Office of Government Ethics
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Letter to a Deputy Designated Agency Ethics Official dated October 31, 1996

This is in response to your letter of March 19, 1996, regarding the "discount" on automobile insurance offered by [an] Insurance Company (Company) to executive branch employees at Grade GS-11 or higher (senior level discount). Your letter asks whether acceptance of this discount violates the prohibition on certain gifts from outside sources in subpart B of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), 5 C.F.R. part 2635. We have concluded that employee acceptance of the senior level discount is permissible. Our reasons are set forth below.

Section 2635.202(a) of the Standards of Conduct provides--

> Except as provided in this subpart, an employee shall not, directly or indirectly, solicit or accept a gift:
>
> (1) From a prohibited source; or
>
> (2) Given because of the employee's official position.

Regardless of whether the Company, in relationship to your agency's employees, is a "prohibited source," as that term is defined in section 2635.203(d), there is no doubt that, if the discount is a gift, then it is "[g]iven because of the employee's official position." Section 2635.203(e) provides--

> 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 his position as a Federal employee.

Since the senior level discount is, by definition, extended only to Federal employees at Grade GS-ll and higher, such employees clearly would not be eligible for the discount if they did not hold their Federal positions. Moreover, we agree with your suggestion that none of the exceptions to the general prohibition, as set forth in section 2635.204(c), apply.

Nonetheless, we find the general prohibition inapplicable under the circumstances of this case because we do not believe that the senior level discount can be considered a "gift." As stated in an early Office of Government Ethics memorandum, "a discount is not necessarily a gift." The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics, 1979-1988, 85 x 13 at 566 (emphasis added). 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").

Based on information provided by the Company, we understand that the senior level discount is 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. As explained in a June 18, 1996 memorandum from a Company official, the senior level discount is--

> analyzed by looking at the loss experience for four calendar years for . . . [the group] that would have qualified for the discount compared to those that would not qualify. The group . . . that would qualify for the discount consistently had a lower loss ratio (incurred loss divided by earned premium).

According to Company officials, the loss experience dictates the amount of the discount.

Given the statistical basis for the price charged, employees purchasing at the so-called "discount" price cannot be viewed as receiving a windfall; neither can the Company be viewed as giving away anything. There is a quid pro quo; in exchange for services provided by the Company, employees agree to pay a price that covers the Company's anticipated costs and still affords it a fair profit. If this price is less than that which those not qualifying for the discount pay, the reason is that, the Company, based on actuarial statistics, reasonably anticipates that it will cost more to insure those not qualifying for the discount.

The price difference in this context is comparable to the lower price charged a person with a good driving record or a family with a new teenage driver who has a record of receiving good grades in school. In the health insurance area, it may be compared to a reduced price offered to nonsmokers. In none of these situations is the insurer providing a service that has value out of line with the consideration paid for the service; rather, the insurer charges less because of the reduced costs of providing the insurance to those meeting specified criteria.

We are not unmindful of the possibility that there may be situations where what looks like a fair contractual situation is in fact a disguised gift given with an improper or questionable motive. In this case, however, there are persuasive indications that senior level employees purchasing insurance from the Company are paying "fair value" and are not receiving a gift. In the first place, not only is the senior level discount determined on the basis of cost-based pricing actuarial methods, as discussed above, but the automobile insurance industry is regulated by the States. According to the Company's June 18 memorandum, it is required to "file [its] . . . rates and rules with the state insurance departments, and in many states . . . must receive approval before . . . [it] can implement rate and rule changes. This includes discounts and surcharges." Based on recent conversations with Company officials, we understand that states requiring and giving approval for the Company's senior level discount include Maryland, Virginia, and the District of Columbia.

In addition, the nature and size of the group to which the senior level discount is extended suggest that employees within the group are not the beneficiaries of a gift or windfall. Thus, it is important to note that the 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. As a result, and particularly given that the discount is not a "limited time only" offer but already has been in effect for a number of years, it is inconceivable that the Company could be selling at anything other than a price that covers costs and ensures a fair profit.

In light of the foregoing, we conclude that employees who purchase automobile insurance at the senior level "discount" price made available to employees at Grade GS-11 and above do not run afoul of the prohibition on acceptance of gifts from outside sources in section 2635.202(a) of the Standards of Conduct. The exchange of quid pro quo under the special circumstances described above does not involve receipt of a gift.

If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

Stephen D. Potts
Director