

Office of Government Ethics

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Memorandum dated January 5, 1999,
from Stephen D. Potts, Director,
to Designated Agency Ethics Officials,
Regarding Employee Acceptance of Commercial
Discounts and Benefits under the Standards
of Ethical Conduct, 5 C.F.R. Part 2635

Among the more common issues that ethics officials regularly confront is the question of whether employees may take advantage of this or that commercial discount without running afoul of ethics restrictions. Clearly, ethics rules prohibit employees from accepting certain gifts from outside sources. But do the rules treat discounts as gifts? And, if they do so as a general matter, are there nevertheless exceptions that allow acceptance of discounts in some circumstances? Perhaps because of the proliferation of marketing gimmicks in recent years, such questions seem to arise with ever increasing frequency. In order to assist ethics officials in resolving them, these comments set forth a framework for analyzing discounts issues, address the regulatory provisions that have particular relevance to discounts issues, and discuss a number of the discounts questions that the Office of Government Ethics (OGE) has decided to date.

Analysis of questions involving commercial discounts and related benefits (collectively referred to as discounts questions) begins with subpart B of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), 5 C.F.R. part 2635, which sets forth rules on gifts from non-Government sources. These Standards of Conduct provide that employees may not solicit or accept "gifts" that are either "[f]rom a prohibited source" or "[g]iven because of the employee's official position," unless an applicable exception applies. 5 C.F.R. § 2635.202(a); see 5 C.F.R. § 2635.203(b). They define a "prohibited source" as--

any person¹ who:

- (1) Is seeking official action by the employee's agency;
- (2) Does business or seeks to do business with the employee's agency;

¹ The term "person" is defined at 5 C.F.R. § 2635.102(k) to cover organizations as well as individuals and to include officers, employees, and agents of covered organizations and individuals.

(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). The Standards of Conduct provide further that:

[a] gift is solicited or accepted *because of the employee's official position* if it is from a person other than an employee and 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) (emphasis added).²

Assuming a discount is from a prohibited source or given because of official position,³ the threshold issue is whether the discount is a "gift" under the Standards of Conduct and, therefore, subject to the general prohibition on employee acceptance. See 5 C.F.R. § 2635.202(a).

IS A DISCOUNT A GIFT?

Subject to certain exclusions, the term "gift" is broadly defined in section 2635.203(b) to include "any . . . discount . . . having monetary value." Nevertheless, it is important to note that "a discount is not necessarily a gift." *The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics*, OGE Informal Advisory Letter 96 x 20, at p. 98; OGE Informal Advisory Memorandum 85 x 13,

² OGE issued the gift regulations pursuant to 5 U.S.C. § 7353 and Executive Order 12674, as modified by Executive Order 12731, 55 *Fed. Reg.* 42547 (Oct. 19, 1990).

³ While in most cases application of the prohibition on gifts from outside sources is reasonably narrow, given its limitation to gifts from prohibited sources or given because of official position, there are some agencies with responsibilities that affect a very broad range of commercial entities and, as to which, accordingly, an enormous range of commercial vendors are deemed prohibited sources. Questions regarding discounts offered to employees of such agencies therefore arise with greater frequency.

at p. 566 (emphasis added). There are a number of so-called discounts which are not considered gifts; the Standards of Conduct, therefore, do not preclude employees from taking advantage of them.

1. Discounts available to the public or to a class consisting of all Government employees or all uniformed military personnel, even if restricted geographically

5 C.F.R. § 2635.203(b)(4) of the Standards of Conduct specifically excludes from the definition of "gift":

[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 uniformed military personnel, whether or not restricted on the basis of geographic considerations.

This exclusion is intended to cover "commercial discounts that are offered to *all* Federal employees on the same terms." OGE Informal Advisory Letter 92 x 26, at p. 111 (emphasis added). For example, under this exclusion employees may accept discounts on automobile rentals or hotel rates that are offered to *all* Government employees. In contrast, the exclusion does not cover discounts or benefits to subgroups of employees, such as free magazine subscriptions offered to all agency field inspectors, *see id.*, at p. 112; or discounts on automobiles if the offer is extended only to United States diplomats, OGE Informal Advisory Letter 94 x 19, at p. 96. Similarly, it would not cover discounts offered to all Government employees who work at agencies with more than a specified number of employees or to all employees who work at agencies that have a contractual relationship with the business offering the discount.

