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THE WHITE HOUSE
WASHINGTON

Date

9/27

Suspense Date

MEMORANDUM FOR:

John

FROM: DIANNA G. HOLLAND

ACTION

- ☐ Approved
- ☐ Please handle/review
- ☐ For your information
- ☐ For your recommendation
- ☐ For the files
- ☐ Please see me
- ☐ Please prepare response for
signature
- ☐ As we discussed
- ☐ Return to me for filing

COMMENT

MEMORANDUM**Office of
Government Ethics**

SEP 17 1985

Subject: **Acceptance of Commercial Discounts**From: **David H. Martin**
Director*David H. Martin*To: **Designated Agency Ethics Officials**

Commercial enterprises offer a variety of special rates and commercial discounts to individuals in the ordinary course of business. In most cases, a government employee's acceptance of a commercial discount poses no problems. There are situations, however, when provisions in Executive Order 11222, the implementing regulations, and the criminal conflict of interest statutes indicate that a government employee should not accept a particular discount that a commercial enterprise has offered to him or her. Section 201(c) of the Executive Order and §735.201a of the regulations at 5 C.F.R. prohibit an employee from taking any action, whether or not specifically prohibited, which might result in or create the appearance of any of the following:

- (1) using public office for private gain;
- (2) giving preferential treatment;
- (3) impeding government efficiency;
- (4) losing independence or impartiality;
- (5) making a government decision outside official channels; or
- (6) affecting adversely the confidence of the public in the integrity of the government.

In the area of commercial discounts, concerns about the appearance of impropriety may preclude a particular employee from accepting a discount that is offered to the general public or to other employees of his or her agency. In the realm of appearances, the determination whether a particular employee may accept a discount must take into account the employing agency's relationship with the entity offering the discount, the types of duties the employee performs in his or her official capacity, the commercial enterprise's motives in offering the discount, and the nature and size of the group to whom the discount is offered.

In order for the commercial discount to be acceptable, the vendor must have a legitimate commercial motive, such as soliciting a large group of potential customers, and not be seeking to supplement an individual employee's salary or to have the employee reciprocate through his or her official duties. When the class of individuals to whom the discount is offered is narrow, there is a greater likelihood that the offeror has an improper motive than in situations in which the class is large and diverse. With a narrow class, the offeror is able to target individuals in specific agencies or positions who might be able to assist the offeror in some way through their official actions.

Although most agencies do not specifically refer to discounts in their regulations, they generally apply the same analysis in determining the acceptability of discounts that they use in determining the acceptability of gifts. However, a discount is not necessarily a gift. In general, a discount that falls within the normal range of discounts available to the public from a particular entity is not considered a gift under section 209 of Title II of the Ethics in Government Act because the vendor is receiving consideration of equal or greater value in the form of a sale to the customer. Based upon that analysis, such a commercial discount would not need to be reported on a financial disclosure form. On the other hand, if the discount is outside the normal range and does not reflect a legitimate commercial motive in inducing increased sales volume, the agency should inquire further into the circumstances surrounding the discount in order to verify that it is not merely a disguised gift given to influence a particular employee in the performance of his or her duties. The determination whether a discount is a gift for purposes of financial disclosure must be made on a case by case basis.

The following guidelines should assist you in deciding whether the employees in your agency may accept a particular discount.

DISCUSSION

Discounts Offered to the General Public

In cases in which an entity offers a commercial discount to the general public, regardless of an individual's employer or position, a government employee may generally accept the discount, subject to his or her agency's policies or standards of conduct regulations. In such instances, it appears that the motivation of the offeror is to increase sales volume by attracting a large identifiable group of customers, rather than to offer something of value to a particular group. In the absence of an agency policy or regulation to the contrary, a federal government employee may accept a discount that a commercial entity makes available to the general public.

Many agencies deal with commercial discounts in the same manner in which they deal with gifts. As a result, their employees are prohibited from taking advantage of a discount when it would create an appearance problem or when it comes from an entity that would be a prohibited source for a gift under section 735.202 of 5 C.F.R. These sources are:

- (1) persons who have, or are seeking to obtain, contractual or other business or financial relations with the employee's agency;

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- (2) persons who conduct operations or activities that are regulated by the employee's agency; or
- (3) persons who have interests that may be substantially affected by the performance or nonperformance of the employee's official duties.

Because the potential for a conflict of interest is minimal in cases in which a federal government employee accepts a commercial discount that has been offered to the general public, agencies treating discounts as gifts might consider carving out an exception for discounts available to the general public.

