

## **Office of Government Ethics**

**94 x 19 -- 11/14/94**

### **Letter to the General Counsel of a Company dated November 14, 1994**

This is in response to your request for an advisory opinion from the Office of Government Ethics (OGE) concerning the application of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) to a sales incentive program offered by your company. For the reasons provided below, we conclude that acceptance by an executive branch

employee<sup>1</sup> of a "favorable price" based upon [your company's] incentive program would violate the Standards.

According to your letter, [the company] has developed the incentive program to increase sales to certain classes of individuals, such as diplomats, embassy staff, members of international organizations and certain foreign military personnel ("eligible purchasers"). The rationale for the program provided in your letter is that the eligible purchasers have "positive contacts" in government and industry and that, as opinion leaders, their choice of [a product] can influence the sale of [your company's products] to foreign citizens. To encourage these sales, [the company] makes incentive payments to retail dealers. Under this program, [the company] will sell a [product] to the dealer at a certain cost, which is less than the Manufacturer's Suggested Retail Price (MSRP). The dealer then negotiates the sale price with the customer. If the dealer can document that a purchaser meets the incentive program's target group, i.e., an "eligible purchaser," then [the company] will pay a marketing incentive to the dealer. Your letter used the example of a [product] with a MSRP of \$30,000, with a dealer cost of \$26,000, and an incentive payment of \$2,200 to the dealer after the sale.

The incentive program therefore allows (but does not require) the dealer to offer the product to an eligible purchaser at a favorable price; the dealer may sell to the eligible purchaser at or even below the dealer's cost and still make a profit when the incentive payment is factored in. It is this ability to offer a favorable price to eligible purchasers that raises the question as to whether it is appropriate for executive branch employees to accept the favorable price. This requires resolution of the following issues: is acceptance of a favorable price of this kind a "gift" for the purposes of the Standards? If so, would acceptance of such a gift be prohibited by the Standards? And, finally, does the exception for

commercial discounts apply in this case? These issues are considered below.

#### "Favorable Price" As a Gift

The Standards define the term "gift" very broadly, including any gratuity, favor, discount, or other item having monetary value. 5 C.F.R. § 2635.203(b). Your letter states that because the incentive is offered to the dealer, not to the purchaser, you believe that the program "avoids any question under the regulations." We disagree. The key concept of the definition contained in the Standards is that something is a gift if a benefit, having monetary value, is conferred upon the employee. Here the benefit conferred is the favorable price that the dealer is able to offer to the eligible purchaser knowing that the incentive program will enable the dealer to maintain the dealer's profit margin. And the incentive program is clearly designed to enable the dealer to offer such a reduced price, thereby increasing sales to the eligible purchasers. It seems unlikely, for example, that a purchaser would be more disposed to purchase a product based solely upon increased profits to the retailer. The retailer passes part or all of the incentive through to the purchaser in order to complete a sale. The result is, in essence, a discount for eligible purchasers. The fact that the MSRP of the [product] is the same for eligible purchasers as for any other purchaser does not preclude this conclusion. As you note, the final selling price is determined by the dealer and the purchaser. It is at this point that any "favorable price" for an eligible purchaser is finally set. Nor does the fact that the monetary benefit may be difficult to quantify prevent the gift rules from applying. Where a benefit with monetary value is provided, a transaction falls within the gift rules under the Standards.

Because there is a benefit having monetary value being given to a purchaser who is offered a "favorable price" based upon the incentive program, we are of the opinion that such a benefit is within the definition of a "gift" under the Standards. We must now turn to the issue of whether the gift exclusion for discounts contained in the Standards would permit employees to accept a "favorable price" offered based upon the incentive program.

#### The Gift Exclusion for Discounts (5 C.F.R. § 2635.203(b)(4))

Certain items and things of value have been excluded from the term "gift" as used in the Standards. 5 C.F.R. § 2635.203(b). These items and things of value may be accepted by employees without regard to the gift prohibition. One of these exclusions, found at section 2635.203(b)(4), excludes "[o]pportunities and benefits, including

favorable rates and commercial discounts, available to the public or to a class consisting of all Government employees or all military personnel, whether or not restricted on the basis of geographical considerations" from the definition of a gift contained in the Standards. The [company] sales incentive program, however, does not meet the terms of this exclusion. The incentive program is not available for sales to the general public, but only for purchases to a limited class of "eligible purchasers." The fact that not all of the eligible purchasers are Government employees does not meet the requirement that the discount be "available to the public." See OGE Informal Advisory Letter 87 x 22 (Employee could not accept discount offered to members of a professional association composed of Government conference planners and private suppliers of conference services). In order for the exclusion at 5 C.F.R. § 2635.203(b)(4) to apply, the discount must be offered to all Federal employees. See OGE 92 x 26. Here the incentive program is only offered to a limited category of Government employees, those who are official U.S. diplomats or who are traveling abroad on official business. We also note that the reference in the exclusion to rates and discounts "restricted on the basis of geographic considerations" does not mean that it is permissible to accept a discount offered to certain employees who work in an area, such as employees who are overseas on official business. OGE included that reference in the regulation to recognize that some discounts are available regionally to the public or to all Government employees. See OGE Informal Advisory Letter 93 x 29.

