest for the terms, then their website would be placed in the first spot under the sponsored links. Second highest bid would be second and so forth. Google was explained to have a highest bid method that also took into account the website's track record in being selected as responsive to a searcher's request. In other words, while the amount of the bid impacted the calculation, there was also value assigned to a bidder's

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<sup>1</sup> It should be noted that search engines generally list the results of organic searches in descending order with what is calculated to be the most responsive website first.



website that was recognized as being most responsive to a searcher's request, i.e. it received more clicks. The actual selection of a site is significant to both the search engine and the advertiser, as the advertiser is only charged when its website is clicked on by the searcher. By extension, there is a financial benefit for the search engine to provide a searcher with the most responsive websites. It is also most beneficial to the pay per click advertiser to only be exposed to searchers seeking the information, services or products they are seeking to sell.

Placement of the web link is of importance, as there are exposure benefits for certain positions. Information was provided to the Advisory Committee by Maine Coast Design that indicated the first three sponsored links at the top of a search results page have been calculated to have a 100% exposure potential when they are listed in response to a search request.<sup>2</sup> The same 100% exposure has been calculated for the three organic listings that follow in the search results.

Advertisers purchasing keywords have several options for matching search requests, each with its own strategy. Broad match, as the name implies, would list any website that contain the keywords regardless of their order or proximity to each other. Phrase match would list websites that contain the keywords as long the keywords are found in the order requested and regardless of whether other search terms are included by the searcher. With exact match websites will be listed that contain the keywords in the exact order and only when those specific search terms are used by the searcher. Searches may be further refined to exclude keywords as well, in what is referred to as a negative match.<sup>3</sup>

### **Maine Office of Tourism**

The Maine Office of Tourism's mission, by law, is to promote, support and expand the tourism industry and "promote the State as a tourist destination."<sup>4</sup> Among these duties specific authority is provided to advertise and promote programs to market the State's travel industry. It undertakes all these activities in consultation with the Maine Tourism Commission,<sup>5</sup> a broad based group that represents the interests of recreation, tourism and travel industry professions. The MOT does not receive a General Fund appropriation, but is funded through a percentage of the lodging and meals tax. *VisitMaine.com*, the Maine Office of Tourism's website is open to all tourism related businesses that wish to list their websites.

MOT represented that it used a number of advertising media and that pay per click was a small part of its advertising budget. In response to the Committee's inquiry, MOT advised that it expended approximately 2%, or \$72,000, of its total advertising budget in FY 2006 on pay per click advertising. MOT has been using pay per click advertising sporadically over the past several years, as part of its overall advertising campaign to promote Maine's tourism industry and has focused more emphasis on this advertising media in FY 2006. The Maine Office of Tourism acknowledges using all types of keyword matching—broad, exact and phrase. Its strategy has evolved and been refined over this time period, as various strategies for

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<sup>2</sup> The person conducting the search has an opportunity to read the copy provided in the sponsored link advertisement and may choose to click on the link (or not) if responsive to his/her search.

<sup>3</sup> The Advisory Committee acknowledges that pay per click is a multi-faceted Internet advertising approach and the summary provided here is to allow for an informed discussion of the issues and is not intended to be an exhaustive understanding of the topic.

<sup>4</sup> Title 5 MRSA Section 13090-C.

<sup>5</sup> Title 5 MRSA Section 13090-F.

effectiveness were tested and as reporting methods and information improved for making these determinations. MOT expressed a commitment to utilizing all variations of keywords and matching options, but also acknowledged that the most efficient use of pay per click was necessary given the limited resources available for this media.

Given the bidding nature of the advertising space and the limited budget, advertising with pay per click is also limited. MOT advised that a certain amount is budgeted per day for pay per click and once the budgeted amount has been expended, the Maine Office of Tourism website would no longer appear as a sponsored link in response to the keyword search.

### **Impact on Private Enterprise**

In providing information to the Advisory Committee, Maine Coast Design takes exception with many of MOT's Internet and web-based promotional activities and questions its strategies and their effectiveness. The Advisory Committee focused specifically on those activities that were the basis of the MCD's complaint, pay per click advertising, and the impact of MOT's participation in this method of advertising in competition with private enterprise, generally and MCD, specifically.<sup>6</sup>

When asked to specify the basis for the unfair competition, MCD asserts that MOT's pay per click advertising interferes with private-sector businesses by increasing the cost of this type of advertising. MCD's contention is that State money is being used to compete with private businesses and MOT can out bid businesses for key terms, thereby gaining access to the more coveted position for placement within the sponsored listing.

In support of this allegation, Maine Coast Design provides information regarding a bid involving MOT and MCD's client for the keywords "Camden Maine" on Overture (subsequently acquired by Yahoo) that resulted in MOT being the highest bidder, and therefore occupying the first spot in the sponsored listing.<sup>7</sup> MCD attempts a similar analysis for Google, however, the methodology of Google's bidding process only allows for an estimation based on extrapolations of the Overture example. MCD's assumptions are also based upon obtaining the first position in the sponsor listing, which was represented as the coveted, though not the only, spot for sponsor listings. While provided an opportunity to do so, Maine Coast Design did not share any specific monetary figures regarding the economic impact to its business or that of its clients'.

