OFFICE OF GOVERNMENT ETHICS

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Letter to an Ethics Official
dated July 6, 2004

This responds to your request, dated June 1, 2004, for advice about whether employees [of a component of your Department] properly may accept "pro sale deals offered by various companies such as a particular business," a designer and retailer of outdoor clothing and gear. [The particular business] offers special discounted pricing, through its "pro sales program," to "outdoor professionals" who work in the snow sports, biking, climbing, paddling and surfing industries, as well as to those who work in the "environmental field." Specifically included are full-time, year-round, "field-based" Government employees.

The Standards of Ethical Conduct for Executive Branch Employees provide that an employee shall not, directly or indirectly, solicit or accept a gift[1] that is: (1) from a prohibited source[2]; or (2) given because of the employee's official position. 5 C.F.R. § 2635.202(a). A gift is solicited or accepted because of the employee's official position if it is from a person other than an employee and it would not have been solicited, offered, or given had the employee not held the status, authority or duties associated with his Federal position. 5 C.F.R. § 2635.203(e).

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[1] "Gift" is broadly defined to include a "discount . . . having monetary value." 5 C.F.R. § 2635.203(b). Excluded from the definition of "gift" are "[o]pportunities and benefits, including favorable rates and commercial discounts, available to the public or to a class consisting of all Government employees . . . ." 5 C.F.R. § 2635.203(b)(4). Because the particular business' offer is made only to a narrow class of individuals, this exclusion does not apply.

[2] A "prohibited source" is any person who: (1) is seeking official action by the employee's agency; (2) does business or seeks to do business with the employee's agency; (3) conducts activities regulated by the employee's agency; (4) has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or (5) is an organization a majority of whose members are described in paragraphs (d)(1) through (4) of this section. 5 C.F.R. § 2635.203(d).

Because participation in the "pro sales" discount program is limited to "outdoor" and "environmental" professionals, only Government employees who perform, full-time, year-round, "field-based" duties are eligible. Thus, the discount is a gift that would not have been offered to the eligible employees but for the duties associated with their particular positions. As such, whether or not [the particular business] is a "prohibited source" for [the component] employees, the offer falls within the general prohibition on employees' accepting gifts from outside sources. 5 C.F.R. § 2635.202(a).

In order for an executive branch employee to accept an otherwise prohibited gift, it must fall within one of the twelve enumerated exceptions to the general gift prohibition. See 5 C.F.R. § 2635.204. One of the applicable exceptions provides, in relevant part, that "an employee may accept . . . [o]pportunities and benefits, including favorable rates and commercial discounts . . . offered to members of a group or class in which membership is unrelated to Government employment." 5 C.F.R. § 2635.204(c)(2)(i). OGE has adopted a three-part test interpreting the phrase "unrelated to Government employment." *See* OGE Memorandum to Designated Agency Ethics Officials dated January 5, 1999 (reprinted as OGE Informal Advisory Opinion 99X1). This test specifies that a gift is "unrelated to Government employment" when (1) it is not necessary to be a Federal employee to be included in the group or class to which the discount is offered; (2) it does not appear that Federal employees are being targeted; and (3) the employee seeking to accept the discount is not in the group or class to which the discount or benefit is offered because of some actual or perceived power, influence, or status associated with his job or position within the Government. The fact that the employee would not be in the group or class if he were not a Federal employee is not in itself disqualifying.

The first prong of this test focuses on the reason for the employee's inclusion in the group or class. If one has to be a Federal employee to be a member, the exception will not apply. In this case, the discount is offered to fifteen categories of outdoor professionals, including "Avalanche Professionals," "Climbing Guides," "Environmental Organizations," and "Search and Rescue Professionals," in addition to full-time, "field based" Government Employees. Thus, clearly, it is "not necessary to be a Federal employee to be included in the group or class to which the discount is offered."

The test's second prong excludes offers that are seemingly neutral but that, in fact, apply primarily to Federal employees. An example of such an offer would be one that is limited to a very narrowly drawn geographic area that is inhabited mostly by Federal employees. [The particular business'] offer clearly is targeted to

individuals with careers that consist of outdoor activities or "field-work." Government employees who perform such duties are only one of fifteen categories of such individuals who may request the offered discount. Thus, we see no indication that [the particular business'] "pro sales" discount program is intended to target Federal employees.

The final prong of the test focuses on the donor's apparent motivation for offering the discount. Where it appears that the only Federal employees to whom the discount is being offered are those whose positions are perceived as carrying some actual or perceived "power, influence, or status," the exception will not apply. This prong is intended to minimize the use of the exception in situations that would raise impartiality concerns or that would create the appearance of the use of public office for private gain. As we noted, for example, in Informal Advisory Opinion 99X1, an employee who serves as his agency's computer procurement official could not accept a discount on computer equipment that is offered only to computer procurement officials because such an offer would appear to be made because of the recipients' authority to purchase computer equipment, on their agencies' behalf, from the donor. Similarly, a Cabinet-level official could not accept a discount offered to all heads of organizations with 1000 or more employees because this benefit would appear to be offered because of the official's status as an agency head. This prong also would prohibit law enforcement officials, who generally are perceived as wielding significant power, from accepting discounted food, transportation, or weapons offered exclusively to them.

Our best understanding is that [the particular business'] motivation to offer "pro sales" discounts to outdoor professionals is threefold. First, the company wishes to support the professional activities of individuals whose work benefits the environment. Second, the company hopes that "pro sales" plan participants will provide valuable feedback to the company about the performance of its products.[3] Finally, [the particular business] believes that use of its products by outdoor professionals will provide "visibility" for its brand name. In other words, [the particular business] hopes that it will create the appearance that experts prefer [the particular business'] products.

[3] The company sends evaluation forms to plan participants who make purchases, but participants are not required to return them in order to continue participating in the program.

Our understanding is that [Department component] employees who have contact with the public generally are required to wear official uniforms and to use Government-issued equipment. Thus, it is uncertain whether [the particular business'] third goal is achieved with respect to the participation in the "pro sales" program of [Department component] employees. Nevertheless, it is the company's motivation that is controlling. [The particular business'] "pro sales" program is motivated, at least in part, by the hope that participating outdoor professionals, including Government employees, will use [the particular business] products while performing their jobs, thereby encouraging others to purchase those products. Thus, it appears that [the particular business] perceives outdoor professionals, the only Government employees to whom participation in the "pro sales" program is offered, as having the ability to "influence" the public to purchase [the particular business'] products. For this reason, we believe that the participation of [Department component] employees in [the particular business'] "pro sales" program would not fall within the gift exception for discounts offered to members of a group or class in which membership is unrelated to Government employment.[4]

We hope that this information is helpful to you. Please do not hesitate to contact us if you have additional questions.

Sincerely,

Marilyn L. Glynn
Acting Director

[4] We understand that a number of other retailers offer similar discounts to [Department component] employees. Although the acceptability of each discount offer must be considered independently, we suggest that you use the analysis outlined above when considering similar offers.