### Prohibited Gift Analysis

Having concluded that a favorable price offered under the [company] sales incentive program creates a benefit that falls within the definition of the term "gift" as defined in the Standards, and that no regulatory exclusion applies, we must now consider whether acceptance of the favorable price by an employee would be prohibited by the Standards. The Standards prohibit employees from accepting any gift from prohibited sources or given because of the employee's official position. 5 C.F.R. section 2635.201. This prohibition implements the statutory gift prohibition, 5 U.S.C. § 7353, as well as a parallel prohibition set by section 101(g) of Executive Order 12674, as modified by Executive Order 12731. A person or entity is a "prohibited source" for an employee if it is seeking official action by the employee's agency, does business with or seeks to do business with the employee's agency, conducts activities regulated by the employee's agency, or has interests that may be substantially affected by performance or nonperformance of the employee's official duties. 5 C.F.R. § 2635.203(d). Because we conclude that the gift (i.e., the "favorable price") is being made available to certain executive branch employees because of their official positions, our

response does not consider whether (and for whom) [the company] would be considered a prohibited source.

Your letter states that, because the term "eligible purchasers" under the program includes private citizens from other countries that represent their countries and persons who are members of international organizations as well as Federal employees, the eligibility classification is unrelated to Government employment. This misconstrues the nature of the prohibition. The question is not whether some or all of those offered a gift are Government employees. See OGE Informal Advisory Letter 87 x 2. A gift is considered to be based upon an employee's official position if it is from a person other than an employee and would not have been offered had the employee not held his or her position as a Federal employee. 5 C.F.R. § 2635.203(e). This is essentially a "but for" test; if the gift would not have been offered to the employee but for his or her official position, acceptance is prohibited under the Standards. According to your letter, the Government employees who are eligible purchasers under the sales incentive program are eligible because they are traveling on official U.S. Government business or are official U.S. diplomats. We therefore have no difficulty in concluding that any discount that an executive branch employee receives under the sales incentive program is based upon their official position.

#### Application of the Exception for Discounts

We now turn to the issue of whether acceptance of a favorable price offered to an employee under the [company] sales incentive program would be permitted under one of the exceptions to the gift rule. Most of the 12 exceptions, which are found at 5 C.F.R. § 2635.204, are not relevant to the program as you have described it. The only exception which arguably could apply is the one found at section 2635.204(c)(2)(iii), which permits employees to accept commercial benefits or discounts offered by a person who is not a prohibited source to any group or class which is not defined in a manner that specifically discriminates among Government employees on the basis of type of official responsibility or on a basis that favors those of higher rank or rate of pay. Your letter states that the incentive program does not discriminate on these grounds, and therefore, based upon this exception, employees may accept the benefit conferred under the incentive program. It is true that, as you have described it, the incentive program does not on its face discriminate on a basis that favors those of higher rank or pay. But we do not agree that the program does not discriminate on the basis of type of official responsibility.

In contending that the incentive program does not discriminate on the

basis of official responsibility, your letter states that "any person, secretary, Assistant Secretary, security clerk or Ambassador who carries the eligible passport code is eligible"**3** (emphasis added). It is this characterization, however, that leads us to conclude that the incentive program does not meet the terms of this exception. The requirement that, to be eligible, Government employees must have passports coded in the "800" or "900" series indicates that the eligible individuals are those who are abroad on official or diplomatic assignment for the United States Government. The program therefore discriminates on the basis of official responsibility in that it is not available to Government employees whose official positions do not involve the responsibility to travel abroad on an official assignment. The fact that the employees so designated serve in a variety of capacities does not change their underlying commonality on this point. We therefore conclude that the incentive program does not meet the terms of the gift exception for certain discounts found at 5 C.F.R. § 2635.204(c)(2)(iii). This conclusion is consistent with long-standing OGE opinions concerning the acceptance of discounts. The interpretations, which the Standards served in large measure to codify, generally permitted employees to accept discounts with a legitimate commercial motive -- those that seek to increase sales volume by lowering prices to a group of individuals. Discounts, such as the [company] sales incentive program, that are offered in order to encourage an employee to look favorably upon a product or promote the product among other consumers do not fall within the types of discounts traditionally permitted under the gift acceptance rules. See OGE Informal Advisory Memorandum 85 x 13.

### Conclusion

Acceptance by an executive branch employee of a favorable price under the [company] sales incentive program would constitute a violation of the Standards of Ethical Conduct. Such a favorable price would fall within the definition of a "gift" under the Standards, and it does not meet the regulatory exclusion for certain discounts. An employee's eligibility for the discount is based upon the employee's official position; acceptance of a gift given based upon an employee's official position is prohibited by the Standards. Nor does any exception to the gift rules appear to apply in this situation.

We trust that this will resolve the question that you have raised. If you have any questions concerning this letter or the issues raised herein, please feel free to contact my Office.

Sincerely,

Stephen D. Potts  
Director

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1 OGE's jurisdiction is limited to employees of the executive branch of the Federal Government. 5 U.S.C. appendix (Ethics in Government Act of 1978), § 402. Our response to you is therefore confined to such employees.

2 The informal advisory letters and memoranda are published in The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics available through the Government Printing Office.

3 Your letter states that, in order to establish a purchaser's eligibility under the program, a dealer must document the purchaser's status by sending a copy of the purchaser's passport to [the company]. We raise, but do not decide here, the issue of whether a Government employee may allow his passport to be copied for such a purpose. An official passport is the property of the United States Government. 22 C.F.R. § 51.9. Use of an official passport for unauthorized purposes may subject an individual to criminal punishment. 18 U.S.C. § 1544. Executive branch employees misusing Government property may also be subject to administrative sanctions. You may wish to consult with the State Department (the agency responsible for regulating the use of passports) on this issue.