The only permissible restriction is one based on "geographic considerations." Section 2635.203(b)(4). Thus, where a utility is authorized to operate in only a particular area of the country, such as the Rocky Mountain States, a discount on services offered only to Federal employees within those States would be permissible. See OGE Informal Advisory Letter 93 x 29, at p. 136. At the other extreme, however, the exclusion would not cover a discount geographically restricted to a single Government facility. *Id.*

Section 2635.203(b)(4) also excludes from the definition of "gift" commercial discounts that are "available to . . . all uniformed military personnel, whether or not restricted on the basis of geographic considerations." A discount offered by a fast food chain to all uniformed personnel, regardless of rank or other distinguishing characteristic, would be covered, as would a discount offered by, for example, an appliance store.

Finally, this exclusion also covers discounts "available to the public." *Id.* Examples would include the discounted prices at discount book or drug stores, as well as the temporary seasonal sale at the local department store, provided the right to purchase at the offered price is not restricted to a particular subgroup of prospective purchasers. Taking advantage of discounts like these is not a problem, even for employees who work at agencies for which most commercial entities, including such vendors, are prohibited sources.

There are of course a number of discounts that would not seem to raise genuine conflicts concerns but that, nevertheless, would not fall within the exclusion at section 2635.203(b)(4). Consider, for example, an advance sale at which discounts are offered to "preferred" customers such as credit card holders -- clearly a subgroup of the public -- or a discount offered on the basis of a fairly narrow geographic restriction. Just because one provision in the Standards of Conduct may not authorize employee acceptance of the discount does not mean that other exclusions or exceptions would not apply and authorize acceptance. As regards the examples noted, see the gifts exception at 5 C.F.R. § 2635.204(c)(2)(i), discussed *infra* at pp. 12-16.

2. Goods or services for which the employee pays "market value" or "fair value"

Another exclusion from the definition of "gift" that has relevance to discounts is the exclusion at 5 C.F.R. § 2635.203(b)(9) for "[a]nything for which market value is paid by the employee." With the exception of tickets to events, entertainment, and such, and regarding which the face value of the ticket generally governs, "market value" is defined to mean "the retail cost the employee would incur to purchase the gift." 5 C.F.R. § 2635.203(c). The Standards of Conduct provide further that, "[a]n employee who cannot ascertain the market value of a gift may estimate its market value by reference to the retail cost of similar items of like quality." *Id.*

How might this exclusion apply in the discounts area? Consider the vendor who, in the course of promoting his merchandise, advertises or refers to his selling price as a "discount" price when in fact the price is not lower than the "market value" price. In such case, an employee paying the so-called "discount" price clearly does not receive a "gift" because he is paying "market value."

The more difficult question is whether an employee seeking to take advantage of a so-called discount price receives a "gift" if he pays what is clearly "fair value" for a commodity or service. The question arose in connection with a "discount" on automobile insurance offered by an insurance company to executive branch

employees at Grade GS-11 or higher (senior level discount). OGE Informal Advisory Letter 96 x 20. In this case, there was no doubt that the senior level discount was extended "because of official position" because it was available only to Federal employees at or above the specified grade. It was also clear that none of the exceptions to the gift prohibition applied. Nevertheless, OGE concluded that the Standards of Conduct did not preclude employees from purchasing the insurance at the discount price:

While the term "gift" is broadly defined in the Standards of Conduct so that it may include a discount, see section 2635.203(b), the term ought not to be understood as encompassing items or services for which the employee "pays the fair value." Preamble to Standards of Conduct, 57 *Fed. Reg.* 35006, 35014 (Aug. 7, 1992); see also *id.* (discussion of exclusion at section 2635.203(b)(9) for "anything for which market value is paid by the employee").

