

Office of Government Ethics

82 x 17 -- 11/18/82

Letter to a Company dated November 18, 1982

This letter is in response to your request of October 7, 1982 regarding your plan to publish a special edition of [a book] to be distributed free of charge at least twice each year to the top 29,000 executive branch officials who are listed in the book. You have asked us to reconfirm our response of July 9, 1982, that the acceptance of this book by these employees would not violate the standards of conduct promulgated under Executive Order 11222 (5 C.F.R. Part 735). Further, you have asked us to confirm your interpretation of Title II of the Ethics in Government Act (the Act) that, because this special edition is valued at less than \$35 a copy, Federal officials receiving the book and subject to Title II of the Act would not be required to disclose the receipt of the book on their financial disclosure reports.

The basic standards concerning the acceptance of gifts for all executive branch employees are set forth in 5 C.F.R. § 735.202. At a minimum, each agency is required to have these same standards although any could promulgate regulations which are more strict. We will discuss the application of 5 C.F.R. § 735.202 to your question.

The basic prohibition in section 735.202(a) is that an officer or employee may not accept anything of monetary value from a person who --

- (1) Has, or is seeking to obtain, contractual or other business or financial relations with his agency;
- (2) Conducts operations or activities that are regulated by his agency; or
- (3) Has interests that may be substantially affected by the performance or non- performance of his official duty.

[Your company] publishes two publications which are sold to Federal agencies. One, the loose-leaf version of [book in question] and the other, a similar version of [a book covering a different group of individuals]. While you expect the

subscriptions to the former to drop off significantly should you be allowed to give away this special edition, you maintain a contractual relationship with any agency which presently subscribes to either service. Therefore, for any official employed by an agency which presently subscribes to either service, or which you are attempting to sell any publication, a gift of the special edition of the [book] would fall under section 735.202(a)(1) and would be thereby prohibited unless it fell within one of the enunciated exceptions. For any official employed by an agency with no contractual relationship to your company, the special [book] would not be a prohibited gift under this standard.

In 5 C.F.R. § 735.202(b), the basic regulations set forth examples of the types of gifts that are exceptions which agencies may allow. Such exceptions may, as outlined in subsection (4), "[p]ermit acceptance of unsolicited advertising or promotional material such as pens, pencils, note pads, calendars and other items of nominal intrinsic value."

You have indicated to us that the special edition of this book will have been more than paid for through the advertising you intend to sell and include in the book. In addition, you intend simply to send unsolicited copies to all persons listed in the book. We believe that under these circumstances the book itself is very similar to unsolicited advertising and is the type of item that was intended to be covered by this exception. Therefore, we believe that an officer or employee of any agency which has included this general exception in its regulations might accept the book without violating the provisions of section 735.202.

We are not saying, of course, that any item which contains some advertising is acceptable. In making this determination, we have taken into consideration the book's mass production, the intent of the donor (to sell and distribute advertising), the neutral content of the listings and the cost of production (even though the value of the information is of significance). Given these factors, the gift of this mass produced publication is of the type that was not intended to be prohibited by these standards.

With regard to your question concerning whether the acceptance of this publication is required to be listed on the public financial disclosure of those recipients covered by Title II of

the Ethics in Government Act, the following guidelines apply. An individual reporting pursuant to the Act need only disclose gifts received from any one source in excess of \$100. See 5 C.F.R. § 734.301(c). Any gift of a fair market value of \$35 or less need not be aggregated for purposes of this reporting requirement. 5 C.F.R. § 734.301(c)(5). If the fair market value of this special edition is less than \$35, there would never be a need for its acceptance to be disclosed. If the fair market value exceeds \$35 but is less than \$100, the receipt of one copy would also need not be disclosed. If the fair market value exceeds \$35 per edition and you give an individual an updated version more than once each year, the value of each edition must be aggregated to determine if the sum equals the \$100 reporting threshold.

You have indicated to us that the special edition will not be sold and therefore does not have a readily ascertainable fair market value. Because the publication does contain information other than advertising and could have some market value, one still must make a good faith effort to determine what that value might be. In anticipation of our requiring this, you have indicated you believe that it would be a value less than \$35 and we have no basis to disagree. Therefore, applying the rules set forth previously, the acceptance of this special edition would not be required to be reported on any financial disclosure statement required by Title II of the Act.

There is one other aspect of this matter which neither you nor we have discussed previously. 18 U.S.C. § 209 prohibits any person or corporation from giving and any officer or employee from accepting any supplementation of salary "as compensation for" his or her Government services. The recipients of this publication, as we understand it, are the approximately 29,000 high-ranking officials who are listed in the book. The reason they will receive copies is therefore linked in one sense to their Government position. To our knowledge, however, the gift is not intended as "compensation" to these officials for any act or non-act on their part and consequently there is no violation of section 209 here. We raise this issue only to highlight the point that some "unsolicited" gifts can run afoul also of section 209(a).

If you have any further questions concerning this matter, please feel free to contact this Office.

Sincerely,

David R. Scott
Acting Director