Discounts Offered to Federal Government Employees as a Group

When the offer of the discount is made to a class as large and diverse as all government employees, there is little likelihood that the offeror is seeking to gain influence or to supplement employees' salaries. As a result, 18 U.S.C. §§ 201 and 209 are not generally implicated in this analysis.

On the other hand, the concern for appearances remains. Despite the fact that the offer extends to all government employees, specific categories of employees might not be allowed to accept. Although most commercial discounts are not considered gifts, when the commercial entity belongs to one of the prohibited sources contained in 5 C.F.R. § 735.202, the concern that the offeror might gain some benefit in its dealings with the government would preclude acceptance by the employee. Therefore, we suggest that agencies consider the source of the discount when determining whether the employee may accept it. If the entity is one which has business dealings with or is regulated by the agency, the employee should not accept the offered discount. In addition, there might be situations in which acceptance of the offer would create appearance problems under section 735.201a of 5 C.F.R. and should not be permitted. In the absence of a finding that acceptance of the discount would run afoul of one or more of these considerations, the agency may permit its employees to accept the discount.

Regarding the practice of hotels giving a federal employee the government rate for his or her room when the employee is on personal travel, the employee may accept the government rate, subject to the following limitations:

- (1) the employee should not accept the government rate if the hotel is one of the prohibited sources set forth in section 735.202 of 5 C.F.R. (This does not prohibit an employee from accepting the government rate if the employee's only involvement with the hotel occurs in the course of arranging his or her own business travel accommodations.); and
- (2) the employee may not misrepresent the purpose of the travel, i.e., say that he or she is on business, in order to get rates that are not available for personal travel.

Discounts Offered to a Class Consisting of Less Than All Federal Employees

When the offeror of the discount targets a narrow class of employees for its discount, the agency must examine carefully the circumstances surrounding the offer. Any discount offered to less than all federal employees raises the possibility of an improper motive and creates appearance problems. In its evaluation of the discounts, the agency should consider the following:

- (1) whether the offeror is one of the prohibited sources;
- (2) whether the employee's acceptance of the discount would create an appearance of using public office for private gain, giving preferential treatment, or acting outside of official channels;
- (3) whether the offeror has a legitimate commercial motive in inducing increased sales volume or whether the offeror expects some form of reciprocation through the employee's official duties (18 U.S.C. § 201); and
- (4) whether the offeror seeks to supplement the employee's salary for his or her official duties (18 U.S.C. § 209).

Using those guidelines, discounts offered to the following types of categories of persons are the least likely to create improper appearances or to be based on improper motives:

- (1) persons within a particular marketing or geographic area that includes both government and nongovernment employees; and
- (2) persons who are members of a club or organization and the discount is based solely upon membership in that club (AAA, American Bar Association, Federal Recreation Associations).

Categories that create appearance problems and bring into question the offeror's motives include those based upon an employee's duties or position. Those situations create problems because of the possibility that the offeror has singled out those individuals because of some benefit, beyond increased sales, that he or she expects to get from them. For example, a manufacturer of air-conditioning equipment offers discounts to certain "key" employees of government-owned utilities who might be asked by utility customers for recommendations on various types of air-conditioning equipment. Because the motivating factor behind the manufacturer's offer is to encourage the employee to look favorably on it and to promote its product among the consumers, the federal government employee should not accept the discount. Another example is the situation in which a store owner gives discounts to a narrow class of employees based upon their governmental duties, such as the government's special investigative agents or other law enforcement personnel. In such cases, the store owner might be expecting some benefit in return for the discount in the form of protection by the government employees, either by their presence in the store or in the exercise of their official duties. Because the offeror's motive is unclear and there is a possible improper motive behind the offer, the agency should caution the employee against accepting the discount.

CONCLUSION

Commercial discounts are not generally considered gifts subject to the prohibitions in the Executive Order and the regulations. As a result, federal government employees may take advantage of commercial discounts that are available to the public, as long as their agencies do not have regulations or policies that would prohibit that practice. However, when the discount is offered to a class consisting of less than the public at large, the agency should conduct a case by case analysis of the circumstances surrounding the discount, using the framework set forth in this memorandum, to decide whether its employees may appropriately accept the discount. Among the factors that the agency should consider are: the source of the discount, the motive of the vendor in offering the discount, and whether there are appearance problems associated with acceptance of the discount. The guidelines contained in this memorandum should assist agencies in making these determinations.