Id. at p. 98. While the "discount" price was not readily available in the marketplace and, therefore, could not be regarded as "market value," there were compelling indications that the price paid was "fair value," *i.e.*, a price sufficient to cover the company's anticipated costs and allow for a fair profit. Thus, the price was based on:

actuarial statistics demonstrating that the cost of providing automobile insurance to those in the discount group is less than the cost of providing insurance to others because those within the discount group are statistically less likely to be in automobile accidents.

Id. at pp. 98-99. In addition, the fact that the automobile insurance industry is regulated by the States provided assurance that fair value was paid. But perhaps most significantly, the "nature and size" of the discount group suggested that employees within the group were not receiving a gift or windfall:

[T]he discount is broadly available to employees throughout the executive branch, albeit only those at Grade GS-11 or higher, and is not targeted at employees whose official duties might be performed in a manner that could benefit the Company; employees who work at agencies having a unique relationship with the Company; or employees whose official positions carry such prestige that, beyond the profit associated with sales to such employees, a seller would derive a unique benefit from having them as purchasers. If the discount were extended only to employees in the latter categories, one might infer that the Company's motive is to improperly influence Government employees, to exploit the status or

potential influence of particular employees, or in some other way to secure a benefit beyond payment for the services provided. In such case, one might have concerns that employees purchasing at the discount price are not paying "fair value." In fact, however, employees in those categories likely comprise only a very small percentage of the vast group of employees to whom the discount is extended.

Id. at pp. 100-101.

In sum, the opinion makes clear that, in an appropriate case, a showing that an employee paid "fair value" may rebut any presumption that a discount is a gift. At the same time, however, OGE would caution ethics officials to carefully examine the facts in any case in which they consider invoking the "fair value" rule and to be wary of situations where the vendor appears to be receiving something other than, or additional to, payment in exchange for the services or goods provided.

One particularly difficult application of the "fair value" or "market value" rule involves situations where an employee and an outside vendor negotiate the selling price of property or a service. Nothing in the Standards of Conduct specifically addresses such situations; however, the fact that a price is negotiated will not necessarily insulate the transaction from operation of the gift rules. In certain situations, a negotiated price will reflect a discount and that discount may prove to be a prohibited gift.

Even though employees generally may enter into bona fide private negotiated business transactions with persons outside the Government, these transactions may be subject to considerable scrutiny in some circumstances. Consider, for example, the case of an employee who has primary responsibility for administering his agency's contract with company X. If the employee negotiates, in his personal capacity, to purchase the vacation home of company X's chief contracting officer, and if the negotiated selling price of the property seems to be lower than the selling prices of comparable properties, the employee could be receiving a "gift" from the seller.

On the other hand, negotiated fees or payments do not necessarily reflect a windfall to the purchaser that will be considered a gift. The facts, for example, may establish that an employee paid fair value as evidenced by objective measures of the vendor's costs or a product's value. See OGE Informal Advisory Letter 96 x 20. In the case of a used car, reference may be made to the "Blue Book" value. The fair value of land may be determined by examining the sale price of comparably situated properties. Of course, these points of reference may be only a starting point in

determining whether an employee paid fair value. The value of a used car may be affected by the number of miles it has been driven. Regarding real property, even where, as above, it appears at first that the selling price is below that of properties that seem comparable in terms of acreage, river frontage, quality of school system and so forth, further inquiry may reveal that the lower price is justified by the fact that the property encompasses a protected wetland area or has been used as a dumping site for toxic waste.

In many such cases, there will be a range of amounts that may reasonably be considered fair value. The transaction will involve a gift only if the employee pays less than an amount that falls within the range that may be considered fair value. The amount of the gift would be the difference between the fair value and the amount actually paid.

Measuring the value of a negotiated item or service by reference to objective criteria may be especially important when an employee enters a transaction with a prohibited source. Consider, along with the above example, the hypothetical case of a Government employee who holds a senior position in the division of investment management at the Securities and Exchange Commission (SEC) and who purchases investment brokerage services from a regulated brokerage firm at a fraction of the firm's standard rates. In such a case, it is not sufficient to assert that the price agreed upon is the fair consequence of tough bargaining on the part of the SEC employee. The employee should ensure that the rate he is charged is within the range that the firm customarily charges clients with similar types of accounts. Where the firm cannot demonstrate that the fees it is charging the SEC employee are consistent with its normal billing practices, the reasonable inference is that the difference between the reduced price and the firm's customary charges constitutes a gift.