MCD also contends that MOT's bidding on pay per click advertising monopolizes key terms to the detriment of local businesses. As an example, it is MCD's position that by bidding on terms such as "Bar Harbor Maine" and "Camden Maine" in broad match format, MOT, in promoting *VisitMaine.com*, "competes with non-tourism businesses for local commerce" by adversely affecting other searches for "Bar Harbor Maine plumbing" and "Camden Maine grocery", for example. This would be of particular concern to non-tourism related business. The impact of

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<sup>6</sup> The Committee generally reviews situations when an allegation is made that a state agency is unfairly competing with private enterprise in providing goods and services to the public. This review is a slight variation, as the allegation presented was the competition by an agency for access to similar resources as private enterprise. Any concerns regarding strategies undertaken by agencies to fulfill their missions and their effectiveness, are policy issues that require another forum.

<sup>7</sup> Although it was not clear from the information provided, given the Advisory Committee's understanding of the bidding process, MCD's client would have occupied the second position in the sponsored listing.

this bidding strategy on private businesses' ability to compete was of concern to the Advisory Committee, yet difficult to quantify.

### **Competition**

The Advisory Committee determined that there was competition by virtue of the fact that MOT is bidding for advertising space in the marketplace with other business.<sup>8</sup> However, the impact of this competition could not be quantified by the Committee as unfair. While the potential for a business to be out bid by the Maine Office of Tourism existed, there was limited information presented regarding the frequency or a quantification of the impact.

The Committee recognizes that MOT has limited resources with which to bid. MOT, similar to a business, benefits by spending funds most efficiently. While a business might be out bid for the first position within the sponsor listings, more than one listing is available and at least 3 listings are calculated to have a 100% exposure on the search page. The Committee acknowledges that any advertiser would attempt to vie for the first spot in order to maximize its ad's impact. However, the Committee must also consider that the first spot is not the only spot available and is not the only spot with a 100% exposure ranking. Opportunities exist for others to participate.<sup>9</sup>

The issue of keywords and match options was a more difficult consideration for the Committee. There was information provided that some changes have been made by MOT, as feedback is provided on the effectiveness of the keyword and match options, and possibly from the concerns raised by Maine Coast Design, leading to a refinement of its process.

The Advisory Committee expressed concern that the broad match keyword search might impact businesses that were not tourism related and there was much discussion around the mechanics of negative searches to limit MOT's becoming an "unresponsive" search result for a person seeking "Camden Maine grocery". Some consideration must be given to the fact that a person presented with a list of web sites in the sponsor area has some opportunity to review the informational copy provided to determine if the site is responsive to the search request before clicking. However, match options or negative words, as well as geographical exclusions are policy issues and strategies that are made by the agency in fulfilling its mission. These policy decisions are best reviewed and addressed through the legislative process.

### **Conclusion**

The Advisory Committee concludes the following from the information received:

1. The Maine Office of Tourism has a statutory mission to promote the State's tourism industry.
2. Pay per click advertisement is one part of the Maine Office of Tourism's overall strategy for promoting Maine's tourism industry.

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<sup>8</sup> State government is often in competition with business for commodities and may impact market price based upon its involvement in the marketplace. To ensure a fair process, State agencies use a competitive bid process in obtaining the commodities.

<sup>9</sup> The Advisory Committee also acknowledges that there are not infinite spots for advertising or that have a 100% exposure ranking. The bidding process will eventually cause a low bidding advertiser to fall outside of the sponsor listing.

3. In bidding for keyword terms the MOT does compete with private enterprise for placement and price.
4. This competition could not be quantified as unfair since
  - other businesses were not excluded from advertising in some manner as a sponsor link,
  - the pay per click advertising budget was limited, and
  - active participation by the searcher was required in selecting a sponsor link responsive to his or her search.
5. There are practices and issues involved in pay-per-click advertising that represent policy decisions that are outside the scope of the Advisory Committee's review and are referred for further consideration and decisions by appropriate legislative entities. These issues include:
  - keyword search methodology, particularly broad match searches,
  - negative match, and
  - geographic exclusion.

**ADVISORY COMMITTEE ON FAIR COMPETITION WITH  
PRIVATE ENTERPRISE**

**Complaint Form Under Title 5, Section 55  
Required Information**

▪ **Contact person for Private Enterprise**

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_ e-mail \_\_\_\_\_

▪ **Private Enterprise(s) impacted (one entity, group, statewide impact)**

Business/Group Name \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

▪ **Government Agency causing impact**

Agency Name: \_\_\_\_\_

Address (if known): \_\_\_\_\_

Location of activity (if different): \_\_\_\_\_

Contact Person (if known): \_\_\_\_\_

▪ **Type of Impact (loss of work, market fluctuation, etc.)**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- **Duration of impact (start date if known, end date if known)**