When an employee negotiates a price with a person who is not a prohibited source, the employee may not solicit a discount based on his official position. For example, if the head of an agency asks a car dealer to agree to a deep discount on the purchase of a luxury car because it will enhance the dealer's reputation to sell to a highly-visible Government official, the difference between the price paid by the employee and the range of prices typically paid by purchasers of that model car at that dealership would appear to be a gift solicited because of official position. Of course, it may be considerably more difficult to determine whether a discount is being offered because of official position. In some cases, however, a vendor may explicitly state that this is his motivation and, in some cases, even in the absence of an explicit acknowledgment, the facts will suggest it. Where an apartment building lessor, for example, offers the well-known head of an agency a lease at a fraction of the going rental rate, the official

should consider whether the lessor would be offering him the discount if he did not hold the status or exercise the authority or duties associated with his Federal position.

3. Goods or services paid for by the Government or secured by the Government under Government contract.

Another relevant provision in the Standards of Conduct is 5 C.F.R. § 2635.203(b)(7), which excludes from the definition of gift "[a]nything which is paid for by the Government or secured by the Government under Government contract." The preamble to the final rule explains the rationale underlying the exclusion: "[I]tems secured under Government contract . . . accrue to the employee *from the Government* and, thus, are not gifts from an *outside source*." 57 Fed. Reg. 35006, 35013 (Aug. 7, 1992) (emphasis added). See also preamble to proposed rule, 56 Fed. Reg. 33778, 33781 (July 23, 1991).

The exclusion disposes of discounts issues more often than one might think. Thus, it would permit employees to accept discounts on parking fees or concierge services provided for in their agency's lease for building space. Moreover, if a building owner or lessor opened a health club in an agency's building during the lease term, and if the agency decided that the discounted memberships could also be accepted under the lease agreement, then the exclusion would allow employees to accept those discounts too without running afoul of the gift prohibition. See Preamble to final rule, 57 Fed. Reg. 35006, 35013 (Aug. 7, 1992) (discount on health club memberships extended by a building owner or manager and made available to all tenants of building housing a Government agency are a "consequence of the Government's lease for that space"). On the other hand, however, it seems highly unlikely that an agency could accept, under the contract, certain types of benefits not provided for in the contract. Consider, for example, the case of basketball tickets offered to the head of the agency by the building lessor.

Recently, a number of agencies have been called upon to consider the applicability of section 2635.203(b)(7) to discounts on cellular phone service offered to employees in their private capacities by companies that provide or seek to provide cellular phone service to agencies for official purposes.⁴ Some agencies

⁴ Some companies offered the discount to all employees who work at agencies with existing contracts for official cellular service; others made the offer conditional on the agency's agreeing to purchase some cellular service for official purposes; still other companies made the offer conditional on the agency's agreeing to purchase from the provider in the event that the agency decided in
(continued...)

have allowed acceptance of the discounts under section 2635.203(b)(7) as "secured by the Government under Government contract." Others have not. In general, a determination that a benefit is "secured by Government contract" is a matter within the discretion of the employing agency. Section 2635.203(b)(7) simply makes clear that where such a determination is made, the gifts prohibition in subpart B of the Standards of Conduct will not preclude an employee from accepting the benefit. Agencies are responsible for ensuring that such arrangements are otherwise appropriate under applicable law, including their authorizing statutes, procurement law, and principles prohibiting unauthorized augmentation of appropriations. Thus, for example, if a contract proposed by a vendor and conferring benefits on agency employees did little to advance agency purposes yet entailed expenditure of agency time and resources to promote or administer sales of a product to agency employees, an agency might decide not to enter into the contract because of concerns about agency authority.

Two other limitations on the use of the exclusion at section 2635.203(b)(7) to accept discounts and benefits are also worth noting. The first of these concerns certain benefits offered to employees in connection with their official travel. A note following section 2635.203(b)(7) cautions employees that frequent flier and related benefits "earned on the basis of Government-financed travel belong to the agency rather than to the employee and may be accepted only insofar as provided under [the General Services Administration's Federal Travel Regulation (FTR) at] 41 C.F.R." The current relevant provision in the FTR is 41 C.F.R. part 301-53,⁵ which elaborates on this limitation as follows:

What must I do with promotional benefits or materials I receive from a travel service provider?

Any promotional benefits or material you receive from a private source in connection with official travel are considered property of the Government. You must:

- (a) Accept the benefits or materials on behalf of the Federal Government; and

⁴(...continued)
the future to purchase cellular service.

⁵ Effective July 1, 1998, GSA replaced 41 C.F.R. sections 301-1.103(b) and (f), the citations currently set forth in the note following section 2635.203(b)(7), with 41 C.F.R. Part 301-53. See 63 *Fed. Reg.* 15950, 15954, 15970-71 (Apr. 1, 1998)

(b) Turn the benefits or material over to your agency in accordance with your agency's procedures established under 41 C.F.R. § 101-25.103.

41 C.F.R. § 301-53.1. See also, *id.* at §§ 301-53.2-53.10. Thus, the general rule is that, notwithstanding that airline or hotel bonus points may be offered to employees as a result of the Government's contract with the airline or hotel, employees may not accept such benefits for personal use.⁶ See also Section 6008, Pub. L. No. 103-355, 108 Stat. 3367, 5 U.S.C.A. § 5702, note (awards granted under frequent traveler programs offered by airlines, hotels, and car rental vendors, if accrued through official travel, shall be used only for official travel). There are, on the other hand, exceptions to this rule. See, e.g., 41 C.F.R. § 301-53.10. OGE therefore advises that employees and ethics officials consult with their agency counsel or the General Services Administration (GSA) if they have questions about specific benefits offered to employees in connection with official travel.

The other limitation of which ethics officials should be aware is that employees may not use the exclusion -- even outside the area of official travel -- to accept for personal use benefits to which the Government is entitled under Government contract or otherwise as the result of Government expenditures. While this limitation is not expressly mentioned in connection with the exclusion, it is necessarily implicit there and is, indeed, codified at section 2635.204(c)(3), which provides:

An employee may not accept for personal use any benefit to which the Government is entitled as the result of an expenditure of Government funds.

The Standards of Conduct illustrate application of this principle as follows:

The administrative officer for a district office of the Immigration and Naturalization Service has signed an INS order to purchase 50 boxes of photocopy paper from a supplier whose literature advertises that it will give a free briefcase to anyone who purchases 50 or more boxes. Because the paper was purchased with INS funds, the

⁶ The note is included to caution employees not to rely on the exclusion as a justification for using official travel-related benefits for personal use. See Preamble to Standards of Conduct final rule, 57 *Fed. Reg.* at 35014. Within the structure of the rules, personal use of, e.g., frequent flyer benefits would not be a violation of the gift standards but, rather, the standard at section 2635.704 prohibiting unauthorized use of Government property. See OGE Informal Advisory Letter 92 x 13, at pp. 47-48.

administrative officer cannot keep the briefcase which, if claimed and received, is Government property.

Example 3, following section 2635.203(c)(3).

There is, to be sure, some inherent tension between this principle and the contract-based exclusion at section 2635.203(b)(7). Section 2635.204(c)(3) suggests personal acceptance is improper if the benefit is one to which the Government is entitled as a result of an expenditure of Government funds; section 2635.203(b)(7), on the other hand, would seem to allow employees to accept benefits offered as a result of the Government's contractual relationship with an outside source. The difference in outcomes results from the fact that, in the one case, there is an official determination that the Government is entitled to the benefit and, in the other, there is an official determination that the employee may accept the benefit.