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- **Support – facts/proof**

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**Requested resolution**

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**ADVISORY COMMITTEE ON FAIR COMPETITION WITH  
PRIVATE ENTERPRISE**

**Government Agency Information  
Upon Receipt of Title 5, Section 55 Complaint**

- **Contact person for Government Agency**

**Name:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**Telephone:** \_\_\_\_\_ **E-mail** \_\_\_\_\_

- **Location(s)**

\_\_\_\_\_

- **Type of government activity**

\_\_\_\_\_

\_\_\_\_\_

- **Duration (start date, end date if known)**

\_\_\_\_\_

\_\_\_\_\_

- **Reason for activity/business**

\_\_\_\_\_

\_\_\_\_\_

- **Impact if activity altered or curtailed**

\_\_\_\_\_

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- **Identify all Applicable Statutes/Regulations/Policies that Authorize the Activity**

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- **Pending Rulemaking – (if any)**

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- **Suggested Resolutions**

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**ADVISORY COMMITTEE ON FAIR COMPETITION WITH  
PRIVATE ENTERPRISE**

**Criteria for Evaluation of Title 5, Section 55 Complaint**

- Step 1. Is there competition?
- A. What is the directly competing function?
  - B. What is the impact on private enterprise?
- Step 2. Why is the Government Agency engaged in this activity?
- A. Statutory/Regulatory
  - B. Health and Safety
  - C. Educational Value (Students)
  - D. Staff Development
  - E. Cost Effectiveness
  - F. Duration
- Step 3. Are there prohibitions to this activity?
- A. Statutory
  - B. Regulatory
  - C. Other
- Step 4. Is there a valid reason for the competition?
- Fair market price?
- Is it subsidized?
- Are taxes/benefits/overhead paid?
- Step 5. Recommendations and Report to Governor/Legislature

**ADVISORY COMMITTEE ON FAIR COMPETITION WITH  
PRIVATE ENTERPRISE**

**Agency Request Form for Approval of Services/Goods**  
(Pursuant to MRSA Title 5, Section 55-A)

**Contact person for Agency**

**Name:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**Telephone:** \_\_\_\_\_ **E-mail** \_\_\_\_\_

**Information about Proposed Services/Goods**

**1. Describe Services/Goods seeking approval pursuant to MRSA Title 5, Section 55-A**

\_\_\_\_\_  
\_\_\_\_\_

**2. Identify any applicable Statutes/Regulations/Policies that authorize the activity**

\_\_\_\_\_  
\_\_\_\_\_

**3. Will the Services/Goods be offered for sale to the Public?**

\_\_\_\_\_  
\_\_\_\_\_

**4. Explain reason for offering Services/Goods**

\_\_\_\_\_  
\_\_\_\_\_

**5. Explain Services/Goods connection with Agency's governmental purpose**

\_\_\_\_\_  
\_\_\_\_\_

**6. Duration for sale of Services/Goods (start and end dates)**

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**7. Locations or market areas where Services/Goods will be offered**

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**8. Identify any potential private business/industry to be impacted by the Services/Goods**

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**9. Anticipated impact of Services/Goods on private enterprise/industry (Please be as specific as possible)**

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**10. Where are these private businesses located?**

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**11. Are the Services/Goods currently offered by any private enterprise located within the State of Maine? Outside of the State of Maine? (Please list any applicable businesses)**

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**12. Could private enterprise offer the Services/Goods in the near future?**

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**13. Describe any similar Services/Goods offered by any private enterprise and explain how it differs from Services/Goods contemplated for sale by Agency.**

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**14. Has Agency approached private enterprise to deliver Service/Goods? Who was approached? What was response?**

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**15. What will be the cost to the Public of the Services/Goods offered? How was this determined?**

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**16. Can the Services/Goods be offered at market value? If not, why not?**

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**17. Is there a public policy purpose in offering the Services/Goods for sale to the Public?**

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**18. Please provide any additional information that would be helpful to the Advisory Committee in evaluating this request.**

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**Criteria for Review of Title 5, Section 55-A Request**

1. (a) Is the requested activity allowed by statute?  
(b) Is there any prohibition to this activity?
  
2. Will the goods/services be offered for sale to the public?  
(a) If goods, how will they be distributed?  
(b) If services, how will they be offered for sale?
  
3. Why is the agency engaged in this activity?
  - (a) Statutory/Regulatory
  - (b) Health and Safety
  - (c) Educational Value (Students)
  - (d) Staff Development
  - (e) Cost Effectiveness
  - (f) Duration
  - (g) Informational Education (Public)
  - (h) Raise Funds
  - (i) Other
  
4. (a) Will there be a direct competition with private enterprise?  
(b) If yes, with whom? (Identify private enterprise affected)
  
5. What is impact on private enterprise?

6. Are there economic factors that give the activity an unfair competitive advantage over private enterprise?
- (a) Is the product sold at fair market price?
  - (b) Is it subsidized?
  - (c) Are taxes/benefits/overhead paid?
  - (d) Does the distribution system of the product/activity pose an imbalance in competition?
  - (e) What is the effect/economic magnitude of the activity on private enterprise?