Except in the area of official travel, where the GSA regulation controls, such determinations will have to be made by agencies themselves, based on consideration of their own contracts and other applicable law. Section 2635.203(b)(7) provides only that where agencies construe their contracts as securing personal benefits for their employees, the gift rules will not prohibit employees from accepting such benefits.⁷

Thus far we have discussed three of the exclusions from the definition of "gift" that have particular relevance to discounts questions. If any one of these -- or any of the other exclusions at section 2635.203(b) -- applies, then the discount is not considered a gift and is not subject to the general prohibition on acceptance of gifts from prohibited sources or given because of official position.⁸ If there is no applicable exclusion, however, then the prohibition will apply in the absence of an applicable

⁷ If the Government is entitled to the benefits, then the exclusion at section 2635.203(b)(7) will not apply and neither will any of the discounts exceptions at section 2635.204(c)(2)(i)-(iii). See section 2635.204(c)(2) and (c)(3).

⁸ Moreover, if an exclusion applies, then the limitations imposed by section 2635.202(c)(2)-(c)(3) do not apply, with the result that there is no prohibition on soliciting such discounts or on accepting such discounts "on a basis so frequent that a reasonable person would be led to believe the employee is using his public office for private gain." Section 2635.202(c)(3); see section 2635.202; 57 *Fed. Reg.* at 35013, 35016. Where the Standards of Conduct permit acceptance of a discount only because of an applicable exception, however, the limitations of section 2535.202(c)(2)-(c)(3) qualify the right of acceptance.

exception. Accordingly, familiarity with the relevant exceptions is needed to determine whether employees may accept offered discounts.

IS THERE AN APPLICABLE EXCEPTION?

There are a number of exceptions that apply to discounts and benefits questions just as they would to any other gift questions. For example, an employee might accept a free mouse pad offered by a new computer store under the \$20 de minimis exception, section 2635.204(a), even though the store does business with his agency. Where an employee's uncle has an appliance business and sells appliances to family members at cost, certainly the employee may accept a discount on a new refrigerator under the exception for gifts based on a personal relationship, section 2635.204(b), notwithstanding the fact that his uncle's business is regulated by his agency. Similarly, the exception for gifts based on outside employment relationships, at section 2635.204(e)(1), permits an employee to make use of discounted theatre tickets that his wife's office makes available to its employees, even though that office is a prohibited source for the employee.

But in addition to these commonly used exceptions, there is a group of exceptions set forth under the caption "Discounts and similar benefits" at section 2635.204(c) which have particular relevance to discounts. Section 2635.204(c) comprises four distinct exceptions; the gift prohibition will not apply if the requirements of any one of the four are met.⁹ Ethics officials should be aware, however, that none of the four applies to a discount or benefit extended on an individual basis; rather, all are intended to apply only where a discount or benefit is extended to a group or class of individuals. Each of the four exceptions is discussed below.

1. Certain discounts offered by professional organizations

The first discounts exception allows employees to accept:

[r]educed membership or other fees for participation in organization activities offered to all Government employees or all uniformed military personnel by

⁹ However, to invoke any of the exceptions at sections 2635.204(c)(2)(i)-(iii), it is necessary that the opportunity or benefit *not* be one to which "the Government is entitled as the result of an expenditure of Government funds." Section 2635.204(c)(3)(emphasis added); see section 2635.204(c)(2) (opportunities and benefits allowed under section 2635.204(c)(2) exceptions include only those not precluded by section 2635.204(c)(3)).

professional organizations if the only restrictions on membership relate to professional qualifications.

Section 2635.204(c)(1). This exception addresses the two-tiered pricing system that some professional associations employ. It would cover a discount on a training course offered by a professional association of accountants or lawyers to members of the association who work for the Government. It would also allow Government economists, for example, to accept a discount on the fee for attending a conference sponsored by a professional association of economists where the discount is extended to all association members who work in Federal, State, or local government.

2. Certain discounts offered to a class in which membership is unrelated to Government employment

A second discounts exception provides that employees may accept:

[o]pportunities and benefits, including favorable rates and commercial discounts not precluded by paragraph (c)(3) of this section . . . [o]ffered to members of a group or class in which *membership is unrelated to Government employment.*

Section 2635.204(c)(2)(i) (emphasis added). This exception would cover and permit employee acceptance of discounts made available to members of an environmental organization, a women's organization, an automobile emergency service organization, or an organization comprised of friends of the local symphony because there is no reason to believe that membership in such organizations is "related to Government employment." Accordingly, even those Government employees for whom the vendor is a prohibited source -- nearly always the case for employees at a few agencies -- may accept the offered discount. At the other end of the spectrum, the exception clearly would not cover discounts made available to members of the Senior Executive Service, or to Federal Marshals, or to Federal IRS auditors, because membership in such groups depends entirely on Federal employment. A great many of the discounts questions addressed to ethics officials, however, fall in a less certain area between these poles. Within this area, it seems clear that the phrase "unrelated to Government employment" should not be construed so broadly that the exception would not allow employees to accept for personal use those trivial or benign discounts that have only an insignificant connection to Federal employment; nor should it be construed so narrowly that it would allow employees to accept discounts presenting substantial concerns about impartiality or use of public office for private gain.

With these concerns in mind, OGE has adopted a three-part test interpreting "unrelated to Government employment" in section

2635.204(c)(2)(i) to mean (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 criteria for inclusion in the group or class to which the discount is offered. If the criteria are such that one has to be a Federal employee to be a member, then the exception will not apply. For example, a discount offered to all Executive Schedule employees or all United States diplomats would not pass muster under this prong.

The second prong precludes artful targeting of Federal employees -- for example, the situation where a class is described in a seemingly neutral way to include private sector as well as public employees but where the class, in fact, consists mostly of Federal employees. A very narrowly drawn geographic limitation might arouse a suspicion of targeting.

The third prong of the test focuses on the donor's perceived motivation in offering the discount and asks whether the employee seeking to accept the discount is in the discount group because of some power, influence, or status associated with his position. Perhaps the most important part of the test, this prong is designed to minimize use of the exception to accept discounts that raise impartiality concerns or that suggest certain uses of public office for private gain. Because of this third prong, an employee who serves as the computer procurement official for his agency could not use the exception to accept a discount on computer equipment offered by a computer company to all computer procurement officials in large organizations. Neither could Federal law enforcement officials accept certain discounts offered to all law enforcement officials -- for example, discounts on food offered by fast food chains, guns offered by weapons vendors, or bus fare offered by bus companies. Similarly, a Cabinet-level Federal official could not use the exception to accept free or discounted opera tickets offered to all heads of organizations with 1000 or more employees. In all these cases, even though it is not necessary to be a Federal employee to take advantage of the offer and even though Federal employees may not be targeted, the benefits seem to be offered by the donor because of some actual or perceived power, status, or influence associated with the officials' jobs or positions.

Ethics officials should be aware, however, that this third prong will not preclude acceptance of discounts related to an employee's more general status as a Federal employee, as opposed to

status, power, or influence associated with a position held within or function performed for the Federal Government. In other words, the fact that an employee would not be in the class to which the discount is offered if he were not a Federal employee is not in itself disqualifying. For example, an employee could accept from a new store that is a prohibited source a discount offered to anyone working within the store's zip code or a discount offered on clothing or other merchandise to anyone working at an organization with more than 100 employees.¹⁰ While in both cases Federal employees are members of the group to which the discount is extended because of their status as Federal employees generally, the relationship to Federal employment is not a meaningful one and the discounts do not suggest a motivation on the part of the vendor that would raise ethics concerns.

OGE anticipates that, when analyzed under the third prong of the test, discounts extended to members of associations with professional licensing or other membership requirements will fare far more favorably than will discounts extended to groups of persons informally defined according to job function. For example, an employee serving as a librarian at a large Federal agency could not accept a discount on books offered by a publisher to all librarians at organizations with more than 500 employees; he could, however, accept the same discount if offered to all members of a particular librarians' association. The existence of an independent association may not eliminate concerns about impartiality and use of public office for private gain, but it does assuage those concerns to some degree. Where an association is involved, the discount is more likely to be based on a reduction in marketing or other costs, rather than a motivation on the part of the vendor that raises ethics concerns. For example, a vendor may agree to offer a reduced price to members of a professional association in exchange for the association's undertaking to endorse the vendor's product and, in effect, market the product to association members for the vendor. In addition, even in the situation where a vendor has interests that could be affected by how the employee performs his job, when a discount is extended to members of a professional or other association, the association tends to function as a buffer between the employee and the vendor, thereby minimizing any sense of obligation to the vendor on the part of the employee. Finally, where a discount is offered based on membership in an association, especially an association with a professional licensing requirement, the relationship between that membership and Federal employment will often be especially tenuous.

¹⁰ Where, however, the vendor makes the discount conditional on the agency allowing the vendor to use agency time or resources in order to promote or facilitate the discount sales program, an agency might decide to effectively prohibit the program for reasons unrelated to the gift rules.

Thus, where a vendor offers a discount to all members of a professional association of nurses -- or pharmacists, doctors, or lawyers -- it is likely that the employee would be a licensed member even if he were not a Federal employee.

3. Certain discounts related to Government employment but broadly available outside Government

A third discounts exception allows employees to accept:

[o]pportunities and benefits, including favorable rates and commercial discounts not precluded by paragraph (c)(3) of this section . . . [o]ffered to members of an organization, such as an employees' association or agency credit union, in which membership is related to Government employment if the same offer is broadly available to large segments of the public through organizations of similar size.

Section 2635.204(c)(2)(ii). Common sense suggests that the exception is intended to cover, for example, a discount on appliances offered to members of the employees' association of the Department of Defense which is also available to the employees' associations at large private sector corporations. See also, Example 1 following section 2635.204(c). Similarly, discounts on merchandise and services offered to members of a Federal employees' union would be permissible under this exception, provided that they are also broadly available to the public through private sector unions or other organizations of comparable size. In such cases, "the potential for abuse is minimal." 57 Fed. Reg. at 35017. Rather, the vendor is simply passing on to consumers certain marketing or other cost savings achieved through the association's participation in the arrangement.

The only OGE opinion construing section 2635.204(c)(2)(ii) to date indicates that the exception was not intended to apply to discounts offered to employees serving at or within a component of an agency. See OGE Advisory Letter 93 x 29, at p. 138 (discount offered to employees working at a new agency facility is not a discount offered to members of an employee organization). Clearly the concept of "membership" in an "organization" suggests something other than an employee's relationship with his employing agency.

4. Certain discounts not from prohibited sources that do not favor those of higher rank or rate of pay and that do not discriminate based on type of official responsibility

The last discounts exception allows employees to accept:

[o]pportunities and benefits, including favorable rates and commercial discounts not precluded by paragraph (c)(3) of this section . . . [o]ffered by a person who is

not a prohibited source to any group or class that 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.

Section 2635.204(c)(2)(iii).

As explained in the preamble to the proposed rule that first suggested this exception, 56 *Fed. Reg.* 33778, 33782 (July 23, 1991), assuming its restrictions are satisfied, this exception will "permit a discount offered by someone other than a prohibited source to all employees of an agency or to all employees of an agency in a particular city or county." It would, therefore, allow employees of an agency for which the new dry cleaner's opening down the street is not a prohibited source to accept the store's offer to all agency employees of a 20-percent discount on their first visit even though the benefit is offered because of official position. While the discount may only be offered, for example, to Federal Bureau of Investigation (FBI) employees, so long as all FBI employees are included, from janitors to investigators to the head of the agency, the discount does not discriminate "on the basis of type of official responsibility."

Two OGE opinions, to date, have addressed this exception. The first, OGE Informal Advisory Letter 93 x 29, found the exception inapplicable because the discount was extended by a prohibited source. The second concerned a discount on certain high-end cars that was extended only to persons whose official positions involved travel abroad. OGE Informal Advisory Letter 94 x 19. Under these circumstances, OGE found that the discount discriminated on the basis of official responsibility and, on this basis, concluded that the exception was inapplicable.

A third requirement of the exception, that the discount not discriminate among Government employees "on a basis that favors those of higher rank or rate of pay," is illustrated by example 2 following section 2635.204(c):

An Assistant Secretary may not accept a local country club's offer of membership to all members of Department Secretariats which includes a waiver of its \$5,000 membership initiation fee. Even though the country club is not a prohibited source, the offer discriminates in favor of higher ranking officials.